Shipping Australia Limited
ABN 61 096 012 574
Suite 606, Level 6, 80 William Street, Woolloomooloo NSW 2011
PO Box Q388 QVB PO, Sydney NSW 1230

www.shippingaustralia.com.au
Tel: (02) 9167 5838
admin@shippingaustralia.com.au

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Commissioners J Abramson & Dr S King
Inquiry into Australia's Maritime Logistics System
Productivity Commission
Level 8, Two Melbourne Quarter
697 Collins Street
Docklands VIC 3008

Submission via online webform:
https://www.pc.gov.au/inquiries/current/maritime-logistics/make-submission#lodge

Dear Commissioners

Shipping Australia response to Productivity Commission 2022, Lifting productivity at Australia's container ports: between water, wharf and warehouse, Draft Report, Canberra, September

We write to provide our submission to the above draft report.

Shipping Australia is the principal Australian peak body that represents the locally owned and the locally active ocean freight-focused shipping industry. We provide policy advice, insight, and information to just over 70 members, who, between them, employ more than 3,000 Australians.

We provide policy input to Australian State, Territory and Commonwealth Government bodies. We are recognised across Australia by politicians, public service officials, national media and trade media as being the national association for Australian shipping.

Our membership includes Australian ports, the local arms of global shipping agents and domestic shipping agents, towage companies, the locally active arms of ocean shipping lines, and a wide variety of Australian-owned and locally-operated maritime service providers. Services provided by our members include ocean freight shipping, local seaport cargo handling, domestic harbour towage, Australian marine surveying, and domestic pilotage, among other services. Our members handle nearly all Australian containerised seaborne cargo. They also handle a considerable volume of our car, and our bulk commodity trades.

In addition, iconic and well-known Australian-based and Australian-owned businesses and industry associations are among our membership.

We hereby provide our submission to the above-mentioned draft report.

1. **Chapter 3: Performance of Australia's Container Ports**
2. Shipping Australia generally agrees that Australian container port performance could, and should, be improved for the benefit of all Australians.
3. We agree that there is "Considerable variation in performance both within and across Australia's container terminal operators points to potential productivity gains from more consistent (high) performance" (Draft Report, p2).
4. This could be achieved by e.g. upping crane rates, cutting the duration of time-into-port, and reducing idle time, which, overall would reduce ship turnaround time, especially if container berth utilization rates are increased.
5. We note and agree with "Draft finding 3.3 The framework for measuring Australian container port performance could be enhanced". Shipping Australia urges that, whatever framework for managing port performance is adopted should be compatible with the World Bank report into comparable container port performance.
6. We disagree with part of the emphasis in Draft Finding 3.7, specifically the comment that "Australian cranes are just a productive as those in the average international port".
7. International average crane rates are mediocre.
8. The best international crane rates are far in excess of the international average. Australian container ports should be looking to emulate the best performance not merely looking to match mediocre performance. Athletes set out to win – they don't set out to be middle of the pack. Australian ports should do the same.
9. Operating times account, by far, for the most of a port call (about 80%) from arrival to steam-out.
10. Increasing crane rates are key to cutting turnaround time without massively increasing expenditure on strengthening berths.
11. Australian ports, and if appropriate, governments, should examine if crane numbers per ship can be increased (this may need to involve e.g. strengthening wharfs via engineering works) and if it is economically beneficial to do so.
12. Shipping Australia agrees that reductions in average anchoring time would be beneficial and that ships should not be kept unduly waiting.
13. We disagree with the emphasis in Draft Finding 3.5. The evidence found in the ACCC analysis (Fig 6.1 ACCC Container Stevedoring Monitoring Report 2021-2022) conclusively demonstrates that crane rates have stagnated since the year 2000 by being in a band of 25-30 box moves per hour per crane.
14. We would suggest that Draft Finding 3.5 ought to read that "Container port productivity has stagnated in the last 20 years. Measured by crane rates, productivity at Australia's major ports has only moved in a narrow band of 25-30 containers per hour".
15. We urge that goal-based regulation be imposed on Australian container ports that incentivizes them to decrease ship turnaround time.

16. **Chapters 4 and 5 – "Framework for analysing competition" & "Market power of port operators"**
17. **Supply chain risk**
18. Shipping Australia notes the comments about port planning on page 168 of the draft report and that there are plans to build new ports in the future as capacity at existing ports is reached.
19. Given the importance of our capital city container ports, and the fact that they each handle so much cargo, it seems that Australia is running a considerable supply chain risk.
20. In November 2017, the near 100,000 dwt dry bulker "Orient Centaur" grounded – having drifted right across the shipping channel so that its starboard shoulder ran aground on the northern batter (a slope leading to the bottom of the shipping channel) and its stern rested on the southern batter. It was seamanship and action by tugs that stopped the ship becoming firmly wedged in the channel and the port potentially blocked for a long time. For instance, when a container ship ran aground on the Astrolabe Reef off the coast of New Zealand, the salvage operation took months to clear.
21. If a ship ran aground and blocked up a shipping access channel in any of our major ports, which in some cases handle 90% plus of state containerised cargo, then it could be economically devastating for that state.
22. It would be better from a supply chain risk viewpoint to build more ports sooner, or, at the very least, widen, deepen, and duplicate the shipping access channels.
23. We appreciate that this might not be technically efficient to an economist, but it would negate serious risks from security incidents, accidents, and industrial relations issues (strikes). The PC report final report should reflect that these risks exist and should encourage the government to consider them, and their mitigation measures.

24. **Market power - ACCC**
25. We note the Australian Competition & Consumer Commission's comments about on the topic of market power at its "Misuse of Market Power" page on its website (see: https://www.accc.gov.au/business/competition/misuse-of-market-power). The ACCC states:
26. "Market power is a business's ability to insulate itself from competition.
27. "A business with market power has more freedom to act without needing to worry how competitors, suppliers or customers will react. For example, it may be able to raise prices or lower quality without having to worry about losing customers. A market can have more than one business with substantial market power.
28. "To work out if a business has substantial market power, we might look at: the number and size of businesses in that market; how easy it is to set up a competing business in that market; the extent of the business's ability to ignore what competitors, suppliers or customers do".

29. **Market power – Productivity Commission**
30. We note the comments under page 161 in respect of the headline "Geographic Scope of the market: can shipping lines easily substitute between container ports?"
31. Shipping Australia generally agrees that container terminals are regional monopolies and have market power over shipping companies, which cannot serve their target markets as there are, effectively, no other ports to use in those regions.

32. We agree that the port privatisation process has impeded port competition for shipping line businesses. We especially agree with "Draft finding 5.2 Privatisation in New South Wales has impeded efficient outcomes".

33. We also agree with the comments on page 169 of the draft report that the countervailing power of shipping lines has been increasing but has had little effect on port operators and the associated draft finding at 5.3 the ports face little countervailing power.

34. We note the comments on price monitoring in the report at page 170, but we assert that price monitoring everywhere other than Melbourne has proven to be utterly ineffective.

35. In NSW, for instance, the Port Authority of NSW merely has to notify state government ministers that it is raising prices. That's it. The state government can then choose to pass this information on to IPART (a regulatory overseer) as part of price monitoring. However, as the state government is a shareholder in PANSW and financially benefits from price rises, there is little incentive for the state government to notify IPART. And it generally doesn't do so.

36. Even where there is more effective actual monitoring, as in South Australia, no action is taken. We agree with the comments attributed to former ACCC chair Rod Sims: "Without competition, simply monitoring prices will not provide any discipline on pricing".

37. **Case for price regulation of ports and non-port actors is strong**

38. We disagree that regulation of ports and terminals – and on various non-port actors – is not needed.

39. Incidentally, below, we discuss non-port actors. These are typically government entities of some form. We acknowledge that governments themselves are not businesses and that misuse of market power as an economic concept does not normally apply to them. However, in the Australian ports sector, there are several government entities that are actors in the commercial space.

40. The Ports Authority of NSW has commercial operations, for instance, and the Western Australian government has implemented financial policy through the Pilbara Ports Authority, a state-owned but commercial entity, by imposing charges. In such commercial circumstances, we assert that emanations of the state in all their forms can simultaneously be considered as both state- and market-actors and, therefore, misuse use of market power as an economic concept can and should apply to them.

41. There are numerous financial charges imposed on shipping by ports and non-port actors. This is done without much (if any consultation) and over the objections of the ocean shipping industry. As the PC has noted, shipping companies cannot credibly threaten to move their business elsewhere and do not, in fact, do so. Shipping lines are not able to exert countervailing power over ports, nor state governments. Ports, and other parties (governments) in a position to impose charges on shipping, do so freely and without fear of any action or protest by shipping companies.

42. Ports, and other actors, clearly do have market power over shipping lines (and container terminal operators)), they clearly do exercise it and they ignore what their customers say about pricing.

43. Since privatization, there has been a massive hike in the rent charged by port owners / operators to terminal operators. These increased costs pass through the maritime logistics system. There is no effective oversight or governance of these rent hikes, other than in Melbourne. As port owners / operators are in a dominant position over container terminal operators, and as they can (and have) hike rents without regard to the wishes of container

terminal operators, it is clear ports have market power over terminals and that they exercise it without regard to the objections of customers.

44. Meanwhile, Australian ports and terminals appear to routinely put their prices up every year, again, without regard to the complaints of their customers.

45. Container terminal operators around the country have been frequently engaging in large hikes on Terminal Access Charges for their trucking customers and they have done so with little notice and without regard for complaints of the trucking customers (note: for the avoidance of doubt, Shipping Australia asserts that container terminal operators have the right to provide services to other companies and to require them to pay for that service (i.e. they have the right to make a customer) however, we do also acknowledge that container terminal operators do have market power over trucking companies. We further assert that (a) this is not an issue that should involve shipping lines and that there is no justification for imposing trucking access charges on shipping companies).

46. In New South Wales, the port authorities (both the Port Authority of New South Wales and the private port operator NSW Ports, which are both port authorities in this context) have decided to impose a requirement on tankers to pay large fees every time a tanker crosses the port boundary. That's a reasonable way to fund a port if the fee is only levied once per trip, but it is not reasonable to make the tankers pay to re-enter the port if it has been temporarily ordered out of the port by the port authorities. Yet that is what is happening in New South Wales. It is double-charging, it is grossly unfair and it is an example of the exercise of market power over shipping companies.

47. We note the existence of the Empty Container Incentive Scheme run by NSW Ports. Although dressed up as an "incentive" it is clearly pseudo-regulation in practice.

48. In Western Australia, the state government (via the state-owned Pilbara Ports Authority) introduced expensive new charges on shipping without meaningful consultation with the shipping industry for the purpose of raising monies to pay people not to live near its port because of the adverse health consequences of iron ore dust exposure. Protection of public health is a sound policy. But, in this case, the state government owns the iron ore and it owns the port. It is the polluter. But it is requiring an innocent third party – the shipping industry – to pay for the government's pollution. It is a clear breach of the "polluter must pay principle". Again, the authorities have market power over shipping companies and they exercise it via their commercial entities and they do not have regard to the objections of their customers.

49. This is clear evidence of a pattern of elected officials, port authorities, port operators and terminal operators setting their pricing in a way that is not constrained by their stakeholders and their wider communities.

50. It is clear that all parties (e.g. ports, port authorities, governments) who have market power, and who have the ability to impose charges, surcharges and price hikes on marine container terminals, ports, shipping lines etc. do in fact exercise that power without regard to their customers.

51. They ought to be subject to a pricing regulator of some form and Shipping Australia suggests that the Victorian Essential Services Commission is an appropriate model.

52. **Existing monitoring is ineffective**

53. We note comments (see e.g. Draft Report, page p16 and also under p171 and 172 and especially in Draft Finding 5.4) that "The Commission received few complaints about port

pricing to shipping lines, consistent with this [port monitoring] regulation acting as a constraint on the ability of each port to exercise market power over the shipping lines".

54. That statement is logically invalid.

55. This is an example of the logical fallacy known as "argumentum ad numerum" aka an argument or appeal to numbers. The number of people who do, or do not, complain about something is not evidence of the probative value of the complaint.

56. If 1,000 people do not complain about X and one person does complain about X, then whether X is **deserving** of a complaint is irrelevant to the fact that 999 people have not complained about it.

57. Surprisingly, the Productivity Commission then acknowledges this point by saying that "this does not mean issues do not exist, however, as aggrieved parties may simply lack an avenue for complaints to be aired". In Draft Finding 5.4, the Draft Report nonetheless cites a lack of complaints about non-Melbourne ports as a justification for claiming that regulatory settings are adequate.

58. The number, or lack of number, of complaints does not prove that the price monitoring regulation is acting as a constraint on the ability of ports to exercise market power over shipping lines. The number of complaints should not be considered as evidence in this context.

59. A further logical fallacy, the "argument from silence" is also encountered in the draft report at page 16 (under the sub-head "Regulatory settings appear to be adequate," and in Draft Finding 5.4) where it is argued that, as only the Port of Melbourne has been found to be exercising market power over tenants, then there is no case for further regulation on ports.

60. **However, only the Port of Melbourne is actually subject to strong independent scrutiny. The rest of the ports simply do not have serious and active oversight.**

61. If the other ports are not subject to scrutiny, or to serious scrutiny, it is logically flawed to argue that because only the Port of Melbourne has been complained about, then the absence of complaints (or, to put it another way, an absence of evidence) proves that price monitoring regulation is consistent with acting as a constraint on the exercise of market power.

62. The fact that it is unknown, or there are few complaints, as to whether or not ports other than Melbourne have engaged in the use of market power does not prove that they have not done so. Arguing from a lack of evidence is the logical fallacy known as "argumentum ex silentio" – the argument from silence. No weight should be attached to a situation where there is a lack of evidence; the aphorism "absence of evidence is not evidence of absence" is apposite.

63. It should be noted that (a) Australian container ports are fairly alike (they are in Australia and they handle container ports, containers are by design interchangeable and modular, they have same or similar market power characteristics and they are regional monopolies), (b) there is scrutiny of the Port of Melbourne, (c) as the Productivity Commission itself notes on the second paragraph of page 172, that the "Port of Melbourne is both the most heavily regulated and most commonly complained about container port".

64. Observations (a), (b) and (c) should immediately give rise to a weak inference that the other non-Melbourne ports could be exercising their market power. Therefore, a more logically valid reasoning would have been as follows: "The Port of Melbourne has been found to be exercising market power; as Australian container ports share similar characteristics, market environments and behavioral incentives, then an audit, scrutiny and oversight of other

container ports is warranted to determine whether or not other ports are also exercising market power".

65. However, in our original submission and in the response to the Productivity Commission's draft report, Shipping Australia has already provided a long list of examples where ports and terminals have acted without regard to the interests of, and over the objections to, their customers. These include massive rental hikes, the NSW Port empty container scheme, the multiple charging of tankers for crossing port boundaries, government authorities imposing extra charges on ships to pay the costs of the pollution caused by government activities and so on.

66. For the reasons given above, we disagree with the statement that "the threat of further regulation appears to be constraining the conduct of ports in Brisbane, Sydney, Adelaide and Fremantle". There is no solid evidence that statement is true.

67. Accordingly, draft recommendation 5.4 should be amended to state, at the very least, that:

68. "Container ports and terminals have been found to have market power. The Port of Melbourne has been found to be exercising market power; as Australian container ports share similar characteristics, market environments and behavioral incentives, then an audit, scrutiny and oversight of other container ports is warranted to determine whether or not other ports are also exercising market power".

69. However, Shipping Australia goes further and suggest that the recommendation should read:

70. "There are many examples of ports, and non-port actors, exercising market power over many parties in the supply chain to the detriment of the industry and to Australia as a whole. The Productivity Commission recommends that a process of port pricing regulation be set up to provide effective, independent and third-party oversight over port charges and charges by governments and other officials on supply chain entities. The Productivity Commission seeks input as to how such a regulator could be established, and what its duties and functions should be".

71. **Chapter 6 – Market Power in other markets – liner shipping exemption (Part X)**

72. Liner shipping is of vital and central importance to the Australian economy. Anything that makes ocean liner shipping cheaper, easier, faster and more productive benefits every Australian no matter how far he or she lives from the sea. Conversely, anything that makes ocean liner shipping more expensive, harder, slower, or less productive, disadvantages every Australian no matter how far he or she lives from the sea. Therefore, Australia should be adopting policies that make business easier for liner shipping and Australia should avoid policies that make business more difficult for liner shipping.

73. On this basis, we (a) do not support the repeal of Part X until a suitable block exemption is in force and (b) oppose the suggestion that there should be a is a requirement to make a business case that any vessel sharing agreement needs to be reviewed and approved in advance of the agreement taking effect.

74. **Commentary on Part X**

75. We note various comments, and especially Draft Recommendation 6.1, that Part X ought to be repealed.

76. Shipping Australia's members met in February 2020 to discuss this topic for the purposes of making a submission to the Australian Competition and Consumer Commission's review of ocean liner shipping. The ocean shipping industry's position is fundamentally unchanged

from that position. In summary, we note that the future of Part X itself will be a government decision; however, subject to a suitable class exemption for liner shipping being agreed and pending that class exemption proving effective in operation, Shipping Australia could support a recommendation to repeal Part X.

77. We hereby incorporate that submission to the ACCC (the submission marked SAL 20013) with this response to the draft report, and that submission should be read as part of our response to the PC's draft report. This document can be found on the ACCC website - https://www.accc.gov.au/system/files/public-registers/documents/Shipping%20Australia%20Limited.pdf

78. **Requirement that shipping lines prove benefit before a VSA is granted**

79. A requirement to prove that there is a net benefit to vessel sharing agreements each time an application is made for an exemption to competition law presents difficulties and would not be in the public interest.

80. There should be no changes to this area of law that induces further delays. The timeline to start a new vessel sharing arrangement is currently already longer than two months, which makes it very difficult for ship operators to respond to changes in demand.

81. If a requirement to prove a business case prior takes one month to go through the application process, then once approved there is another month before the service can start to operate, then this, alongside time taken to negotiate windows with terminals, rotation with vessel sharing arrangement partners and an identification of vessels, will result in the process taking three to four months. Any liner shipping competition law exemption system needs a turn-around time for vessel sharing arrangements to be much faster than they are today. Meanwhile, a one month "waiting" period post approval does not make much sense after a service has been approved.

82. Further, a requirement that shipping lines show that their agreements will provide a net public benefit prior to approval may be impossible to prove as it would require shipping lines to prove a future state of affairs (what the benefit would be like in the future after the agreement is improved). Being able to prove a future state of affairs is next to impossible, as was noted by the former ACCC Chair, Rod Sims, when he criticized the law relating to the NSW Ports case and control of future mergers.

83. **Benefits of vessel sharing has already been proven**

84. It has already been repeatedly proven that vessel sharing arrangements benefit shippers and national economies, so there should not be a requirement to make a business case that any vessel sharing agreement needs to be reviewed and approved in advance of the agreement taking effect.

85. In March 2020, the European Commission announced that it would prolong for another four years the regulation outlining the conditions under which liner shipping consortia can provide joint services without infringing EU antitrust rules (the liner shipping block exemption to EU law) (See: "Antitrust: Commission prolongs the validity of block exemption for liner shipping consortia", 24 March 2020, European Commission).

86. Following a consultation and review process, the European Commission found that Consortia Block Exemption Regulation results in efficiencies for carriers that can better use vessels' capacity and offer more connections. It also found that those efficiencies result in lower prices and better quality of service for consumers. Specifically, the evaluation has shown that

in recent years that costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) have decreased by approximately 30% and quality of service has remained stable.

87. In 2017 the Hong Kong Competition Commission decided to issue a block exemption to competition law in respect of Vessel Sharing Arrangements because such arrangements are unlikely to result in significant harm to competition and that vessel sharers still compete with each other and with non-members on price and non-price measures (e.g. customer service). The HK Competition Commission also considered that the efficiencies which are said to arise from VSAs are likely to be passed on to a greater extent to consumers where the parties to the VSA are subject to effective competition. This would include for example the cost savings which are claimed to arise from the use of larger vessels through VSAs. The Hong Kong Competition Commission has since proposed renewing its Block Exemption for ocean liner shipping.

88. In Australia, we have had an exemption for ocean liner shipping for many years, and over the years there has actually been an increase in liner shipping services. There have been new entrants to the Australian trade lanes; existing participants have increased services; the UNCTAD Liner Shipping Connectivity Index (which enables the connectivity of liner shipping can be assessed for each country over time) has increased by a whopping 42.6% since UNCTAD began collecting data in 2006. The level of liner shipping connectivity is higher than it has ever been. As increased liner connectivity lowers transport costs and expands access to markets, it is absolutely clear that the liner shipping exemption in Part X has not harmed the Australian economy nor hurt Australian well-being. It has only benefited Australia.

89. **Consequences of not having an exemption from competition law for vessel sharing**

90. Incidentally, as we were finalizing this submission, we noted with interest the article in ShippingWatch.com that "Customers and ports to have 'drastically' reduce services with EU ban of container alliances" Thomsen, J, 10-10-2022, ShippingWatch.com. According to ShippingWatch, it has been told by DB Schenker's COO for Air and Ocean, Thorsten Meincke, carrier servicing of shippers and ports will be reduced "drastically" if the European Commission decides to remove container liners' exemption from EU competition regulation. He reportedly recommends a continuation of the EU exemption for box carriers.

91. Shipping Australia can see how this would occur in the Australian trades too. Vessel sharing reduces costs for vessel operators. If vessel sharing is banned, then it seem likely that ship operating costs would increase. During times of lower freight rates, smaller ship operators or ship operators who only deploy one or two smaller ships on the Australian trade, could find that the costs of offering a service are too great relative to the revenues received and they could pull out. Even the larger ship operators could have to scale back on their offerings if ship operating costs rise significantly or if we enter into a low freight rate environment. The likely consequences would be an increase in freight rates offered by the remaining providers, and less services. Consequences could cascade, fewer services means less access, and less frequent access, to markets. Australian shippers of perishables could be particularly badly affected if they cannot access overseas markets frequently.

92. It is clear the presence of an ocean liner shipping block exemption to competition law is of benefit to Australia as vessel sharing delivers benefits to carriers, shippers (importers and exporters both), and to the general Australian community. It is evident that the Australian exemption for liner shipping to competition law has not harmed the Australian economy nor Australian wellbeing.

93. Reducing administrative burdens on ocean shipping will benefit Australia greatly. It would be an administrative burden to require shipping lines to prove that their proposed vessel sharing agreements would provide a net public benefit each time they seek to enter into an agreement.

94. Incidentally, it may be worth noting that the Australian Commonwealth Government asked the Productivity Commission to review Part X of the Trade Practices Act (as it then was) back in 1999 and to report on appropriate arrangements for the regulation of international liner cargo shipping services. The Productivity Commission was not convinced that the scrapping of Part X and reversion to general competition law would generate outcomes as good as, or better than, Part X. The 1999 Productivity Commission was not convinced that it was desirable to have a case-by-case approach in the industry (See Byron and Wall, "International Liner Shipping: an assessment of Part X of the TPA and its application to the Australia-Southeast Asia Trade," Economic Papers Vol. 21 No. 4 December 2002 pp. 23-44).

95. As the costs to Australian wellbeing outweigh the benefits of immediately scrapping Part X, we therefore advise that Draft Recommendation 6.1 should be amended as follows:

96. The Australian Government should not repeal Part X of the Competition and Consumer Act 2010 (Cth) (CCA) until an adequate Block Exemption to competition law has been developed by the Australian Competition and Consumer Commission in consultation with the ocean shipping industry. Once a satisfactory Block Exemption has been implemented and proven to be effective, then the Australian Government should repeal Part X.

97. **Chapter 6 – Ports, shipping and off-window arrivals**

98. Shipping Australia notes "Information request 6.1 - The Commission seeks information on why container terminal operators do not charge shipping lines fees for arriving outside their windows".

99. Shipping Australia suggests that it is misleading to focus on the fact that ships often do not meet windows.

100. A shipping window is a mere forecast and is subject to the many uncertainties of the sea. Bad weather such as storms, hurricanes, high swells etc often throw ships off-window.

101. Ship schedules are often adversely affected by action on the landside such as by industrial action.

102. Ships are most often delayed by delays at ports, specifically, port congestion which is caused by requiring ships to stay at anchor, idle times at berth, low ship/crane intensity (cranes per ship), and low crane rates (box moves per hour per crane).

103. Container ports also prioritise having a low berth utilisation rate (around 60-65%) compared to say, dry bulk ports, which operate on a one-ship in / one-ship out basis.

104. A further problem is the way that, in Australia at least, ports and terminals treat on / off window arrivals. If a ship arrives, say 5-minutes away from being "off-window", it is regarded as being "on-time" and it is berthed as soon as possible.

105. If a ship arrives, say, 5-minutes after its due time and it is "off-window" it is regarded as being "late" and is sent to wait until the next available berthing slot. That slot might not be for some time as the on-window ships are given priority over off-window ships.

106. So a ship that is on a small, low volume trade, on a relatively weather-calm part of the sea, will likely be on-window and will cause delays to a big, high volume ship, from a strike-hit and port congested part of the world, that may have had to sail through stormy seas to get

here. The smaller volume ship in such a scenario will be prioritised and the bigger ship held up – possibly for days.

107. This practice leads to compounding lateness. Assume a ship is delayed by bad weather and arrives slightly off window at Brisbane. It may be held up for a day, then another day for cargo operations, then a day to sail to Sydney. It is now two or three days late.

108. Congestion, anchorage times, idle times, crane rates etc at Sydney are often worse than other ports. So the ship is made to wait another couple of days because it is off-window. There is no anchorage at Botany so the ship is forced to chug up and down the coast, burning fuel, wasting time and costs.

109. It then arrives at Melbourne say, five or six days late. Such lateness earns it a place in the back of the queue and another few days of wait-time pass. The same process occurs at Adelaide, and again at Fremantle, so the ship may be nine days behind schedule when it leaves Australia.

110. Ships most typically miss windows because of port delays because, in Australia at least, ports have low performance, slow turnaround times, and refuse to expedite the processing of delayed ships.

111. It would be extraordinary in the extreme if a terminal operator was able to cause a ship to miss a window and then, at the next port, charge that same ship for being late!

112. Shipping Australia strongly urges the Productivity Commission to make no recommendation in this area.

113. **Chapter 6 – Competition in other markets - Terminal Access Charges**

114. Shipping Australia notes draft recommendation 6.2 that "Terminal access charges and other fixed fees for delivering or collecting a container from a terminal should be regulated so that they can only be charged to shipping lines and not to transport operators".

115. Shipping Australia fundamentally and profoundly disagrees with this recommendation.

116. It is unjust, unduly harmful to shipping lines, and will substantially harm the interests of Australian shippers while unduly subsidizing an industry (trucking) that is already in receipt of massive subsidies and which imposes appalling externalities on the Australian community in terms of personal injury and death from accidents and pollution, and which worsens the global climate change problem.

117. Further subsidizing the trucking industry also counteracts and undermines a wide range of government policies aimed at taking freight off road to reduce the harm to the Australian population caused by the trucking industry.

118. The Productivity Commission's thought process seems to be that:

(1) shipping lines have market power over container terminals;
(2) container terminals have market power over landside trucking operators;
(3) container terminals are exercising market power over trucking companies by having and increasing Terminal Access Charges;
(4) shipping lines can be forced to pay the fees charged to trucking companies (and, here, there is either an unspoken assumption that shipping lines will suffer no harm, or, alternatively, that prospect has not even been considered);
(5) shipping lines can then exercise their market power over container terminals if Terminal Access Charges are unreasonable; the result will be a non-distorting benefit to society.

119. This line of thinking is terribly flawed in numerous ways, both economically and also in a range of philosophical and public policy ways.

120. Points (1) and (5): are flawed. Shipping companies do not have market power over container terminals in all respects. In some container ports, such as Adelaide, ocean shipping simply has no choice at all because the port / container terminal is monopoly provider. Using the Productivity Commission's rationalization, why then, should ships be forced to pay Terminal Access Charges in Adelaide if they literally have no choice of provider?

121. Meanwhile, although there may have been some shifting of contracts in recent years, as the Productivity Commission acknowledges in its draft report, shipping lines carry cargo that flows to population centers. Terminals with the equipment to handle container shipping are located in ports at those population centers and shipping lines cannot credibly go elsewhere because container terminals are regional monopolies (see PC draft report comments on page 15). Shipping line / terminal contracts are negotiated at the international level by global-scale companies taking into account world-issues and markets. The Australian market is not a sufficiently large market to influence global negotiations.

122. Then, after stevedoring contracts are signed, ships simply cannot choose to load and unload at a rival terminal – they are contractually committed to the one given terminal. Because shipping companies do not have market power over container terminals, they cannot act as constraints on the exercise of market power by container terminals against Australian trucking companies. Therefore, in relation to point (5), they cannot push back against container terminals if terminals believe that Terminal Access Charges are unreasonable.

123. Point (2): Shipping Australia accepts the analysis that container terminals, which are regional monopolies, have market power over trucking companies.

124. Point (3): we acknowledge there is widespread shipper and trucking company concern at the fact that Terminal Access Charges have been introduced, that charges have been frequently increased and that charges were hiked from negligible fees to substantial fees. However, whether or not container terminals are actually exercising market power over trucking companies is a matter for debate as there are solid reasons why terminals can – and should – charge trucks, and that it is correct for terminals to do so.

125. Point (4): for reasons we will discuss later, we are disputing point (4) – that shipping lines can be forced to pay the fees currently charged to trucking companies. We view this as an example of the is-ought fallacy. Just because something is a given way, or can be a given way, does not mean that it should be that way. Just because shipping lines can be forced to pay the Terminal Access Charges does not mean that they ought to pay the Terminal Access Charges.

126. Point (5), the supposition that shipping lines can then exercise their market power over container terminals if Terminal Access Charges are unreasonable, has been covered and refuted above in previous paragraphs.

127. Point (6): the view that the result will be a non-distorting benefit to society, is also flawed. Ocean liner shipping delivers enormous benefits to Australia that simply cannot be obtained in any other way. Australia relies entirely on overseas headquartered shipping lines for international liner cargo / general goods shipping services. While the ocean liner shipping industry may only support small numbers of directly employed persons in Australia (although note that the DFAT states that 1-in-5 jobs are directly or indirectly supported by international trade) and may only have small direct revenues and expenditure in Australia (relative to other sectors of the economy), the activities of ocean liner shipping support practically every

activity in Australia. It can be fairly said that liner cargo shipping is an essential and vitally important service to every business and person in Australia.

128. Anything that makes the liner shipping cheaper, easier, faster, and more productive, therefore benefits every Australian no matter how far he or she lives from the sea. Conversely, anything that makes liner shipping more expensive, harder, slower, or less productive, therefore disadvantages every Australian no matter how far he or she lives from the sea.

129. It is either assumed by the Productivity Commission that shipping companies will suffer no harm from being forced to pay Terminal Access Charges or it simply has not been considered. But it could prove extremely harmful to ocean shipping companies and, by extension, to Australia.

130. Such a move would obviously increase the costs for ocean shipping companies.

131. It is false to assume, as explained above, that shipping companies can push back on terminal operators. It is also false to assume that they can pass charges on. Some shipping contracts have clauses banning the imposition of surcharges. In such cases, shipping companies themselves will bear the economic burden of Terminal Access Charges. Even where there are no such clauses in contracts, as the Productivity Commission has noted, shipping lines compete fiercely on price. Their competitive situation simply may not allow them to pass on a surcharge as they could lose business to their competitors. It is quite foreseeable that the Productivity Commission's draft recommendation could ultimately result in shipping lines bearing the economic burden.

132. All shipping companies that are forced to pay Terminal Access Charges, even if they can pass on charges, will suffer an adverse impact to their capital and cashflow because they will have to pay for charges that they would not otherwise have had to pay.

133. All of this is particularly harmful in low freight rate environments. Although freight rates over the last few years have been high, normally the freight rate environment is normally quite low.

134. Container shipping had very low freight rates from 2008 to the end of the second quarter in 2020. According to internationally respected shipping analysts, Alphaliner, container shipping rates have been so low that the average ocean-going carrier had an operating margin of minus 2.9% in the six years following the 2008 financial crisis. Eight of the major ocean shipping companies recorded an aggregate net loss of more than US$2.5 billion in the five years prior to 2020 despite generating over USD$350 billion in revenues. Prior to COVID, freight rates were bumping around the US$1,200 to US$1,400 rate for a forty-foot shipping container, according to Freightos.

135. In such environments cost control for ocean liner shipping companies is of vital importance.

136. If shipping lines are forced to pay Terminal Access Charges, costs that should be paid by trucking, then it is very likely that that smaller ocean shipping operators (here defined as any operator (regardless of size) that only has one or two ships in the Australian trade) could pull out of the Australian liner shipping trade on the grounds of costs.

137. This has happened for various reasons in the past. For instance, MISC Berhad quit the ocean liner shipping business globally, pulling out of Australia in the process, back in 2011, citing high operating costs (see e.g. "MISC Berhad quits container liner business", Freightwaves, Freightwaves staff, 29 November 2011 - https://www.freightwaves.com/news/misc-berhad-quits-container-liner-business).

138. If the smaller operators pull out then this will result in fewer services, less resilience (so more blanked sailings, more port skipping and the like) and costs will increase for the remaining shipping lines (companies that pull out of the Australian trades won't be contributing to costs under a vessel sharing arrangement) which means that the cost of shipping to / from Australia will likely increase.

139. Meanwhile, those ocean shipping companies that can pass on Terminal Access Charges are quite likely to do so but this will likely be expensive as the shipping companies will likely use mark-ups to cover the extra costs and administration.

140. Ultimately, contrary to the draft report's assertion, a policy of forcing shipping lines to pay Terminal Access Charges is likely to result in many hidden, foreseen, and unforeseen distortions in the freight market / to from Australia that would result in the Australian economy being harmed rather than enjoying a benefit.

141. There are also a number of other profound objections to the Productivity Commission's suggestion that shipping lines be forced to pay Terminal Access Charges.

142. If container terminals do have market power over trucking companies, and if they are exercising that power over trucking companies, then the obvious comment is that it is a matter for container terminals and trucking companies to deal with, possibly with the assistance of government. It is grotesquely unfair to randomly burden an innocent third party (shipping lines) with the business costs that should rightfully be borne by trucking companies.

143. We note that the Productivity Commission argued that it is costly and difficult for government to regulate charging. Whether or not this is true, it does not justify lumbering a third party with the costs that are, and should be, paid by trucking companies. If it is deemed that these matters should be dealt with by regulators, and that it is costly and difficult to regulate, then that is a problem for government to deal with, not shipping lines.

144. Shipping companies are also fundamentally opposed to any suggestion of being used as an instrument of government policy to benefit trucking. If governments want to have a transport policy to deal with any perceived problem, it should do so directly and not coerce unrelated and unpaid private sector parties to deal with any perceived problem.

145. We note the comments that Terminal Access Charges "simply represent a fixed charged levied by a container terminal operator to receive a container from, or to deliver to, transport operators". Nothing could be further from the truth; such an assertion is fundamentally incorrect. **Terminal Access Charges fulfill the role of compensating terminal operators for creating landside infrastructure and for keeping it in good repair.**

146. Secondly, it is also irrelevant. Marine container terminal operators have an inherent right to charge customers for their provision of services.

147. The starting point for this analysis is that stevedores are long-term lease holders who have made a range of capital investments (upgrades to land, infrastructure, container handling equipment, security equipment and fittings, along with a multitude of other capital investments) to create a secure terminal used to facilitate the international trade in, and transport of, containerized goods.

148. In a democratic, capitalist, system, the owner of private property is entitled to decide how to deal with that property. The owner has the right to decide who, if anyone, can access it and on what terms. The owner of land-related property is entitled to charge other people for access to its premises. The operator of a private highway may decide to charge tolls on road

users to access its road. If you, as a road user, want to use that road, then you will have to pay the toll, which is a form of access charge. Similarly, a container terminal operator is entitled to charge trucking companies a Terminal Access Charge for access to its terminal.

149. It is fair and just for container terminal operators to charge trucking companies at terminal access charge to access the container terminal. In commerce, if you benefit from using someone else's property, then, if the owner decides to issue a charge, then you have to pay to use it.

150. Container terminal operators provide and maintain land transport-related infrastructure such as roads, roundabouts, weighbridges, ramps, parking, holding points, turnaround facilities, rail links and information systems that enable transport operators to manage their assets more efficiently. Trucking companies simply could not provide services to their customers if this infrastructure had not been provided by container terminal operators.

151. The history of terminal access charges is illuminating in this context.

152. Leading up to 2005/6, there was a concentrated lobby campaign from landside transport operators about the poor performance of maritime terminals, along with allegations of unfair treatment of trucking companies. This campaign received attention from the NSW Govt, which finally led to the implementation of Port Botany Landside Improvement Scheme and a revamp of the regulatory framework.

153. In summary, penalties applied both on truckers and on terminals. Terminals were forced to invest in new infrastructure and technology to provide transparency. Meanwhile, the trucking operators took the brunt of penalties due to their inefficiencies (and they still do so today).

154. Around the same time, the Chain of Responsibility legislation was passed in NSW and the "Loading Master" (in this case the marine terminals delivering containers to the trucks) was designated as the responsible party to ensure that the truck and load departed the marine terminals in full compliance with the legislation.

155. This requirement resulted in additional infrastructure and technology like the 'weigh in motion' systems to be put in place. The cost of this additional infrastructure, not to mention issues related to the PBLIS scheme, penalties, Chain of Responsibility etc., which induced an "Infrastructure Levy" to be put in place. This levy was recovery costs for landside infrastructure to be put in place to improve the service levels to the transport companies.

156. The infrastructure levy had no bearing on shipping lines as it did not deliver any direct benefit to a shipping line. Any additional berth provisions are normally recovered from lines via wharfage charges and channel and navigational improvements are recovered via port dues.

157. In addition, the Chain of Responsibility legislation was adopted by all State Governments in Australia, so the infrastructure levy was rolled out in all states.

158. Also of relevance was the privatization of the ports and the significant increase in rent on terminal facilities. Meanwhile, the terminal companies are now bound by certain infrastructure investment key performance indicators in their leases. All of this is factored into the infrastructure levy.

159. Marine terminal operators have an inherent right to charge for access to their assets and for their services. They have an inherent right to make a customer. Until relatively recently, stevedores have not previously charged trucking companies for access to their terminal.

160. However, that has now changed with the introduction of Terminal Access Charges. It is reasonable for container terminal operators to ask trucking companies, which benefit from infrastructure that has been provided for them to use, to pay a financial contribution to the cost and upkeep of that infrastructure.

161. Trucking companies were formerly given that access for free. But now they have to pay a fee to access the terminal. The Merriam-Webster dictionary definition of a "customer" is "one that buys a commodity or service". To "buy" means to acquire possession of, or the rights to use, goods or services in return for the payment of money.

162. If a private highway operator allows your car to access its highway on condition that you will provide financial compensation for that access, then you have used a service in return for the payment of money. In that situation you are, by definition, a customer of the private highway operator.

163. If a container terminal operator allows a truck to access its terminal on condition that the trucking company will provide financial compensation for that access, then the trucking company has used a service in return for the payment of money. In that situation, the trucking company is, by definition, a customer of the container terminal operator.

164. It is clear that container terminal operators have two different, but similar, products for sale to two different sets of commercial customers. One product is access to the terminal for ocean going ships and the other product is access to the terminal for trucks.

165. The whole argument of the shipper representatives that shipping lines should be forced to pay all stevedore charges rests wholly on the contention that shipping lines are the clients of stevedores. Incidentally, the Merriam-Webster dictionary definition of a "client" includes the word "customer".

166. But, as we have shown above, any trucking companies that pay money in return for being granted access to a container terminal are customers of the stevedore. It is reasonable to accept that customers should pay the fees and charges of their suppliers. However, it does not logically follow that one set of customers (ocean shipping companies) should be forced to pay the fees charged to another set of customers (trucking companies) if both groups are both customers of same supplier (the container stevedores). It is clearly a flawed premise and should therefore be rejected.

167. By way of example, think of the operations of two different kind of wheeled delivery vehicles: heavy freight trucks and light commercial vans. There are other kinds, but to keep the analysis simple, we will focus on just two types.

168. Heavy freight trucks, say, prime movers with two trailers in a Double-B configuration, are typically used to move large volumes of goods across land between two points. Light commercial delivery vans are typically used to pick up smaller volumes of cargo from retail and distribution centers and to deliver that cargo to, say, home occupiers on quiet suburban streets.

169. Heavy trucks may be employed to bring and take large and heavy volumes of cargo to and from a city-located distribution center. The heavy freight trucks would be loaded / unloaded, and the cargo sorted. Then, perhaps, light commercial vans may be used to pick up numerous small parcels and packages for delivery to residents all over the city. We will assume in this example that the heavy freight truck, the distribution center and the light commercial vans are all owned by different companies. In this example, we have two sets of wheeled freight vehicles, filling similar but different roles, working on different scales and using the same

independent supplier – the distribution center – and everything takes place on a commercial basis.

170. The central depot owners decide to charge access fees levied each time the big heavy freight trucks enter the central depot to use their heavy-truck specific facilities and to carry out operations. Similarly, the central depot decides to charge the operators of light suburban commercial delivery vans for access to the depot and for using the light commercial van-specific facilities to unload and reload cargo to / from their vans.

171. The central depot sends invoices to the light delivery van operators, who then promptly demand that the heavy truck operators pay them. What's the rationale? The light commercial van operators claim that heavy truck operators should pay all of the depot's invoices because the heavy truck operators are commercial clients of the central depot.

172. But the heavy truck operators would immediately, and quite correctly, point out that the light commercial vans are also the commercial clients of the depot and there is no reason for the truck operators to pay the bills of the van operators.

173. While the decision as to who to charge for access to a terminal is, and should be, up to the terminal owner, it is also completely fair and equitable for stevedores to charge trucking companies because a container terminal is the interface between the sea and the land. It exists for the benefit of ships and trucks.

174. Ships enter a terminal via the sea, and they pick up and drop off containers. Stevedores and port authorities have provided dedicated ship-specific infrastructure such as ship-to-shore cranes, wharves, and loading/discharge areas. This infrastructure has been provided for the benefit of ships. Shipping companies pay to use that infrastructure through wharfage charges.

175. Trucks enter a terminal via the land, and they pick up and drop off containers. Stevedores have provided dedicated truck-specific infrastructure such as roads, roundabouts, ramps, parking, weighbridges, turnaround facilities and transport booking systems. This infrastructure and technology has been provided for the benefit of trucks. Trucking companies pay to use that infrastructure and technology through Terminal Access Charges.

176. **If it is fair for stevedores to charge ships to use ship-related terminal infrastructure, then it is equally fair for stevedores to charge trucks to use truck-related terminal infrastructure.**

177. Additionally, trucking companies and ocean shipping companies are both suppliers to the cargo owner. Both sets of companies incur costs for the services they supply to the cargo owner, and they may or may not decide to absorb those costs or to issue a charge. For example, a wharfage charge is incurred by the ocean shipping company, and it may decide to absorb the cost or to recover that cost by issuing an ancillary charge to its own customers. Correspondingly, a Terminal Access Charge is incurred by the trucking company, and it may decide whether it wants to absorb that cost or recover that cost by issuing an ancillary charge to its own customers.

178. It is unfair to expect ocean shipping companies to subsidize the ordinary business costs of trucking companies merely because they both provide services to cargo owners and, in the course of providing those services, merely because they both use the same supplier.

179. Trucking companies previously had terminal access for free but now they must pay. No one likes to pay for a service previously provided for free. Container terminal operators have decided to recover the costs of the significant investments made for the benefit of landside

transport operators by charging landside transport operators. They have the right to do that because the container terminal is their private property.

180. The Terminal Access Charge is just another cost of doing business for trucking operators. All businesses must pay their own costs. That's just a commercial reality. There is no valid reason for shipping lines to be forced to subsidize the businesses of trucking companies so that those trucking companies can have more commercial benefit.

181. Shipper representative and land transport operators may argue that the Terminal Access Charges situation is unsustainable because shipping line-charged terminal handling charges – charged for the transfer of containers to / from the ship – have not declined even as terminal access charges have increased. This argument is flawed because the terminal handling charges that a shipper / land transport operator sees on the invoice are not shipping line-origin charges. They originate from the terminal and are passed on by shipping lines.

182. Shipper representatives and land transport operators argue that they are being cheated because they are being double charged. There are several ways in which this argument is flawed.

183. The first is because the buyer and seller induce a transport journey to occur for their benefit so the burden of the whole cost of transport from start to finish should directly or indirectly fall upon them. It is not clear why any party in the transport journey, such as shipping lines (or, indeed, anyone else), should subsidize the cost of that journey by paying charges of other parties.

184. The second way that the argument flawed is that terminal handling charges pay for the loading and unloading of a ship and the various pieces of equipment (such as cranes) that enable that to happen. Terminal access charges can be regarded as paying for the landside infrastructure – roads, roundabouts, weighing equipment and the like. The third way is that it is a charge levied by the stevedore on trucks in return for permission to access a terminal. Fourthly, the container terminal belongs to the stevedores. In a free market they can charge who they want.

185. Further shipper / trucker arguments that trucking companies are not customers because they do not have any choice in whether or not to use a given terminal (they are contractually required to pick up / drop off boxes from a given terminal) are, again, not valid. A related argument that customers also have an ability to discuss and accept pricing with suppliers also is not valid.

186. If a person is a customer of a monopoly business, then he or she is still a customer despite the fact that there are no competitors to turn to. On the assumption that Sydney Water is a monopoly retailer of potable water in Sydney, if I consume some of Sydney Water's product, and if the company bills me, and if I then pay that bill, then I am a customer of Sydney Water. That fact that I cannot go to a competitor because none exist is irrelevant to the fact that I have paid money for a product, for which I have received access to a service in return. That, by definition, means that I am a customer of the company. I also do not get the opportunity to negotiate prices with Sydney Water.

187. Clearly, trucking companies get substantial benefits from being able to access the assets of marine terminals, which have provided considerable trucking related infrastructure for them to use. All businesses in Australia have the right to use their assets and services in an attempt to make a customer and to charge a fee to that customer for the use of assets and services. Trucking companies are customers of marine side terminals.

188. **Lack of socio-economic justifications for intervening in trucking / terminal / shipping line sector**

189. Shipping Australia is concerned at the implied and unwritten starting point that the Productivity Commission appears to have adopted in respect of the land transport (trucking) sector.

190. It seems that that the Productivity Commission has, in its draft report, decided that trucking industry deserves to be protected and subsidized. The Productivity Commission never examined, for instance, whether or not the trucking industry should be left with the status quo nor did it look at what the trade-offs are of the status quo versus forcing shipping lines to pay Terminal Access Charges.

191. And, as will be demonstrated, there are profound social, environmental and policy objections to forcing anyone at all – and not just shipping lines – to pay charges that rightfully should be paid by the trucking industry. Much of the following commentary relates to the justification of regulation.

192. Regulation on economic grounds can generally be justified on the grounds that the costs of regulation outweigh the harms. Values-oriented regulation, such as moral action-oriented legislation of social-objective-oriented legislation, can be justified on the grounds that this is the "right thing to do" based on societal values such as compassion, transparency, justice, addressing historical wrongs perpetrated against an oppressed group and so on. Examples might include human rights laws, freedom of information law, discrimination law and the like. Examples of regulation that could simultaneously be both economic-justified and values-based could include, for example, public health or environmental regulation.

193. It is a simple fact that the owners / operators of trucking-based businesses work in the sector for the purpose of generating revenues and profits for themselves. And trucking businesses have being doing very well in the freight boom of the last few years. Integrated trucking company Lindsay AU in February 2022 reported H1 FY22 underlying EBITDA growth of 20.2% to $31.4 million. CTI Logistics has recorded over AUD$283 million of revenue in 2022 and a massive increase in profits before tax from AUD$11.3m to just under AUD$22m. New Zealand based Mainfreight, which is also highly active in Australia, has reported a 47.2% increase in revenue – up from NZ$1.67 billion to NZ$5.22 billion with a corresponding 86.5% increase in profit before tax up by NZ$227.0m to NZ$489.4 million.

194. For the avoidance of doubt or confusion, we are not criticising these businesses for being profitable. On the contrary, we congratulate them for their excellent results, and we wish them continued success. However, such results do show that trucking businesses are not necessarily poor companies that are deserving of being benefited by state action. Of course, there are undoubtedly many businesses that are not so profitable and some which are failing. This is normal in a free market and does not imply that any such businesses should be subsidised.

195. Trucking businesses are created and operated for the purposes of making profits for their owners. Their operators are shrewd and sophisticated business-people. It is a basic principle of commerce that if someone (such as a terminal operator) has resources or services that you wish to access then you should pay for it. It is also a basic principle that businesses generate a variety of input costs (such as rent, fuel, staff wages and the like) and that businesses have to bear the burden of their own costs. It is hard to see why the Productivity Commission appears to feel that they need to be protected from the fundamentals of how their own industry works (and indeed, against the principles of commerce generally).

196. Some business types, or sectors of the population could reasonably enjoy an exception to those principles. In a variety of countries, there are often entrepreneur grants aimed at potential business owners and operators who may be experiencing disadvantage, such as being located in an economically depressed area. However, there are no issues of social justice, or any other values-based issues affecting trucking companies. Truckers as a whole are not a group that needs protection, nor subsidies, because of disadvantage.

197. As it happens, the trucking industry is already very substantially protected and subsidized by government.

198. Professor Philip Laird, Honorary Principal Fellow at the University of Wollongong, has pointed out in his 2017 article, "Trucks are destroying our roads and are not picking up the repair cost" (The Conversation 23 June 2017), that: "the current annual fee for a six-axle semitrailer is A$6,334 and for a nine axle B-Double is A$15,016. With rebates, most trucks pay fuel excise of 25.9 cents per litre (this will change to 24.8 cents per litre on 1 July), whilst motorists pay 40.1 cents per litre.

199. "The registration fee seems steep. However, a B-Double can cause, per kilometre travelled, 20,000 times the road wear and tear that a family car does… In Australia, National Transport Commission data shows that in 2014-15, **heavy vehicle operators paid combined road user charges and registration fees revenues of about A$3 billion.**

200. **"However, this only makes up about 12.5% of all government outlays on roads that are now over $24 billion per annum"** [emphasis added].

201. Professor Laird has since provided an updated estimate of how much the trucking industry is subsidized in his 2021 article: "Distance-based road charges will improve traffic — and if done right won't slow Australia's switch to electric cars" (Professor Laird, 6 January 2021, The Conversation).

202. "I discussed road-user charges for heavy trucks in a 2017 Conversation article. At that time in Australia, hidden subsidies for heavy truck use in the form of unrecovered road system costs, along with related external costs of road crashes, pollution, emissions, noise and road congestion, totaled about A$3 billion a year. **I now estimate this shortfall to be about A$4 billion**" [emphasis added].

203. Further subsidies can be found in the communique of the Infrastructure & Transport Ministers' Meeting and the earlier meetings of the Transport and Infrastructure Council. Different names, but essentially the same meeting of the Federal and State Infrastructure and Transport Ministers from around Australia.

204. The 22 November 2019 meeting communique notes:

205. "Heavy vehicle charges: Council considered the advice of the NTC, and acknowledged that… there was a growing gap between road expenditure and revenue from charges. National heavy vehicle charges, which are designed to recover the heavy vehicle share of road expenditure, have essentially been frozen since 2014... Council identified a preference for charges to rise by 2.5 per cent in 2020-21 and 2.5 per cent in 2021-22, subject to consideration by governments where necessary. Council noted **the charge increases would be significantly less than the amount of 11.4% estimated by the NTC as necessary to recover the heavy vehicle share of recent road construction and maintenance costs**" [emphasis added] (see: https://www.infrastructure.gov.au/sites/default/files/migrated/transport/infrastructure-transport-ministers/files/12th_transport_and_infrastructure_council_communique_22nov_2019.pdf)

206. Subsequently, page 4 of the communique of 22 December 2021 notes:

207. "Having considered submissions received in response to the NTC RIS, Ministers identified a preference for heavy vehicle charges to increase by 2.75 per cent for 2022-23… In making these decisions, Ministers were mindful of the growing gap between the heavy vehicle share of recent government road expenditure and the current level of charges. Ministers acknowledged that charges needed to move back towards cost recovery levels…"

208. Professor Laird's analyses and the communiques from the Ministerial Council demonstrate that the trucking industry enjoys massive financial subsidies. So, it is unclear why the Productivity Commission feels that further massive subsidies should be directed to the trucking industry.

209. Meanwhile, as noted in the Productivity Commission Draft Report, there are policy moves to direct freight to rail. There are a variety of non-market reasons for this. Trucking produces enormous externalities in the form of personal injuries, death, and atmospheric pollution (NOx, SOx, CO2, particulate matter).

210. About seven people die from heavy truck related incidents in Australia each fortnight; approximately 510 heavy truck occupants are hospitalized from road crashes each year. ("Road trauma involving heavy vehicles 2020 statistical summary", 2022, Bureau of Infrastructure and Transport Research Economics).

211. This is an appalling toll of injury and death on the Australian population that could be reduced by adopting policies that promote the modal switch of freight from road to rail and sea. This modal switch is not happening (and has, in fact, been going backwards: "Instead of putting more massive trucks on our roads, we need to invest in our rail network", Professor Laird, 17 December 2021, University of Wollongong) partly because of the massive subsidies to trucking, which means that trucking is not bearing the full cost of the burdens it imposes on society.

212. Meanwhile, as has been widely reported, human societies worldwide face potentially catastrophic harm from global warming caused by man-made emissions of industrial gases. As Laird has pointed out in his articles for The Conversation, rail freight produces far less global warming emissions than road freight – up to one third less (see "Instead of putting more massive trucks on our roads, we need to invest in our rail network", Professor Laird, 17 December 2021, University of Wollongong). As can be seen from the IMO Second Greenhouse Gas Study, road freight transport is one of the worst greenhouse gas emitting methods of freight transport (second only to aviation; ocean-based shipping is the least polluting).

213. It is well-known that the combustion of diesel (such as occurs in truck engines) produces considerable volumes nitrous oxides, sulphur oxides and particulate matter. These gases severely damage human, animal (terrestrial and aquatic), plant health and can induce eco-system damage.

214. Trucking's atmospheric pollutants can cause human eye, nose, throat and lung irritation, damage lung function, and aggravate conditions such as asthma, heart disease, create cardiovascular hospital admissions, and increase extra risks of chronic bronchitis, lung cancer and heart disease (see e.g. "Fine Particles PM 2.5 Questions and Answers, New York State Department of Health, undated under "Air Quality"; "What are Diesel Emissions" Majewski, undated, dieselnet.com; "Sulfur dioxide" Queensland Government (www.qld.gov.au), undated, "Nitrogen oxides," Queensland Government (www.qld.gov.au) undated. Sulphur dioxide and nitrogen oxides can cause acid rain (literally, rain that is acidic) which kills

plants and aquatic animals (See "What is Acid Rain? United States Environmental Protection Agency).

215. It is therefore advisable to reduce trucking volumes to the minimum necessary to ensure the movement of freight so as to avoid fewer heavy-trucking induced injuries and hospitalizations, fewer heavy trucking deaths, fewer greenhouse gas emissions (and the consequent harm that accompanies global warming) and less air pollution that would harm human, plant, animal and eco-system health.

216. However, the Productivity Commission has, in its draft report, recommended that this polluting industry instead be further massively subsidized by forcing shipping lines to pay the trucking industry's Transport Access Charges.

217. Given that the imposition of Terminal Access Charges on shipping lines is **(a)** grossly unjust as it makes the unrelated sector pay for the business costs of the trucking sectors; **(b)** will likely substantially harm the legitimate business interests of shipping companies; **(c)** interferes with the legitimate private property rights of shipping companies; **(d)** interferes with the legitimate private property rights of terminal operators to manage their assets and businesses; **(e)** could prove to be highly disruptive to the shipping sector's ability to offer shipping services; **(f)** is highly distortionary to the shipping sector as they may not be able to recover the costs; **(g)** subsidizes an already extremely subsidized industry (trucking); **(h)** subsidizes an industry that imposes severe (hospitalization-level) trauma on numbers Australians every year; **(i)** kills about seven Australians a year; **(j)** externalizes its air pollution worsening global climate change and producing emissions that harm human, plant, animal (terrestrial and aquatic), and eco-system health; **(k)** is a subsidy that undermines policy efforts by various government and private sector bodies to undo some of this severe damage that the trucking industry inflicts in society, then, the Productivity draft recommendation absolutely should be removed from the final report.

218. Shipping Australia advises that draft recommendation 6.2 that "Terminal access charges and other fixed fees for delivering or collecting a container from a terminal should be regulated so that they can only be charged to shipping lines and not to transport operators", and all associated commentary ought to be excised from the final report.

219. **Chapter 6 – Market power in other markets - unfair terms law and container detention fees**

220. Draft recommendation 6.3 (remove shipping's exemption from unfair terms law) and information request 6.4 (issues that might arise in relation to international treaties).

221. Ocean shipping has traditionally been exempt from unfair terms legislation for a variety of reasons.

222. **Sophisticated actors**

223. One reason is the sophistication of actors in international trade. Ocean shipping, freight forwarding and multi-modal logistics are sophisticated and complex industries engaged in by sophisticated and complex businesses. Such organisations are thought to be able to look after their own affairs.

224. The unfair terms laws were generally aimed at consumers and small businesses that were dealing with large businesses. This situation is generally not the case in relation to international shipping – the participants are normally large complex business or are businesses with a high degree of sophistication (in relation to international trade and

shipping, or both). Relations between such organisations have historically been on a laissez-faire arrangement.

225. All regulation involves costs and trade-offs, some of which may be unforeseen. Unless there is an overwhelming need for change then these extra costs are best avoided.

226. **International treaties**

227. We note that in the Draft Report that the Productivity Commission appears to have been persuaded to make a recommendation to introduce unfair terms law to shipping following arguments about the fees charged for the ongoing hire of containers and the issues relating to their return.

228. However, draft recommendation 6.3 **is not limited to empty container matters**. As written**, it would also encompass the carriage of goods by sea too** as it states that "Shipping contracts should not be exempt from the unfair terms provisions in Australian Consumer Law. The Australian Government should remove this exemption".

229. Such a recommendation with its reference to "shipping contracts", would, if enacted, likely apply to all ocean shipping contracts, including contracts for the carriage of goods to / from Australia. This could potentially re-ignite decades worth of problems that have been settled.

230. As the Productivity Commission has noted, the explanatory memorandum (along with ACCC documents) notes that expanding unfair terms legislation into the maritime sphere is unnecessary because of the existing network of national and international maritime law.

231. There is a vast network of sophisticated national and international law in this area. Shipping Australia urges the Productivity Commission to take a long-term, international, and holistic view.

232. Ocean shipping involves the industry doing business in about 190 or so nations around the world, each with their own sets of values, cultures and laws. Ocean shipping – and world trade – simply cannot exist if there are 190+ different sets of laws and liability regimes that apply to shipping.

233. This has been recognised for a very long time and there are now numerous international agreements that govern world shipping. This is, in fact, one of the very reasons that the nations of the world created the International Maritime Organization (a specialised UN agency) and also the UN Commission on International Trade Law.

234. Typically, delegates from governments around the world will gather, agree an international treaty so that there is one set of harmonised global rules, and local officials will then transform that treaty into national law. This is the case in Australia even in extremely important areas such environmental and even labour law.

235. Australia implements the International Convention for the Prevention of Pollution from Ships ("MARPOL") via the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and the Navigation Act 2012. Australia also implements the Maritime Labour Convention 2006 (the aka the Seafarer's Bill of Rights) via the Navigation Act 2012 and via the Australian Maritime Safety Authority's Marine Order 11. As will be discussed in more detail below, we implement the Hague-Visby Rules as the Carriage of Goods by Sea Act.

236. These examples demonstrate that there is precedent for Australian participation in international treaty-making with the legal obligations for those treaties being transformed into national law.

237. In relation to the carriage of goods and the liability that attaches thereto, there are numerous sets of global rules and treaties that could apply, such as the Hague Rules, Hague-Visby Rules, Hamburg Rules, the Rotterdam Rules (the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) and the UN Convention on International Multi-Modal Transport.

238. In Australia we have the Carriage of Goods by Sea Act, which implements the international regime to govern maritime cargo liability by adopting the International Convention for the Unification of Certain Rules Relating to bills of lading as amended by the Brussels Protocol of 1968 and the "SDR" Protocol of 1979 ("the Hague-Visby Rules").

239. The Hague-Visby based regime governs the substantive obligations of the principal parties to a contract of carriage by sea under which a bill of lading is issued. It also limits the circumstances in which a carrier may exclude liability under a contract of carriage.

240. Contract terms for the carriage of goods by sea is (usually) governed by the terms and conditions of the bill of lading.

241. For reasons that will become clear below, it is worth noting the objects of the Carriage of Goods by Sea Act are to introduce a regime of marine cargo liability that is up-to-date, equitable and efficient; is compatible with arrangements existing in countries that are major trading partners of Australia; and takes into account developments within the United Nations in relation to marine cargo liability arrangements.

242. Australia arrived at its position after, literally, well over a hundred years of disputes between sea carrier and cargo interests over such matters as cargo liability. There have been a whole series of international diplomatic conferences and the balance of rights and obligations has swung to and fro between shippers and carriers (a summary of the history can be found under "Marine Cargo Liability Rules in Australia – an introduction", Hannah, Findlaw Australia - https://www.findlaw.com.au/articles/895/marine-cargo-liability-rules-in-australia--introdu.aspx).

243. All of these rules govern the framework of liability for the carriage of goods by sea. These are well-known and sophisticated rules that the participants in world trade know (or should know, or should have access to experts who know).

244. In considering the Productivity Commission's comments, it is worth reviewing the words of the politicians in parliament who spoke during the second reading speech of the Carriage of Goods at Sea Act.

245. The Right Hon. Tony Smith MP (Independent), who was legally qualified and who appears to have worked as a seafarer, noted in Parliament on Tuesday 24 June 1997, that the debate around the law had been ongoing for years. He commented: "A cargo liability working group was set up in 1995 to examine the issues involved in this debate and make recommendations to improve the cargo liability regime for Australian shippers. The group included representatives of shippers, carriers, shipowners, marine insurers and marine lawyers—all relevant groups in the industry. In October 1995, the report of the marine cargo liability working group was presented to representatives of concerned industry groups and a package of measures was endorsed.

246. "There is acute difficulty at times in the carriage of goods and people by land, sea or air in terms of legal interpretation and analysis. Whenever anything that remotely resembled a problem that arose in relation to carriage of goods by land or by sea, or where air carriers' liability was concerned, a whole host of rather complex legal situations came into play and limitation periods abounded. A lawyer acting in the matter had to be extremely careful to

ensure not only that his own professional indemnity insurance was up to date, for fear of an error that could be made with the very strict limitation periods and unusual traps for young players that were in those pieces of legislation, but also that the right steps were taken.

247. "In essence, this legislation, in my view, attempts not only to rectify some inequities in the system but also to unravel some of the oddities involved. Shipper's liability and liability at sea have bedevilled jurisprudence for many years. If you care to peruse the Lloyds law reports, you will see numerous cases involving interpretation of liability conventions, rules and common law developments that arose from interpretations of various pieces of legislation.

248. "It was an absolute legal minefield… In essence, it is a solution that has come about effectively by a good deal of negotiation and a great deal of compromise, I suppose, on the part of some people. On the other hand, the relevant groups, particularly the insurers and the lawyers in the industry, have come up with something that hopefully will promote people like my constituents who are looking to secure safe passage for their goods overseas and to have those goods delivered promptly, efficiently and in an undamaged condition and, if they are not, that they will be paid if the loss has come about as a result of what has occurred between when the goods were left on the wharf and when they arrived on the wharf for their point of destination.

249. "In my submission, these measures are good and are the sorts of measures which will promote those seeking to export goods while, at the same time, providing a little more certainty and equity in an industry where there has been a good deal of uncertainty brought about by legal interpretation, prolonged litigation and frequently injustice at the end of the day…".

250. Amendments to the international regime would also put Australia out of step with its main trading partners. This is not desirable. As then opposition politician the Right Hon. Peter Morris MP noted:

251. "This Carriage of Goods by Sea Amendment Bill is a package of conditions that have been agreed to by the cargo liability working group… All things considered, including the interests of all parties, this is about the best deal that they could come to… As we are an integral part of international trading arrangements, it is important that we are in step with our major trading partners… Overall, looking at the background to this legislation and the background to the industry and the international trade movements from Australia, the bill provides the framework for coverage of liabilities incurred in the carriage of goods by sea in the course of our international trade. Hence, it is of great importance to Australia's shipping industry, all of its maritime related services, as well as Australia's international trade which provides the cargoes for carriage".

252. Also of note are the comments by the Right Hon. Mark Vaile (government), who commented: "It is always an education in shipping to listen to the member for Shortland (Mr Peter Morris) on any bill that is relevant to this area of transport policy in Australia… The Carriage of Goods by Sea Amendment Bill gives effect in Australia to an international convention—the amended Hague Rules—relating to carrier liability for loss or damage to marine cargoes. The amending bill is supported by industry. It is supported by shippers, shipowners, the marine insurance sector and maritime law groups… The industry agreed compromise, which is the basis of these amendments, is [that] various amendments should be made to enhance the extent of the protection afforded to Australian shippers of marine cargoes... It is another one of those areas where Australia is involved in international conventions, and we need to take a more flexible and pragmatic approach to this, as we do in a number of other international

public policy areas… the package is endorsed by industry. The Cargo Liability Working Group considered at length the elements of difference on which a compromise is achievable and offered proposals for consideration by the industry].

253. So, to summarise, the existing legislation and policy is based on literally over a century's worth of global policy discussion. The current policy situation in Australia was based on extensive, detailed and prolonged discussion by a working group of industry practitioners and experts and was strongly supported right across the political spectrum – it was supported by independents (one of whom was a lawyer and a mariner), an opposition MP who was also a maritime expert and a government MP.

254. Shipping Australia suggests that it would be unwise to disturb a settled policy area that has been described as a giving rise to a "whole host of rather complex legal situations" and as a legal "minefield". It would involve unsettling an area that has been settled with extensive industry co-operation (including shippers) and broad political support. If it is deemed necessary to look at this area again, then the draft recommendation ought to be changed so that research and study ought to be carried out to investigate the area with great care.

255. Meanwhile, the recommendation as it is written would impinge on Australia's international treaty obligations, its international relations, and its foreign affairs posture. It is perhaps best if there is refrain from recommending amendments that would impinge upon decades worth of international trade diplomacy without careful, considered, and expert industry input.

256. If there is a genuine issue to be resolved in the area of fees charged when – in breach of their voluntarily assumed contracts – shippers and transport operators do not return containers that they have promised to return (and Shipping Australia disputes that there is a problem to be resolved) then that problem is best addressed by a public consultation carried out by the Australian Government.

257. The Commonwealth Government could then put its considered views forward via international diplomacy to the global trading community in appropriate fora, such as the United Nations, where those views can be reviewed and considered and then translated into appropriate legal terms by bodies such as the Comité Maritime International. Such amendments can then be put forward in a separate treaty, or an amendment to a treaty, such as an amendment to the Hamburg Rules, the Rotterdam Rules or the UN Convention of International Multi-modal Transport or some other treaty.

258. Then there is the issue of whether the removal of an exemption would cause the application of unfair terms law to apply to marine insurance contracts. Currently, the unfair terms laws do not apply to insurance contracts because of section 15 of the Insurance Contract Act 1984. However, if a draft recommendation is enacted at some point in the future to remove shipping's exemption from unfair contract terms, would that later legislative action over-ride section 15 of the Insurance Contract Act 1984? Presumably "yes" as a later Act usually over-rides an earlier Act unless it is specifically stated not to do so in a savings clause.

259. If unfair terms law is extended into marine insurance, this could prove problematic. A key issue would be how the global insurance markets would react in relation to Australian shippers being able to strike down parts, or all, of an insurance contract on the grounds of unfair terms. It is possible that the global insurers could reduce or withdraw cargo insurance cover, or charge higher rates, or some combination of all of these.

260. Then there is the issue of General Average (York-Antwerp Rules) and the application of unfair terms laws. The York Antwerp Rules (since amended) were set up about 130 years ago and they are widely incorporated into maritime agreements and contracts of carriage.

261. Ships sometimes meet with grave misfortune. For instance, there could be bad weather or a shipboard fire. The crew may have to take action that results some cargo being sacrificed so that their lives, the ship, and the rest of the cargo is saved. The York-Antwerp Rules draw a balance as to how the loss of cargo is paid for. The cost of the lost cargo is shared between the parties; an average contribution to be paid by each party who benefitted from the sacrifice (the ship owner, the other cargo owners) is determined by an expert average adjuster. But how will this process proceed if some Australian cargo owners (or rather, their insurers) are entitled to claim that some or part of the contract is unfair and to void the contract or part of it? Will this slow down the administration of general average? Will it frustrate it? If there follows massive litigation (which there surely would after a general average incident if some cargo owners potentially have a way to avoid paying), how will the insurance markets view Australian cargo risks? Hikes in premium? A reduction of cover? A withdrawal of cover?

262. All of this appears to be incredibly complex with the potential for a variety of unforeseeable and profound disadvantage to Australia and its economy in the future.

263. We would suggest that extreme care in this area is warranted.

264. Draft recommendation 6.3 as it is written should be removed. No recommendation should be made in relation to Australian national unfair terms legislation.

265. In the alternative, if the Productivity Commission deems that there may be an issue to be resolved (which we dispute) the most sensible course of action would then be for the Productivity Commission to make a draft recommendation for an expert working group to examine whether or not the Australian Government should seek to introduce an amendment to international trade and shipping law at the global forums where such things are discussed.

266. **Container Detention Fees**

267. "Container detention fees" were raised as an issue in the draft report. These are monies charged by container owners to those parties who have leased the container. Shipping Australia much prefers the term "ongoing container hire fees" because that term more accurately reflects what has happened to the container.

268. At some point the container owner (usually, but not always, an ocean container carrier) will allow another party, a shipper, to borrow the carrier's container in return for the payment of money. The term of the loan of a container is decided in a market transaction that is freely entered into by both carrier and shipper (presuming that the container is carrier-owned).

269. The container owner typically charges a daily fee for the use of the container. To obtain the use of an object in return for the payment of money is literally the dictionary definition of the word "hire". If this continues on an ongoing basis then it is an "ongoing container hire". Although, through an accident of history, it is called a "detention charge", it is not in reality a penalty for the retention of the container.

270. In addition, there may be "demurrage" charges. These are daily charges imposed by a container terminal for the use of container equipment inside the port terminal.

271. Shippers benefit from the provision of containers in several ways. Firstly, and somewhat obviously, shippers have access to standard-sized containers in which they can put their goods. The goods are therefore protected from the damage by the container. Secondly, the provision of containers enables goods to be shipped via the global containerised shipping network. That, in turn, enables shippers to access markets that would otherwise be out of reach.

272. Shippers have a further benefit from the provision of carrier owned containers because, as Container X-Change describes it, "using and owning containers is an operational nightmare". Provision of container owned carriers relieves shippers of this burden.

273. Among those burdens are container tracking (knowing where the container is and where it should be next), storage when not in use, inspection, repair and disposal. These burdens require considerable investment in computerised logistics systems, land, warehousing, security systems, depots, and staff time, among other resources, to ensure that containers are in the right place at the right time and can be safely used by customers. There is also a considerable burden as capital has to be provided to create containers and to build and acquire facilities and equipment to repair containers, not to mention ongoing cashflow to actually pay for the repair and maintenance of containers.

274. All of these benefits are provided to shippers in return for freight rates and container hire fees. As we are sure readers of this submission can agree, it is a good deal.

275. However, shipper advocates complain that container owners require the payment of ongoing hire fees for the continuing usage of boxes that belong to container owners. Shipper advocates have therefore been calling for the public authorities to interfere in the transaction between container owners and shippers.

276. Shipper advocates want the public authorities to force container owners to give shippers completely free hire of containers for a given period ("free time"). Container owners already grant several days of free time. However, shippers want container owners to have more free time and for that period to be fixed by law. Shippers also want public authorities to decide when the container owners are allowed to start and stop charging for the use of their container; and to rule in what circumstances the container owner can and cannot charge for the hire of their containers.

277. Firstly, ocean shipping containers are privately owned property and the concerns and interfering with privately owned property is an issue. Therefore, as a starting point, there is a rebuttable presumption that interference by public authorities with the private property rights of container owners in favour of shippers is unjust. There is no justification to overturn this presumption. Shipper advocates are proposing that the rights of container owners should be interfered with so that importers, exporters and transport operators, will gain commercial advantages. These commercial advantages include shippers experiencing less inconvenience, improving their cashflow, increase their profits and reducing the risks of being in business.

278. Seeking to preference a class of actors so that they can have a commercial advantage for their own benefit is not a justification of sufficiently overwhelming importance to override the rights of property owners to deal with their own property.

279. The costs to the container owners, and society, would be harsh. Ongoing hire fees incentivise hirers to return the container to the owner. Prompt return of containers to ocean shipping carriers enables the container to be re-used by being re-stuffed with goods and transported for a fee. Containers are an essential part of the supply chain. Without prompt return containers there can be no seaborne carriage of goods. Containers need to be returned to owners in good time so that the containers can be used for the business of cargo carriage.

280. The Productivity Commission should bear in mind that there are two sets of incentivization here.

281. There is the incentivization of individual hirers of containers to get specific containers back. We note (but disagree) with the Productivity Commission's views that this incentivization may be somewhat blunted when ECP yards are full. We disagree with Productivity

Commission on this point because, even if the system is somewhat full, ongoing hire fees incentivise hirers or holders of containers to keep a watch on their containers and not simply wash their hands of the container and abandon it somewhere. Ongoing hire fees also incentivize hirers or holders of containers to reach out to shipping lines to come to a deal to make sure that the container gets back to the shipping line with the least possible time, cost, and effort. If those ongoing hire fees are not available then there is a strong incentive for hirers to simply abandon containers by the roadside somewhere.

282. Meanwhile, there is also the broader incentivization of the system as a whole to ensure that the container hiring community as a whole is generally incentivized to return containers. This is a view that has found favour with the Productivity Commission in reviews gone by (further details below).

283. Putting restrictions on the ability of container owners to manage their containers, mandating that container owners have to allow commercial shippers to have free use of containers, restricting when container owners can charge a hire fire and reducing the incentive for containers to be returned will likely cause a shortfall in the supply of containers.

284. Containers not only have to be present in sufficient volume to meet demand, but containers must also be present in specific places at specific times and in specific volumes to meet demand. If containers are not present, then shippers may find they may that they do not have sufficient access to containers to transport their goods to market. That will lead to a loss of sales, loss of opportunity, damage to shipper reputations, possible spoilage of perishable goods, and the reduction in the economic value of time-sensitive goods. There could also be a variety of other costs such as ongoing storage costs for goods that cannot be shipped on time because of a lack of containers in the right place at the right time, or the costs of dealing with spoiled or ruined goods.

285. There would also be significant opportunity costs for ocean shipping companies. For instance, as of 28 January 2022, shipping market platform Freightos reported that a forty-foot box on one of the China / US trades was attracting hire of approximately US$15,485. That is potentially quite a lot of lost opportunity in itself. However, there could be many tens of thousands of containers that are in the wrong place and the aggregate opportunity cost would be massive.

286. If restrictions on hire fees are instituted, then container owners will find that a bigger part of their capital will become tied up in container stock than would have been the case if controls were not implemented. That will reduce the cashflow of container owners, which could produce a host of issues and, in extreme cases, could be a cause of enterprise failure. Container owners would also likely have to invest more capital in containers than they otherwise would have done to avoid the supply issues and reputation issues mentioned above. It can be reasonably speculated that container owners would likely raise the cost of hiring a container to cover these extra costs.

287. Restrictions on how container owners can commercially deal with their containers also imposes unwarranted burdens on their business. If “X days” is set as the free time, then a given container owner and a given shipper are stuck with that period of free time. Perhaps the parties would otherwise be willing to use a different period of free time because it is mutually advantageous. But, if free time is controlled, that’s tough. The parties are stuck with it.

288. On the import side, if controls on the terms and conditions of containers are introduced, then Australian importers will likely pay higher freight rates and ancillary charges which they will pass on to Australian end users (both consumers and business end users) of goods. Eventually, everyday Australians will pay in the form of higher goods prices. On the export

side, Australian exporters will likely be faced with higher freight rates and ancillary charges than they would have otherwise had to pay.

289. Restrictions on how container owners can lease containers will make business more difficult for many parties in the supply chain and will increase costs for shippers, for container owners, for ocean shipping companies, for Australian importers, for Australian exporters and, ultimately, it will increase the costs of products that are bought by Australian families.

290. It is grossly unjust to deprive the container owner of the right to decide how the container will be used simply so as to benefit commercially focused third parties have made no investment, and bear no risk, in the creation of the property nor in keeping it accessible and safe to use. That's especially so when those third parties are borrowing a container as part of a wealth-generating enterprise for their own benefit. And it is even more so when those third parties have voluntarily entered into contracts. As the Productivity Commission itself notes, one way in which trucking companies compete with each other is via the claim that they can return containers in time. They do this for their own benefit, they voluntarily choose to do it and they contract to do it. It is hard to see why trucking companies should be given yet another massive benefit by society by being relieved of obligations to pay ongoing hire fees (commonly called detention fees) when they voluntary contract and accept liability to pay those ongoing hire fees.

291. In any event, such controls are unnecessary. Complaints from shippers about container hire fees come and go. They are driven by the state of the market at that point in time. When times are very busy (as now) or during times of disruption (such as during industrial action) that shippers complain most vociferously about ongoing hire fees. In many cases, it is a self-solving problem. The situation that leads to the charging of ongoing hire fees changes and the issue largely goes away. It is not sensible or appropriate to institute a permanent change to tackle a temporary matter.

292. Secondly, shippers have a wide range of tools and tactics available to manage container hire fees. The first, most obvious, and simplest tactic is for shippers and forwarders to return the container on time. There are examples where shippers have not tracked containers and have racked up ongoing hire bills. Returning containers will end any ongoing hire fees. It is clear that some instances of large container hire bills have their root cause in poor management of the logistics process. There are plenty of articles online explaining the root causes of ongoing hire fees and demurrage fees.

293. Shippers and forwarders can plan in advance and arrange freight in advance as much as possible, allowing for buffer time. They can have contingency plans (e.g., alternate truckers; alternate cargo routes). They can make sure that all documentation is correct (no discrepancies in addresses, voyage details, cargo particulars, freight particulars etc); make sure documents are not delayed or lost – better yet, digitise the documentation if possible.

294. Shippers can more carefully monitor shipments – sometimes boxes can be sitting in yards / ports for days before anyone is aware that the boxes are there. Estimated times of arrivals for boxes can be inaccurate but, these days, however, there are digital tracking software programmes such as Transvoyant, Arviem, Project44 / OceanInsights and others. Systems should be able to also track the return of containers. Today, the estimated time of arrival of ships can also be cross-referenced against highly accurate online ship tracking software such as Marine Traffic, Fleetmon, Shipfinder, VesselFinder, VesselTracker, VT Explorer and many more.

295. Shippers, importers and exporters need to know their business. Staff need to be trained on such matters as contracts, the basics of principal-agent law, misrepresentation, indemnity

clauses and the like. Logistics managers need to know, and should know, about possible border holds by border agencies for such things as drugs, biosecurity risks (stink bugs and the like), written documentation of customers being notified of such matters as free time, hire charges, container availability, container collection times, container cleanliness, who was notified to pick up the container and when and a variety of other practical measures.

296. All of the above ought to be simple stuff for commercial actors involved in moving international trade – it is literally their business to know and apply these measures. Incidentally, trucking operators sometimes find themselves potentially on the hook for ongoing hire fees. They too can insist on indemnity clauses in their contracts.

297. Furthermore, shippers can contact carriers in search of the best rates, free time and best ongoing hire policies. It's a free market. Shippers can also ask around and find out how sympathetic ocean shippers are to requests to be absolved of ongoing hire fires.

298. Shippers can also negotiate with carriers in advance of entering into a contract for extended free time and to be absolved of ongoing container hire in given circumstances.

299. If ongoing container hire is incurred because of exceptional circumstances, then shippers can always pick up the phone and talk to their carrier. Ocean shipping companies are in the business of having satisfied customers. Ocean shipping lines have an incentive to listen, to make determinations on a case-by-case basis and to come to reasonable arrangements.

300. Incidentally, no reasonable justification has been given by shippers as to why container owners should automatically foot the bill during unusual situations. These include situations such as when the border authorities hold up a container, or if there are delays caused by industrial disputation. All businesses face risk of loss. It's just part of being in business. If a shipper hires a container on the basis of paying a daily hire fee, then it is reasonable for the container owner to expect the shipper to give the container back when it has contracted to do so or to continue paying hire.

301. If there are issues around the return of the container then that is a matter for the shipper to deal with – it is part of the risk assumed when hiring a container. By way of analogy, a member of the public who hires a hire-car would be expected to return the car on time or to pay continuing hire. If there are random events that prevent the car being returned on time, such as gridlock, then the hire car company would reasonably expect the hirer to pay continuing hire.

302. In some circumstances it is possible to obtain liability insurance that covers ongoing hire fees provided the event is generally unexpected, unintentional and is not voluntarily incurred. Insurance can generally be obtained when container hire fires are incurred due to negligence when goods are wrongfully detained or are delivered to the wrong address. Coverage may also be obtained for container theft, consignee fraud and disappearance of the consignee.

303. Another way of avoiding ongoing container hire fees is to not hire a container. Most ocean shipping containers are "carrier owned" meaning that they are owned and operated by the ocean container-shipping companies. However, some ocean shipping containers are owned by shippers and are known as "shipper owned containers".

304. Shippers can, accordingly, invest their own resources into acquiring ocean shipping containers. Smaller, regular, shippers could band together to operate a pool of containers. Or, indeed, they could take advantage of the pre-existing pools of shipper owned containers that have been set up for this exact purpose.

305. In summary, there is a long-standing practice in which container owners (usually ocean shipping companies) lease containers to shippers for the purposes of containerised goods transport. Shippers benefit greatly from hiring containers. However, some shippers and their representatives are urging public authorities to interfere in this system and to set rules that in are their favour for their commercial benefit. Implementation of such rules would be a gross breach of private property rights and would impose massive costs on other parties and society generally causing freight rates and other charges to escalate and could put containers in short supply.

306. Although shippers may find ongoing demurrage and container hire fees unpalatable, there are a multitude of management options that shippers can use to manage their potential exposure (as listed above). Policies aimed at restricting and controlling what container owners can do with their containers is nothing more than blatant rent-seeking that, ultimately, would be highly detrimental to pretty much everyone.

307. Finally, as the Productivity Commission itself has previously noted, there can be advantages to society as a whole with contracts, hire and fees of this nature.

308. In the Productivity Commission's Inquiry Report (Volume 2) of its Review of Australia's Consumer Policy Framework (N04 45, 30 April 2008), the PC discussed "one-sided contracts". In relation to a discussion about one-sided contracts and unfair terms, the PC wrote:

309. "…'one-sided' contracts can actually be beneficial to consumers as a whole by providing them — through the business — with a way of deterring problematic behaviour by small groups of consumers. In particular, just as some businesses behave in bad faith or otherwise inappropriately, so too do some consumers. For instance, they may not be careful in using their purchases, conceal damage they have done to a rented asset, or seek to extract themselves from contracts that require businesses to commit significant upfront resources…

310. "As a result, what appear to be one-sided contracts may sometimes better protect the bulk of customers from the behaviour of the few, than balanced contracts… In that case, they may not be so one-sided. The bulk of consumers know that their implicit contract will generally be honoured, and indeed, sometimes exceeded, while those whose behaviour threatens the spirit of the contract know that the supplier has a capacity to act against them.

311. "A provision simply barring one-sided contracts may also threaten the continued availability of certain types of consumer products or services — for example, the capacity to return a rental vehicle to a convenient drop off without a vehicle inspection… This is why an important consideration in deciding whether (and how) to act on unfair contracts is whether it is possible to strike out terms that are genuinely used unfairly (and inefficiently), while preserving the long-term benefits for the bulk of consumers that arise from suppliers being able to act against consumers who act in bad faith or otherwise inappropriately".

312. This is certainly the case in the ocean shipping industry as shipping companies experience behaviour where importers inappropriately use containers for storage due to high cost and limited warehouse capacity.

313. The benefits of allowing ongoing hire fees ("detention fees' in industry jargon) to continue outweigh the costs of hindering or preventing ongoing hire fees being issued.

314. Accordingly, there should be no recommendation in relation by the Productivity Commission in relation to container detention fees.

315. **Chapters 08 and 09 - Workforce Issues**

316. Shipping Australia generally agrees that the waterfront industrial relations and workforce environment in Australia is too often disrupted, for too long, too frequently. We generally agree with the draft findings and recommendations made in chapters eight and nine.

317. Reform is needed as per our original submission.

318. In summary these reforms should include extending the length of notice period from three days (see our further comments below); requiring waterfront enterprise bargaining to take place on a staggered schedule while prohibiting protected industrial action from being taken simultaneously at several designated waterfront companies; fixed periods for bargaining centred around the expiry date of the existing enterprise bargain; mandatory arbitration and settlement if disputes are not resolved in a given timeframe; and a prohibition on industrial action that prevents the working of sub-contracted vessels.

319. In relation to the Productivity Commission's comments in its draft report, Shipping Australia supports the rendering unlawful of a variety of terms in enterprise agreements that would impose excessive constraints on productivity in the ports and costs on the supply chain.

320. We support options that allow employers to engage in a variety of protected industrial action in response to employee industrial action. The right of employers to apply to terminate enterprise agreement should not be infringed.

321. The Fair Work legislation should be amended so that the high bar of the word 'significant' is reduced.

322. We strongly support "Draft finding 9.6 - Additional or improved mechanisms are needed to help address excessively lengthy bargaining and its costs in container terminals".

323. We strongly support "Draft recommendation 9.2, Improving bargaining practices in the ports".

324. We note "Draft recommendation 9.3 Add options for protected industrial action by employers to the Fair Work Act," and add that all the Shipping Australia suggestions for improving the regulation of industrial relations on the waterfront (as detailed in our original submission and as detailed above) should be implemented.

325. We note "Information Request 9.10: Is the current level of penalties providing effective deterrence of unlawful or unprotected industrial action in the ports? If not, what level of penalties would achieve this outcome".

326. Given ongoing unlawful and unprotected industrial action continue, it is clear that the current levels of financial penalties are not sufficient and an increase in penalties is warranted.

327. Meanwhile, extensive, high quality and unequivocal, evidence has been provided (in the form of court judgments and tribunal judgments), showing that there is extensive unlawful industrial action taking place on the waterfront in the form of an unannounced productivity cap / go-slow by the workforce and that such industrial action takes place because of organised labour representatives. The PC should make a finding of fact to that effect.

328. We note: “Draft recommendation 9.5 - Make it easier for employers in the ports to extend the notice period for protected industrial action”. We agree with the headline of the draft. Although changing the threshold for industrial action from three days of notice to seven is better than nothing, it is not sufficient.

329. Most of Australia's container trade is trans-shipped via South East Asia (either Singapore, Malaysia (Port Klang) or possibly Laem Chabang (Thailand). These routes typically take around 14 days of sailing time. As containerised cargo enters the system about 3 days before sailing, an 18-day notice period for industrial action would be appropriate - affected shippers and ocean carriers (who are innocent parties in an industrial dispute) could take preventative steps to mitigate potential harm. In this scenario yet ports / terminal operators would still be subject to the harm caused by industrial action and, therefore, the benefit to the workforce of industrial action would be preserved.

330. At the very minimum, the three days of notice should be extended to 14 days. This would enable the vast majority of companies that are not actually part of enterprise bargaining (i.e. the Australian importers and exporters, and the shipping lines) to take preventative action to avoid being caught up in an industrial dispute. Such a timeframe would also give innocent third parties more time to take remedial action (e.g. shippers and carriers would have time to organise onward land transport for cargo that has to be dropped off in the wrong port because the original port of destination is or will be strike-hit and congested).

331. Shipping Australia agrees with “Draft recommendation 9.9; Equip the Fair Work Commission for an extended role in the ports”.

332. We agree with “Draft recommendation 9.10 Independent evaluation of changes to improve workplace relations in the ports”.

333. **Chapter 10 – Skills and Labour Supply**

334. We agree with “Draft finding 10.2 - If they arise, skills shortages for seafarers can be solved through immigration and industry-led solutions such as cadetships…Skills shortages can, and have been, solved through targeted immigration and industry-led initiatives such as cadetships, without the need for a strategic fleet”.

335. **Chapter 11 – Technology and Information**

336. We note: “Draft finding 11.2 - There is no case for a government-run port community system” and also “Draft finding 11.3 - Government should continue to overhaul cargo clearance systems”.

337. Any Simplified Trade System should adopt a “tell us once” philosophy and should have a single window. Duplication of multiple systems (as we currently appear to be developing) should be avoided.

338. On the assumption that "port community system" is a neutral and open computer system that allows supply chain participants to rapidly and securely exchange information after a single submission of data by the data-owner for the purposes of industry-to-industry-connections or industry-to-government connections, regardless of whether it is privately- or government-run, or government-regulated, there should be one single window for the provision of maritime and trade information from industry to government.

339. Ships and other industry participants should be able to enter their data into one system, once. And, after that, they should not have to enter that data anywhere else or respond to data

requests from any other government official or emanation of the state (apart from e.g. emergency responders in an emergency situation).

340. Once that data has been entered into the system, all government agencies, executives, officials, departments and all other emanations and officials of government (whether that is Federal, State, Local or miscellaneous other) should then consult that system for the required data.

341. A fragmented system with different ports and entities running different systems is the worst possible outcome as it creates multiple inefficiencies and can be potentially dangerous (e.g. dangerous goods issues) if information is repeatedly entered incorrectly.

342. Shipping Australia would prefer that there is one system and that the choice of the system and the operation of the system is decided through some open-market mechanism e.g. an open-market government-organised bid.

343. If there is to be digital-focused policy / regulation on cargo systems, we would suggest that the adoption of goal-based approach (e.g. used best available system not entailing excessive cost) rather than a prescriptive approach e.g. (use X system). Technology is changing all the time. The long-used standard Electronic Data Interchange now appears to be giving way to APIs. Shipping Australia urges that any standards etc should align with those set internationally by such bodies such as the Digital Container Shipping Association.

344. **Chapter 12 – Australia's National Shipping Concerns (coastal shipping and national fleet)**

345. Shipping Australia generally agrees with the draft findings and recommendations in Chapter 12.

346. The evidence shows that the current Australia's cabotage system is detrimental to Australia and hasn't met its policy goals.

347. If international vessels calling in Australia were allowed to carry coastal cargo, they would still be subject to Australian laws and inspections by Australian officials (biosecurity, customs, police (if necessary), the Australian Maritime Safety Authority etc) and will continue to have to provide the information that they already provide (such as pre-arrival reports etc). There is no disbenefit to scrapping the cabotage regime and considerable benefits in scrapping it. The existing cabotage regime should be scrapped and international vessels should be allowed to freely carry cargo.

348. We would also add that the proposed so-called "strategic fleet" will likely also be detrimental to Australia's interests (it will consume a variety of resources) and its policy goals could be more efficiently met by other methods (e.g. boosting skills could be done by paying for cadets to serve aboard international ships trading on global voyages).

349. The so-called strategic fleet is unlikely to achieve any of its policy goals. Historically, several expensive Australian government-owned or supported fleets have failed. The policy should not proceed. Further – extensive – details can be found in our submission to the Productivity Commission.

350. A considerably shorter, yet interesting and detailed, dissection of the many failures of Australian coastal shipping policy and national fleets through recent history can be found on our website. The article is "Shipping Australia cautions against government support for protectionist maritime policies", 2022-05-13 by Shipping Australia. See: https://www.shippingaustralia.com.au/shipping-australia-cautions-against-government-support-for-protectionist-maritime-policies/.

351. Shipping Australia urges that all the draft findings and recommendations in chapter 12 simply be distilled as followed:

352. Draft Recommendation 12.1 – there is no valid reason for the existing coastal trading regime to exist; it should be repealed and international vessels allowed to compete for cargo

353. Draft Recommendation 12.2 – there is no valid reason to create a government owned fleet or to provide government incentives for the creation of an Australian fleet. All policy work on such projects should stop and not proceed.

Shipping Australia's submission to the Productivity Commission concludes.

We look forward to meeting with the Commissioners to further discuss the content of our submissions.

Submission authorised by:
Capt Melwyn Noronha
CEO
Shipping Australia

SUBMISSION ENDS