

Customs Brokers and Forwarders Council of Australia Ltd.

COMMENTARY

Proposed Class Exemption for Ocean Liner Shipping



Discussion Paper - 3 December 2019

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1. INTRODUCTION








1.1 Customs Brokers and Forwarders Council of Australia Ltd.

The Customs Brokers and Forwarders Council of Australia Limited. (CBFCA) is Australia's leading peak national body, which represents members interests in international trade logistics and supply chain management service provision. We are committed to be the voice for customs brokers, international freight forwarders and other associated groups concerned with international trade, representing and supporting our members in a difficult regulatory environment.

CBFCA members (international freight forwarders and customs brokerages) control around 65% of Australia's containerised freight as consignees on the ocean bill of lading assisting importers and exporters to facilitate trade.

Since 1904, our success for the last 116 years is built on consistently providing leadership, information, representation and networking opportunities for members nationally.

We meet the professional demands of members and represent members interests in dealings with:

-  Department of Home Affairs, Australian Border Force
-  Department of Agriculture, Water and the Environment
-  Department of Infrastructure, Transport, Cities and Regional Development, Office of Transport Security Working Group.
-  Other Federal and State Government Regulatory Authorities
-  Other key National Industry Associations and service providers in the trade logistics supply chain
-  International Federation of Freight Forwarders Associations (FIATA)
-  International Air Transport Association (IATA)

Further details of the CBFCA, its credentials and its involvement in the movement and clearance of goods into and out of Australia are available at www.cbfa.com.au

1.2 Contact Details

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2. CBFCA COMMENTARY

The CBFCA welcomes the Australian Competition & Consumer Commission (ACCC) release of the Discussion Paper on “*Proposed Class Exemption for Ocean Liner Shipping*” and the opportunity for CBFCA to provide commentary.

The CBFCA has interest in this discussion paper as our members (international freight forwarders and customs brokerages) control around 65% of Australia’s containerised freight as “consignees” on the ocean bill of lading assisting importers and exporters to facilitate trade. Our members who have control of the ocean freight have direct commercial relationships with shipping lines and negotiate ocean freight contacts and services individually with the shipping lines they chose to use.

The CBFCA is of the view shipping lines providing international liner cargo shipping services to and from Australia for too long have had access to a wide suite of exemptions from Australia’s competition law as set out in Part X of the Competition and Consumer Act 2010 (the CCA). No other industry sector in the global and domestic supply chain that manages the movements of shipping containers has access to such exemption.

Australia’s Part X regime is among the most permissive employed by a developed country. The exemptions pre date the Trade Practices Act 1974 and Part X is now outdated and needs a review.

The CBFCA has observed that over time, as the ships have become larger and the industry has consolidated, the justification and cost for maintaining such broad exemptions has been re-examined in many key jurisdictions around the world. The consolidation in the shipping industry provides more market power to the shipping lines servicing the Australian trade lane.

The CBFCA supports the recommendations in the 2015 Competition Policy Review (the Harper Review) which again noted that the protections enjoyed by shipping lines under Part X are unique, and no other industry enjoys legislative exemption from Australia’s competition laws.

The Harper recommendation for Part X of the CCA be repealed, should be considered by ACCC or have a class exemption that sits alongside the existing provisions of Part X until legislators chose to change or remove Part X. The consolidation of the shipping industry gives shipping lines more market power and for this reason the “*price fixing*” and “*regulate capacity*” exemption, which enables shipping lines to create demand by reducing capacity under Part X should be removed, as it is anti-competitive.

The CBFCA has also observed shipping lines are not fully utilising the Part X exemptions on “*price fixing*” due to market competitive pressures, which questions the need for this exemption to be included under Part X. It is more pro-competitive for the market to dictate the price just like it does in other industry sectors without access to such price fixing exemptions. What makes the shipping industry special, as for too long they have been threatening the government by saying Australia was “absolutely dependent” on international commercial shipping for economic prosperity and without the shipping lines trade will stop. Perhaps it is now time to stop playing politics and do what is pro-competitive and of public benefit.

If a block (class) exemption is granted by the ACCC to shipping lines they must meet a minimum standard of pro-competitive features. The following feature will not impact on competition or public benefit and the CBFCA believes should be permitted by the class exemption.

- ❶ Coordinate and/or jointly fix sailing timetables and the determination of port calls in Australia.
- ❷ Exchange, sell, hire, or lease (or sublease) spaces (slots) on vessels.
- ❸ Pool their vessels to operate a network to service the demand requirements for the Australian trade lane.
- ❹ Sharing or exchanging of equipment such as containers.
- ❺ Adjust capacity in response to fluctuations in supply and demand for international liner shipping services, under a regulated environment to prevent shipping lines reducing capacity to create demand and increase freight rates.

A block (class) exemption must exclude the following anti competitive features:

- ❶ Fix or coordinate freight prices.
- ❷ Fix or coordinate surcharges.
- ❸ Restrict capacity (slots) offered.
- ❹ Pool or apportion earnings, losses or traffic.
- ❺ Share commercially sensitive information.
- ❻ Collectively bargain with suppliers (e.g. stevedores).
- ❼ Collective bargain with cargo owners or peak import / export shipper body.
- ❽ Cooperation between larger market participants
- ❾ Restricted access for shipping lines to be eligible for the class exemption.
- ❿ Exclude cap on the combined market share of the coordinating shipping lines

The CBFCA believes collectively bargain with suppliers (e.g. stevedores) is anti-competitive as the shipping industry consultation has already given more market power to shipping lines to negotiate lower rates with stevedores who have now

implemented infrastructure charges collected via the transport industry to recover some of their increase landside cost and reduced revenue from stevedoring fees the shipping lines pay the stevedores.

The CBFCA agrees with the ACCC preliminary view that price and surcharges fixing are anti-competitive and should not be permitted under a class exemption or Part X due to the significant risk of lessening competition and generally do not benefit the public.

Restriction of capacity for the Australian trade lane to create demand in order to increase freight rates should not be permitted. This is a common practice between shipping lines as they reduce capacity to create demand and force the importers, exporters and freight forwarders to pay high freight rates during the peak demand period, which they create. Publishing blank sailing to reduce capacity and create capacity demand is a very common practice used by shipping lines.

The CBFCA believes collective bargain on freight rates and surcharges with cargo owners or with import and export peak shipper body is also anti-competitive and there is a risk of lessening competition.

Collective bargain will favour the bigger players to the detriment of the smaller cargo owners and freight forwarders. The peak shipper body does not represent all the importers and exporters and for this reason collective bargaining should not be permitted in any class exemption to discuss freight rates and surcharges. The peak shipper body should however continue to be able to negotiate the minimum level of shipping services when Part X agreements are registered as per current arrangements.

3. CONCLUSION

The CBFCA believes a class exemption that enables operational coordination between shipping lines (such as scheduling, exchanging spaces/slots on vessels and pooling vessels to operate a network) may improve the service supplied to cargo owners with a low risk of substantially lessening competition.

The CBFCA is of the view that any class exemption should not cover agreements or coordination on price because such agreements carry significant risk of lessening competition and generally do not benefit the public. The New Zealand block exemption model should be considered for Australia as such cooperation improves the service supplied to cargo owners and does not provide for any agreements or coordination on price /surcharges and does not include market share cap.