



28 February 2019

Senator Glenn Sterle
Chair
Senate Rural and Regional Affairs and Transport References Committee

Sent electronically: rrat.sen@aph.gov.au

Dear Senator

Inquiry on the policy, regulatory, taxation, administrative and funding priorities for Australian shipping

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Senate Rural and Regional Affairs and Transport References Committee Inquiry on the policy, regulatory, taxation, administrative and funding priorities for Australian shipping (the Inquiry).

The ACCC is Australia's national competition and consumer protection enforcement agency. Our role is to enforce compliance with the *Competition and Consumer Act 2010* (CCA) with the view to ensuring that Australia's market economy works for the benefit of all Australians.

We make this submission on the basis of our role in promoting competition in all sectors of Australia's economy. More specifically, we have a legislated function under Part VIIA of the CCA to monitor and annually report on the prices, costs and profits of container stevedores at specific ports. Under Part X of the CCA, we also have a role to investigate, whether self-initiated or through complaints from affected parties, potential adverse effects of exemptions of international liner cargo shipping from some provisions of the CCA.

In summary, we submit the following to the Inquiry:

- As an island nation, Australia's economic prosperity depends on importers and exporters having access to efficient and effective shipping services. Many billions of dollars of consumer goods are transported via ship on their journey to Australian households and workplaces. Imported goods are often key inputs for Australian businesses. In the other direction, Australian products set off on ships every day for export markets in places such as Asia, Europe and North America. As a result, any inefficiency in shipping will flow through to higher costs of goods in Australia and a loss of competitiveness for our goods overseas.
- The ACCC supports changes to coastal shipping laws which would foster increased competition in the coastal shipping market. In particular, we support easing the regulatory burden on foreign-flagged ships in conducting coastal trades.

- The ACCC considers that Part X of the CCA should be repealed. Part X provides an automatic exemption from the cartel provisions in the CCA for certain agreements between international shipping lines. Instead, exemptions for agreements between shipping lines should be subject to the same transparent and public interest exemption process conducted by the ACCC that applies to all other industry sectors through Part VII of the CCA. This is consistent with the recommendations of the 2015 Harper Competition Policy Review which considered that Part X be repealed, and that ACCC exemption be available for liner shipping agreements that meet minimum pro-competitive features.
- The rapid escalation of container stevedores' infrastructure charges to truck and rail companies is a cause for concern and is worthy of consideration by governments.
- In privatising assets such as ports and other critical freight infrastructure, governments should not focus on short term budget objectives and should have appropriate regard to the effects of the asset sale on competition in the long term. Governments should also not attempt to inflate the sale values of assets by removing or not imposing appropriate regulatory oversight or by entering into potentially anti-competitive contracts, arrangements or understandings.
- Implementing proposed reforms whereby road charges for heavy vehicles are determined by an independent regulator instead of governments would improve confidence that heavy vehicles are paying an appropriate price for the use of roads. In turn, it would also provide a more informed basis for the choice of efficient transport mode for moving freight within Australia.

Regulatory restraints to foreign-flagged ships engaging in coastal shipping should be removed

The interstate movement of cargo is a significant logistical challenge for a country as geographically dispersed as Australia. While importers and exporters have a degree of choice between many international shipping lines, the ability of cargo owners to transport their cargo to interstate markets by ship is far more limited due to regulatory constraints.

The Australian coastal shipping regulatory regime under the Coastal Trading Act¹ continues to impede foreign shipping lines from effectively competing with Australian vessels for domestic trade. The higher costs and administrative requirements caused by the tiered licensing system, in particular the additional restriction imposed on foreign-flagged vessels, have deterred the vast majority of international lines from carrying domestic cargo despite the obvious efficiencies for vessels already calling at a number of Australian ports.

Indeed, data published by the Department of Infrastructure and Regional Development shows that between 2004–05 and 2014–15, shipping's share of Australian freight fell from approximately 25 per cent to around 17 per cent.² Since the implementation of the current regulatory regime in 2012, the decline in the number of Australian general licence vessels has continued, and the carrying capacity of these ships decreased by 69 per cent from 2011–12 to 2015–16.

The ACCC submits that easing the regulatory burden on foreign-flagged ships in conducting coastal trades could induce market entry by international shipping lines. This market entry is likely to result in greater competition and lower shipping costs, with flow-on effects of lower prices for manufacturing inputs and consumer goods. This can have significant benefits for

¹ Under the Coastal Trading Act, all vessel operators looking to coastally transport Australian cargo are required to have an appropriate licence. Australian-flagged vessels operate under a General Licence which gives them unrestricted access to the Australian coast. Foreign-flagged vessels operate under Temporary Licences which carries more stringent conditions and restrictions than the General Licence. Vessels can also apply for Emergency Licences in the event of significant national emergencies; such licences are valid for 30 days.

² Department of Infrastructure and Regional Development, *The current coastal trading regime*, <https://infrastructure.gov.au/department/ips/government_responses/response-coastal.trading.aspx>

the wider Australian economy, even if the vessels are international-flagged rather than Australian-flagged shipping.

In the ACCC's experience, industries that are protected from competition are less likely to face appropriate incentives to minimise costs and invest efficiently in a better service, or offer their customers the most attractive terms and conditions of service.

With an expected doubling in Australia's freight transport task over the next twenty years, Australia's road and rail networks will need to be well equipped to handle the future freight task. A more efficient coastal shipping industry will help to relieve pressure on road and rail networks, lowering transport costs and consequently prices across the economy.

Any action to make coastal shipping services more competitive, such that domestic cargo owners have access to a more efficient coastal shipping service (e.g. lower cost / higher frequency), should increase the extent to which shipping is substitutable for road and rail and assist governments and industry to address the growing transport challenge. Lower transport costs can ultimately flow to consumers in the form of lower prices with the benefits spread more broadly throughout the domestic economy.

For these reasons, the ACCC considers that competition in coastal shipping services should be promoted wherever possible, and regulatory restraints on foreign-flagged ships should be removed.

International shipping lines should not receive automatic immunity from cartel provisions

Part X of the CCA provides certain exemptions from competition law to registered shipping lines cooperating with each other in transporting cargo to, or from, Australia. The ACCC considers that Part X of the CCA should be repealed and exemptions from competition law for liner shipping agreements only be made available following a transparent and public interest assessment process conducted by the ACCC under Part VII of the CCA, and which applies to all other industry sectors.

The 2015 Competition ('Harper') Policy Review concluded that there was insufficient evidence to support continued special treatment of the liner shipping industry and recommended that Part X of the CCA be repealed. This recommendation follows a similar earlier recommendation by the Productivity Commission in 2005.³

Part X was included in the CCA to address a concern that Australia, being geographically remote from many of its trading partners, was not an attractive region for international shipping lines to service. It was considered that international shipping lines would be more likely to service Australian markets if they were given exemption from the anti-competitive conduct prohibitions to enable discussions about scheduling and other matters (e.g. on capacity and price).

The Harper Review recognised that some coordination by shipping lines may be pro-competitive and that there was, therefore, a case for these elements to be allowed an exemption from competition law. The Harper Review recommended that the ACCC be given the power to grant a 'block' or 'class' exemption, which would provide a mechanism to exempt such pro-competitive elements. In 2017, amendments to the CCA provided the ACCC with the ability to issue class exemptions for specified conduct that may otherwise carry a risk of breaching competition laws, but is not harmful to competition, and/or is likely to result in overall public benefits. The ACCC already had, and continues to have, other mechanisms to grant exemption from competition law to particular conduct where it is in the

³ Productivity Commission, Parliament of Australia, Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping: A Productivity Commission Inquiry Report 32 (2005) XXXI ('Productivity Commission Report 2005').

public interest to do so. However, these mechanisms, known as authorisations and notifications, require parties to make an application. In contrast, once a class exemption is in place eligible businesses would not need to lodge individual applications with the ACCC but would enjoy automatic exemption for the specified conduct.

The ACCC considers that Part X of the CCA is out-dated and unnecessary. Globally, the industry has become more concentrated as a result of mergers and global alliances and many countries have progressively removed, in whole or part, exemptions similar to Part X, particularly for price fixing agreements. However, there are still a number of jurisdictions that provide a complete exemption for shipping conferences, including Australia.

Maintaining a sectoral exemption from competition law results in a lack of transparency. Consulting on and developing a class exemption for liner shipping would provide the opportunity for the ACCC to assess the public benefits and detriments from the cooperative agreements between shipping lines. This process would also provide further evidence to policy makers and give them greater comfort in making a decision about whether to repeal Part X.

The ACCC has held informal preliminary discussions with some industry stakeholders to inform the scope of a possible class exemption for shipping. We intend to commence more in-depth discussions with industry and other stakeholders shortly.

Rising stevedore 'infrastructure charges' are a concern and should be examined in greater detail by governments

Container stevedores lift containerised cargo on and off ships at ports. As an island nation, most of Australia's imported goods, and a significant number of our exports, are containerised, transported on container shipping vessels and eventually handled by container stevedores at the ports. Therefore, improving the productivity and efficiency of the stevedores is crucial in ensuring the competitiveness of Australia's supply chains.

The container stevedoring industry has changed significantly since the government directed the ACCC to commence monitoring 20 years ago under Part VIIA of the CCA.⁴ Changes to the industry over this time have largely been positive. Productivity has increased significantly and new technologies and increased economies of scale have allowed for reductions in stevedores' unit costs. At the east coast ports, entry by new stevedoring companies has also significantly increased the competitive tension between stevedores which has led to lower prices to shipping lines.

However, challenges remain for the industry. In particular, strong criticism has been levelled at stevedores for introducing and/or rapidly escalating 'infrastructure charges' to trucks and trains (or 'land transport operators') receiving or delivering full containers at the ports.⁵ While in 2013 only stevedores in Brisbane applied an infrastructure charge, since 1 July 2018, all stevedores in Adelaide, Brisbane, Fremantle, Sydney and Melbourne have applied an infrastructure charge.

The significant increases in the infrastructure charges have been led by stevedore DP World, with other stevedores generally being quick to follow. The increase in charges has

⁴ On 20 January 1999, the Federal Treasurer directed the ACCC under s.27A of the *Prices Surveillance Act 1983* (PSA) to monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. The PSA has since been repealed and the price surveillance provisions are now contained under Part VIIA of the CCA. The direction under the former s.27A of the PSA is now deemed a direction under s.95ZE of the CCA.

⁵ An examination of the stevedores' infrastructure charges is available in the ACCC's Container Stevedoring Monitoring Report 2017-18 < <https://www.accc.gov.au/publications/container-stevedoring-monitoring-report/container-stevedoring-monitoring-report-2017-18> >

been most notable in Melbourne, where DP World's charge has increased from \$3.45 per container in April 2017 to \$85.30 from 1 January 2019.

The stevedores have put forward a number of reasons to justify the charges. Most significant of these is the impact of falling prices to shipping lines as a result of both increasing competition between stevedores and increased bargaining power of shipping lines resulting from consolidation. Stevedores have also pointed to significant increases in operating costs such as rents charged by some recently privatised ports, and increases in council rates and land taxes. The stevedores have also justified the charges on the need to invest in infrastructure such as that required to handle the increasing sizes of ships visiting Australian ports.

While it is not unreasonable for stevedores to recover costs from land transport operators, the likely impact of the charges on overall supply chain costs for cargo owners, who may be paying the infrastructure charges through their land transport costs, is worthy of consideration by governments.

In the supply chain, shipping lines choose the stevedore that will service the ship. Land transport operators do not have a choice and must go to the stevedore to which they are directed. Land transport operators therefore cannot choose a stevedore that has a lower infrastructure charge. Cargo owners have a choice of which shipping line and land transport operator to use, but not the stevedore. Cargo owners may also be limited in being able to move their business away from stevedores with high infrastructure charges to the extent that these charges are passed on by their land transport operators.

The use of infrastructure charges means that stevedores can earn a growing proportion of their revenues in a market which their market power is stronger relative to the more competitive market in which they provide services to shipping lines. Given this, there is an incentive for stevedores to increase the charges. Without constraint, they may be able to set the charges at levels greater than necessary to recover costs and earn an adequate rate of return. The outcome may be that land transport operators bear the additional cost if they cannot pass them on, or where they do, that importers and exporters will pay higher charges than otherwise. It may be only the shipping lines that benefit from the increased competition between stevedores at the east coast ports.

Various industry participants and governments have expressed concerns about the rise in infrastructure charges. However, the ACCC does not have the power to determine stevedores' charges. There is currently no evidence to suggest that the charges are in breach of the CCA.

While there may be some justification for the use of infrastructure charges, the nature of the container freight supply chain is such that this pricing strategy may ultimately reduce competitive pressure on overall stevedoring charges and lead to increases in costs to the supply chain.

The economic regulation of stevedores and ports rests with state governments. While the ACCC is concerned with the potential impact of the infrastructure charges, the scope of our container stevedoring monitoring role does not provide a basis for conclusive findings on whether they should be regulated. This reflects the limited scope of the ACCC's monitoring role and the information gained through it. We are also aware that the stevedores' profitability to date has continued to fall despite the increases to the infrastructure charges.

The ACCC will continue to monitor developments in the infrastructure charges in future monitoring reports. However, the recent significant increases in charges may require a more detailed examination by state governments and if warranted, a regulatory response. Such a review by state governments would be assisted by further information than that obtained by

the ACCC under the container stevedoring monitoring regime, such as whether cargo owners are benefitting from the reduction in stevedoring charges to shipping lines through lower terminal handling charges.

Appropriate regulation of privatised monopoly assets is necessary

Governments have privatised much of Australia's critical freight infrastructure in the past decade. This has included the sale of the Port of Brisbane in 2010, Port Botany and Kembla in 2013, Port of Newcastle in 2014, and the Port of Melbourne in 2016. However, the privatisation of monopoly infrastructure in the absence of appropriate regulation has led to sub-optimal outcomes for consumers and the economy. For example, soon after privatisation, the new operators of the Port of Newcastle significantly increased access charges to users of the port.⁶

The ACCC considers that, if implemented appropriately, the privatisation of state assets can realise economic benefits for the users of the asset and the general community. Private owners may develop operating efficiencies and adopt innovative ways of delivering services to customers. However, these efficiencies will only be realised where there is strong potential for competition. In the absence of competition due to monopoly or near monopoly characteristics, there needs to be an appropriate structure and/or sufficient regulatory oversight to ensure that competition in related markets is not hindered by the transaction. The privatisation process should therefore be focussed on achieving competitive and efficient outcomes to protect the long-term interests of users and consumers.

The ACCC considers that governments should appropriately deal with these issues early and upfront in the privatisation process. This provides greater certainty for bidders than ex-post arrangements and is essential for promoting efficient investment incentives. By understanding how assets will be structured and regulated upfront, potential acquirers of assets can factor these arrangements into their purchase price and bid accordingly. Users of the asset would also benefit from being able to forecast, and account for, how prices are likely to move in the future.

Reliance on general competition law is not an acceptable alternative to regulation where there are inherent monopoly characteristics. Tailored regulatory frameworks are required to address industry-specific access and pricing issues upfront. In the ACCC's experience, three particular problems can arise when competition and regulatory issues are not adequately considered and addressed as part of the privatisation process:

- worsening or entrenching a market structure that is not sufficiently competitive, or impeding the development of a competitive market structure
- selling a monopoly or near monopoly asset to a bidder with existing or potential upstream or downstream interests in related markets, without ensuring that appropriate third party access arrangements will exist, and
- selling monopoly or near monopoly assets without sufficient controls on pricing, to ensure that excess public monopoly returns are not merely transformed into private monopoly excess returns.

While the ACCC cautions against imposing unnecessary restrictions on firms' abilities to participate in markets, the ACCC recommends governments implement a sound regime at the beginning of a privatisation process and consider the need for vertical separation where the sale of an asset is likely to confer enduring market power. The ACCC also submits that governments should not bundle infrastructure assets that have the potential to provide competitive restraint on one another as part of a single transaction.

⁶ In January 2015, Port of Newcastle Operations increased the charge for coal ships entering the port by around 40 per cent to \$0.69 per gross tonne.

The ACCC has publicly advocated for the need to have competitive market structures and appropriate regulatory frameworks prior to the privatisation of bottleneck infrastructure with monopoly characteristics. For example, the ACCC has advocated for this approach in relation to the privatisations of Port of Melbourne and Utah Point Bulk Handling Facility.

Where privatisation processes involve potentially anti-competitive contracts, arrangements or understandings, the ACCC will investigate and may take court action. Indeed, on 10 December 2018, the ACCC instituted proceedings against companies in the NSW Ports group for entering into contracts (called the Port Commitment Deeds) with the State of New South Wales (the State) as part of the 2013 privatisation of Port Botany and Port Kembla.

The Botany and Kembla Port Commitment Deeds oblige the State to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a minimal specified cap. The ACCC alleges that the Botany and Kembla Port Commitment Deeds contain provisions that had the purpose, or were likely to have the effect of, substantially lessening competition in the market for the supply of port services for container cargo in New South Wales.

In 2014, when the State privatised the Port of Newcastle, it entered into a further Port Commitment Deed with the successful bidder that requires the operator of the Port of Newcastle to reimburse the State for any payments made to the operators of Port Botany and Port Kembla. The ACCC alleges that the Newcastle Port Commitment Deed is an anti-competitive consequence of the Botany and Kembla Port Commitment Deeds, and that it makes the development of a container terminal at the Port of Newcastle uneconomic.

The ACCC has had concerns about the Port Commitment Deeds since the time the ports were privatised, but at that stage there was no clear plan for the development of a container terminal at the Port of Newcastle. With the Port of Newcastle now looking to proceed with developing a container terminal, in 2018 the ACCC investigated whether the arrangements may breach the Competition and Consumer Act and commenced proceedings.

The ACCC's proceedings against companies in the NSW Ports group are being heard in the Federal Court.

Reforming the way roads are funded and priced

The terms of reference for the inquiry refers to the interaction of shipping with other modes of freight transport. Whereas rail networks are generally provided in a commercial environment, roads continue to be provided through government department processes. This has implications for the efficiency by which they are provided, priced and used. It also undermines confidence in the way that prices for heavy vehicles to use the road network are determined.

It has now been over ten years since the Productivity Commission called for reforms to the way that roads are funded, following its review of road and rail freight infrastructure pricing.⁷ During this time, the academic and policy arguments for reform have only strengthened with various publicly and privately-funded reports and inquiries advocating for change, most notably the 2015 final report of the Competition Policy Review.

Such reforms represent an enormous opportunity for Australia. At a high level, they would:

- result in funds being allocated to road projects of greatest benefit to users, rather than those that reflect political goals
- provide a more sustainable revenue base for funding roads, without the need to draw down from consolidated taxation revenue, and

⁷ Productivity Commission, *Road and rail freight infrastructure pricing*, Inquiry report, December 2006.

- provide incentives for road users to use the road network in an efficient manner.

The ACCC is encouraged by the work undertaken by state and federal governments to progress heavy vehicle road reform under direction from the Transport and Infrastructure Council.⁸ This work has identified that the next steps will need to see the introduction of a regulator to set heavy vehicle charges at arm's length from government. Setting prices on an independent basis would improve confidence that heavy vehicles are paying an appropriate price for the use of roads. In turn, it would also provide a more informed basis for the choice of efficient transport mode for moving freight within Australia.

Yours sincerely

Rod Sims
Chair

⁸ See <https://infrastructure.gov.au/roads/heavy/> for further information.