Productivity Commission inquiry into the Long-term Productivity of Australia's Maritime Logistics System

ACCC submission

February 2022

1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into long-term productivity of Australia's maritime logistics' system (the Inquiry).

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), regulate national infrastructure and undertake market studies.

The ACCC's views set out in this submission are informed by the findings of the Container Stevedoring Monitoring Report 2020-21 (Stevedoring Report 2020-21),[1] the operation of Part X of the CCA, and our broader competition and consumer protection work in ports and shipping.

2. Key findings of the Container Stevedoring Monitoring Report 2020-21

One of the ACCC's roles is to monitor prices, costs and profits of container stevedores at international container ports in Adelaide, Brisbane, Fremantle, Melbourne and Sydney. On 3 November 2021, the ACCC released its Stevedoring Report 2020-21. Given the interconnected nature of the container freight supply chain and the significant challenges that the Australian container trade is currently facing, this report included a broader analysis of the container freight supply chain and identified areas that need to be addressed in the longer-term, beyond the COVID-19 pandemic.

The ACCC found that the COVID-19 pandemic has destabilised the global container freight supply chain, leading to delayed shipments and rapidly rising freight rates. The ACCC considers that once the ongoing shocks imposed by the pandemic stop, the performance of the global supply chain will be restored and global freight rates will abate. Many of the issues the COVID-19 pandemic has caused for Australian importers and exporters will also subside.

However, the ACCC has identified a number of longer-term trends that were adversely affecting the operation of the supply chain on Australian container trade routes even before the pandemic.

To improve the performance of Australian container ports for the benefits of Australian businesses and consumers, the ACCC recommended:

- addressing industrial relations and restrictive work practices issues across the container freight supply chain
- ensuring that privatised ports do not levy excessive rents and charges
- repealing Part X of the CCA
- investing in infrastructure to fix inefficiencies in the container freight supply chain.[2]

[1] ACCC, *Container stevedoring monitoring report 2020–21*, ACCC website, 4 November 2021.

[2] Ibid, p. xxii.

These matters are briefly discussed below. For further information, please refer to the Stevedoring Report 2020-21.

Industrial relations

The ACCC found that Australian container ports are performing poorly compared to overseas ports. A recent study by the World Bank and IHS Markit showed that even before the recent logistical issues caused by the pandemic, Australian container ports were relatively inefficient and well below international best practices. The study ranked Australia's largest container ports, Melbourne and Sydney, in the bottom 15% and 10%, respectively, of the 351 global ports in the study.[3]

The ACCC considers that systemic industrial relations issues across the entire container freight supply chain have played a pivotal role in inhibiting productivity and efficiency gains at Australian ports. While this has been a challenging area for some time, restrictive work practices and industrial actions have escalated in recent years.

The ACCC found that stevedores' Enterprise Agreements contain provisions that limit their ability to automate, reduce labour costs and control their recruitment decisions. The ACCC also found that the Maritime Union of Australia (MUA) has used protracted industrial actions to demand that stevedores, and other port operators, accept such provisions. These industrial actions have been causing ongoing disruptions to the container freight supply chain for the past three years. The restrictive work practices and industrial actions are hampering productivity and increasing disruptions at the Australian container ports.

On 26 October 2021, Patrick Terminals, announced that it has applied to the Fair Work Commission to terminate its agreement with the MUA on the basis that it is no longer fit for purpose and restricting its ability to meet customer requirements.[4] In January 2022, Svitzer, a tugboat operator, also applied to terminate its enterprise agreement with the MUA, the Australian Maritime Officers Union, and the Australian Institute of Marine and Power Engineers.[5]

On 7 February 2022, it was reported that Patrick Terminals and the MUA reached an in-principle agreement over their Enterprise Bargaining Agreement. Under the proposed agreement, all employment decisions will now be at the full discretion of Patrick Terminals.[6] While this appears to be a positive development in the dispute between Patrick Terminals and the MUA, this doesn't address the systemic issues across the entire container freight supply chain.

The ACCC does not propose a specific solution to address these issues, as industrial relations matters are outside the scope of the ACCC's functions and expertise. However, the ACCC considers that an effective solution is likely to be specific to the waterfront and should aim to minimise the adverse impact of restrictive work practices and industrial actions on the efficient operation of the Australian container ports.

The ACCC also supports development of a framework of performance measures for assessing port performance and benchmarking Australian ports internationally, given the importance of the global freight trade to the Australian economy.

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[3] Ibid., p. 61-64.

[4] Patrick Terminal, Patrick Applies to Terminate Agreement with MUA, media statement, Patrick Terminal website, 26 October 2021, accessed 27 October 2021.

[5] Abby Williams, 'Svitzer applies to terminate agreement with MUA, AMOU and AIMPE', *Daily Cargo News,* 18 January 2022, accessed 20 January 2022.

[6] David Marin-Guzman, *'Patrick Terminals removes union hiring veto in docks peace deal'*, *Australian Financial Review*, 7 February 2022, accessed 7 February 2022.

Privatisation of key infrastructure

Container ports in Australia are regional monopolies and, in the absence of appropriate regulatory oversight, can extract monopoly rents from port users who are unable to choose to go to an alternative port. The ACCC considers that the major container ports in Australia were privatised without effective regulation being put in place.

In the Stevedoring Report 2020-21, the ACCC found that land rents at the Port of Melbourne have increased significantly following its privatisation in 2016. In 2020, the Essential Service Commission of Victoria (ESC) found that the Port of Melbourne had exercised its market power in charging land rents to port operators.[7]

On 28 January 2022, the ESC publicly released its final report into the Port of Melbourne's compliance with the pricing order over the period 1 July 2016 to 30 June 2021.[8] The ESC found significant and sustained non-compliance by the Port of Melbourne.[9] As part of its non-compliance, the Port of Melbourne overstated its revenue requirement by around $300-650 million, by using a weighted average cost of capital that was on average 2% higher than that of a benchmark efficient entity with a similar degree of risk.[10]

The ACCC considers that steps need to be taken to bolster the regulatory oversight of privatised ports to ensure that they do not levy excessive rents. The ACCC also considers that it is incumbent on governments to ensure that an appropriate regulatory regime is put in place at the time of privatisation of key national infrastructure to constrain the pricing powers of the privatised entity.

Part X of the CCA

The ACCC has found that over the past decade or so, shipping lines have increased their bargaining power through consolidation, alliances and cooperation agreements. Industry analysts expect shipping consolidations to continue. This means that the bargaining power of shipping lines is likely to grow further and may put them into a stronger position to control shipping capacity in the market.

With the shipping industry becoming more concentrated, there is a growing risk that shipping lines could use Part X of the CCA to artificially elevate freight rates in the future.

The ACCC considers that Part X is outdated, unnecessary and should be repealed. Section 3 of this submission discusses the ACCC's position on Part X in more detail.

Investment in infrastructure

The ACCC found that further investments are needed to fix inefficiencies in the container freight supply chain caused by larger ships, lack of rail access to Australian container ports and shortage of space in empty container parks. Such investment would allow for a more efficient movement of containers.

The ACCC also considers that it is essential to establish an appropriate access regime for any key connecting infrastructure, such as intermodal terminals, to promote effective competition in upstream and downstream markets. Best practice is for such terminals to be open access, with access arrangements designed to take into account the long-term interests of all terminal users. It is also important to ensure that such terminals are owned by an entity that is not vertically integrated.

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[7] Essential Services Commission (ESC), *Port of Melbourne – Market Rent Inquiry 2020*, 14 August 2020, pp. 41–43.

[8] The pricing order regulates how the Port of Melbourne is required to set its prices for prescribed services.

[9] Essential Services Commission (ESC), *Inquiry into Port of Melbourne compliance with the pricing order*, 31 December 2021.

[10] Ibid., p. ii.

3. Part X of the CCA

The ACCC recommends that Part X of the CCA be repealed. Part X of the CCA provides a broad exemption from the competition and cartel provisions in the CCA to registered international shipping lines. The effect of Part X is that shipping lines can reach agreements with each other about the freight rates to be charged, and the quantity or kind of cargo to be carried, on trade routes. No other industry benefits from such a broad legislated exemption from Australia's competition laws.

Competitive and open markets are critical to the prosperity of Australians. Competitive markets increase innovation and productivity, and lead to better outcomes in terms of price, quality and service for consumers and business.

To qualify for the Part X exemption, agreements are registered with the Registrar of Liner Shipping (an office created under Part X within the Department of Infrastructure, Transport, Regional Development and Communications). The test for registering a conference agreement under Part X involves an assessment by the Registrar of Shipping of the agreement's 'overall benefit' to Australia. The ACCC is not involved in this assessment, and the process is not transparent and public.

This contrasts with all other industries where, under the existing authorisation and class exemption regime in the CCA, the ACCC must not grant an exemption from the CCA unless it is satisfied there are public benefits that offset the loss of competition from the competitor collaboration.

The broad exemption from Australia's competition laws that is available to shipping lines through Part X is also out of step of step with a growing number of international jurisdictions. Over the last two decades several jurisdictions have removed, or limited, the competition law exemptions enabling shipping lines to collude and set rates.[11]

In 2015, the Competition Policy Review (the Harper Review) recommended that:

- Part X of the CCA be repealed, and
- A block (class) exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features. The minimum standard of pro-competitive features to qualify for the class exemption should be determined by the ACCC in consultation with cargo owners (the representative, owner or exporter of the goods being shipped), their representative bodies and the liner shipping industry.

[11] By way of example:

In 2019 New Zealand replaced broad protections from competition laws that had been available to the shipping industry with a narrow block exemption that applies to a limited range of operational coordination activities where such cooperation improves the service supplied to cargo owners. New Zealand's block exemption does not provide for any agreements or coordination on price (see https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/cartels-and-collaborative-activities-2017/international-shipping-in-the-commerce-act/)

Since 2008 the European Union has not permitted exempt consortiums that fix prices, limit capacity or sales, or allocate markets or customers (see https://eur-lex.europa.eu/summary/EN/legissum:cc0009),

United States provides a competition law exemption common liner agreements, but has weakened the enforceability of agreements between operators by stipulating that individual Liners have the right to enter into independent confidential service contracts. This has the effect of significantly eroding the capacity for Liner conferences to enforce compliance with the agreed terms of conference agreements (see the *Shipping Act of 1984*, 46 U.S.C. App. §§ 1701-1719, as amended by the *Ocean Shipping Reform Act of 1998*, Pub. L. 105-258, 112 Stat. 1902 (1998)).

In 2017, the Hong Kong Competition Commission issued a block exemption covering vessel sharing agreements only. The HKCC declined to issue a block exemption for voluntary discussion agreements, due to competition concerns around pricing discussions between Liners and lack of evidence of associated efficiencies. (see https://www.compcomm.hk/en/enforcement/registers/block_exemption/files/Block_Exemption_Order_and_Guidance_Note_final.pdf)

These recommendations of the Harper Review were consistent with the 2005 recommendation of the Productivity Commission to repeal of Part X and use the ACCC's authorisation process for the selective approval of shipping agreements on the basis of their net public benefit, as occurs for all other industries.[12] The main difference is that the Harper Review recommended the ACCC be given a new class exemption power to operate in addition to the authorisation process.

The Harper Review also recommended a transition period of two years to identify agreements that qualify for the proposed class exemption and to allow for specific authorisations to be sought if necessary. The ACCC considers that this would be an appropriate transition period, but it is important that there is a clear message that Part X will be repealed at the end of that period. A clear position on the future of Part X will facilitate the transition given that overlapping parallel regimes (Part X and a class exemption), unless it has a defined end date in the near future, will cause confusion and result in administrative inefficiencies.

Consistent with the recommendations of the Harper Review, the ACCC commenced public consultation on a possible class exemption for ocean liner shipping on 3 December 2019. The ACCC's discussion paper and public submissions received are available on our public register.

The ACCC notes that economies of scale and scope are important features in the ocean liner shipping industry. As such, there may be instances in which it will be efficient to permit competing ocean liners to collaborate on certain limited aspects. Notably, in response to the ACCC's discussion paper there was support among shipping lines as well as importers and exporters for a possible class exemption to provide for limited cooperation on some operational matters (e.g. coordinating sailing timetables, slot swaps and pooling vessels to operate a network), but not on forms of commercial coordination that Part X can currently permit (e.g. coordinating prices and surcharges, pooling earnings, restricting capacity offered on liners and allocating markets).

The ACCC's work on developing a possible class exemption was put on hold in 2020 while the ACCC focused on regulatory activities arising from the COVID-19 pandemic. The ACCC is yet to recommence this work, in part, because there is limited merit in the ACCC developing a class exemption without a firm commitment that Part X will be repealed; as a class exemption is unlikely to have any significant effect while Part X continues to operate alongside it, and cause the administrative inefficiencies discussed above.

Determining what, if any, forms of collaboration should be exempt from competition laws should be a matter for the ACCC and only where the reduction in competition from the collaboration would result in significant efficiencies or public benefits, following a transparent and accountable assessment process. The CCA already provides the appropriate mechanism for this assessment through the authorisation and class exemption regimes.[13]

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[12] Productivity Commission Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, 23 February 2005

[13] Under section 95AA of the CCA, the ACCC may issue a class exemption by legislative instrument that provides an exemption for specified conduct that may otherwise risk breaching competition laws, but is:

- not likely to substantially lessen competition, or
- is likely to result in a benefit to the public that would outweigh the detriment to the public.