Shipping

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PROPOSED OVERHAUL OF AUSTRALIAN COMPETITION LAW IN THE SHIPPING LINER TRADE

In 2011, the Australian Government ushered in a raft of changes to the country's competition and consumer laws culminating in the renaming of the *Trade Practices Act 1974 (Cth)* (TPA) as the *Competition and Consumer Act 2010* (CCA) and the enactment of the new Australian Consumer Law (ACL). At the time, Part X of the TPA – which in broad terms exempted shipping lines from most of the anti-competitive provisions of the TPA – was carried over into the CCA and therefore remained intact. That was so despite recommendations made by the Australian Productivity Commission in 2005 and later in 2012 for Part X to be repealed[1]. The current exemption may soon be wound back following publication this week of a Draft Report by the Review Panel constituted under *The Australian Government Competition Policy Review* recommending the repeal of Part X.

The Review Panel was tasked with carrying out *"an independent 'root and branch' review of Australia's competition laws and policy"*.

This included considering whether existing exemptions from competition law and/or historic sector-specific arrangements, such as Part X for the shipping liner trade, were still warranted. Under the current Part X regime, liner shipping operators are permitted to enter into conference agreements amongst themselves regarding freight rates and quantities and kinds of cargoes to be shipped on particular trade routes. Part X permits registration of such agreements which in turn confers exemption from the usual cartel conduct provisions of the CCA. The rationale underlying Part X is that, without cooperation amongst shipping companies, there would be undue volatility in price and service levels, creating periods of excess and under capacity.

The Review Panel noted in the Draft Report that no other industry enjoys legislative exemption from Australia's competition laws. It is also observed that this is despite the fact that other industries have similar economic characteristics to the liner shipping industry, such as the international airline industry. The Review Panel concluded that the exemptions available to

1 Prior to the 2005 review, the Productivity Commission had carried out a review in 1999 which concluded that, on balance, the Part X regime served Australia's national interests at the time. A number of amendments were also recommended to improve its operation.

The repeal of Part X, should this occur, will mean that all existing agreements registered under Part X will no longer be exempt from the competition provisions of the ACL and transitional arrangements will need to be put into place to allow shipping lines in the transitional phase to identify new agreements that qualify for the proposed 'block exemption' and for relevant authorisation to be sought from the ACCC in relation to other agreements.

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shipping lines under Part X were too broad and recommended that Part X be repealed.

In the place of Part X, the Review Panel has recommended that the Australian Consumer and Competition Commission (ACCC) be given power to issue 'block exemptions' for exempt categories of conduct. Under such a power, the ACCC could develop a block exemption for shipping liner agreements that meet a minimum standard of pro-competitive features. For example, conference agreements which coordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts and not involving common conference tariff and pooling of revenues and losses could be eligible for 'block exemptions'. The minimum standard of pro-competitive features to qualify for the block exemption should, it was suggested, be determined by the ACCC in consultation with shippers and the liner shipping industry.

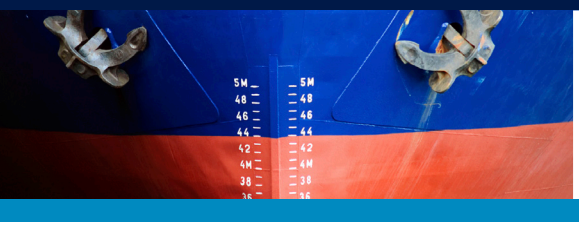
It was also recommended that agreements that do not meet a minimum standard of pro-competitive features should be subject to the usual authorisation process under the CCA, under which individual agreements would be assessed on a net public benefit basis.

The repeal of Part X, should this occur, will mean that all existing agreements registered under Part X will no longer be exempt from the competition provisions of the ACL and transitional arrangements will need to be put into place to allow shipping lines in the transitional phase to identify new agreements that qualify for the proposed 'block exemption' and for relevant authorisation to be sought from the ACCC in relation to other agreements. The Review Panel considered a transitional period of two years should suffice to allow shipping liner operators time to make existing agreements ACL compliant.

The Review also referenced the Government's proposed separate review of the coastal shipping reforms put into place by the previous Labour Government (see our Briefing Australian Government to overhaul coastal cabotage regime, September 2014: http://www.hfw.com/Australian-Government-to-overhaul-coastal-cabotage-regime-September-2014) and observed that current cabotage restrictions raise the cost and administrative complexity of coastal shipping services. Arguably, this lessens competition. The Review Panel therefore recommended that cabotage restrictions be removed unless they can be shown to be in the public interest.

As with the previous reviews of Part X, the next step in the competition policy review is further consultion with stakeholders on the Draft Review through written submissions and public forums. This will be followed by the publication of a Final Report to be provided to the Government by March 2015.

Should the Review Panel's recommendations be accepted and implemented by the Australian Government, shipping liner regulation in Australia may become more aligned with regimes in other jurisdictions such as the EU and US.



The EU block exemption for liner conferences was repealed in 2008, but the EU block exemption for liner consortia agreements for co-operative agreements short of price fixing up to a combined market share of 30% was renewed recently. Under US law, the shipping liner trade enjoyed exemptions to anti-trust laws which were significantly modified in 1998. Currently, limited exemptions apply to certain carrier agreements, however, those agreements cannot prohibit or limit confidential individual service contracts.

In the Asia-Pacific context, South Korea and Taiwan have longstanding competition law exemptions for all types of cooperative carrier agreements. Singapore's block exemption was extended in 2010 until December 2015 following a study that liner shipping agreements have "net economic benefit". Japan decided in 2011 to maintain its carrier agreement exemptions and legislation in New Zealand to remove its exemption has been stalled. India has an exemption for vessel sharing agreements short of price fixing.

Given the implications of the repealing of Part X, the consultation process is likely to generate robust debate. Any changes to the Australian regime are unlikely to come into play before the end of 2015. We will provide updates as the review process continues to develop.

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