Australian Government
Department of Infrastructure, Transport,
Regional Development and Communications

Proposed Class Exemption for Ocean Liner Shipping

Submission to the ACCC Discussion Paper

Introduction

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) welcomes the opportunity to provide comment on the ACCC Proposed Class Exemption for Ocean Liner Shipping Discussion Paper, noting the paper has been developed in line with recommendations of the 2015 Competition Policy Review (Harper Review).

As a major trading nation, Australia depends upon efficient liner shipping services to assist exporters to remain competitive in overseas markets and to ensure that imports, many of which are significant inputs to Australian industries, are carried at least cost and on a regular service. To ensure ongoing access to these services for international liner cargo services to and from Australia, ocean liners are currently exempt from certain anti-competitive behaviour in accordance with Part X of the *Competition and Consumer Act 2010* (Part X).

Part X provides industry-specific competition rules for international liner shipping. It is in place to regulate limited anti-competitive behavior of shipping lines, provide additional rights and negotiating power to shippers while allowing a higher level of joint operations and services, in line with global practices. It recognises the special role liner shipping plays in providing services to exporters and importers and supporting Australia's trade.

The Department recognises the global landscape for liner shipping, including competition law exemptions in other jurisdictions, has changed significantly since Part X was first introduced in 1974. However, regular, reliable and competitively priced liner shipping services remain essential in meeting Australia's national and trade interests. The Department believes the objectives of Part X remain equally valid today and should form the basis on which any alternate regulatory regime for liner shipping in Australia is developed.

The Department believes a class exemption for liner shipping should have similar objectives to Part X:

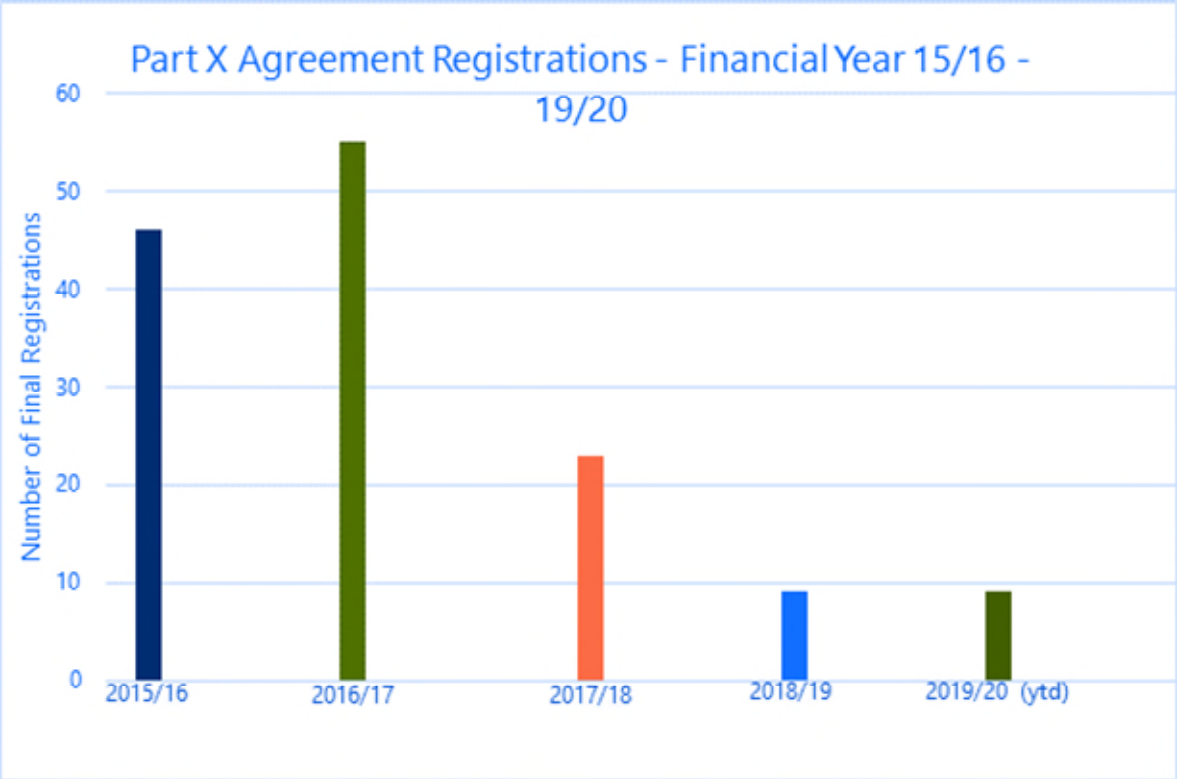
- to ensure that Australian exporters and importers have continued access to outwards and inwards ocean liner shipping services of adequate frequency and reliability at freight rates that are internationally competitive;
- to promote conditions in the international liner shipping industry that encourage stable access to export markets for exporters in all States and Territories;
- to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner shipping trade; and
- as far as practicable, to extend to Australian importers in each State and Territory the protection given by Part X to Australian exporters.

Part X

The Registrar of Liner Shipping is appointed by the Minister for Transport and sits within the Department. The Registrar is responsible for:

- Registering shipping agreements, provisional and final;
- Approving requests for confidentiality;
- Registering ocean carrier agents;
- Registering non-conference ocean carriers with substantial market share;
- Releasing public information on the registers;
- Supporting negotiations as an authorised officer; and
- Providing guidance on Part X.

The growing size of individual shipping lines through recent mergers and acquisitions globally has seen a concentration of market power within fewer shipping lines and a correlating decline in the number of applications for the registration of conference agreements under Part X.



The Department has also witnessed a shift in the composition of the types of agreements seeking registration under Part X. The number of traditional conference agreements and discussion agreements has diminished over time, while the prevalence of slot charter, vessel sharing and consortia agreements has increased. This shift represents a move away from the inclusion of freight rates and/or price within agreements.

What works well

Part X relies on countervailing power on the part of shippers to apply downward pressure on freight rates and maintain minimum levels of service. When liner service providers seek to provisionally register a Part X Agreement, they must provide a copy of the Agreement to the designated peak shipper body and negotiate the minimum levels of shipping services they will provide. Liner service providers and the shipper body must provide each other any information reasonably necessary for the purposes of negotiations. However, Part X does not require the liner service providers and the designated shipper body to reach agreement on the minimum levels of service for the Part X Agreement to proceed to final registration. This mandated negotiation process helps ensure that there is reliable liner shipping services and the level of service meets the needs of Australian exporters and importers.

Once finally registered, agreements are open to public inspection unless an applicant has requested and been granted confidentiality by the Registrar. This transparency further provides shippers and shipper bodies' additional information that might not otherwise be available, which may be used when negotiating rates and/or service levels with liner service providers for new agreements.

Part X also requires ocean liners to provide 30 days' notice to the designated peak shipper body for changes to negotiable shipping arrangements including, for example, freight rates, frequency of sailings and ports of call. Liner service providers are further compelled under Part X to file details of events (other than varying conference agreements) and 'agreements' with other liner service providers which may have some impact on the registered conference agreement.

These notification requirements are an important element in providing certainty to shippers so they will be able to transport their goods as scheduled, and if not, will have sufficient time to make alternative arrangements so as to meet their own contractual arrangements. For a number of export markets, the ability to ship goods regularly and on time also plays a key role in maintaining Australia's reputation as a dependable source for these goods, thus furthering the nation's interest through a number of export industries.

Another requirement is the application of Australian Law to outwards conference agreements and withdrawal from agreements. This entitles an aggrieved party or designated shipper body to resolve legal disputes in Australia rather than overseas thus offering legal protection to Australian shippers and minimising the cost of pursuing legal action for Australian businesses.

What doesn't work well

A key criticism of Part X is the length of time involved in the registration process. An agreement registration under Part X can take up to 72 days, including provisional assessment, negotiation between the parties to the agreement and the designated peak shipper body, final assessment and statutory 30 day waiting period between final registration approval and commencement of services. The same timeframe applies to varying an existing registered agreement. The relatively long process for registering and/or varying agreements decreases flexibility, and may inhibit liner service providers' ability to respond quickly to changes in the market.

The Department also notes some existing Part X provisions, particularly those requiring shippers be provided with 30 days notification for changes in 'negotiable shipping arrangements', have not always been effective in ensuring shippers have certainty of service provision, or been provided sufficient notice to arrange alternative shipping services in order to meet their contractual commitments. The Australian Peak Shippers Association (APSA) has previously voiced concerns that shippers have not been provided any notification, or been provided less than the prescribed 30 days notification, of changes to services such as blank sailings and new surcharges.

Possible repeal of Part X

The Department acknowledges the ACCC's intention for a class exemption for ocean liner shipping to operate in parallel to the existing provisions of Part X unless and until legislators choose to change or repeal Part X. The Harper Review recommended a two year transition period during which time liner service providers can choose to operate under either regulatory system. The Department supports this initial two year transitional period.

At the expiry of the transition period, the Department anticipates the following options for regulation of ocean liner shipping being available to the Australian Government:

1. Repeal Part X and replace it permanently with a class exemption in its established form;
2. Repeal Part X and replace it permanently with a class exemption in a varied form;
3. Remove the class exemption and revert back to Part X in its current form; or
4. Remove the class exemption and revert back to a varied Part X.

Any decision on a future regulatory regime for ocean liner shipping should be guided by the outcomes of the initial implementation of the class exemption. The Department considers that option one could be pursued if the transition period and any subsequent review indicates that the class exemption was working effectively.

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

The Department does not have visibility of the commercial drivers or industry structures which necessitate any particular form of cooperation over another when entering agreements for the provision of liner shipping services to and from Australia. However, the Bureau of Infrastructure, Transport and Regional Economics (BITRE) has previously cautioned it cannot be certain that requiring Part VII authorisation in respect to price setting agreements will not have any negative effects in terms of reducing service reliability. It could also lead to increased market concentration, which is not desirable from a competition viewpoint[1].

Notwithstanding the apparent decline in reliance on price setting agreements as suggested by the reduced number of these types of agreements being registered under Part X, there is potential for the narrowing in scope of conduct currently permissible under Part X to create unintended consequences. In determining which conduct is allowable under a class exemption, the ACCC should consider any perverse outcomes which could arise from narrowing the scope of behaviour currently permissible under Part X. For example, agreements

[1] 2014 BITRE Review of Part X of the Competition and Consumer Act 2010, p19

covering certain jurisdictions may require the inclusion of a pricing schedule in order to meet legislative requirements.

The class exemption should permit coordination between shipping lines to enable them to provide additional services (either increases in frequency or alternative routes) that they would not otherwise be able to provide as a single service provider. As noted above, in recent times these arrangements have increasingly taken the form of slot charter, slot exchange and vessel sharing agreements, rather than discussion or conference agreements.

The current exemptions afforded by Part X extend beyond blue water operations by including the ability for the Minister to declare that a specified facility is an inland terminal for the purposes of Part X. This provision has the effect of increasing flexibility of agreements by allowing certain conduct to extend beyond traditional blue water ports to other freight handling facilities in certain circumstances. The ability of parties to extend agreements to include inland terminals allow for efficiencies to shippers through utilising freight handling facilities outside of traditional ports, and may also increase the ability for ocean liners to respond to unanticipated or force majeure events affecting one or more traditional blue water ports.

What eligibility conditions (if any) should limit which Liners can access the class exemption?

Liner shipping trades can often be characterised as 'natural oligopolies'. A relatively recent spate of mergers and acquisitions globally has further concentrated market power in the global liner shipping industry. Furthermore, the relative geographic isolation of Australia from the world's major shipping routes may lead to further concentration in the market for liner service provision to and from Australia.

The requirement under Part X for parties to conference agreements to negotiate minimum levels of service with shippers, along with a requirement for 30 days notification for changes to negotiable shipping arrangements (e.g. blank sailings, freight rates) plays an important role in countervailing market power. Negotiations undertaken between parties to the agreement and designated shipper bodies in accordance with these provisions have included frequency of sailings, ports of call and capacities. An eligibility condition requiring negotiation and/or notification could be considered as part of a class exemption.

The requirement to negotiate and communicate between shippers and shipping lines should be aimed at providing certainty about the level and frequency of shipping services to be provided and clear and early notification of changes to these services. This is to ensure that shipping lines understand the needs of shippers, shippers have an opportunity to influence the proposed arrangements and that any changes to services are made in sufficient time to ensure that shippers can make alternative arrangements to ensure their goods are shipped on time and meet the terms of their supply contracts.

Consideration may also be given to transparency in pricing, particularly around surcharges. In most markets, surcharges represent a significant addition to base rates and sometimes even a higher proportion of total costs

compared to base rates. There is growing evidence that many of the surcharges are not transparent and that it is difficult to link them to actual costs incurred by carriers.[2]

In determining whether to restrict access to the class exemption based on a market share cap or other mechanism, it is important to consider not only the competition implications for any given service but also whether restrictions could lead to reduced frequency or reliability of services for Australian shippers.

Class exemptions should not be given for any agreements that inhibit shippers from negotiating confidential contracts with individual shipping companies. Experience following passage of the US Ocean Shipping Reform Act (OSRA) 1998 showed that allowing confidential contracts makes enforcement of shipping conference rates by conferences virtually impossible.[3]

Should cargo owners be able to collectively bargain with Liners?

The Department is supportive of the ability for shippers to collectively bargain where there are improved outcomes for Australian exporters and importers. In its 2014 report, the BITRE noted by permitting shippers and shipping companies to band together and negotiate on freight rates, situations of 'bilateral monopoly' and 'bilateral oligopoly' are set up. The BITRE also noted bargaining leads to more efficient outcomes when the parties are well-informed because, in the absence of information about each other's bargaining limits, some trades may not take place despite the existence of gains from trading. It is also important, as far as Australia is concerned, that shippers not be the least informed party[4].

Under Part X, the statutory requirement to negotiate with the designated peak shipper body, currently APSA, has resulted in better outcomes in terms of service reliability and frequency than otherwise may have been realised by individual shippers. The Department believes a class exemption should also consider the role a designated shipper body, along with negotiation and notification requirements, could play in advancing the interests of Australian importers and exporters.

Industry background

Shipping lines and shippers are best placed to respond to this question. In its role as Registrar of Liner Shipping, the Department's insight into the structure of the relevant markets and prices, costs and profitability in those markets is limited.

One observation the Department does make is the emergence of 'Infrastructure Surcharges' charged by stevedores directly to shippers for landside access to container terminals. These charges are levied in addition to the charges applied to shipping lines for quayside services, which are typically passed through to shippers by shipping lines as a Terminal Handling Charge. Shippers have raised concerns the imposition of two charges for stevedoring services has significantly increased the overall cost of importing or exporting a container of

[2] ITF/OECD, The Impact of Alliances in Container Shipping, 2018, p32

[3] 2014 BITRE Review of Part X of the Competition and Consumer Act 2010, p 8, Fusillo M. 2006, Some notes on structure and stability in liner shipping, *Maritime Policy and Management*, 33(5), pp. 463-475.

[4] 2014 BITRE Review of Part X of the Competition and Consumer Act 2010, p 9

goods. Whilst these charges and their regulation are not within the remit of Part X, they should be considered in terms of a possible class exemption and the broader ability of Australian exporters and importers to access liner shipping services at competitive rates. This consideration is important as they impact directly on the international competitiveness of Australian exporters and the cost of goods charged to Australian consumers.

Conclusion

The Department supports the development of a class exemption by the ACCC in line with the Harper Review recommendations and subsequent Government response. The Department believes the objectives underpinning Part X and what currently works well under Part X, should, as much as possible, be retained and enhanced through the class exemption process.