Comments of the

World Shipping Council

Submitted to the

Australian Competition & Consumer Commission

In the matter of

Proposed Class Exemption for Ocean Liner Shipping Discussion Paper

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28 February 2020

The World Shipping Council ("WSC") respectfully submits these comments in response to the Australian Competition and Consumer Commission's ("ACCC") Proposed Class Exemption for Ocean Liner Shipping Discussion Paper, released on 3 December 2019 ("Discussion Paper").

WSC is a non-profit trade association that provides a unified voice for the international liner shipping industry on important policy matters. With offices in Asia, Europe, and the United States, WSC has 19 ocean carrier members that represent approximately 90 percent of global liner vessel capacity. WSC members have invested hundreds of billions of dollars in ships, port terminals, and related infrastructure to ensure that a wide variety of options continue to exist for safe, dependable and economical international ocean transportation of cargo. A number of WSC's members provide substantial liner service in the Australian ocean trades. More information about WSC may be found at www.worldshipping.org.

WSC understands that Shipping Australia Limited ("SAL"), the local association representing ocean carrier interests in Australia, is submitting comments on the Discussion Paper. WSC supports the SAL comments, which provide the ACCC with a valuable perspective of local issues and trade conditions. As a global trade association, WSC's comments are intended to provide the ACCC with an international perspective on the broader issues and questions raised in the Discussion Paper. In addition, the ACCC has requested that stakeholders provide both factual and economic support for their comments. WSC retained RBB Economics, a consulting firm specialising in competition economics with particular expertise in the liner shipping sector, to provide an independent report to supplement its submission ("RBB Report"). The RBB Report, attached as an appendix hereto, includes data, statistics, and analyses on the Australian liner shipping market demonstrating the public benefits and economic efficiencies of carrier operational agreements.

1. Executive Summary

1.1 Part X of the Competition and Consumer Act 2010 ("Part X") has for many years provided a broad system for regulating international liner shipping in Australia. As noted in the Discussion Paper (at 5), Part X provides ocean carriers with an exemption from the Competition and Consumer Act 2010 ("CCA") to cooperate with respect to a number of activities including coordinating prices, pooling of earnings, losses, or traffic, and agreeing on operational matters like vessel capacity and schedules. In this regard, Part X has historically exempted ocean carrier operational agreements, such as vessel sharing agreements ("VSAs"), slot charter agreements ("SCAs"), and slot exchange agreements ("SEAs"), as well as commercial agreements, such as liner conferences and voluntary discussion agreements ("VDAs"). Part X requires that these cooperative agreements register with the Department of Infrastructure, Transport, Cities, and Regional Development, as well as provide notice to the designated peak shipper body for Australian importers and exporters, and consult with that body regarding minimum levels of shipping services that the ocean carriers will provide through such agreements.

1.2 In light of recent developments in the industry, as well as trends in the competition law treatment of liner shipping generally, WSC considers that various aspects of Part X are outdated and inconsistent with best international standards. WSC further considers that the Government should repeal Part X and replace it with a narrower class exemption for the liner shipping sector, that is more appropriately tailored. In this context, WSC agrees that the ACCC's adoption of a new class exemption, providing legal certainty to purely operational arrangements including VSAs, SCAs, SEAs, and other operational agreements, would "improve the service supplied to cargo owners with a low risk of substantially lessening competition." Discussion Paper at 7. As described in more detail below, a class exemption for operational agreements like VSAs, SCAs, and SEAs would be consistent with the standards for such exemptions set forth in the CCA. Those standards, as outlined in the Discussion Paper (at 6), require that the operational agreements in question: (1) would not have the effect or likely effect of substantially lessening competition, and/or (2) would result or would be likely to result in overall public benefits.

1.3 Finally, WSC agrees with the ACCC's preliminary view (at 7) that "any class exemption should not cover agreements or coordination on price" charged to customers which would therefore likely exclude liner conferences and VDAs from any new class exemption. In this regard, WSC believes that, to the extent there will be any administrative requirements accompanying the new class exemption, such requirements should be far more streamlined than the current filing procedures and stakeholder engagement requirements under Part X, which are more suited to a broad exemption that covers commercial agreements. A simpler administrative approach would appropriately balance the Government's interest in maintaining sufficient oversight over the industry's activities with the industry's ability to be nimble in responding to changes in market dynamics.

2. Industry Background

2.1 In the Discussion Paper (at 10, Question 4), the ACCC has asked stakeholders for information on the history of and recent developments in the liner shipping industry, including the structure of the liner markets, prices, costs and profitability in those markets, and the extent to which ocean carriers today utilise operational and commercial cooperative agreements. WSC's response is set out below, which provides important context for the consideration of any repeal of Part X as well as a roadmap for the adoption of a new class exemption for liner shipping. We emphasise that given the imperative of some cooperation between shipping lines to facilitate the efficient movement of goods, any replacement of Part X with a class exemption must be seamless; there cannot be a "gap" during which neither Part X nor a new class exemption applies.

A. Liner Shipping Background

2.A.1 Liner shipping companies are the engines of international trade, providing regularly scheduled ocean transportation service at key ports for essential manufactured goods, consumer products, raw materials, and agricultural commodities worldwide. These services, which connect thousands of ports worldwide at very low cost, are of vital significance to national economies, importers and exporters, manufacturers, and consumers. As the world economy has

become more globalised, liner shipping has grown significantly. Approximately 60 percent of all world seaborne trade, or more than US $7 trillion annually, is carried by liner ships. Over the past two decades, global container traffic has increased at an average annual rate of almost 6%, increasing from roughly 50 million twenty-foot equivalent units ("TEUs") in 1998 to over 150 million TEUs in 2018.[1] As noted in the RBB Report (at s2.2), the total number of containers shipped to and from Australia between 2010 and 2018 increased from 6.4 million TEUs to 8.7 million TEUs, or over 36% in this period.

2.A.2 Liner ships use groups or "strings" of vessels that make regular weekly calls at pre-announced ports. There are approximately 500 global liner services in operation today, and about 55 serving Australia's ocean trades involving about 25 different shipping lines. As an island nation, services to and from Australia are unique and can be challenging in several respects. Services in the Australian trades have some of the longest trade routes and transit times, and require a higher number of vessels per service. In addition, there is a smaller importer and exporter customer base that nonetheless requires highly regular and reliable services in light of the agricultural-based economy and nature of its cargo.

2.A.3 In all trades, liner vessels sail whether they are empty or full, and capacity that is not used on one voyage cannot be used on another. If a space is left empty, it represents a lost opportunity, and a cost, that cannot be recovered. Demand for liner shipping services is seasonal, cyclical with changes in trading patterns and variations in the global economy, and usually asymmetric on any given trade lane (typically with a "head-haul" direction that accounts for more cargo volume than the lower-volume "back-haul" direction).

2.A.4 In contrast to these short-term variations in demand, supply is provided by expensive vessels with useful lifespans of around 25 years. Vessels must be large enough to accommodate peak demand, but actual demand at any given time is often below the peak level capacity. This gap between supply and actual demand for much of the year often being below peak level capacity has worsened over the past few years and is expected to continue. Under these structural conditions, it is difficult at best to match supply to demand and thus maximise the efficient use of vessel fleets.

2.A.5 Liner shipping also requires high capital and fixed operating costs. In order to maintain a regular liner service, a liner shipping operator must offer or arrange (i) the commitment of multiple ships on a specific route to ensure frequent regular port calls; (ii) tens of thousands of containers to carry cargo; (iii) arrangements for trucks, chassis and stack trains; (iv) computerised worldwide documentation, booking and tracking systems; (v) marine terminals and regular availability of vessel berths with specialised container cranes at origin, transshipment and destination ports; and (vi) costs for fuel, crew, insurance, maintenance and repair.

2.A.6 Once carriers have placed an order for new ships, the timing of which is based on many factors, the owner is obligated to take delivery of those ships when they become available.

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[1] *See* UNCTAD Review of Maritime Transport 2019 at 12.

This means that the carrier must be able to deploy the new ships in such a way as to achieve the efficiencies that justified the expense of the investment. If the cargo demand is not sufficient to provide the utilisation needed by any one carrier, then it is incumbent upon that carrier to look at other ways to achieve the needed utilisation. One less efficient option might be for a carrier to review whether, within its own network, it is possible to combine services so that, for example certain port pairs served with 3 weekly strings might be provided with ample capacity by using 2 weekly services comprised of larger ships. This might result in a port receiving two calls per week versus three but still being provided with ample capacity to move the cargo demand for that port. Another option, as described in more detail below, is for carriers to partner through the use of different types of operational arrangements to jointly share space on each other's vessels and networks. This ensures that multiple carriers continue to serve a particular trade and provide continuity to their customers in terms of future service offerings.

B. Cooperative Arrangements

2.B.1 Over the years, the industry has relied on various forms of cooperative agreements as tools for maximising efficiency to offset its challenging economics. These agreements historically have fallen into two categories: commercial and operational. Commercial agreements such as liner conferences and VDAs allowed participating carriers to discuss and reach agreements on prices. Given the carriers' preference in recent years to handle commercial issues independently, and the trend among global regulators to remove or limit competition law exemptions that allow carriers to discuss and coordinate on prices, many liner operators have withdrawn from any participation in commercial agreements. Few (if any) conferences or VDAs continue to operate globally or in Australia. Thus, for practical reasons, the legal protections currently provided by Part X to commercial agreements are no longer necessary.

2.B.2 However, the continued importance of operational agreements to liner operators cannot be overstated. Virtually all liner operators continue to rely on VSAs to provide service to importers and exporters in most trades, including Australia.

2.B.3 Indeed, as noted in the RBB Report (Table 1, s3.2.1), the majority of current services (14 of 24) between Australia and Asia are offered through VSA cooperation. However, because Drewry only reports structural cooperation between carriers through VSAs, RBB analyzed service data from the Alphaliner database, which also includes relevant information on SCAs and SEAs. RBB notes (at s.3.2.4) that this data shows "there are only 5 services without slot agreements," meaning "the number of services on which some type of cooperation between carriers takes place is much larger than indicated in Table 1, and the number of services operating without any type of cooperation is much smaller."

2.B.4 As noted by the ACCC in its Discussion Paper and RBB in its Report (at s.3.1), ports in Asia are important hubs for containers to or from Australia because these ports provide a link to the main East-West trades to Europe and North America. Given the unique challenges described above in serving the Australia trades, it is not surprising that carriers significantly rely on operational agreements in serving Australia.

1. Forms of Operational Agreements

2.B.1.1 As outlined by the ACCC (at 3-4, Table 1), operational agreements among ocean carriers can take many forms, but all forms are variations of the same concept. By having one or more partners among which space on ships can be shared, more carriers can offer scheduled services to more ports than those carriers could offer individually. The structure, duration, and geographic scope of these agreements varies according to the needs of the carriers seeking to offer service to a particular market. They can be structured as simple SCAs between two carriers, where carrier A agrees to charter a certain amount of space on carrier B's vessel(s), often on a limited number of services and/or between a limited number of port pairs, thereby offering carrier A the ability to compete in a market where it does not have sufficient customer volume to justify the expense of operating an independent service.

2.B.1.2 An SEA is similar except that the carriers involved exchange space on each other's vessels. A more expanded version of an operational agreement is a VSA, also sometimes referred to as a "consortium," where two or more carriers each agree to provide a specified number of ships in order to jointly operate a service string in order to serve a particular market. In a VSA, carriers typically coordinate on the number, size, type, and speed of the vessels to be deployed in the service, as well as the vessel schedules, sailing patterns, and ports to be called. The VSAs also provide for the basic allocation of space on all vessels in the service among the participating parties, and provide for other additional operational or administrative details (e.g., insurance, maintenance and repair, procedures for handling dangerous cargoes, and dispute resolution procedures).

2.B.1.3 While the basic structure of these various forms of cooperation may differ, a universal feature among all types of operational agreements is that there is no discussion, agreement, or coordination among the participating carriers with respect to any commercial issues like prices, charges, customers, or other contract terms and conditions. Each carrier that participates in SCAs, SEAs, and VSAs maintains separate and different business structures, independent customer bases, marketing strategies and service strengths. Hence, any carrier that is a party to any operational agreement decides its own commercial strategies independently and competes on pricing and level of service. Even where carriers are parties to the same operational agreement, the level of cooperation is limited such that there remains every incentive to compete. In this regard, information shared among parties to a VSA is limited to the operational information necessary for the functioning of the agreements. Vessel deployments are agreed upon only to the extent necessary for the efficient joint operation of VSAs and to adapt to current supply and demand conditions, but otherwise, carriers make individual decisions as to investment and continue to manage freely their capacity. They are therefore able, and have the incentive, to increase capacity to meet customer demand.

2. Efficiencies and Economic Benefits of Operational Agreements

2.B.2.1 Each category of operational agreements meets the standard for a class exemption under the CCA, because these agreements do not and are not likely to lessen competition, and they result in overall public benefits. By allowing carriers to exchange or share space on each other's vessels, or integrate their vessels into a coordinated operating arrangement, these arrangements enable each carrier to offer more service in more trades with lower capital cost commitments and better utilisation of space. The result for carriers is a reduction of operational costs, the promotion of efficient use of vessel capacity, and a greater incentive to make investments in new and more efficient and environmentally beneficial tonnage. The result for importers and exporters, and national economies, is broader service coverage at lower cost, on newer, more efficient and technologically up-to-date vessels. RBB explains the key public benefit of operational agreements in its Report (at s3.3), stating:

> "Consortia and other cooperation agreements result in benefits to customers as cooperation between carriers (a) allows for the generation of efficiencies through using larger vessels whilst at the same time allowing for services with a regular frequency and, importantly, (b) it allows shipping lines to offer services also where they would not have the scale to offer such services on their own."

2.B.2.2 The RBB Report provides additional economic support that shows operational agreements do not lessen competition. The RBB Report (at Figure 2, s2.3) provides a graph that shows the development of spot rates between Shanghai and Melbourne between July 2011 and November 2018. The data shows that spot rates at the end of 2018 are essentially the same as they were in 2011, which if one accounts for inflation means that rates have decreased in real terms over time. RBB concludes (at s2.6) that "stable (in nominal terms) to decreasing prices (in real terms) in a growing market with improved connectivity evidences an efficiently functioning and competitive market."

2.B.2.3 Further evidence cited in the RBB Report (at s2.4) shows that operational agreements are pro-competitive. For more than a decade, the United Nations Conference on Trade and Development ("UNCTAD") has maintained a liner shipping connectivity index ("LSCI") for most trading nations of the world. UNCTAD's LSCI shows the integration level of countries to global liner shipping networks. The LSCI is composed of five components: (1) the number of ships, (2) the total container-carrying capacity of the ships, (3) the maximum vessel size, (4) the number of services and (5) the number of companies that deploy container ships on services from and to a country's ports. The higher a score is on the index, the higher the integration of a given country to liner shipping networks.

2.B.2.4 The graph provided in the RBB Report (at Figure 3, s2.4) shows the development of Australia's score on this index from 2006 to 2019. Australia's score in 2019 is the highest it has been in this 13 year period, and the steady increase over time is a clear indication that carriers have been able to utilise operational agreements to expand services and Australia's overall connectivity to global networks.

2.B.2.5 The RBB Report provides further analysis showing the impact of operational agreements on service quality. The Report (at Annex B) presents and discusses a conceptual example to illustrate that the absence of operational agreements would have a negative impact on service quality because – absent consolidation – carriers would need to reduce service frequencies in order to maintain utilisation or otherwise switch to smaller vessels incurring significant costs and result in upward pressure on pricing. Based on this analysis, RBB concludes (at Appendix B, sB1.1.1) that "moving from the current market structure with consortia to a market structure without consortia would result in a severe reduction in the quality of service offered." RBB's overall conclusion in its report (at s4), based on its data and analysis, was that "a class exemption that would allow for useful cooperation between carriers can hence be considered in the public interest."

2.B.2.5 Indeed, operational agreements promote competition by lowering barriers to entry on a given trade. New market entrants or smaller carriers, for example, have the ability to partner with other carriers, some of which may have larger networks, in order to expand their service offerings.[2] Similarly, when a carrier offers a service to a smaller market, it is able through its participation in an operational agreement to share some of its capacity with other carriers that might seek to offer service to that market, thereby creating additional service and competition in that market. As the RBB Report shows, the consistent growth in Australia's container trade over the years is proof that these cooperative agreements have greatly helped promote service to and from Australian ports.

C. Industry Developments

2.C.1 WSC addresses below comments and questions raised by the ACCC in the Discussion Paper relating to the impact of recent industry consolidation on the market, and carriers' participation in a form of VSA called "alliances." As set forth below, the industry remains highly competitive today despite recent consolidation, and the carriers' participation in alliances enhances competition in the industry, not lessens it.

1. Industry Consolidation

2.C.1.1. The ACCC notes in the Discussion Paper (at 1, 3, and 10) that the liner shipping industry has consolidated recently, and requested feedback from stakeholders on the current structure and level of competition in the market. The liner shipping industry has undergone a period of consolidation in recent years. COSCO and China Shipping Group (2015), CMA CGM and Neptune Orient (2016), Hapag-Lloyd and United Arab Shipping Co (2017), Maersk and

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[2] *See* RBB Report at s.3.3 ("The continued presence of smaller carriers is (also) relevant with a view to the importance of the transhipment of containers to and from Australia in Asian hub ports: cooperation not only allows the smaller carriers to offer services on the Asia – Australia trade. Because they are able to offer the Australia-Asia leg, they can also offer services to and from other parts of the world to Australian customers (with transhipment in Asia).")

HSDG (2017), and COSCO and Orient Overseas International (2018) have, respectively, combined. NYK, K-Line, and MOL also created a joint venture called ONE, which includes each of their respective liner shipping businesses.[3] The consolidation was generally the result of long-term sustained losses by the carriers and low or no return on capital.

2.C.1.2 As a matter of fact, huge financial losses in the industry even resulted in the bankruptcy of another major carrier, Hanjin Shipping, in 2016. This type of industry consolidation demonstrates just how important cost savings are to the carriers today. As noted, operational agreements allow carriers to increase efficiency and cut costs by reducing unused space on their vessels. The need for cost savings is another major reason why the industry relies so heavily on operational agreements in virtually all trades.

2.C.1.3 That said, it is important to stress that the level of consolidation in liner shipping should not be overstated. Indeed, the industry remains highly competitive, with numerous carrier options for importers and exporters in virtually all trades. According to Alphaliner, even the largest ocean carrier as of February 2020 has only 17.4% of total worldwide capacity. Combined, the top five carriers have less than 65% of the world's fleet capacity.[4]

2.C.1.4 The RBB Report (at s.3.2.3) shows similar results for the Australia-Asia trade. The largest carrier has a 28% capacity share, and there are multiple carriers serving the trade, including 8 carriers with a capacity share of 6% or less.[5] As noted by RBB (at s.3.3), “there are quite a few smaller carriers active on the Australia-Asia trade that have low market shares, but are able to maintain current service levels as a result of cooperation with other carriers.” This is strong evidence that both the global and Australian markets remain fragmented and are not close to a point where even the leading companies could maintain their level of service individually. Operational cooperation remains critical to virtually all carriers.

2.C.1.5 Drewry Shipping Consultants recently undertook an examination of whether or not the container shipping industry remains competitive following the recent rounds of mergers and acquisitions outlined above. The title of the report reflects its conclusions: “Container market still competitive.” Drewry identified almost 400 different vessel operators providing regularly scheduled container service worldwide. Using the Herfindahl-Hirschman Index (HHI) methodology, which is a commonly accepted measure of market concentration by competition authorities, Drewry analysed the competitive environment in 12 main trade routes globally and concluded that “the industry remains highly competitive by standard measures.”[6]

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[3] *See* RBB Report at s2.5.

[4] Alphaliner, Top 100 Carriers, (Feb. 12, 2020), *available at* https://alphaliner.axsmarine.com/PublicTop100/.

[5] As the RBB Report notes (at s.3.2.3), capacity shares are not necessarily equal to market shares.

[6] Drewry Shipping Consultants, “Container Markets Still Competitive” (Jan. 2018).

2.C.1.6 The RBB Report (at s3.2) provides additional evidence to show that the consolidation in the industry has specifically not harmed competition in the Australian ocean trades. While the number of ocean carriers serving the trade between Australia and Asia has decreased from 22 to 13 between 2014 and 2019 as a result of mergers, acquisitions, and bankruptcies, RBB reports “service levels have remained stable between 2014 and 2019.” The report shows number of services remain stable (at 24), average ship size has increased, the number of port calls in Australia has remained stable while increasing in Asia. RBB concludes (at s3.2.1) that the data demonstrates the “consolidation and cooperation between carriers has not resulted in a reduction in service levels and… is highly unlikely to have resulted in a reduction of competition.”

2.C.1.7 The Alphaliner, Drewry and RBB analyses all reinforce the fact that the global and Australian liner markets are highly competitive, and that operational agreements help preserve competition by allowing numerous competitors—particularly small and medium size carriers—to participate in markets (including Australia) that they otherwise would not be able to on their own.

2. Carrier Alliances

2.C.2.1 Another industry development over the past few years as recognised by the ACCC in its Discussion paper (at 3) is the carriers’ participation in a particular type of operational agreement, sometimes referred to as “global alliances” or “alliances.” Alliances are a type of VSA that involves joint operation of fleets of vessels and sharing of vessel space in multiple trades. These types of agreements are particularly useful for carriers wanting to enter new markets or continue to serve markets with smaller cargo volume.

2.C.2.2 The growth of alliances has in many ways paralleled the significant growth in international trade. As the ACCC notes in the Discussion paper (at 1), carriers operating in large volume trades are becoming even more dependent upon the use of larger vessels in order to make those services economically viable. As a result, the size of the fully containerised ships deployed to transport those volumes has grown. For example, the largest ship delivered in 2005 was 9,200 TEUs. Today, the largest ship is over 23,000 TEUs. Larger ships help carriers reduce per unit costs, resulting in additional cost savings. The European Commission has described in positive terms the benefits resulting from the deployment of larger vessels, stating:

> “Expanding cooperation across multiple trade lanes increases the ability of the container liner shipping companies to deploy assets in the most appropriate and cost efficient way. If new larger ships are introduced in one trade, existing tonnage can be more easily and efficiently redeployed or cascaded into other trades. At the same time, the port coverage that each container liner shipping

company can offer to its clients may be expanded, leading to enhanced customer choice and more price competition at each port location."[7]

2.C.2.3 As ships have gotten larger, the industry has seen an expanded use of alliances to ensure better utilisation of these assets. This is because it is not the deployment of the larger ship alone that can achieve an economy of scale or related cost reduction for the carriers; it is the deployment of the larger ship when it is reasonably full with paying cargo. In other words, a 14,000 TEU ship that is half full is less efficient that a 7,000 TEU ship that is full. Alliances and other types of VSAs have greatly improved carriers' vessel utilisation levels.

2.C.2.4 It is important that the ACCC understands a few things about alliances. First, "global alliances," despite what the name might suggest, include specific trade routes and/or services within their scope. None actually cover all global trades. Second, although alliances have existed for many years, the total number of them in recent years has reduced, and the size of each of them has grown somewhat. Today, as the ACCC notes, there are three main global alliances on the main East-West trades. This development is partly the result of carrier consolidation and partly due to growth in trade volumes. However, as is the case with all operational agreements, carriers participating in alliances only cooperate on operational matters and continue to compete with each other (and carriers in other alliances) on items like price, customer service, and overall networks. The relative size of alliances has not impacted competition among carriers. Indeed, competition among alliances on items like network coverage, vessel frequency, service reliability, documentation, cargo viability, billing accuracy, and landside services also remains fierce. Third, carriers operating in alliances also continue to participate in other cooperative operational agreements with other carriers (e.g., SCAs, SEAs, VSAs). Today the carrier parties to the three main alliances offer many services in certain markets including Australia that are outside of the alliances' geographic scope. Thus, alliances, like all VSAs, are designed and operated to increase efficiency and expand service offerings, not to limit flexibility or competition.

3. <u>International Treatment of Operational Agreements</u>

3.1 As liner shipping is by definition an international business, WSC agrees with the ACCC that it is important to consider the broader regulatory environment for carrier operational agreements when considering any changes to the Part X regime in Australia. The Discussion Paper (at 4) provides a brief summary of the international treatment of cooperative carrier agreements under several countries' competition laws. It is generally accurate to note that some global regulators have over the past few years removed or limited competition law exemptions for commercial agreements. It is equally accurate that operational agreements have been, and continue to be, recognised globally as providing efficiencies to customers and therefore generally continue to be provided protections from the application of competition laws.

[7] European Commission Decision, COSCO/OOIL, M.8584, Para. 29.

3.2 Virtually all of the major trading nations in the world (including Australia and many of its key trading partners) that have studied this issue have recognised the importance of carrier operational agreements in promoting liner services, whilst preserving competitive choices for importers and exporters. Such protections are provided for in various forms, including statutory exemptions (e.g., Australia, New Zealand, Japan, South Korea, Taiwan, U.S., and Canada), regulatory exemptions (e.g., China[8]), and block exemptions (e.g., EU, Hong Kong, Singapore, Malaysia, India,[9] and Israel). Some exemptions are overseen by maritime regulators, while others are overseen by competition authorities.

3.3 To ensure that the ACCC has a more complete understanding of various countries' treatment of the liner industry and operational agreements under competition laws, and to provide additional context to WSC's responses to the ACCC's questions in the Discussion Paper regarding a new class exemption, WSC provides below a more detailed presentation of the exemption regimes in Australia's key trading countries, as well as an overview of some of the more recent exemption reviews and decisions relating to operational agreements.

A. New Zealand

3.A.1 The Commerce (Cartels and Other Matters) Amendment Act 2017 repealed the previous New Zealand Shipping Act, 1987 exemption, which provided a broad exemption to both commercial and operational agreements, and replaced it with a more streamlined statutory exemption for operational agreements, effective in August 2019.[10] Under the current exemption, the following activities required for the proper functioning of operational agreements are exempted:

1. coordinating schedules and determining port calls;
2. exchanging, selling, hiring, or leasing space on a ship;
3. pooling ships to operate a shipping network;
4. sharing or exchanging of equipment such as containers; and
5. capacity adjustments in response to fluctuations in supply and demand for international liner shipping services.

3.A.2 In adopting the current exemption, the New Zealand Ministry of Business, Innovation and Employment ("MBIE"), found that:

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[8] The Discussion Paper (at 4, Table 4) includes China among a list of countries with no shipping-specific exemptions. As discussed, *infra,* while it is correct that China does not have a shipping specific statutory exemption, current regulations adopted by the State Council and overseen by the Ministry of Transport in China authorize ocean carrier agreements.

[9] The Discussion Paper (at 4, Table 4) omits India as among the countries that have an exemption for carrier operational agreements. As discussed, *infra,* India has had such an exemption since 2013.

[10] Public Act 2017 No. 40, Sections 44A and 44B of the CCA (14 August 2017). Under Section 2(2) of the Commerce (Cartels and Other Matters) Amendment Act 2017, the repeal of the Shipping Act exemption and replacement of the new provisions relating to international shipping came into force 2 years after the Act's effective date.

> "Cooperation between carriers is a common feature of providing liner shipping services. Most forms of cooperation between carriers relate to vessel sharing, space charter and slot exchanges. Cooperation of this sort enables carriers to offer regular, scheduled services on fixed trade routes to any customer in return for payment. This cooperation generally leads to efficiencies and better services for customers."[11]

3.A.3 Finding that the above categories of carrier operational cooperation are "procompetitive," the MBIE further noted that "this form of cooperation should be distinguished from anticompetitive collusion or 'cartel conduct,' which restricts capacity on New Zealand trade routes and raises prices to customers."[12]

3.A.4 The legislation does not provide any market share threshold for agreements to benefit from the exemption. It requires the parties to all operational agreements to self-assess against the statutory standards, with no requirement to file any materials or otherwise engage with the regulator prior to undertaking any cooperative activity. In this regard, the MBIE commented that: "The purpose of this exemption is to minimise the compliance costs to carriers involved in these cooperation arrangements, and in turn, the costs that would be passed on to their customers. Given the widespread use of these agreements, a specific exemption is desirable so that carriers have greater certainty as to the lawfulness of these operational activities."[13]

B. European Union

3.B.1 The EU has exempted consortia agreements since 1995. The current consortia block exemption regulation ("BER") was renewed in 2015 and expires on April 25, 2020.[14] The BER includes a market share threshold of 30% for operational agreements to automatically benefit from the exemption. Agreements above the 30% market share threshold are not *per se* unlawful, but they are not covered by the block exemption. The BER does not include any requirement for the consortia parties to file materials with the competition authority.

3.B.2 The current BER provides that consortia "generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they

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[11] Ministry of Business, Innovation and Employment, Consolidated Supplementary Order Paper to the Commerce (Cartels and Other Matters) Amendment Bill, Explanatory Material for Shipping Industry, at Para. 16 (March 2017).

[12] *Id.* at Para. 16.

[13] *Id.* at Para. 20.

[14] Commission Regulation (EC) No. 906/2009 of 28 September 2009 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions, and Concerted Practices Between Liner Shipping Companies (Consortia).

bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity."[15]

3.B.3 Following a thorough review, which included data collection from stakeholders, a public comment period, and consultation with national competition authorities, the European Commission recently published a Staff Working Document in November 2019, which indicated its intention to renew the BER for an additional period of 4 years, with no substantive changes to its scope.[16] In announcing its intention to renew the current BER, the Commission stated: *"Overall, the evaluation showed that the market conditions of the liner shipping sector still appear to necessitate the existence of a sector-specific BER. Therefore, we propose that the CBER application period should be prolonged."*[17]

C. Malaysia

3.C.1 Malaysia's Competition Act became effective in 2010, and it has had a block exemption order ("BEO") for liner shipping agreements since 2014, which has since been renewed in 2017 and 2019.[18] The original BEO provided broad immunity for all types of operational agreements, and permitted VDAs as well, but expressly prohibited them from fixing prices or making price recommendations. The BEO contained limited authority for VDAs to share information relating to the shipping industry, including market data, supply and demand forecasts, international trade flows, and industry trends.

3.C.2 The BEO was most recently renewed in July 2019 for an additional period of three years. At the industry's request, the BEO was narrowed to only include operational agreements. Carriers participating in operational agreements covered by the BEO are required to file those agreements with the Malaysia Competition Commission ("MyCC"). There is no market share threshold.

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[15] EC No. 906/2009 at Para. 5.

[16] Commission Staff Working Document (20 November 2019), *available at* https://ec.europa.eu/competition/consultations/2018_consortia/1_en_dts_evaluation.pdf.

[17] *See* World Maritime News, European Commission to Extend Liner Consortia Block Exemption, *available at* https://worldmaritimenews.com/archives/286809/european-commission-to-extend-liner-consortia-block-exemption/

[18] Gazette No. P.U. (A) 195/2014: Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services (Amendment) Order 2014; Gazette No. P.U. (A) 191/2017: Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services (Amendment) Order 2017; Gazette No. P.U. (A) 314/2019: Competition (Block Exemption for Vessel Sharing Agreements in Respect of Liner Shipping Services through Transportation by Sea) Order 2019.

3.C.3 In its initial decision to grant a block exemption in 2014, the MyCC noted there are "significant identifiable efficiency benefits arising from VSAs."[19] The Commission noted that "high investment in vessels and operating costs for services require the need to have cooperation between liner operators to maintain the quality of services that is able to meet frequency and regularity which are the defining characteristics of scheduled shipping services for the benefit of the industry, including shippers."[20] The Commission also noted that operational agreements "enable the liner shipping industry to continue investing billions of dollars in ships, new vessel services, equipment, infrastructure, information technology and other technological innovations in order to be able to continue providing liner shipping services. Scheduled and regular services cannot be provided at lower costs and regularity unless there is an agreement between competitors. These benefits could not have been provided unless there are agreements in place between liner operators."[21]

3.C.4 In the decision to first renew the BEO in 2017, the Commission determined that the following justifications for the original BEO still applied, based on the unique economics of liner shipping: (1) there is a "need for regularity in meeting shippers' demand at ports," (2) there is a "latent demand for such regularity and frequency of services by small shippers," (3) the liner industry is beset by high fixed costs and numerous operational costs, (4) there is "unbalanced demand on various trade routes, and (5) "external trade of Malaysia has an important containerized shipping component."[22]

D. Hong Kong

3.D.1 The Hong Kong Competition Ordinance went into effect on December 14, 2015. Following a lengthy review process, on August 8, 2017, the Hong Kong Competition Commission ("HKCC") issued its final Block Exemption Order ("BEO"), which granted a block exemption for VSAs, but not VDAs.[23] The following operational activities are covered by the BEO:

1. The joint operation of liner shipping services including any of the following activities:

    a. The coordination and/or joint fixing of sailing timetables and the determination of ports of call;

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[19] Malaysia Competition Commission, Explanatory Note, Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping) Order 2013 at Para. 1.3(a).

[20] *Id.*

[21] *Id.* at Para. 1.3(b).

[22] No. MyCC/700/4/2/3(2), Proposed Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services at Section 6.1, Para. 52 (11 May 2017).

[23] Competition (Block Exemption for Vessel Sharing Agreements) Order 2017.

b. The exchange, sale, or cross-chartering of space or slots on vessels;
c. The pooling of vessels and/or port installations;
d. The use of one or more joint operations offices;
e. The provision of containers, chassis, and other equipment and/or the rental, leasing, or purchase contracts for such equipment;

2. Capacity adjustments in response to fluctuations in supply and demand, which may be necessary for the operation of a joint service

3. The joint operation or use of port terminals and related services;

4. Any other activity ancillary to those referred to above.[24]

3.D.2 The BEO is for a period of five years, subject to review after 4 years. The BEO includes a 40% market share threshold for VSAs to automatically qualify for the exemption. In the HKKC's Guidance Note attached to the BEO, it notes that "[if] parties to a VSA exceed the market share limit, this would not necessarily mean that the efficiency exclusion does not apply in respect of that VSA and/or the parties to the VSA are in contravention of the first conduct rule, but merely that the benefit of the [Block Exemption] Order does not apply."[25] There is no requirement for agreements to be filed with the HKCC.

3.D.3 The HKCC found that VSAs "enable individual carriers to offer their customers broader service coverage and higher service frequency than would be the case if they operated alone." The HKCC also found that VSAs result in economies of scale and cost savings by supporting the operation of larger, more modern and more efficient vessels.[26]

E. Singapore

3.E.1 Singapore has had a block exemption for liner shipping agreements since 2006, shortly after the Singapore Competition Act became effective. This exemption was studied and first renewed by the Minister of Trade and Industry ("MTI") in 2010 and then again in 2015, following the recommendation of the Competition Commission of Singapore (the "CCS").[27] The

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[24] *Id.* at Para. 6. As noted in the HKCC's Guidance Note Regarding the Provisions of the Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 at Para. 11, the BEO defines VSAs "in broad terms, in order to cover the varying forms of cooperation which VSAs may take. It is intended that consortia, slot exchange agreements, slot charter agreements, joint service agreements, slot swap agreements, and 'alliances' or strategic alliances' all constitute 'vessel sharing agreements' for purposes of the Order."

[25] HKCC Guidance Note Regarding the Provisions of the Competition (Block Exemption for Vessel Sharing Agreements) Order 2017 at Para. 19.

[26] Case BE/0004, Application for a Block Exemption Order Under Section 15 of the Competition Ordinance in Respect of Certain Liner Shipping Agreements, Statement of Reasons, at Paras. 4.22 and 4.41-4.48 (8 August 2017)

[27] The agency is now called the Competition and Consumer Commission of Singapore ("CCCS").

CCS' most recent recommendation to extend the exemption until 2020 came after a public consultation process and consideration of a CCS-commissioned consultancy study.[28]

3.E.2 Many of the factors that the CCS took into account in recommending the extension are equally applicable in the context of Australia, including the size of Singapore's economy, the fact that Singapore is not a major port of origin or destination, and that a very large proportion of Singapore's containerised cargo throughput involves transshipment. Singapore noted the fact that liner shipping agreements result in a "higher degree of connectivity and service choice for Singapore's importers and exporters," and made the following determination:

> "Relying on the findings of the CCS-commissioned consultancy study, which was based on both quantitative and qualitative information provided by industry stakeholders, as well as feedback from CCS's own consultation with key industry stakeholders, CCS has assessed that liner shipping agreements contribute to improving the production of liner shipping services and the distribution of goods in Singapore. In particular, they enable the connectivity of Singapore's container port with consequent broader benefits to the Singapore economy, and facilitate cost savings for the liners from resultant economies of scale." (emphasis added)[29]

3.E.3 Parties to liner shipping agreements with less than a 50% market share automatically qualify for the BEO without having to file their agreements. Although the BEO does not have a market share threshold as such, it does require parties to agreements that hold an aggregate market share above 50% to file these agreements, and any variation or amendment thereto, with the CCS.

F. India

3.F.1 In 2013, the Indian Ministry of Corporate Affairs ("MOCA") issued its first competition exemption for VSAs. In consultation with the Ministry of Shipping and the Competition Commission of India, MOCA has renewed the exemption five times since 2013, including most recently on July 4, 2018 for a term of three years.[30]

3.F.2 All of the exemptions were based on the Government's finding that VSAs are in the "public interest" under Sec. 54 of the Indian Competition Act.

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[28] No. S 420, Competition Act, Competition (Block Exemption for Liner Shipping Agreement) Order 2006; No. S 768, Competition Act, Competition (Block Exemption for Liner Shipping Agreement) Amendment Order 2010; No S 718, Competition Act, Competition (Block Exemption for Liner Shipping Agreement) Amendment Order 2015.

[29] CCS's Response to the Public Consultation of May 2015 on the Proposed Recommendation to the Minster on the Competition (Block Exemption for Liner Shipping Agreements) Order, at Para. 5.

[30] The Gazette of India, Ministry of Corporate Affairs Notification, S.O. 3250(E), 4 July 2018.

3.F.3 The exemption applies broadly to all types of carrier operational agreements, and to carriers of all nationalities operating ships of any nationality from any Indian Port. During the three-year exemption period, all VSA agreements must be filed with the Director General of Shipping.

G. China

3.G.1 The PRC State Council adopted the Regulations on International Maritime Transportation in 2002 ("Maritime Regulations"). The Ministry of Transportation ("MOT") oversees the Maritime Regulations. Article 22 of the Maritime Regulations states that "photocopies of liner conference agreements, service operation agreements, and freight rate agreements concluded between international shipping operators engaged in international liner services in which Chinese ports are involved shall be submitted" to the MOT after the conclusion of such agreements.

3.G.2 In 2003, the MOT released its Implementing Rules in conjunction with the Maritime Regulations, defining the different types of carrier agreements, including "freight rate agreements," defined as "agreements relating to the kinds of charges to be collected, the rates thereof, the freight rates or surcharges etc. which is concluded between two or more than two operators of international liner services" and "service operational agreements", defined as "agreements relating to the increase or decrease of shipping capacity in one or more shipping routes concluded between two or more than two international operators of international liner services for the purpose of stabilising or controlling the freight rates, or other agreement coordinating the joint efforts of operators of international liner services." Article 32 of the Implementing Rules includes an agreement filing requirement: "The liner conference agreements, service operation agreements and freight rate agreements which involve the services to and from Chinese ports and are concluded between operators of international shipping services shall be filed with the Ministry of Communications within 15 days after the date of concluding the agreements."

3.G.3 The PRC Anti-Monopoly Law ("AML") was adopted in August 2007, and became effective on August 1, 2008. Although the AML does not contain an express exemption for cooperative carrier agreements, Section 15(7) of the AML provides that agreements "as stipulated by law and the State Council" are exempt from the AML and therefore benefit from competition law immunity. It has been interpreted that the Maritime Regulations, which were adopted by PRC State Council prior to the AML, continue to authorise carrier agreements by virtue of Article 15(7) of the AML.

H. Japan

3.H.1 The Japanese Marine Transportation Law was originally enacted in 1949 to regulate liner shipping companies and to provide antitrust immunity for liner shipping agreements. Japan reviews its immunity regime every five years, with the last reviews occurring in 2011 and 2016. The current legal framework was the result of an extensive review in 2016. At

that time, it was decided that the current competition exemption system should be preserved in order to: (1) ensure the continued provision of stable prices, service, and rationalised operations, and (2) to promote efficiency by means of international cooperation, and maintain consistency among systems worldwide.[31]

3.H.2 Article 28 of the Japanese Marine Transportation Law provides that any agreement, contract, or concerted practice between or among shipping operators concerning "freight rates, fares or fees, transport terms or conditions, routes, sailings or calls" are exempt from the Japanese Anti-Monopoly Law. Thus, carrier agreements are exempt from the Anti-Monopoly Law, and are instead subject to regulation under Article 29-1 and 29-2 of the Marine Transportation Law.

3.H.3 Pursuant to Article 29-1, "the Minister of Transport may not grant the approval under [Article 29] unless it acknowledges that the contents of the agreements which have been applied for approval under the same paragraph meet the following criteria:

(1) Users' interests are not unduly impaired.
(2) No undue discrimination arises.
(3) Participation in or withdrawal from the agreement is not unduly restricted.
(4) Contents of the agreement are at the minimum level judging from the purpose of the agreement."

3.H.4 Article 29-2 provides for the filing of exempt agreements, stating "Ship operators shall file with the Minister of Transport in advance of any acts [described in Article 28]." These filings are currently made with the Ministry of Land, Infrastructure, Transport, and Tourism.

I. United States

3.I.1 The United States was the first country to adopt antitrust laws when it enacted the Sherman Antitrust Act in 1890. Soon thereafter, in 1916, the U.S. Congress recognised the need for a special exemption for liner shipping to allow for rate agreements, consortia, and similar agreements. The U.S. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), is the current version of the law. It provides antitrust immunity to a wide variety of cooperative carrier agreements, including agreements to "discuss, fix, or regulate transportation rates." The Shipping Act also exempts agreements that "engage in…cooperative working arrangement[s]," such as consortia and VSAs.[32]

3.I.2 Under the U.S. regime, ocean carriers are given broad latitude to structure their cooperative agreements in the manner they deem most efficient from a business standpoint. However, the U.S. also has an extensive regulatory framework for agreements. Such

[31] Press Release, Ministry of Land, Infrastructure, Transport, and Tourism (16 June 2016).

[32] 46 U.S.C. § 40301(a).

agreements must be filed with a specialised federal agency, the U.S. Federal Maritime Commission ("FMC"), and are subject to a federal regulatory regime geared to maritime commerce and designed to protect the shipping public.

4. Discussion Paper Questions

WSC responds below to the specific questions that the ACCC has raised in the Discussion Paper relating to the structure and scope of a possible new class exemption for liner shipping in Australia.

A. *Question 1: What forms of coordination between Liner should the class exemption permit?*

4.A.1 As noted, WSC believes that a new class exemption should apply broadly to all types of carrier operational agreements, including SCAs, SEAs, VSAs, and alliances, but should exclude any commercial agreements, including any agreements that permit carriers to discuss or coordinate on matters such as prices (conferences and VDAs). With reference to the specific list provided by the ACCC in the Discussion Paper (at 8), WSC believes the following types of operational conduct should be covered by a new class exemption:

1. Coordinate and/or jointly fix sailing timetables and the determination of port calls in Australia
2. Exchange, sell, hire, or lease (or sublease) spaces (slots) on vessels
3. Pool their vessels to operate a network
4. Adjust capacity in response to fluctuations in supply and demand for international liner shipping services.

4.A.2 As discussed in this submission and the RBB Report, ocean carriers significantly rely on these operational arrangements to serve the Australian ocean trades. The economic and public policy benefits of these agreements have been discussed at length in this submission. As demonstrated above, these specific categories of activities are consistent both with the class exemption criteria in Australia (i.e., that any conduct not have the effect or likely effect of substantially lessening competition and/or would result or would be likely to result in overall public benefits), as well as the exemptions for operational agreements provided by other countries with similar competitive and public interest standards.[33] For clarity, WSC submits that the activities described in items (e)-(k) of Question 1 of the Discussion Paper (at 8) should not be included in a new class exemption.

[33] As noted in the RBB Report (at s4), "if the ACCC would adopt such class exemption, this would be in line with similar type regimes around the world including e.g. in Europe and Singapore, which would have the additional benefit of regulatory alignment in an industry that is by definition international in scope."

4.A.3 Item (l) in Question 1 asks whether "any other activity" should be covered by the class exemption. Consistent with the authorities in items (a)-(d), WSC submits that the class exemption should cover the establishment of a joint service, including decisions relating to the number, type, size, and speed of the vessels in that service, schedules and port calls, and decisions to increase or decrease capacity on such service. Further, while WSC does not believe that the class exemption should cover the sharing of commercial or competitively sensitive information, it should allow parties to operational agreements to exchange and discuss limited operational or strategic information necessary for the functioning of those agreements.

4.A.4 The ACCC asks (at 8) whether such coordination should be permitted by a class exemption and, if so, why? A class exemption for operational agreements is crucial because of the reasons set out above at section 2.B.2 above. In short, operational agreements (and the types of conduct provided for in (a)–(d) in the Discussion Paper) enable carriers to offer more service in more trades with lower capital cost commitments and better utilisation of space and therefore maintain service levels and promote competition, and a class exemption is necessary to ensure these benefits (and resultant public benefits) are realised. WSC is not aware of any detriments or impact on competition that a class exemption on operational agreements would cause.

4.A.5 On the contrary, if Part X (which currently covers operational agreements) was repealed, but not replaced with a narrower exemption covering operational agreements (and the specific types of conduct in (a)-(d) in the Discussion paper), there would be legal uncertainty. Given that operational agreements are used in virtually all trades, the removal of exemptions could trigger a breakdown in market structure and trade as carriers consider how to deal with existing operational agreements. Carriers (especially small to medium sized carriers) may also be reluctant to enter into new operational agreements given the increase in risk and complexity and there could be a chilling effect on efficiency-enhancing cooperation in the liner shipping industry. The likely result is that there would be further consolidation, reduction in service levels and/or increase in prices, which would be detrimental to all.

4.A.6 With respect to the terms of the class exemption, it would be important to list the specific types of conduct permitted, as it informs liner operators what they can and cannot do with respect to vessel sharing activities in order to benefit from the exemption, thus increasing compliance. In this regard, a class exemption provides the greatest possible legal certainty for entering into and modifying operational agreements. As noted in the EU BER recitals, the block exemption "legislation" contributes to the competitiveness of the shipping industry by making it "easier" for carriers "to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy."[34]

[34] Council Regulation 246/2009, Recitals 6 and 8.

B. *Question 2: What eligibility conditions (if any) should limit which Liners can access the class exemption?*

1. Access Restrictions

4.B.1.1 The ACCC asks for stakeholder views (at 8) on whether it would be appropriate to restrict which liner operators would be eligible for the new class exemption, questioning whether it would be preferable for only smaller companies to receive an automatic exemption or if it would be more desirable for all carriers to be covered by the exemption if the competitive concerns of the cooperation are minimal and the public benefits are clear. In light of the rationale for operational agreements, and the clear benefits of these agreements to carriers and customers alike, it is important that vessel operating carriers of all sizes benefit from the protection of any new class exemption. Further, as noted above, operational agreements are relied on by carriers of all sizes and not just smaller companies – large carriers rely heavily on these agreements for their operations to compete and to justify their investment and maintain service levels. Without the class exemptions authorizing these operational agreements, large carriers would likely struggle in the current environment and also could be forced to reduce services or exit the market. Similar to other international exemptions, any new class exemption should be limited to vessel operating carriers only, given the operational activities are only relevant to these entities, and the purpose of and basis for the exemption is to preserve regular liner services in the trade.

4.B.1.2 The ACCC furthers asks (at 9) whether there should be a cap on the combined market share of the carriers participating in any activities covered by the new class exemption. As the ACCC notes in the Discussion Paper, the EU BER includes a 30% market share limit as a condition to agreements enjoying the exemption. This is, however, not the majority view. In fact, since the adoption of the EU BER exemption, only Hong Kong and Israel have included a similar threshold for their operational agreement exemptions, albeit both are slightly higher at 40%.[35] Countries like New Zealand, China, the United States, Canada, Japan, Malaysia, South Korea, Taiwan, and India all have exemptions for operational agreements with no market share threshold. As noted above, Singapore's BEO does not have any market share threshold. Under the Singapore BEO, VSAs under a 50% market share in the relevant market are not required to file their agreements with the regulator, meaning there is a presumption that they do not have any anti-competitive effects.[36] Unlike the EU or Hong Kong, VSAs over 50% market share in Singapore still benefit from the block exemption, but simply need to be filed with the regulator. It is also relevant that even in the EU and Hong Kong, agreements with market shares over 30% and 40%, respectively, are not presumed to be unlawful, but they must be self-assessed under the criteria set forth in Article 101(3) of the Treaty on the Functioning of the European Union or the Hong Kong Competition Ordinance.

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[35] The market share threshold in Hong Kong is 45% for a period of 2 consecutive years.

[36] The market share threshold in Singapore is 55% for a period of 2 consecutive years.

4.B.1.3 In its review of non-ratemaking carrier agreements, the Asia-Pacific Economic Forum ("APEC"), of which Australia is a member, recognised that global trade is dependent on scheduled liner shipping services that offer the widest possible geographical coverage at the highest level of efficiency and that "exemptions and exceptions from a competition driven regulatory framework may be necessary and that these will be implemented in a way that minimises economic distortions, giving consideration to those principles". However, it rejected the concept of market share limits for such exemptions. On this issue, APEC adopted the following formal guideline: "Given the difficulty defining the relevant markets, APEC member economies do not subject non-ratemaking agreements to a market share test based on a pre-defined threshold level as a condition for a formal exemption from the relevant provisions of general competition law."[37]

4.B.1.4 There are several reasons why most countries do not impose any market share cap as a condition of their VSA exemptions. Typically, the objective of a market share threshold test is to ensure that any group of competitors engaged in a cooperative agreement would not unduly exert market power against their customers and competitors. However, experience with operational agreements has uniformly confirmed in practice that there is no such issue with regard to market shares for these agreements. Indeed, in operational agreements, each participating carrier retains its individual commercial and marketing identity. Because the carriers are only cooperating on operational matters, each carrier markets separately to the trade. Competition for cargo bookings (price, customer service, contract terms, variety of containers, etc.) are all outside the scope of the operational agreement, and therefore there is an exceedingly low possibility of competitive harm that any market share cap would otherwise seek to address.

4.B.1.5 Moreover, subjecting operational agreements to an arbitrary market share test would be inconsistent with the broadly accepted understanding among virtually all countries that these agreements enhance efficiency, increase competitive options in the market, and expand service levels for importers and exporters. Particularly in trades like Australia, with generally fewer carriers, a pre-defined market share cap could in fact have a negative effect on competition, by discouraging those carriers from expanding or continuing service for fear of legal risk. Uncertainty would in fact discourage investment and reduce competitive options.

4.B.1.6 A static market share threshold for all agreements in all trades would likewise be impractical. Trades vary considerably (high vs. low volume). As discussed in this submission, operational agreements also vary considerably. Depending on the level of coordination, market share limits might be a non-issue (e.g., SCAs). Market share limits could also lead to unintended and negative results. For example, variation in trade volumes, as well as the arrival and/or departure of carriers in certain trades could change the market share of the arrangement on a fairly regular basis. This means an agreement could arguably gain and lose protection from the exemption not on the basis of its own actions, but rather on the commercial decisions of its

[37] APEC Guidelines Related to Liner Shipping, 13-17, June 2011.

competitors (i.e., those choosing to enter or leave a trade) or unrelated drops in trade volumes. For all of these reasons, WSC generally does not believe that a market share threshold is necessary for any new class exemption in Australia.

4.B.1.7 That said, WSC understands that the ACCC might nonetheless be interested in maintaining some level of regulatory oversight over the industry in any transition from Part X to a new class exemption. If that is the case, then as an alternative, WSC suggests the ACCC consider a block exemption regime similar in scope and form to the block exemption in place in Singapore.[38] The industry's experience is that this regime is flexible, while providing protections and legal certainty to carriers and shippers alike, as well as oversight by the competition regulator over the agreements where the combined market shares of the participating carriers is over 50%.

4.B.1.8 Under the Singapore BEO, the market shares are calculated by reference to: (1) the volume of goods carried, or (2) the aggregate cargo carrying capacity of the vessels measured by freight tons or 20-foot equivalent units. The CCCS has never expressly indicated whether these two conditions were cumulative. Moreover, the CCCS has never indicated whether the market shares to take into account were (i) those deriving from the concerned agreement only, or (ii) also the market shares of the parties deriving from other agreements or stand-alone services in the same market (the latter of which being the approach, for example, under the EU BER). Finally, the Singapore BEO does not expressly define "relevant market," but again WSC understands the European definition of the "trade route" has on occasion been adopted.

4.B.1.9 The Singapore agreement filing mechanism is also considerably less onerous than the current regime under Part X. The CCCS has a sample form ("Form MBEO"), that requires basic information about the agreement parties, the geographic scope, and the authorities contained therein, to be provided by the parties. A signed agreement such as a Memorandum of Understanding accompanies this filing form. The CCCS then has the authority under its BEO to request certain additional information from the parties.

4.B.1.10 Part X, on the other hand, has the longest and most technical filing process among any of the international exemption regimes. It requires both a provisional and final filing. The exemption does not take effect until (at the earliest) 72 days after the agreement has been initially filed. Provisional applications must be filed within 30 days of forming an agreement, which is followed by another 14-day review period by the Registrar of Shipping to assess the provisional application. Another 14-day period commences for the applicants to negotiate with the peak shippers body (which WSC addresses separately below), at which point the parties file a final registration, which takes effect 30 days later. This is a lengthy and cumbersome filing regime, particularly in circumstances where operational agreements must be entered into with relatively short notice in response to changing market dynamics, including supply and demand. The Singapore filing model provides the Government with the same level of oversight as Part X with a far more streamlined process. Carriers need flexibility to modify arrangements, including

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[38] The Singapore BEO currently includes an exemption for agreements relating to prices. As noted throughout this submission, WSC is not advocating or requesting that any new class exemption in Australia include such authority.

canceling them, adding new parties, or entering into new agreements. The ability to be nimble and react quickly to changes in the industry and the market is one of the key factors that has allowed the liner industry to provide regular and reliable scheduled service that meets customer demand.

4.B.1.11 Since indications are the CCCS take reference from the European Commission, if the ACCC were not inclined to adopt a new class exemption without any reference to market shares, WSC submits that the ACCC should consider adopting the Singapore model of agreements needing to be filed if they are over 50% market share in the relevant market, while using European precedent to define the market.

2. Exemption Duration

4.B.2.1 The ACCC notes (at 6) that it must specify the duration of any new class exemption, and can make class exemptions that last for up to 10 years. WSC respectfully submits that ACCC consider granting a new class exemption for operational agreements for the maximum period of 10 years for the following reasons. First, an exemption for operational agreements has existed under the current Part X for decades. The results have generally shown improved services and expanded container trade. Importers and exporters have had numerous competitive carrier options and service to meet their growing demands.

4.B.2.2 Second, a longer-term exemption is consistent with other countries' VSA exemptions. Indeed, many countries do not place any term limits on their operational agreement exemptions, including for example China and the United States. For those countries that do have term limits on their exemptions, most are for 5 years. The EU has been on a five-year exemption cycle since 1995. Hong Kong's recently adopted VSA exemption is for five years, and Singapore has had three five-year exemptions since 2006. While Japan's exemption has no term limit, the government periodically reviews the exemption every five years.

4.B.2.3 Third, the liner industry is not seeking that any new class exemption include pricing authority. Given the ACCC's stated preliminary views in the Discussion Paper, it is clear the Commission had additional competitive concerns about commercial agreements. Thus, there appears to be more support for a longer-term exemption if the scope of such exemption was narrower to only cover operational arrangements.

4.B.2.4 Fourth, as the ACCC states in the Discussion Paper (at 6), a longer term does not preclude the ACCC from varying, revoking or withdrawing the class exemption.

4.B.2.5 Finally, a longer-term exemption would benefit both Australia and the liner shipping industry by providing an exemption of a sufficient duration that will provide the legal certainty to allow carriers to plan well in advance and make the necessary long-term investments in vessels and equipment. A longer exemption term would provide certainty and stability of Australia's regulatory policies to an industry that is critical to the Australian import and export community.

C. *Question 3: Should cargo owners be able to collectively bargain with Liners?*

4.C.1 In light of the fact that WSC does not seek to import into a new class exemption the existing Part X protections for carriers to cooperate on commercial matters such as pricing, the corollary is that such commercial activity by shippers should likewise be considered outside the scope of a liner shipping class exemption. Therefore, the ACCC should separately consider whether this type of customer "collective bargaining"—which exists under Part X—remains relevant and valid given the changes in industry structure and in the context of a more limited class exemption.

4.C.2 WSC is aware that Australian shippers have voiced a concern that the enforcement of the current Part X exemption has not sufficiently protected their interests, and any new class exemption requires a strong notice and consultation procedure as regards rates and changes in service.

4.C.3 WSC believes that these concerns erroneously conflate two things: (1) the liner operators' tariffs (rates and charges) set up independently from each other, and (2) decisions taken within the framework of operational agreements relating to services and capacity adjustments in the trade. As noted above, considering that carriers no longer participate in commercial agreements that allowed them to coordinate on rates and charges, and that the industry does not seek any protection for such agreements under a new class exemption, any notice relating to changes in carriers' rates and charges is irrelevant and no longer necessary. Parties to operational agreements do not discuss or agree on rates or charges. The decision to increase or decrease any rates or charges is made individually by each liner operator, based on its own commercial strategy and negotiations with its customers. It is not the result of any discussion between competitors. Therefore, notice and consultation procedure as regards rates and changes is not necessary, and contrary to current market dynamics and principles of free trade.

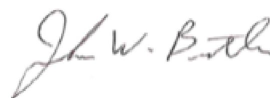
4.C.4 With regard to consultation on service changes, including schedule changes, blank sailings, port omissions, or capacity adjustments, it is important for the ACCC to recognise that an essential feature inherent to all operational agreements is the ability to make service changes in response to fluctuations in supply and demand, which may also be required quickly and on short notice. In Australia, typically capacity adjustments happen during the slack season where anticipated demand is below supply, and carriers make adjustments in their seasonal deployments for operational reasons (i.e., to avoid sailing the ships empty). Carriers participating in operational agreements do not discuss or agree on capacity adjustments to artificially increase rates. These decisions are made within operational agreements to avoid inefficient vessel utilisation and to adjust available supply with actual demand. Thus, a consultation procedure in relation to service changes that shippers already know will occur most of the time on a seasonal basis is unnecessary, and could only impede the carriers' ability to be nimble in responding to market dynamics. In this regard, WSC notes that it is not aware of any other jurisdiction that requires this type of notice and consultation with shippers as part of its operational agreement exemption regime.

4.C.5 For these reasons, WSC does not believe that a new class exemption to replace the current Part X should include any requirements for the carriers to notify or consult with regard to rates, charges, or service changes.

# # #

WSC appreciates the opportunity to submit its views on the additional issues raised and questions asked regarding a possible new class exemption for liner shipping. WSC is available to discuss or answer any questions that the ACCC might have with respect to these comments.

Sincerely,



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John W. Butler
President and CEO
World Shipping Council