28 February 2020

The Australian Competition and Consumer Commission

By Email: adjudication@accc.gov.au

Dear Sirs

Re: Ocean Liner Shipping Class Exemption – Submission by ANL Container Line Pty Ltd

Reference:

A. Australian Competition and Consumer Commission - Proposed Class Exemption for Ocean Liner Shipping – Discussion Paper - dated 3 December 2019

Introduction

In response to the call by the Australian Competition and Consumer Commission ("ACCC") for public comments regarding a proposed class exemption for international ocean liner shipping, ANL Container Line Pty Ltd ("ANL CL"), ANL Singapore Pte Ltd ("ANL Singapore") and CMA CGM S.A. ("CMA CGM") are pleased to provide this submission to the ACCC.

By way of introduction ANL CL is headquartered in Melbourne and is the largest shipping container ocean carrier based in Australia with operations right around the world. Formally known as the "Australian National Line" ("ANL"), ANL was established in 1956 by the Australian Government to operate shipping services around the Australian coast. Over many years ANL became the backbone of maritime activity in Australia carrying goods around the Australian coast and to many ports around the world.

In 1998 ANL was privatised, renamed as ANL Container Line Pty Ltd, and became part of the CMA CGM Group of ocean carrier companies based in Marseille, France. CMA CGM is the fourth largest ocean container shipping line in the world. The CMA CGM Group operates on more than 200 shipping routes with over 500 vessels. ANL Singapore is a 100 percent owned subsidiary of ANL CL, and is an ocean carrier based in Singapore responsible for Asian ocean services carried under the ANL brand. Since the acquisition of ANL by CMA CGM in 1998, ANL CL's and its subsidiaries volumes have rapidly grown from 70,000 TEU (twenty-foot equivalent unit) in 1998 to over 1.16 million TEU in 2019, consolidating ANL CL's role as the leading ocean container shipping line in the Oceania region.

The three ocean carriers - ANL CL, ANL Singapore and CMA CGM have for many years been managing various competition related matters, in particular the registration of various ocean cooperation agreements under Part X of the *Competition and Consumer Act* (2010) ("CCA"). This activity includes not only handling the technical aspects of the legal filings with the Registrar of Liner Shipping, but also negotiating with the relevant shipper bodies on behalf of ocean carriers to reach mutually beneficial outcomes for ocean carriers and Australian importers and exporters represented by such shipper bodies.

Therefore, ANL CL appreciates the opportunity to comment from an international ocean carrier perspective on the ACCC's proposed class exemption for ocean liner shipping as it relates to Australia's competition regime.

Registered Agreements by ANL CL, ANL Singapore and CMA CGM

As the ACCC is aware, under Part X of the CCA the term "conference agreements" represents an umbrella term covering various types of cooperation agreements between shipping lines, and their agreed conditions for conference services. The term "conference agreements" therefore is defined broadly in the Australian jurisdiction, and includes "freight rate agreement".

The term "freight rate agreement" is defined under section 10.02 of Part X to mean a conference agreement that consists of or includes freight rate charges. "Freight rate charges" is further defined to mean those parts of a conference agreement (inwards or outwards) that specify freight rates (including base freight rates, surcharges, rebates and allowances) for liner cargo shipping services (inwards or outwards).

Therefore, Part X of the CCA offers protection from competition law to both freight rate agreements (section 10.17A and section 10.18A) and operational agreements (section 10.17 and section 10.18). As a result, freight rate agreements and operational agreements can be registered with the Registrar of Liner Shipping under Part X for protection.

However, for the registered conference agreements under Part X to which ANL CL, ANL Singapore and CMA CGM are a party, they are of purely operational nature. They are generally in the form of vessel sharing agreements ("VSA"), joint service agreements ("JSA") and slot charter agreements ("SCA") pertaining to such operational agreements. The focus of these agreements pertains strictly to operational matters such as port combinations, frequency of sailing, slot allocation/sale/exchange, vessel sharing and the like. For the avoidance of any doubt, ANL CL refers to these agreements uniformly as "Operational Agreements".

On the basis of this position regarding the nature of our registered Operational Agreements under Part X, we provide the following responses to your questions as outlined in the ACCC Discussion Paper dated 3 December 2019.

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Part I - What forms of coordination between Liners should the class exemption permit?

a. Coordinate and/or Jointly Fix Sailing Timetables and the Determination of Port Calls in Australia;

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes. From our experience, the joint determination of sailing timetables and port calls is one of the most common forms of coordination in registered Operational Agreements under Part X. Such items are usually combined with other coordination elements of a sole operational nature.

Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as such coordination is very likely to lead to overall public benefits because *inter alia*:

a. Joint coordination on sailing schedule provides more service efficiency and ensures greater service stability to customers than any individually operated service, and

b. Joint port determination increases the number of port-pair combinations that any individual carrier could offer. This also helps increase the utilisation of port capacity.

How would allowing such coordination impact competition or otherwise cause detriment?

Such coordination does not impede competition, rather it improves competition because it lowers barriers for entry and expansion, especially for small and medium shipping lines, and/or for new competitors that aim to enter into the market.

In turn, such arrangements also ensure that customers have a wider range of ocean carriers and services to select from, thus further promoting competition.

Would allowing such coordination to impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. As noted above, the coordination on sailing time schedules enables ocean carriers to better utilise their operational resources to provide service efficiency and stability for customers. For example, one individual carrier may only operate one round service to Australia each month due to operational constraints and financial limitations; however, by coordinating with, say, three other carriers a monthly service becomes a weekly service with each shipping line providing one vessel each week. For an island nation like Australia service efficiency and stability are key requirements for Australian exporters and importers.

Further, the coordination on ports of call by multiple carriers under an Operational Agreement improves the efficient utilisation of port facilities. Such cooperation amongst ocean carriers provides the opportunity to call at ports that one single carrier may not be able to call. Accordingly, this promotes greater connectivity and agility among several ocean carriers, which may not be offered when a service is operated only by one individual carrier. This is particularly useful for smaller and more remote ports which benefit cargo interests located in those regions and states.

b. **Exchange, Sell, Hire, or Lease (or Sublease) Spaces (Slots) on Vessels**

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes, although ANL CL, ANL Singapore and CMA CGM are not currently parties to slot hire or lease arrangements; rather, our main arrangements are slot charter or sale/purchase arrangements.

Should such coordination be permitted by a class exemption and if so, why?

Yes. Such arrangement meets the legal test for the ACCC to make a 'class exemption', as it is likely to lead to overall public benefits.

Such arrangements improves competition as they lower barriers to entry and expansion, especially for small and medium shipping lines, and/or for all lines that wish to enter into a new shipping market.

With the use of such arrangements, typically more carriers are able to compete in a service, therefore customers are presented with more choices of services and price competitiveness, generating economic benefits to the general public.

How would allowing such coordination impact competition or otherwise cause detriment?

Such coordination promotes competition in two ways.

a. Under a VSA / JSA for example, each ocean carrier still transports cargo under its bill of lading terms with its rates being determined solely based on the internal commercial strategy of each individual carrier. Accordingly, the ocean carrier parties to the VSA / JSA have a strong economic incentive to sell their own slots to individual customers at a competitive price. Ocean carrier parties in a VSA / JSA are therefore full competitors from the market's perspective, not only regarding pricing but also including other basic competition parameters such as quality of service and service innovation.

b. Sometimes parties to a VSA / JSA may also sell or charter their slots to non-vessel operating third party ocean carriers. These may be small to medium shipping lines,

or carriers that are interested in exploring a new market positioning. Such co-operative arrangements allow these carriers – which would not otherwise be able to establish themselves as independent scheduled service providers – entry into specific shipping market with relatively low initial capital investment, leading to a higher number of active competitors available for customers.

Would allowing such coordination to impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. Such coordination allows better utilisation of vessel capacity thus increasing service efficiency for customers. Fuller vessels are also more carbon efficient, generating lower CO2 emissions per TEU. Customers benefit from price competitiveness and service differentiation, due to a more diverse range of ocean carriers resulting from the lowered barriers of entry created by Slot Agreements and the like. Each slot user / purchaser markets its services under its own brand and transports cargo under its bill of lading terms and conditions, and under its own competitive cost models.

c. Pool Their Vessels to Operate a Network

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes. Vessel pooling / sharing is one of the most common forms of coordination in registered Operational Agreements to which ANL CL, ANL Singapore and CMA CGM are a party, namely VSAs.

Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is likely to lead to overall public benefits.

Vessel pooling / sharing is likely to increase competition as it enables shipping lines to operate in the market with lower operational costs, whilst lowering the barriers for entry of other ocean carriers and encouraging market expansion.

Such coordination also benefits the public as it reduces vessel operating costs and generates costs efficiency, which are the basis for ocean carriers independently calculating their freight rates.

Those cost efficiencies are likely to be ultimately shared with customers.

How would allowing such coordination impact competition or otherwise cause detriment?

Vessel operating costs are generally high in the international liner shipping business, which is a key deterring factor for shipping lines to start new scheduled services. However, by

pooling and sharing vessel resources, ocean carriers of different capacities and economic scales are more able to join forces to operate joint services. Such coordination improves competition as it enables Ocean carriers to enter the market, especially for small and medium shipping lines. In turn, they ensure that customers have a wider range of carriers and services to select from, also increasing competition.

Would allowing such coordination to impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Vessel pooling / sharing enables the more efficient utilisation of right-sized vessels for the appropriate service, which improves the economic sustainability and efficiency of the ocean services provided. There are many efficiencies created by such pooling / sharing activities including:

- economies of scale for carriers.
- lower costs (bunker/port/slot costs etc.).
- larger vessel size.
- better capacity management.
- better frequency (i.e. more sailings).
- larger port coverage.
- environmental benefits (reduction in gas emissions per unit of cargo transported).
- reduced transit times.
- increased capacity of supply.
- increased allocated capacity.
- reduction in operational risks.
- more competitors on the market.
- rationalization of services.
- better service quality provided to customers.

It is the view of ANL CL, ANL Singapore and CMA CGM that vessel sharing / pooling is essential to make sure that operational costs are kept reasonably stable, which in turn provides a greater level of rate stability for customers.

d. Adjust Capacity in response to Fluctuations in Supply and Demand for International Liner Shipping Services

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

Yes. This is one common coordination in registered agreements to which ANL CL, ANL Singapore and CMA CGM are a party.

Should such coordination be permitted by a class exemption and if so, why?

Yes. Such coordination meets the legal test for the ACCC to make a 'class exemption', as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits by providing that ocean carriers can adjust their capacity / supply of slots on vessels to meet changes in demand for such slots.

How would allowing such coordination impact competition or otherwise cause detriment?

We consider that such coordination does not cause any long-term detriment to competition in the relevant market and does not result in a substantial lessening of competition. Based on the Australian jurisprudence and the ACCC's Merger Guidelines[1], the term "substantial" has been variously interpreted to mean real or of substance, not merely discernible but material in a relative sense and meaningful.[2]

In this regard such coordination, commonly in the form of blank sailings, is temporary and a short-term adjustment to expected seasonal or other anticipated lower demand for vessel capacity on a particular trade route. It is necessary for ocean carriers to retain this form of coordination in response to changes in the supply and demand profile of the subject market, including seasonal fluctuations.

Once the level of demand in an impacted market and demand for vessel space / capacity returns to its normal level then the supply of vessel space / capacity responds accordingly and returns to the previous level of supply, hence promoting competition. There is no long-term or substantial detriment caused to the market by such temporary measures. On the contrary, such ad hoc capacity adjustments are designed to meet demand and customers' needs, while preserving cost efficiencies for ocean carriers, and still being able to share those efficiencies with customers.

Would allowing such coordination to impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

Yes. Underlying such coordination is the need to ensure the long-term economic efficiency and sustainability of the relevant shipping service and the ocean carriers operating in that service. Such coordinated adjustments encourage a better calibration of vessel capacity to suit demand conditions, seasonal fluctuations, and promotes improved responses to changes in the subject market. If the demand from the market is low, such coordination provides flexibility to adjust and reserve operational resources for future high demand whilst reducing unnecessary environmental impacts. Without such a supply adjustment mechanism ocean carriers may be adversely impacted by the considerable costs of operating vessels in a service without a reasonable economic incentive.

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[1] Australian Competition and Consumer Commission, Merger Guidelines November 2008 (Updated November 2017), < https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

[2] *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at 41.

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Additional Comments:

Noting the above, we consider that ocean carriers should have the flexibility to respond quickly to market dynamics which is critical to ensuring the long-term sustainability of a particular service. This coordination flexibility to adjust supply capacity to changes in demand should form a necessary element of any class exemption and there should be no minimum notice periods inserted into the class exemption.

Further, when entering into an Operational Agreement the parties to the agreement typically agree standard ancillary provisions including the total number of vessels to be provided in the service, and how many vessels each shipping line will contribute to the service. Each party to the agreement undertakes that its vessel(s) will meet certain operational capacity criteria – including a TEU capacity range, refrigerated container capacity in terms of available reefer power plugs, deadweight tonnage and speed parameters. For example, for a weekly South-East Asia – Australia service, two ocean carriers may agree to contribute two vessels each and may undertake that each vessel provided to the service will have a declared TEU capacity ranging from 8,000 TEU to 9,000 TEU, with each vessel to have minimum of 500 reefer plugs.

e. Fix or Coordinate Freight Prices;

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No.

Should such coordination be permitted by a class exemption and if so, why?

No. They should not be permitted by a class exemption for the reasons outlined below:

a. As mentioned above, the registered Operational Agreements to which ANL CL, ANL Singapore and CMA CGM are a party are purely Operational Agreements such as VSA, JSA and SCA. Such agreements do not include any provisions at all for setting freight rates by the parties. In such agreements the parties have equivocally determined and agreed that they will each set their own pricing decisions independent of the other agreement partners. Any discussions on prices under such agreements are strictly prohibited and not protected by any exemptions under Part X of the CCA.

b. Ocean carriers within the VSA, JSA and SCA to which ANL CL, ANL Singapore and CMA CGM are parties do not discuss or agree on freight rates, as such conduct is not covered by the registered exemptions and would contravene the CCA.

c. To the contrary, allowing such freight rate discussions would reduce competition among the parties by substantially lessening price competition. In the context of sole operational agreements (as those currently allowed), the parties fiercely compete

amongst themselves to source and retain customers. It is important to note that although the ocean carrier services offered by the parties may be similar in terms of routing and scheduling, ocean carriers compete strongly on rates as well as on, amongst other things, documentation efficiency, cargo visibility, billing accuracy, customer services and landside services, that is, any quality parameters that strongly contribute to sound and free competition among competitors.

d. Commercial decisions and pricing decisions are made individually by each ocean carrier, based on its own commercial strategy.

f. Fix or Coordinate Surcharges

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No. For the same reasons as set out for paragraph 1. (e) above.

Should such coordination be permitted by a class exemption and if so, why?

No. For the same reasons as set out for paragraph 1. (e) above.

g. Pool or Apportion Earnings, Losses or Traffic

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No. Any current occurrence of such agreements is to be considered legacy and on the verge to be reconfigured into straight forward SCA.

Should such coordination be permitted by a class exemption and if so, why?

No. For the same reasons as set out for paragraph 1. (e) above.

h. Restrict Capacity (Slots) Offered

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

In the context of restricting capacity (slots) offered as a means of reducing competitiveness in the market or manipulating prices for ocean container shipping services, then NO, such coordination is not relied upon in agreements to which ANL CL, ANL Singapore and/or CMA CGM are a party

The above noted, see the comment under clause 1. (d) in respect of certain ancillary capacity agreements entered into in most VSA / JSA.

Should such coordination be permitted by a class exemption and if so, why?

In the context of the above clarification - NO.

How would allowing such coordination impact competition or otherwise cause detriment?

Not applicable.

Would allowing such coordination to impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

No.

i. Allocate Markets (e.g. Ports, Trade Routes or Regions)

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No.

Should such coordination be permitted by a class exemption and if so, why?

No.

j. Share Commercially Sensitive Information

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

No.

Should such coordination be permitted by a class exemption and if so, why?

No.

k. Collectively Bargain with Suppliers (e.g. stevedores)

Is this form of coordination relied upon in agreements that are currently being utilised by Liners servicing Australia?

To ANL CL's knowledge the coordination of collective bargaining with suppliers has only been considered for stevedoring contracts pursuant to section 10.24A of the CCA. Further, it is our understanding that such coordination is only permitted when the parties to a Part X

filed agreement have expressly agreed in writing in that Part X filed collective operational agreement for such collective bargaining to occur.

Currently, this form of coordination to collectively bargain with stevedores is only provided in one registered Operational Agreement to which ANL Singapore is a party; however, ANL CL notes that the parties to that Operational Agreement have not to date engaged in any collective bargaining with any Australian stevedores.

Should such coordination be permitted by a class exemption and if so, why?

In the context of the existing provisions of section 10.24A of the CCA, and in light of historical precedence, if such a collective bargaining exemption is to be included in any class exemption for ocean container services then it should be specifically limited to stevedoring services only. ANL CL does not advocate a broad exemption for collectively bargaining between ocean carriers and their suppliers.

The above noted, ANL CL considers that due to the unique relationship between the shipping lines and stevedores that arguably a specific coordination exemption for the purposes of jointly procuring stevedoring services by ocean carriers does meet the legal test for the ACCC to make a 'class exemption', as it is likely to lead to overall public benefit.

The basis for this argument is that by permitting ocean carriers to collectively bargain with stevedores the ocean carriers are able to promote efficiencies between different shipping lines and a consistent stevedoring provider of key services to support customer services and service efficiency, thus generating positive economic outcomes for the overall benefit of Australian cargo interests.

How would allowing such coordination impact competition or otherwise cause detriment?

ANL CL considers that collective bargaining by ocean carriers with stevedores does not substantially lessen competition in any given market. Based on the Australian jurisprudence and the ACCC's Merger Guidelines[3], the term "substantial" has been variously interpreted to mean real or of substance, not merely discernible but material in a relative sense and meaningful.[4] Based on the admittedly limited number of Part X filed consortia agreements that do contain such a provision, ANL CL notes that any joint procurement of stevedoring services is required to be undertaken by a tender process open to all interested stevedores. Thus, competition among all interested Australian stevedores is encouraged and any decision to engage in such tenders are made collectively by the ocean carriers in the Operational Agreement. This process removes any potential disadvantage to the relevant stevedores and promotes efficiency and competition between stevedores.

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[3] Australian Competition and Consumer Commission, Merger Guidelines November 2008 (Updated November 2017), < https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

[4] *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at 41.

Would allowing such coordination impart a public benefit (e.g. an economic efficiency)? If so, please provide reasons and supporting information.

The economic efficiency resulting from such specific stevedoring services collective bargaining with ocean carriers is demonstrated by the joint procurement for stevedoring providers in international ocean carrier services.

Stevedoring arrangements are an essential component in any ocean carrier service operation. Such arrangements provide the basic port related infrastructure for the ocean carriers to be able to provide their port - to - port services to all customers. In particular, the collective bargaining ability under the same Operational Agreement would result in a more consistent level of stevedoring and terminal related services provided to the relevant ocean carriers. This will in turn maximise the operational capacity for the relevant service, benefiting downstream customers.

Further, allowing ocean carriers to negotiate collectively with stevedores for a consortium rate promotes economic benefits to customers if, for example, the ocean carriers are able to offer large volumes of cargo which can secure lower rates than public tariffs offered by those stevedores. This can give the ocean carriers considerable leverage in negotiating a more favourable stevedoring rate than would be the case where lines negotiate individually with the same stevedores. Such collective action may in turn promote reduced freight rates and any port-related charges that are likely to be passed on by the ocean carriers to their customers.

Any Other Activities

In addition to the above ANL CL proposes the following activities should be included in the proposed ocean container shipping class exemption:

I. Sharing or Exchanging of Equipment such as Containers.

Although this form of coordination has not been frequently utilised in the registered Part X agreements to which ANL CL, ANL Singapore and CMA CGM are a party, this specific activity was exempted from New Zealand's extensive review of its ocean carrier collective bargaining regime which led to the recently enacted *Commerce (Cartels and other matters) Amendment Act* (2017).

ANL CL considers that a similar coordination exemption in Australia would also meet the legal test for the ACCC to make a 'class exemption' as it is unlikely to substantially lessen competition and/or is likely to lead to overall public benefits.

Sharing and exchanging of equipment is unlikely to substantially lessen competition. To the contrary, by sharing equipment such as containers this may assist in reducing operating costs

for ocean carriers, particularly for small and medium carriers with limited resources, thus lowering barriers of entry and expansion of new ocean carriers into the market.

Further, such an exemption may increase service quality and efficiency as it may ensure sufficient supply of equipment and containers when demand is high and equipment is in short supply across the market.

Part II - What Eligibility Conditions (If Any) Should Limit Which Liners Can Access the Class Exemption?

ANL considers that for the proposed Australian class exemption it is not necessary nor appropriate to restrict which ocean carriers are eligible for the class exemption. The reasons for this include the following:

a. Exempt Conduct: Minimum Competition Effect and Public Benefit

As outlined throughout this submission the class exemption categories proposed by ANL CL under Part I of the ACCC's Paper are purely operational in nature and for the purposes of Operational Agreements.

In ANL CL's view the exempt conduct as described in Part I, questions 1. (a), (b), (c), (d), (k) and (l) do not substantially lessen competition. The coordination on the above operational elements by ocean carriers is likely to promote competition, lower point of entry costs, promote expansion of ocean container shipping markets, enabling smaller and/or new ocean carriers to participate in the market and ocean carrier services and improve service quality and stability among ocean carriers engaged in Operational Agreements to provide a quality ocean container shipping service to customers.

Further, these proposed collective activities by ocean carriers are likely to produce a wide range of operational and economic benefits for Australian cargo interests, including: providing more diverse port combinations, better utilisation of port facilities and capability, more efficient calibration of vessels and vessel slot capacities. All of these types of conduct are likely to result in lower costs to cargo interests and better service coverage overall for customers.

Considering the economic efficiencies and customer benefits generated by such exemptions in the Australian competition law context, ANL CL considers that it is desirable for all ocean carriers to be permitted to engage in such operational coordination regardless of the size of the carriers who wish to participate in the proposed Operational Agreement. To exclude ocean carriers on the basis of their size would have the potential of limiting the effectiveness of the class exemption, thus reducing the anticipated benefits of such a regime for customers of ocean container shipping services in Australia.

Further, limiting the scope of the class exemption in respect to the size of some of the parties to the operational arrangement would deprive small or medium size carriers from benefiting of equal cost efficiencies than the ones they can expect from joining forces with large carriers.

b. The Nature of the Australian International Liner Shipping Market

Further on the above issues ANL CL considers that in respect of the international shipping line services environment the Australian commercial environment and jurisdiction is most analogous to the recently introduced New Zealand collective bargaining regime for ocean shipping services. The shipping market in Australia, New Zealand and in Oceania in general can be clearly distinguished from other major shipping jurisdictions in Europe which entail market share limits in their block exemptions for international container shipping line services.

Compared to the EU, Australia and New Zealand are much smaller shipping markets for international ocean container shipping services.

It is ANL CL's submission that for an island nation such as Australia, which has a relatively small ocean container shipping market on a global scale, it is critical that the Australian market remains attractive and open to international container shipping lines. This is key to providing quality, stable and efficient container shipping services to meet the needs and demands of Australian exporters and importers.

Currently there are no market share conditions under Part X of the CCA. The legal requirement of market entry must be balanced against the commercial reality, and also be carefully assessed against the relatively low risks of competition concerns arising in this part of the world. The introduction of market share limits in an Australian class exemption for ocean container shipping lines may deter international shipping lines from continuing to offer their services in the Australian ocean container shipping market, or dissuade new entrants from entering the Australian shipping line market.

For the reasons outlined above, and also noting that no market share limit was imposed in the New Zealand *Commerce (Cartels and other matters) Amendment Act* (2017), ANL CL considers that any Australian class exemption regime for ocean container shipping services should not impose any particular eligibility criteria or restrictions, such as a market share threshold, to restrict which shipping lines can access the class exemption.

Part III - Should Cargo Owners Be Able to Collectively Bargain with Liners?

ANL CL does not consider that a separate and specific provision in any Australian ocean container shipping class exemption should include a provision for cargo owners to collectively bargain with ocean carriers.

ANL CL notes that the ACCC's recently issued class exemption for collective bargaining by small businesses and franchisees provides a clear process that allows such qualifying competing businesses to jointly negotiate with customers or suppliers over common commercial issues such as pricing and terms and conditions of business arrangements.

Question 3 on page 20 of the ACCC Discussion Paper includes a statement that: "Part X provides a role for the peak organisation representing Australian cargo owners and enables it to negotiate with Liners seeking to register a Part X Agreement". ANL CL notes that the designated peak shipper body for both Australian importers and exporters is the Australian Peak Shippers Association ("APSA"). It is unclear to us if this statement provides the rational for the ACCC to propose a potential class exemption in which collective bargaining and negotiation by cargo owners with shipping lines is to be included.

In any event ANL CL considers that it is important to note that the scope of the negotiations carried out by the peak shipper bodies, such as APSA, under Part X of the CCA is quite different from the traditional collective bargaining conducted by small businesses. APSA's "negotiations" as provided by Part X on behalf of cargo interests with a group of carriers are specifically limited to the operational matters, either when Part X agreements are provisionally registered under section 10.29 of Part X, or after they are finally registered under section 10.41 of Part X.

The negotiations by APSA are conducted with the whole consortium for operational matters that are jointly determined in an Operational Agreement. APSA does not negotiate with consortia about specific commercial terms of any ocean freight services, for example, freight rates. This is because no such commercial matters are agreed or provided for in the context of any VSA, JSA and SCA to which ANL CL, ANL Singapore and/or CMA CGM are a party.

ANL CL considers that the existing CCA competition framework, without a separate class exemption for cargo owners, already provides sufficient legal protection to Australian cargo interests. Once the proposed new class exemption for collective bargaining by small enterprises and franchisees is finalised, then qualifying cargo interests with less than a $10 million aggregated annual turnover can utilise such an exception. For cargo interests with more than a $10 million aggregated annual turnover, they can still obtain legal protection under the CCA for collective bargaining by lodging a notification or obtaining authorisation with the ACCC in the normal course.

For these reasons ANL CL does not support any proposal for cargo owns to be able to collectively bargain with ocean carriers under any proposed Australian class exemption for ocean container shipping services.

Part IV - Further Input under Question 4

a. Industry Background

ANL CL understands that the World Shipping Council ("WSC") and Shipping Australia Limited ("SAL") will be providing their separate submissions to the ACCC for this review. In response to Question 4 of the Discussion Paper ANL CL anticipates that the WSC and SAL will put forward their respective extensive industry and international shipping knowledge, expertise and information on the structure of the shipping line market – locally and internationally, recent developments in the worldwide shipping line industry, freight rates trends and profitability trends across all shipping line markets.

On this basis ANL CL does not intend to provide its comments on this question in this submission.

b. Transition Period from Part X Registration to Self-Assessed Class Exemption

As noted on page 6 of the ACCC Discussion Paper, ANL CL agrees with the ACCC that it is a matter for the Australian Government, not the ACCC, to decide whether to repeal Part X of the CCA.

In our submission; however, ANL CL considers that should the Australian Government determine to repeal Part X of the CCA then there should be a transition period of two years, whereby during the transition period ocean carriers have the option to continue registering an Operational Agreement with the Registrar of Liner Shipping or to conduct a self-assessed class exemption exercise. At the conclusion of the two-year transition period then Part X of the CCA would be repealed.

The rational for this proposal is to provide ocean carriers with the opportunity to prepare for any class exemption regime, to shift from the registration system under Part X of the CCA and to adjust existing Part X filed agreements as required.

ANL CL notes that for many years the international ocean container shipping industry in Australia has benefited from the legal certainty and stability provided by the registration system under Part X of the CCA. Upon final registration under Part X ocean carriers are exempted from certain restrictive trade practices as stipulated under Part X of the CCA. Under the proposed general framework of a self-assessed class exemption regime; however, there it likely to be a fundamental shift from statutory approval of collective conduct under Part X to a self-assessment exemption regime. ANL CL considers that it will take some time for ocean carriers to become familiar with a class exemption regime and to determine how to assess commercial activities within such a new regime.

In support of this proposition ANL CL notes that under the New Zealand *Commerce (Cartels and other matters) Amendment Act 2017,* a two-year transitional period was provided to implement the specific amendments relating to international shipping line operations.

For these reasons ANL CL proposes a similar two-year transitional period should be introduced to ensure a smooth transition from Part X of the CCA to the new class exemption.

c. Freight Rate Issue under Part X of the CCA

The first paragraph on page 6 of the ACCC Discussion Paper ends with a statement that "Part X also requires Liners to provide 30 days' notice to the peak shipper body for changes to freight rates and surcharges.". ANL CL submits that this interpretation of the shipping lines' notification obligation for rate changes under section 10.41(2) of Part X of the CCA is only partially correct.

ANL CL notes that it has been liaising with the Registrar of Liner Shipping on this point for the past several months and we are yet to reach an agreed understanding with the Registrar of the statutory interpretation of section 10.41(2) of Part X of the CCA.

Noting this, ANL CL takes this opportunity to provide our interpretation of this provision of the CCA for your consideration.

Sections 10.41(2) & 10.43 of Part X of the CCA

Section 10.41(2) of Part X of the CCA requires parties to finally registered conference agreements to notify the relevant designated shipper body of any changes in negotiable shipping arrangements with at least 30 days' notice unless the shipper body agrees to a lesser period of notice (**section** 10.41(2)).

The definition of "negotiable shipping arrangement" is provided under **section** 10.41(3) of Part X of the CCA for outwards conference agreements (**section** 10.41(3)(a)), and inwards conference agreements (**section** 10.41(3)(b)) respectively, which provides inter alia:

"negotiable shipping arrangement covers the arrangements for, or the terms and conditions applicable to, shipping services (outwards or inwards) provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call)"

(emphasis added)

First, based on the above definition ANL CL considers that "negotiable shipping arrangements" must be the arrangements for or the terms and conditions that are clearly specified and incorporated in the registered conference agreements.

Secondly, under Part X the term "conference agreements" represents an umbrella agreement covering various types of cooperation agreements between shipping lines and their agreed conditions for the conference services. The term "conference agreements" therefore is defined broadly in the Australian context, and it includes "freight rate agreements". For instance, "freight rate

agreement" is defined under section 10.02 of Part X to mean a conference agreement that consists of or includes freight rate charges.

However, not all conference agreements protected by Part X of the CCA include freight rates. In fact, it is our understanding that most of the registered conference agreements with the Registrar of Liner Shipping nowadays do not container any reference to freight rates, and that they focus purely on operational aspect of the conference arrangements, such as VSA, JSA and SCA.

This is the case for ANL CL, because the registered conference agreements to which ANL CL, ANL Singapore and CMA CGM are a party are solely Operational Agreements in the form of VSA, JSA and SCA. Our Operational Agreements do not contain any references to freight rates or surcharges. In other words, these agreements are "non-freight rates" conference agreements, as distinguishable from "freight rates" conference agreements that are also protected under Part X of the CCA upon registration.

Accordingly, under these ""non-freight rates" conference agreements / Operational Agreement (VSA, JSA and SCA), the decision to increase/decrease rates and charges is decided at the sole discretion of each shipping line company, based on its own commercial strategy, which is not shared among ocean carriers. In practice, and in law, it is prohibited among ocean carriers to engage any in discussions on commercial information including rates if the registered agreements are "non-freight rates" conference agreements / Operational Agreements.

Therefore, our position is that the obligation of providing 30 days' notice to the peak shipper body under section 10.41(2) of Part X of the CCA for changes to freight rates and surcharges only applies to parties to a freight rate agreement.

This understanding of the notification obligation on ocean carriers for changes to freight rates and surcharges under Part X should be translated into the consideration of any proposed class exemption for ocean container services in Australia.

For the proposed class exemption ANL CL has submitted earlier in this submission that no rate related exemptions (Question 1 (e) and (f)) should be included. Accordingly, if there are no class exemptions for any rate related exemptions, then no condition should be imposed upon the ocean carriers to notify any freight rate changes either.

d. Time limits on Ocean Liner Shipping Class Exemptions

ANL CL submits that in the event that the ACCC determines to grant a class exemption for ocean liner shipping in Australia then the term of that class exemption should be for a period of 10 years. ANL CL notes that the container shipping industry requires significant investment and long-time lines for the supply of ocean liner shipping vessels, for the development of supporting infrastructure and for effective services to be developed. These factors demand certainty of the operational and regulatory environment for all participants. The current long-term stability provided by the Part X

regime has led to a very sustainable and competitive ocean container shipping market in Australia that positively supports Australian importers, exporters and their customers.

Concluding Remarks

ANL CL appreciates the ACCC's consideration of these submissions to its enquiry and we welcome the opportunity to discuss any of these issues with the ACCC at your convenience.

If the ACCC has any questions regarding this submission, please contact the persons as listed below. We would be most pleased to provide further assistance to the ACCC regarding the development of a class exemption for ocean container shipping lines operating to and from Australia.

Yours faithfully

Nick Slingsby
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