SUBMISSION BY SHIPPING AUSTRALIA LIMITED

TO THE COMPETITION POLICY REVIEW

PART A

ADDRESSES THE QUESTION UNDER PARA 5.33 DO THE STATUTORY EXEMPTIONS INCLUDING LINER SHIPPING, OPERATE EFFECTIVELY, AND DO THEY WORK TO FURTHER THE OBJECTIVES OF THE COMPETITION AND CONSUMER ACT?

PART B

ADDRESSES VARIOUS QUESTIONS RAISED IN THE ISSUES PAPER FOR THIS REVIEW. OTHER THAN THE QUESTION RELATING TO PART X OF THE CCA (PARAGRAPH 5.33 REFERS)

June 2014

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Key Messages

- Part X contains only the minimum exemptions from the anti-trust provisions of the Competition and Consumer Act (CCA) to support the codification of the Government's policy on international liner shipping policy outlined in Part X. This policy is to ensure that Australian container exporters and importers have access to adequate, economic and efficient shipping services at competitive rates of freight, in a regulatory regime that is compatible with those of our major trading partners.
- A low level of red tape is involved in its application and parties to registered Agreements meet their obligations under the watchful eye of the best regulator of all - the users of the services provided as represented by the Australian Peak Shippers Association and the Importers Association of Australia. Safeguards exist to ensure appropriate Government oversight is maintained should there be any perceived failure in the operation of Part X. While the ACCC has an investigative role, there have been no investigations since 2004. Nevertheless, the Chairman of the ACCC has been outspoken in criticising the existence of Part X without any analysis of its benefits and its pursuit of the national interest. It is hoped the Panel will not be persuaded by this bias in opinion with no foundation other than an ideological one.
- To meet the objectives of this review and especially the principles outlined in the Issues Paper requires an assessment of why no other industry sector has a substantial part of the CCA devoted to its specific regulation? In sum, the reasons are the special characteristics of international liner shipping which includes chronic overcapacity outstripping demand with potential detrimental effects on exporters and importers if required service levels and freight rate stability cannot be maintained. Under Part X, 18 of the top liners operators in the world service the Australian trades at extra-ordinarily low freight rate levels despite the low volumes and long distances involved. No alternative regime can offer this outcome combined with a system of low cost regulation, certainty to support the massive capital investments required and guaranteed Minimum Service Levels negotiated with peak shipper associations.
- For almost 50 years, successive Australian Governments have supported Part X and adopted recommendations to improve its operation. One of the reasons has been strong exporter support for its retention. The Issues Paper misleadingly fails to mention under paragraph 5.33 that the Australian Government in order to achieve competitive reform of Australia's liner cargo shipping regulatory regime, did not accept the previous Productivity Commission's recommendation to repeal but did accept its recommendations for improvements to Part X.
- Virtually all countries in the world that have competition laws accept consortia arrangements between shipping Lines, which involves the sharing of space on each other's vessels so that more frequent and a wider range of port calls can be offered to the trade at much lower cost than would otherwise be possible. New Zealand is totally out of touch in the introduction of a Bill to remove such an exemption but this may be one of the reasons the Bill has stalled in the NZ Parliament.

- Whilst retaining block exemption for consortia, the EU in 2008 did remove the block exemption for liner conferences and expected other countries to follow suit. This did not eventuate and subsequently both Japan and the USA in separate investigations have cast serious doubt whether the envisaged benefits have materialised. Importantly, unlike Part X, in Europe there were no compulsory negotiations with shipper groups, if requested, no Minimum Service Levels to be negotiated for each Agreement, no 30 days' notice to shipper bodies before changes in negotiable shipping arrangements could come into effect and no role for DGIV in investigating shipper complaints. Very different circumstances to what prevails under Part X which, because of these requirements, leads to an international competitive advantage for Australian exporters and importers.
- Alternatives to Part X, such as authorisation under Part VII of the CCA, would introduce a much greater degree of uncertainty and risk, be significantly more costly and involve a much more lengthy bureaucratic process. Notification would also be an uncertain process and introduce an unacceptable degree of risk that could have a chilling effect on significant capital investment and service levels in the future. Notification or authorisation could not cover the exemptions presently provided in Part X which are so important to its effectiveness.
- Through an administrative oversight, there appears to be an unintended effect when consequential amendments were made to Part X as a result of the new cartel provisions introduced into the Act in 2009 which has recently been bought to the attention of Shipping Australia. The oversight has created the new requirement to maintain the necessary exemptions that agreements to limit capacity on the berth to provide a more economical service during low demand have to be separately registered. Part X requires a small amendment to rectify this oversight (refer Chapter 5).
- To answer the question posed in the issues paper (para 5.33) for this review, the statutory exemptions (along with the regulatory regime for international liner shipping) contained in Part X do operate effectively and further Australia's national interest objectives as outlined in the CCA.

SHIPPING AUSTRALIA LTD SUBMISSION TO THE COMPETITION POLICY REVIEW
PART A

ADDRESSES THE QUESTION UNDER PARA 5.33 DO THE STATUTORY EXEMPTIONS INCLUDING LINER SHIPPING, OPERATE EFFECTIVELY, AND DO THEY WORK TO FURTHER THE OBJECTIVES OF THE COMPETITION AND CONSUMER ACT?

OVERVIEW

The object of the Competition and Consumer Act (CCA) is "to enhance the welfare of Australians through the promotion of competition, fair trading and consumer protection." The extensive Part in the CCA, entitled Part X, which contains limited exemptions from the application of parts of Sections 44, 45 and 47, meets this object of the CCA. Importantly, it also ensures that Australian exporters, and as far as practicable, importers have continued access to liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive and to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories.

"It is the intention of the Parliament that these principal objects in Part X should be achieved:

- By permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power, particularly by: permitting only partial and conditional exemption from restrictive trade practice prohibitions, enacting additional trade practice provisions applying to ocean carriers, requiring conference agreements to meet certain minimum standards and be generally publicly available and requiring conferences to take part in negotiations with representative shipper bodies;
- Through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters; and
- By the exercise of jurisdiction, consistent with international law, over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services and to enable remedies for contravention of the provisions of this Part to be enforced within Australia."

Part X sets up a comprehensive system for regulating international liner shipping. No alternative would meet this intention of the Australian Parliament which has been in force for almost fifty years with a proven track record of facilitating Australia's international liner cargo trade.

One of the objectives of this review is to make recommendations to achieve competitive and productive markets having regard to principles that include no participant being able to engage in anti-competitive conduct within the market and its broader value chain; government should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised and remove, where possible, the regulatory burden on business when assessing the costs and benefits of competition regulation. The panel should also consider overseas experience insofar as it may be useful for the review.

The following comment in paragraph 1.10 of the Issues Paper is also important: "concentrated markets are not a concern if market participants are operating in a way that delivers durable and competitive outcomes; that is, trying to win business by offering consumers better products at more attractive prices than rivals."

Consistent with the intent and purpose of the CCA, the Panel should therefore support Part X because an evaluation of the observable facts shows:

- **The international liner shipping market to and from Australia is a highly competitive and productive one (chapter 2 – table 4 refers);**
- **There is a high level of contestability in the market not only from direct new entrants but also competitors offering possibly cheaper transhipment services and individual shipping Lines competing fiercely for market share;**
- **Participants under Part X are confined to the blue water parts of the service with a very restricted ability to extend the exemption onto land and its broader value chain;**
- **Part X ensures the market functions effectively without Government intervention unless complaints are specifically brought to the attention of the ACCC and no inquiries have been held since 2004;**
- **Any alternative regulatory regime to Part X would involve a greater regulatory burden on businesses at a time when the government is trying to reduce red tape, and;**
- **Many of Australia's major trading partners (including China, Japan, Republic of Korea, and the USA)[1] all have an exemption for international liner shipping agreements (both consortia and Discussion Agreements) from their competition laws because of its special characteristics similar to many other countries. Moreover, to date, no country has removed the block exemption for operational consortia.**

The issues paper notes the Bill currently before the New Zealand Parliament that proposes to remove the exemption overall. However, that Bill was introduced in late 2011, and still remains unpassed and its future is unknown. It should also be emphasised that New Zealand has never had a regulatory regime like Part X and the Bill, among other things, is totally out of step with the global standard of exemptions for consortia. Part X is a far broader regulatory regime than exemptions alone and as such a comparative approach to that considered in New Zealand fails to take account of the overall operation and benefits of Part X. The Issues Paper on page 35 refers to the joint recommendation of the Productivity Commissions of Australia and New Zealand that the Liner Shipping exemptions be removed , preferably on a co-ordinated basis, but in a Statement issued 9th May, 2014 both Governments agreed to defer this decision pending finalisation of processes in both Australia and New Zealand.

In 2008, the European Union withdrew the block exemption for liner conferences (i.e., rate setting Agreements) but kept a block exemption for shipping consortia. It was expected and advocated by the European Commission that other countries would follow suit but more recent Investigations by Japan and the USA, for example, have cast serious doubt on the envisaged benefits of the withdrawal of the conference exemption.

Four of the last five reviews of Part X have recommended that Part X be retained but with amendments to improve its operation. The last Productivity Commission review in 2005 recommended repeal but the Government did not accept this recommendation on the basis that it would not be in the country's national interests to do so. The Government did accept many of the recommendations to improve the operation and effectiveness of Part X which was recommended by the PC if its primary recommendation was not accepted.

Any regulatory regime for international liner shipping needs to accommodate the specific characteristics of an industry that:

[1] ABS Trade data, DFAT STARS data base and ABS catalogue 5368 (September 2013).

- Is highly capital intensive with large indivisible assets and need for continual reinvestment in hardware – ocean vessels and containers;
- Is highly contestable which, when combined with service and rate competition between shipping Lines frequently results in chronic and sustained overcapacity of shipping space ;
- Is focussed through innovative measures to continue to offer regular (mostly weekly) and a comprehensive range of services to container exporters and importers at very competitive freight rates; even in the low volume and long line haul trades such as Australia which is reliant upon the certainty of operation provided by Part X;
- Covers peak and off-peak demands as well as off-peak and seasonal fluctuations in demand and empty container positioning including specialised refrigerated containers;
- Use of highly technically advanced systems both at sea and ashore;
- Operates internationally with many different customs, quarantine and maritime security regulations and cost structures;

Included in the list of international shipping lines that serve the Australian trades are 18 of the top 20 Lines in the world which accounts for 78% of the global container trade.[2] All of these 18 Lines are parties to Agreements registered under Part X. Whilst Australia represents approximately 3% of the world container trade, it is vitally important to our economy in terms of Australia's agriculture and manufactured exports and the imports of consumer goods and inputs to the production of Australia's exports.

The modern form of a Conference is the Voluntary Discussion Agreement. Voluntary discussion agreements are commercial agreements in which the members review market research on trade flows and business trends, represent carrier interests in consultations with government regulatory bodies and with designated shipper organizations, discuss ways that carriers can improve service and efficiency, and discuss general rate levels, supply and demand trends, ancillary charges and similar topics, all with the purpose of promoting quality liner services. Importantly, unlike Conferences, there is no public tariff and parties can agree by consensus to a general rate variation, for example or the charging of a specific surcharge such as a bunker adjustment factor, although freight rates for specific shipper accounts are not agreed collectively but are levied by an individual Line under a confidential service contract. Discussion agreements develop and recommend voluntary, non-binding guidelines for rates and charges, in order to encourage stable and predictable rate levels and achieve remunerative and sustainable revenues to fund future investment in vessels and equipment. Of note, there is no compulsion on members to agree to any decision made under a Discussion Agreement and experience has shown that there are substantial rate variations among Agreement parties. Ultimately, actual rates, charges, and other transportation terms are set by the Discussion Agreement members individually in the course of negotiations with their customers and are set forth in the respective contracts between the VDA members and their customers. A higher level of competition prevails under Discussion Agreements compared to the old Conference Agreement.

The other major form of Agreement is the operational consortia which do not address any price setting issues. Most major carriers rely upon consortia to provide service today in virtually all significant trades. Exporters and importers require the economies of scale and frequency/scope of services that such registered Agreements and their Minimum Levels of Service can deliver. Through consortia, carriers cooperate to meet importers' and exporters' demands for regular weekly fixed day sailings with fuel efficient environmentally friendly vessels from a large number of ports. These

[2] Alphaliner – Top 100 operated fleets as at 2 May, 2014. There are a total of 4,974 fully cellular container ships worldwide with a total capacity of 17,615,847 TEU's (20 ft. Equivalent Units). However, globally around 230 million TEU's are handled annually.

services are delivered at much lower cost than would be possible if such forms of co-operation were restricted or prohibited. These agreements are thus cost-saving and efficiency-enhancing, and therefore are generally considered to have net economic benefits. They allow carriers to avoid redundant vessel calls, avoid excess and unused space, and exchange vessel space. This form of cooperation in turn allows carriers to offer additional service options and vessel calls while reducing amounts needed to invest in additional vessels. In this way, these agreements moderate the structural overcapacity resulting from the need to adapt capacity to cover peak season demand. Authorisation or notification under part VII of the CCA would put such arrangements at risk because of the certainty required to substantiate the very high investments required and the legal risk that could have a chilling effect on beneficial changes to existing consortia or new consortia being formed. The high costs compared to the Part X regulatory regime required to achieve authorisation, the bureaucratic processes involved and uncertain result will dramatically increase the level of regulation and Government involvement at a time when the Government is trying to reduce the burden of red tape on businesses.

Part X provides significant benefits to the users of the services provided by the international Liner carriers serving the Australian trades and therefore passes the public benefit test. This comprehensive Code regulates the behaviour of the carriers party to Agreements in favour of container exporters and importers; underlining the important roles played by such peak bodies as the Australian Peak Shippers Association and the Importers Association of Australia. This system of regulation advances the national interest by:

- Requiring parties to registered Agreements to give 30 days' notice to the peak shipper bodies of changes to negotiable shipping arrangements and to negotiate when requested to do so;
- Negotiating with peak shipper bodies guaranteed Minimum Levels of Service to be provided under the Agreement before any such Agreement can be finally registered;
- 30 days' notice being given after final registration before the exemptions come into effect to ensure all users are aware of the impending new Agreement and have the opportunity to complain to the ACCC.

In addition;

- Chapter 2 of this submission shows the fluctuation in rates on a number of trade lanes and how ultra-competitive they are even by international standards;
- There being low barriers to entry into the Australian trades;
- Part X is a low cost, certain and timely regulatory regime with low levels of red tape involved. The counter-factual would involve the opposite;
- Jurisdictional disputes and possible conflicts of law are avoided given the wide acceptance of this statutory exemption world-wide.

CHAPTER 1 – INTRODUCTION

1.1 Shipping Australia Ltd, amongst other roles, provides secretariat services to the shipping Lines party to nearly all of the Agreements registered under Part X. At Appendix one is a list of all the shipping Lines involved.

1.2 It is the view of those shipping Lines and the focus of this submission that Part X has shown its flexibility and resilience in meeting many of the challenges faced by the industry and the users of their services since its introduction in its modern form in 1966. It is worth noting that the Industries Preservation Act of 1916 included provisions exempting agreements between shipowners and shippers. Part X has produced not only highly competitive outcomes in terms of freight and service levels for Australia , but it has also provided a transparent process in terms of the behaviour of parties to these Agreements that would not have been available under alternative regulatory regimes.

1.3 There is a clear and detailed public benefit test contained in Part X if one examines the objectives and detailed obligations on parties to the publically registered Agreements, with the registration process itself providing for 30 days' notice after final registration before the exemptions come into effect to ensure all affected parties can review the provisions of new Agreements to ensure that they meet the public interest objectives specified in Part X. The ACCC has an investigative role if serious complaints are brought to their notice and can make recommendations to the relevant Minister, if necessary, to rectify the problem. This legislation has been a relatively inexpensive but effective form of light-handed regulation.

1.4 The fundamental issue is that international liner shipping has a set of characteristics that require a specialised regulatory regime that, in turn, provides some limited exemption for price setting. The reasons why this issue is so important are set out in this submission.

1.5 The question must remain what regulatory procedures are required to achieve the objectives set by Government for its international liner shipping policy and its protection of exporter and importer interests? Part X achieves certainty in its application by being essentially an automatic authorisation process on the basis that ACCC investigation of any prohibited behaviour does not result in a withdrawal of that exemption. This has supported the massive investment in the Australian liner trades to-date.

1.6 It is a basic tenet of this submission that the current operations of international liner shipping in the Australian trades as regulated by the current Part X meet the principles and objectives of this review.

- It is a contestable market (aside from entirely new services, entry can be on the basis of buying slots on vessels operated by other carriers);
- There are economic benefits in shipping Lines co-operating together due to the economies of scale and scope and sharing of financial risk and volatility;
- The range of different services provided by these co-operative arrangements meet the demands of the marketplace and therefore provide value added services to Australian container exporters and importers;
- Parties to the registered Agreements must give the Australian Peak Shippers' Association (APSA) and the Importers Association of Australia at least 30 days' notice of any change in the terms and conditions of service unless the shipper body agrees to a lessor period of notice;

- Besides there being direct competition for services provided under these Agreements, there are the substitutes of relay services, especially where these meet the requirements of particular exporters;
- Due primarily to chronic overcapacity, freight rates are very low, especially in the Australian export trades and are generally lower than land based charges in this industry.
- Ocean carriers, not consortia or Discussion Agreements, negotiate independent and confidential service contracts with exporters and importers.

1.7 The industry is characterised by;

- High fixed costs;
- "Lumpy" supply (ie capacity must be added or withdrawn in large units such as one or more whole vessels);
- "long-life" capital assets , irrespective of ownership;
- Low marginal costs and relatively inelastic demand for services (reductions in freight rates rarely increases demand);
- Relative inelastic supply (eg need to meet peak demand);
- Positioning of container stocks (eg empty containers) can mean the difference between a profit and a loss because of significant trade imbalances;
- Provision of high cost refrigerated containers and other specialised equipment;
- Significant costly imbalances of container flows by volume, as well as type.
- Dealing with market distorting Government subsidies of one sort or another.

1.8 As the World Shipping Council stated in its paper on international liner shipping regulation in March 2001; "the benefits to caucus –better market information and marginal improvements in revenue results – are more than matched by benefits to the shipping public. Today's existing practical and well-accepted regulatory system avoids the negative consequences of conflicting maritime regulations and chronic price and service instability, and encourages private investment in greater capacity and new technologies needed to meet future market demand."

1.9 Under the Part X regime, the international liner shipping industry serving the Australian trades has been at the forefront of technological adaptation both on-board the vessels employed and on the land-side. Many vessels serving these trades have the latest technology on-board with electronic charts, GPS navigation, bow thrusters and in some cases stern thrusters which can reduce the number of tugs required in ports, and Automatic Identification Systems and so on. On land , shipping agents have adopted on-line booking systems , other electronic documentation services, sailing schedules updated regularly on websites, container tracking systems, electronic bills of lading, electronic Pre-Receival Advice (PRA), and systems tailored to meet individual shipper requirements , to name a few.

1.10 As the Chairman of the Taskforce reviewing Part X in 1989, John Rowland pointed out "*Liner Shipping is an industry which perhaps more than any other is intrinsically multinational in its economic structure and in its operations. Any nation which seeks to regulate its liner shipping must have regard not only to the industry, but also to the policy framework, legislation and regulations operating in those countries with which it trades and those which share in the provision of its liner services."*

1.11 Professor Mary Brooks[3] has stated "that because there has not been convergence in the policies applied to international liner shipping or the application of regulatory regimes, there is a desperate need to find common ground for increased international harmonisation as national policies are no longer appropriate in this global industry."

1.12 In the next Chapter we examine the current data on container volumes, capacities and low freight rates in certain Australian trades in recent times. The financial difficulties facing the international liner shipping operators in the Australian trades are clearly identified. Chapter 3 briefly summarizes the main findings of the five reviews that have been undertaken of Part X since 1966 and the Government's reaction to the recommendations contained in their reports. Chapter 4 addresses the issue of international comity and the need for compatibility between the regulatory regimes governing the operation of international liner shipping. Chapter 5 asks the very relevant question whether there is any practical alternative regime to Part X that would more effectively meet our public interest objectives and further the objectives of the CCA?

[3] Professor Mary Brooks, "Sea Change in Liner Shipping-Regulation and Managerial Decision Making in a global Industry", Centre for International Business Studies, Dalhousie University, Halifax, Nova Scotia, Canada, Pergamon press, 2000

CHAPTER 2 – CURRENT TRENDS IN CONTAINER VOLUMES, SHIP CAPACITIES AND FREIGHT RATES IN THE AUSTRALIAN LINER TRADES.

2.1 The current over-capacity problems and cost pressures faced by the international shipping industry are certainly prevalent in the Australian trades. As the President of the Baltic and International Maritime Council (BIMCO) , John Denholm[4] stated at the end of 2013 in forecasting possible developments in 2014 " it is estimated that the across the bulk carrier, container and tanker fleets there is over 20% more tonnage than required. The oversupply is aggravated by very high bunker (fuel) prices; on the one hand this is forcing slow steaming that is absorbing some of the over-supply; on the other hand it is driving the desire for more energy efficient ships. As a result, a worrying amount of ordering is taking place, adding tonnage to an already excessive world fleet." The international container carriers are at the forefront of this trend.

2.2 In 2013, new orders totalled 1.69 Million TEU (compared with 0.4 million in 2012) with 52% of the new capacity being Ultra Large Container Ships (10,000 TEU and above), 35% being in the range of 8000-9999 TEU, leaving only 13 % for vessels below 8000 TEU and able to use the Panama canal.[5] In 2013 Maersk took delivery of its first 18,000 TEU vessel (triple EEE class) as Part of a 20 vessel order. Many of the large shipping companies are ordering ULCV's for use in the major (high volume) East-West trades with the displaced smaller container vessels cascading down into the lower volume North-South Trades. The largest container vessel at present in use in the Australian trade is just under 6000 TEU but this can be expected to increase in the relatively near future, if the Part X regime is maintained, to a range of 6000 to 8000 TEU even if the higher end of this range could not be fully utilized because of draught and/or physical constraints in our current container ports. Lower slot costs and more fuel efficient vessels will assist in maintaining low cost and stable services and meet the capacity requirements of Australian exporters.

Table 1 – Container volumes in five Australian capital city ports in 2012/13[6]

000' TEU's (twenty foot equivalent units)

	Brisbane	Sydney	Melbourne	Adelaide	Fremantle	Total
Full imports	479.8	1,064.0	1,134.6	127.0	329.9	3,135.3
Full exports	335.4	442.9	864.1	141.5	174.5	1,958.4
Empties	254.7	619.5	514.2	70.5	165.8	1,624.7
Total	1,069.9	2,126.4	2,512.9	339.0	670.2	6,718.4

[4] Forward to the BIMCO reflections Document-2014, BIMCO 161 Bagsvaerdvej 2880 Bagsvaerd, Denmark. www.bimco.org

[5] BIMCO Bulletin , VOL 108, Number 6 , December 2013 page 70

[6] Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2014, Waterline 53, statistical report, pages 14 to 19. BITRE Canberra, ACT

Table 2 – Percentages of containers exchanged in five Australian capital city ports 2012/13

	Percentage
Full imports	46.7%
Full exports	29.2%
Empties	24.1%

2.3 As the Bureau of Infrastructure, Transport and Regional Economics Pointed out in its last edition of "Waterline ", over the period January 1993 to June 2013, the GDP (of Australia) grew by about 75 per cent while container throughput grew by 250 per cent. This would appear to be roughly in line with the rapid growth of container volumes worldwide over the last 20 years.

Table 3 – Capacity of various Discussion Agreements compared to total of associated trade volume[7] during 2013

	Total Trade Volume	Capacity	
	(TEU/1000's)	Total (TEU/1000's)	AS % OF TRADE VOLUME (TEU)
AADA (from North East Asia)	1204	1454	121%
TFA (to North East Asia)	587	757	129%
TFG (to South East Asia)	318	334	105%
AFDA (to Fiji)	7	7	100%
ANZUSDA (to East & West Coast USA)	89	98	110%

Table 4 – Freight Rate Indices

(i) Shanghai Container Freight Index[8]

	Shanghai to Melbourne Per TEU
July '12	100
Jan '13	103
July '13	66
Jan '14	104
May '14	66

[7] Total trade volumes based on main east coast Australia container port statistics. Capacity based on factors used to derive minimum levels of service. Discussion Agreements represent varying portions of the overall capacity available, e.g. non members capacity is excluded.

[8] Shanghai Container Freight Index relates to freight rate including Bunker Adjustment factor and Peak Season Surcharge when applicable.

(ii) Average Gross Revenue Index[9]

	Melbourne to Shanghai		Brisbane to Yokohama	
	Dry		Reefer	
	20FT/US$	40FT/US$	20FT/US$	40FT/US$
July '12	100	100	100	100
Jan '13	86	96	98	95
July '13	81	92	100	99
Jan '14	70	77	93	95
May '14	71	75	94	94

(iii) Average Gross Revenue Index

	To East Coast USA			
	Dry		Reefer	
	TEU	FEU	TEU	FEU
July '12	100	100	100	100
Jan '13	98	94	99	95
April '13	92	100	102	98
July '13	86	89	100	105
Jan '14	94	92	103	99
Apr '14	94	77	102	101
	To West Coast USA			
	Dry		Reefer	
July '12	100	100	100	100
Jan '13	94	84	97	100
April '13	99	88	99	101
July '13	107	85	97	98
Jan '14	102	71	102	96
Apr '14	102	85	100	103

Table 5 – Maximum trucking costs in Sydney

Top of the market trucking costs from Liverpool to Port Botany (approx. 35 klm) normally paid by the exporter		
	20 ft ctr rate	40 ft ctr rate
30.0 to 39.0 klm	$480.00	$530.00
VBS booking fee (1 stop)	$30.00	$30.00
ECP booking fee (Container Chain)	$20.00	$20.00
Motorway tolls (M5)	$20.00	$20.00
Fuel surcharge (currently)	around 13%	around 13%
Total	$612.40	$668.90

[9] Average gross revenue figures represent the sum of local ancillary charges, Origin Terminal Handling Charges, ocean freight rate, bunker surcharge and Destination Terminal Handling Charges submitted confidentially by various service providers.

Table 6 – Typical freight rates $A (converted at $A1=$0.93 US) including surcharge in the export trade to North/East Asia[10]

Commodity	Type of container	Rate
Cotton	40 ft	$800
Wool	40 ft	$780
Metals	20 ft	$460
Grain	20 ft	$710
Waste paper	40 ft	$160

2.4 The rates for waste paper and metals are below costs but there are technical and global marketing reasons why Lines carry these cargoes. If we assume market trucking rates to be say $521 for a 20 ft container and $569 for a 40 ft container for the journey from Liverpool, Sydney to Shanghai then more realistic comparisons can be made.

Table 7 - On a per kilometre basis

	20ft	40ft
Trucking costs per kilometre	$14.90	$16.25
Total ocean freight rate of say $800/40ft per kilometre		$0.10
Total ocean freight rate of say $700/20ft per kilometre	$0.09	

2.5 If we assume a typical freight rate for a forty foot container in the outward trade from Sydney to China was $780 and the trucking costs Liverpool to Port Botany was $569, then from Liverpool in Sydney to Shanghai in the PRC, 42% would be trucking costs and 58% the total freight rate from terminal gate Port Botany to terminal gate at Shanghai.

[10] - These rates were quotes from one shipping line. Rates subject to confidential service contracts may vary from these rates but they are regarded as being typical for those commodities in this trade.

CHAPTER 3 –SUMMARY OF THE FIVE REVIEWS OF PART X SINCE 1966

3.1 The first review in 1977 was by the Department of Transport with assistance from a Canadian academic and amongst the conclusions were the following:

- "The Conference system is generally supported by shippers and Governments;
- An advantage of a closed Conference system is that it provides an opportunity for Lines to rationalise services so as to provide a desired level of service at a minimum of cost;
- Because of major disadvantages with the Australian Government attempting to regulate rate and service matters, it is appropriate that primarily, reliance should continue to be placed on commercial negotiations to resolve matters between shippers and shipowners;
- The conduct of negotiations (under Part X) on the basis of efficiency of Conference practices and the competitive forces to which they must respond is consistent with economic principles, with the policy of Government to rely on commercial forces , and with the new views of the Australian Shippers' Council (now APSA)."

3.2 Although a Bill to amend the old Part X was introduced into Parliament in May, 1980, it was not proceeded with as both shippers and shipowners felt the principles underlying the provisions of Part X at that time were suitable as a framework for commercial shipping practices.

3.3 In 1986, an Industry based Task Force chaired by a senior official of the Department of Transport reviewed Australia's Overseas Liner Shipping Legislation and its wide ranging recommendations included:

- *"A Shipping Act separate from the Trade Practices Act;*
- *A Shipping Industry Tribunal should be established;*
- *Shipowner Agreements should be publicly available and should be subject to a "public Interest "test along the lines of the exceptional circumstances test now contained in Part X;*
- *Shipowners should be prohibited, amongst other things, from unreasonably discriminating between shippers, unilaterally imposing 100% loyalty contracts on shippers and engaging in predatory pricing practices;*
- *That there should be one Designated Shipper Body."*

3.4 Following extensive consultations with industry, the Government amended the Act picking up a number of recommendations but not those relating to a separate Act or a Special Tribunal. In particular:

- The exemption from the restrictive business practice provisions of the TPA for both inward and outward trades was limited to the blue water parts of the shipping service unless door-to-door rates were fixed then terminal-to-terminal rates could be fixed. Conference members were nevertheless subject to the prohibition of abuse of market power and prohibition on third-line forcing provisions of the TPA;
- Conference Agreements in the outwards trades were required to have minimum conditions including net shipper benefits be public unless granted confidentiality in specified circumstances, go through a transparent registration process involving provisional and final registration with 30 days' notice thereafter for new Agreements, before the necessary exemptions could be granted;.

- Conference/Consortia Agreements were to include Minimum Service Levels following negotiation with the Designated Peak Shipper Body between provisional and final registration. There was also provision for Secondary Designated Shipper Bodies;
- The then Trade Practices Commission had a new role in investigating complaints and unfair competition could be regulated in certain circumstances following a Trade Practices Tribunal Hearing and there was a substantial increase in the power of the Minister to regulate Conferences.

3.5 The 1993 review of Part X was led by a previous Secretary of the Attorney-General's Department, Mr. Patrick Brazil, AO, and other Panel members were Professor Ted Colson and Captain John Evans, AM. The Major recommendations included:

- The continuation of the regulatory regime embodied in Part X;
- The extension of Australia's regulatory influence to our inwards liner trades;
- Enabling closer scrutiny of Accord and Discussion Agreements in appropriate cases;
- Establishment of a Liner Cargo Shipping Authority to carry out the various investigation functions then entrusted to the TPC under Part X.

3.6 Whilst these recommendations were generally accepted by the then Labor Government with the exception of an independent investigator, with the election of the coalition Government in 1996 Part X was not amended but another review was undertaken in 1999. Interestingly, the Brazil report examined in detail the issue of Authorisation under Part VI of the TPA and these observations are included in Chapter 5. In relation to the jurisdictional issue, the Brazil Committee found that "…the more usual anti-trust approach of outlawing collusive and other anti-competitive practices in the interests of competition, arises from a view that the Conference system in particular is probably beyond the scope of any one nation to prohibit effectively. Combinations of shipping companies are a long-standing and widespread phenomenon in the liner cargo shipping industry. Any attempt by one jurisdiction to outlaw combinations could see their arrangements shift overseas so as to be beyond the effective reach of that jurisdiction."

3.7 The 1999 review was undertaken by the Presiding Commissioner of the Productivity Commission, Dr. Neil Byron and Assistant Commissioner, Dr. Robin Stewardson. Key messages were:

- Because transport costs and service levels directly affect their competitiveness, Australian exporters and importers have a direct interest in obtaining the best-possible deal from foreign carriers. Thus pursuit of their self-interest in relation to liner shipping also serves the national interest;
- The tension between the benefits and potential costs of Conference arrangements has led to special treatment of Conferences worldwide. Part X is an industry-specific, legislated industry code which exempts conferences from some general provisions of the TPA, provided they meet certain obligations to Australian exporters and they do not misuse any market power. Exporters are also allowed to form collective buying groups to enhance their negotiating power, backed up by regulatory intervention as they see fit;
- The current regulatory approach has met the national interest because Part X allows the efficiencies of Conference arrangements while letting competition from non-conference Lines and the countervailing power of Australian exporters constrain their potential market power. Repeal of Part X in favour of a potentially more interventionist approach under the general (authorisation) provisions of the Act is unlikely to deliver greater net national benefits. Scope for successful intervention appears limited and, moreover, the general

provisions are likely to involve greater administrative and compliance costs compared to Part X;
- The ultimate test for any regulation or legislation is whether it promotes the national interest and does so more efficiently than alternatives. Part X passes the test.

3.8 The Government accepted the majority of these recommendations but also increased regulatory intervention as far as inwards shipping was concerned. In other amendments:

- Conference exemptions were further restricted to apply only to or from an Australian container terminal or inland container terminals declared by the then Minister for Transport and Regional Services (but not shippers' premises);
- Potential new members of Conference Agreements could not be unreasonably excluded from joining;
- Additional powers were given to the Minister and ACCC to deal with exceptional circumstances that may have detrimental effects on Australian exporters or importers (eg unreasonably increasing transportation costs and/or unreasonably reducing transportation services).

3.9 As pointed out in the Issues Paper for this review, the 2005 review of Part X by the Productivity Commission recommended that Part X be repealed but fails to mention that the Government did not accept that recommendation. Amongst the key findings were:

- The immunities provided under the United States and the European Union have recently been narrowed in scope as part of a move to more pro-competition arrangements;
- The wide variety of Agreements registered under Part X have varying potential to provide a net public benefit for Australia, depending on the nature of the Agreement and their impact on competition in the trade routes on which they operate. Consortia Agreements can, in principle, offer significant cost savings and pose little competitive risk but those which fix prices and control the supply of shipping on a trade route pose the greatest anticompetitive risks;
- The Commission considered that the most effective way to introduce selective approval of carrier Agreements would be to repeal Part X and rely on authorisation under Part VII of the TPA;
- If Part X is not repealed , current arrangements could be improved by selectively registering only Agreements that do not contain provisions to discuss or set prices and/or limit capacity offered on a trade route, and by revoking registration for those that do or by revoking registration of Discussion Agreements together with providing for the protection of confidential individual service contracts between carriers and shippers;
- If no selectivity were introduced, some improvements could be made to Part X, by providing for the protection of individual service contracts.

3.10 The majority of submissions for that review did not support repeal of Part X. Shipping Australia would disagree with lumping the US changes to its regulatory regime with that of the EU which was seeking to repeal the exemption for rate fixing. Such an exemption remains firmly part of the US law to this day. References to price fixing and control of capacity by some Agreements were in our view misleading and were not substantiated by any evidence in the report. For the reasons set out in this submission, parties to such Agreements clearly do not have such power. Perhaps for these reasons the Government did not accept repeal of Part X. In a joint media statement between the Treasurer and the Minister for Transport and Regional Services dated 4 August, 2006 it was announced that the Government had decided to retain Part X but to amend it to promote further competitive reform of the international liner

cargo shipping sector in Australia. In summary the amendments proposed were to clarify its objectives, remove Discussion Agreements from its scope, protect individual service contracts between carriers and shippers and introduce a range of penalties for breaches of its procedural provisions.

3.11 Parties to the Agreements registered under Part X agreed with these recommendations but could not understand why the Government wanted to remove the exemption for Discussion Agreements which were the modern form of Conference with substantial benefits for Australian exporters. There were no public tariffs, collective decisions were taken by consensus and adherence to any agreement was purely voluntary. Service contracts between individual carriers and individual shippers are not revealed or collectively considered under Discussion Agreements.

3.12 These proposed amendments were not proceeded with given the election of the Labor Government in 2007. A further review of Part X was to be undertaken in 2011 but the Government had other priorities at that time.

CHAPTER 4 - REGULATION OF INTERNATIONAL LINER SHIPPING BY AUSTRALIA'S MAJOR TRADING PARTNERS

4.1 " Virtually all of the major trading nations in the world –many of which have recently studied this issue- have recognized the importance and unique nature of co-operative carrier Agreements in promoting essential liner services and preserving competitive choices for exporters and importers. These countries have recognized that the economic and public interest benefits of these Agreements strongly outweigh any potential for anticompetitive harm, and therefore have decided that these Agreements should receive exemptions from their respective competition laws. Within the last 15 years, **the United States, Canada, Singapore, Japan and China** have each retained competition law immunity for co-operative carrier Agreements after extensive reviews of the economic effects and benefits of these Agreements."[11]

4.2 "Other countries in the Pacific Rim, such as **South Korea** and **Taiwan**, also have long standing competition law exemptions for all types of co-operative carrier Agreements. **India** has also just recently adopted a competition law exemption for VSAs. **Hong Kong**, which adopted a competition law to become effective likely sometime in 2015, has already issued public statements that it will strongly consider exempting the shipping industry after its new law comes into effect. Other countries in Asia such as **Indonesia** and **Vietnam** are members of the UNCTAD Liner Code, which is an international treaty that recognizes and authorizes carrier Agreements. Based on the foregoing, it is clear that acceptance of these important co-operative Agreements among ocean carriers are the norm."[12]

4.3 "Regulations authorizing carrier Agreements to operate in the **People's Republic of China** have existed since 2002. In March of 2007, the PRC Ministry of Transportation released a "Notice on strengthening supervision on Liner Conferences and Freight Discussion Agreements ". The Notice reinforced the permissibility of carrier Agreements operating in China and was intended to "facilitate the healthy development of China's market for international container liner transportation, ensure fair competition in international shipping markets, and protect the lawful rights and interests of carriers and shippers." To meet these goals, the Notice established an Agreement filing procedure and a consultation mechanism between carriers and shippers for all ratemaking Agreements. These Regulations were in effect when the PRC's anti-monopoly law went into effect in 2008 and these Regulations authorizing carrier Agreements have been maintained since that time."[13]

4.4 "In December, 2010 **Singapore** extended its broad block exemption for liner shipping Agreements until end December, 2015 following detailed studies by the Competition Commission of Singapore which concluded that liner shipping Agreements have a "net economic benefit" and that the presence of these co-operative Agreements "provides a higher degree of connectivity and service choice for Singapore's importers and exporters."[14]

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[11] Cozen O'Connor, US Attorneys at law. Submission by Mr. Marc Fink (mfink@cozen.com) dated 29 January, 2014 to the Chairman of the International Container Lines Committee regarding the New Zealand "Commerce (Cartels and Other Matters) Amendment Bill – Proposed Removal of Shipping Act Exemption. "

[12] Cozen O'Connor 29 January, 2014 Submission page 2

[13] Ibid pages 2 and 3

[14] Ibid page 3

4.5 "After a thorough review of the issue by the Japanese Ministry of Land, Infrastructure, Transport and Tourism (MLIT) in 2011, it was decided that the current carrier Agreement exemption in **Japan** should be maintained. The MLIT noted that competition law exemptions for all types of carrier Agreements continues to be the international standard. The potential consequences on ocean carriers, shippers and the Japanese economy as a whole that could result if the immunity was withdrawn were also recognized. Such negative impacts according to the MLIT included prolonged freight rate volatility, newer and higher surcharges and a potential number of service problems, including service reductions and a lack of available vessel capacity to meet the growing needs of importers and exporters."[15]

4.6 A Bill to remove the exemption was introduced into the **New Zealand** Parliament entitled the Commerce (Cartels and Other Matters) Amendment Bill in 2011 but appears to have stalled in the NZ Parliament following the final report of the Commerce Committee being handed down on 13 May, 2013. There have been submissions critical of the proposed removal of the exemption and the future of the Bill is uncertain. NZ's proposal to remove a block exemption for consortia in particular puts it completely out of step with the global community. It must be said that New Zealand has never had a Part X type regime and perhaps the introduction of such a regulatory regime would provide substantial benefits for NZ exporters and importers as well as providing much needed harmonisation of the regulatory regimes for international liner shipping between Australia and New Zealand and promote Closer Economic Relations between the two countries.

4.7 The **European Union** repealed its block exemption for liner conferences in 2008, but the EU still has a competition law exemption for vessel sharing and consortia Agreements through to 2015 when there will be another periodic review of the exemption. It is important to recognize that Part X makes no distinction between different types of Agreements whether they be VSA's, consortia, Discussion Agreements or Conference Agreements. The EU repeal has not produced the benefits expected by the EU. "As identified by recent government reports in the United States and Japan, numerous structural problems exist in the European trade including prolonged rate volatility, newer and higher surcharges and a number of service issues , including overall service reductions and a lack of available service capacity to meet the basic needs of importers and exporters. These types of structural problems as experienced in the EU have not been experienced in other trade lanes like the Transpacific or Intra-Asia, where competition law exemptions for carrier agreements still exist.[16]" In February 2014, the European Commission published a notice and request for comments on its proposal to extend the consortia exemption, without changes, for five years beyond the current expiration date. The new expiration date will be April 25, 2020. In making its extension proposal, the Commission noted that: "On the basis of the Commission's experience in applying the block exemption, it appears that the justifications for a block exemption for consortia are still valid and that the conditions on the basis of which the scope and content of Regulation (EC) No 906/2009 were determined have not substantially changed."

4.8 Previously, the EU Commission appointed a team of expert maritime economists associated with the Erasmus University in Rotterdam led by Professor H.E.Haralambidies and the team also included the well - known shipping economist Dr. Sjostrom, to, inter alia, review

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[15] Ibid page 3

[16] Ibid page 3

submissions and analyse the economic issues related to Conference activities and ocean freight rates. The group concluded that liner shipping Conferences:

- Are not price setting cartels;
- Play a complex role against a background of difficult competitive conditions inherent in liner shipping;
- Function as a platform to discuss prices and related cost levels;
- Have virtually no ability to collectively raise rates, may even foster more competitive pricing in the market as a whole, and reduce freight rate volatility.

They recommended that the appropriate way forward was to ensure a regulatory policy for liner shipping that maintained a limited anti-trust exemption while at the same time ensuring that conditions were in place to safeguard the longevity, sustainability and success of liner shipping alliances. [17]

4.9 Professor James Crawford was requested by Shipping Australia Ltd to comment on the terms of reference issued in 2004 by the Productivity Commission in its review of Part X including the question of avoiding conflicts of jurisdiction. Professor Crawford has in the past been professor of international trade law at the universities of Adelaide and Sydney and is currently Whewell Professor of International Law at the University of Cambridge. In October, 2012 the Australian Government nominated Professor Crawford for election as a judge of the International Court of Justice. Amongst his findings regarding the PC review, was the following which is relevant to this review; "DG IV of the EU Commission proposed the deletion of Article 9 of Regulation 4956/86, which allowed provisions to be negotiated to avoid conflicts of laws between countries in relation to shared trades. It does so on the ground that conflicts of laws between different countries will not arise because antitrust exemption is not a requirement of the laws in those countries but rather a favourable exception…….This is to take a narrow and formalistic view of what amounts to a conflict of laws or regulations. If Asia, Australasia and north America maintain their existing positions –for example on discussion of forward rates- there would be a practical conflict: EU law would prohibit in its inward trades what the law of the exporting State specifically permits and envisages in its export trade. To say in such a case that carriers may obey both laws by avoiding Conferences and Discussion Agreements is simply to assert that EU law is to trump."

[17] "Contract for Services for the assistance in processing public submissions" to be received in response to the consultation paper on the review of Council Regulation 4056/86, final report prepared by economists from the Erasmus Universiteit, Rotterdam, November 12 , 2003

CHAPTER 5 – POSSIBLE ALTERNATIVES TO PART X THAT WOULD MORE EFFECTIVELY MEET AUSTRALIA'S NATIONAL INTERESTS AND FURTHER THE OBJECTIVES OF THE CCA?

5.1 The Issues Paper for this review notes" that if the exemption (for international liner shipping as contained in Part X) were removed, these liner shipping arrangements would be subject to the general competition laws in Part IV of the CCA. As is the case for other sectors currently, authorisation from the ACCC would remain available if the benefits of such arrangements were found to outweigh their costs."

5.2 It is the view of all the parties to the Agreements registered under Part X that authorisation would be a far more costly, uncertain and be an administratively more burdensome regulatory regime when compared to Part X. It costs $570 in registration fees under Part X and another $1500 or so in administrative costs depending on complexity. Final registration for both new and varied Agreements normally takes around 8 to 10 weeks including the 30 days' notice after final registration is granted. Under Part VII, the fee to initiate an application varies but for an authorisation is in the range of $7,500 upwards depending on the provisions applicable to the application. However, the application fee alone is not indicative of the real and substantial costs the authorisation process would involve. Discussion, joint service and consortia agreements, if they were brought under the authorisation provisions, would potentially require authorisation in respect of different aspects of the agreements subject to different provisions of the CCA. That is, the Agreements would have to be authorised in respect of all forms of conduct, which would involve an extensive and administratively difficult task for each Agreement. Each involved party would require professional assistance (lawyers, economists etc.), firstly to conduct an assessment of whether the proposed conduct under the agreement requires authorisation, if so, which provisions of the CCA could apply and accordingly the appropriate forms and process (authorisation or notification). This assessment stage would be necessary for each and any existing and new agreement. Combined with the preparation of the authorisation application itself and further involvement of professional advisors in this aspect could easily result in the total cost to each party being into six figures per agreement. Even more worrying is the uncertainty of outcome (which is explored below) and the fact that authorisation could be subsequently withdrawn if there is a material change in circumstances which would not necessarily be an unusual event in the rapidly changing world of international liner shipping. Each authorisation would be determined in an undefined period up to 6 months or longer if an interim decision is made by the ACCC. The question must be asked, what happens to meeting shipper requirements in the meantime?

5.3 A number of previous reviews of Part X considered this issue in depth. The 1993 Review Panel led by a previous Secretary of the Attorney-General's Department noted that the Part VII authorisation would be hostile to price fixing, which was per se illegal under the then Section s45A of Part IV of the TPA. The comments made in the 1993 report on National Competition Policy in relation to price fixing confirmed this. One of the conclusions in the Brazil Committee review was "While a Part-X type outcome for regulation of liner shipping could, in principle, be replicated under Part VII, (especially if block authorisation were allowed) or under a special notification procedure, there can be no certainty that these alternatives would, in practice, meet the criteria as well as Part X does. Nor could they be introduced at negligible transitional cost."

5.4 The 1999 review considered alternative approaches asking whether the same matters covered by Part X could be covered in an authorisation, in particular whether the ACCC was likely to authorise core elements of Conference Agreements, particularly the price fixing provisions. The PC questioned whether it would increase regulatory uncertainty arising from the ability of the ACCC to revoke authorisations, uncertainty about the process, the criteria the ACCC would apply and the conditions that would trigger reviews. The compatibility of authorisation with overseas liner shipping regulatory regimes and the relatively high administrative and compliance costs were of concern.

5.5 In summary, the Commission concluded at that time that these concerns were valid and noted that other countries have granted exemptions from their competition laws for liner shipping Conferences without the need for case-by-case justifications. Imposing a requirement for a case-by-case justification on foreign shipping lines may impose additional costs on carriers and ultimately, Australian shippers.

5.6 An important issue to consider with both notification and authorisation under Part VII is the increase in risk for carriers and their massive investments and what possible effects and costs this would have on current arrangements. As the World Shipping Council, the International Chamber of Shipping and the European Community Shipowners' Associations pointed out in a recent submission regarding the forthcoming periodical review of the EU exemption for consortia; "The presence or absence of legal certainty has real economic effects. It is one thing to engage legal counsel to provide an approximation of legal risk (the self-assessment model) but it is quite another to know that , so long as one falls within the boundaries of the regulations, one may enter into a business arrangement knowing there is little competition law risk. The former situation introduces an element of risk that becomes a factor in deciding whether to enter into a particular business arrangement. Sometimes that risk will be deemed acceptable; sometimes it will not. Under the self-assessment model there will be some carrier co-operative arrangements- arrangements that provide market efficiencies and tangible benefits to exporters and importers- that will be foregone because carriers would not be willing to accept the legal risk that an arrangement will be challenged in the future. From an economic perspective, removing legal risk reduces transaction costs and there could be a chilling effect on innovation such as carriers foregoing consortia opportunities to improve combined service delivery or remain in an existing consortium rather than form a new consortium, even when changing consortia would make operational and economic sense and would more closely meet the customers' needs."[18]

5.7 With respect to the point that legal certainty supports fluidity in the formation, amendment and dissolution of consortia in response to market demands, it is also important to emphasise that virtually every major trading nation in the world that has a competition law either exempts consortia from its competition laws or otherwise permits consortia to operate. Legal certainty is a must because removing that legal certainty over time would have a negative effect, reducing efficiency and competition by discouraging the formation of consortia and changes to existing arrangements, even if such changes would be more economically beneficial for carriers, shippers and international trade.[19]

[18] World Shipping Council, the European Community Shipowners' Associations and the International Chamber of Shipping submission to the EU Commission review of Regulation (EC) No 906/2009 which provides a block exemption for consortia. June, 2013. Pages 14 and 15.

[19] Ibid pages 15 and 16 but note that to ensure brevity the views have been summarised above and they are not a direct quote.

5.8 "If every liner operator needed to provide vessel capacity by itself on every trade route in which it participated, there would be a gross oversupply of capacity, thus making the services economically unsustainable, or a shortage of investment and fewer service providers . In short, in the absence of consortia, there would be fewer services and fewer competitors. It is difficult for carriers to provide individual services in major trade lanes in part because the smallest economically viable unit of supply is a vessel string–typically defined in the industry as the number of vessels necessary to provide a weekly service on a given route."[20] This point is even more important when considering the difficult demands of low volume, imbalanced and long line haul trades such as Australia.

5.9 Different sizes of carriers can benefit from vessel sharing consortia but even large carriers may not have significant volumes of cargo in particular trade lanes. This enables carriers to offer to the trade more port calls, sailing frequencies and choice in administrative services than would be otherwise available. Consortia facilitate the introduction of larger container vessels in the trade than would otherwise be economically sustainable. In turn large vessels lower slot costs and are generally more fuel efficient and eco-friendly. Another point to make is that while there are no regulatory barriers to entry in liner shipping, consortia reduce the risk that ships' capital and operating costs become barriers to entry.

5.10 When the new Division 1 of Part IV of the CCA was introduced in 2009, which rewrote Australia's cartel laws, Shipping Australia received advice from the Registrar of Liner Shipping that there was no impact on the operation of Part X and consequential amendments were made to Part X to continue the necessary exemptions. This advice was confirmed in July, 2013. Surprisingly, in September 2013, the Department of Infrastructure recommended that SAL obtain independent legal advice to determine the relevance or otherwise of the 2009 amendments to Conference operations. Legal advice subsequently received by SAL found that there was what appeared to be unintentionally a gap in this immunity which meant that Shipping Lines party to Discussion or Consortium Agreements that agree to limit shipping capacity as a result of lower demand and to maintain economical service levels, were required to be registered to ensure exemption. Upon receipt of this legal advice, relevant Lines compiled with this technical requirement. This was not required prior to the 2009 reforms. The making of freight rate agreements were exempt from the cartel provisions and Section 45 under Section 10.17A but there was no Section 10.17B to exempt the making of an agreement to limit capacity so that capacity limiting Agreements would not need to be registered in addition to the main Discussion Agreements or Consortium Agreements. This technical oversight needs to be rectified by a small consequential amendment to Part X. SAL would be willing to provide some suggested wording if that would be of assistance.

5.11 The authorisation provisions as they presently stand only provide for authorisation of certain conduct. If all of Part X were repealed (as proposed by the PC in 2005 and rejected by the Government at that time), there would no longer be, for example, Minimum Levels of Service attached to each registered Agreement which are presently the result of joint discussions or consideration between peak shipper bodies and parties to such Agreements. If it were proposed that Part X is repealed, key and fundamental elements of the regulatory regime for international shipping such as the involvement of peak shipping bodies, minimum requirements and mandatory provisions in agreements and other codified aspects would be removed without any replacement provisions. It is unclear from the Issues Paper whether consideration of the removal of exemptions and effectiveness of Part VII in the context of international shipping is being considered in this broader context of the purpose and

[20] Ibid page 8

objectives of Part X as a whole. We submit that any review of the Part X exemptions must take into account the broader context as clearly Part VII cannot fulfil the role currently fulfilled by Part X.

CHAPTER 6 – CONCLUSION

6.1 As challenged by the Issues Paper for this review; do the statutory exemptions, exceptions and defences, including liner shipping, operate effectively, and do they work to further the objectives of the CCA? This submission strongly contends that the substantive code of behaviour for international liner operators set out in Part X with its encouragement of pro-competition outcomes combined with its protection of consumer interests operates effectively and fully meets the objectives of the CCA. It does more than this. It sets out Government policies to facilitate Australia's international liner trade and provides a regulatory regime compatible with those of our major trading partners.

6.2 It is crucial to maintain the Discussion Agreements and consortia that are regulated under Part X because they include the following advantages:

- National interest advantages by guaranteeing the provision of the bus-like services required by Australia's container exporters and importers, more than meeting their need for an adequate supply of reliable and economic liner shipping services;
- Meeting Australia's requirements for specialised refrigerated equipment given the perishable nature of some of Australia's agriculture exports on a regular and predictable basis;
- Being subject to vigorous competition in a contestable market from operators offering direct and transhipment services. Some export freight rates in Australia are below cost to meet technical requirements for ship stability (c.f. carrying empty containers) and to meet global customers' requirements. Overall freight rates are very competitive internationally and are similar to Australian landside costs despite the greater distances and capital costs involved. These levels of rates are despite the limited size of the market, high Australian costs (eg port costs, low productivity), the distance from major markets and the frequency of service which several of Australia's export commodities demand;
- Registered Agreements for both outward and inward trades are transparent; being open to scrutiny and within the purview of the Australian marketplace;
- Operational Agreements encourage through slot chartering arrangements greater economies of scale than could otherwise be achieved under a completely unregulated market. Predictability and stability of service go hand in glove with obtaining greater economies of scale and better utilisation of shipping space.

6.3 Part X certainly does not restrict competition; in fact this submission has proved the opposite to be the case.

6.4 A small consequential amendment to part X is required as a result of the introduction of the cartel provisions in the CCA in 2009. Contrary to advice received at the time that there was no impact on Part X, it has subsequently come to light that capacity limiting Agreements need to be separately registered under Part X, in addition to the main Discussion or Consortium Agreements, if the necessary exemptions are to be maintained.

6.5 It is considered unrealistic and impracticable to simply apply the current authorisation process in Part VII of the Act, given the impact such a lack of certainty would have on investment in the Australian trades as well as the cost and lack of timeliness in achieving authorisation compared to the processes in Part X. Application of that regime would pit Australia against the strength of the regulatory regimes of our major trading partners and the focus of attention would be on resolving jurisdictional problems and the difficulties that arise with the seeking of the extraterritorial application of Australian law. The objectives set under

the Australian Government's approach to international liner shipping policy as outlined in Part X would not be achieved under the application of the Part VII regime.

6.6 For these and the other reasons set out in this submission, it is essential that the regulatory regime currently in Part X be maintained.

Appendix 1

Parties to Registered Discussion Agreements / Consortium under Part X of the CCA

ANL Singapore Pte Ltd
APL Company Pte Ltd
COSCO Container Lines Co. Ltd
China Shipping Container Liner Co. Ltd
Evergreen Marine Corp
Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft KG (HSDG)
Hanjin Shipping Co Ltd
Hapag-Lloyd Aktiengesellschaft (HLAG)
Hyundai Merchant Marine Pty Ltd
Kawasaki Kisen Kaisha Ltd
A.P. Moller-Maersk A/S
Mitsui OSK Lines Ltd
MSC Mediterranean Shipping Company SA
Nippon Yusen Kaisha
Orient Overseas Container Line
Pacific International (Pte) Ltd
T.S. Lines Ltd
Sinotrans Container Lines Co Ltd
Yang Ming Marine Transport Corp
CMA CGM SA
Marfret Compagnie Maritime
Neptune Pacific Line Inc
Pacific Direct Line
Pacific Forum Line (NZ) Ltd
Sofrana Unilines (NZ Ltd)
The China Navigation Company Pte Ltd
United Arab Shipping Company
Regional Container Lines

SHIPPING AUSTRALIA LTD SUBMISSION TO THE COMPETITION POLICY REVIEW
PART B
SUBMISSION ADDRESSING VARIOUS QUESTIONS RAISED IN THE ISSUES PAPER FOR THIS REVIEW. OTHER THAN THE QUESTION RELATING TO PART X OF THE CCA (PARAGRAPH 5.33 REFERS)

INTRODUCTION

1.1 Shipping Australia Ltd (SAL) is a peak national shipping association comprising 37 member shipping lines and shipping agents that are involved with over 70% of Australia's container and car trade, over 60% of our break-bulk and bulk trades and significant cruise ship and tug operations. At Appendix 1 is a list of those member lines and shipping agents.

1.2 In paragraph 1.13 of the Issues Paper, on page 10, an example of ports is given as a market with very little competitive pressure and if likely to persist, Governments may regulate in the public interest to constrain the exercise of market power, limiting adverse impacts on consumers. SAL would like to bring to the Panel's attention that Governments do not always regulate to produce pro-competition outcomes. A case in point is the Victorian Government's decision in 2011 to apply a special port levy called a port licence fee in Melbourne to raise funds for infrastructure in the State. In 2013/14, it is expected to raise an extra $80 million over and above the dividends and taxes raised from port operations but such funds are most likely not to be spent on building infrastructure to benefit the Port of Melbourne or its users including the container exporters and importers in Victoria. Australia's international competitiveness is being lowered as a result as it is effectively a tax on trade.

1.3 We briefly comment below on the question raised in the Issues Paper regarding the restrictions on the export of goods from Australia on page 15, the key question on page 19 whether there is a need for further competition-related reforms in infrastructure sectors with a history of heavy government involvement (such as water, energy and transport sectors), the question on page 27 whether the current competition laws are working effectively to promote competitive markets as well as the questions raised on pages 32 to 34 regarding primary and secondary boycotts, price signalling, third line forcing and the joint venture provisions of the CCA.

RESTRICTIONS ON THE EXPORT OF GOODS FROM AUSTRALIA

2.1 Under paragraph 2.13, on page 15, the question is raised "are there restrictions on the export of goods from Australia which should be removed or altered in order to increase competition for exporters and producers, and choice for consumers?"

2.2 Whilst the question is aimed at the situation in Australia, it is important to also recognise restrictions that prevail in overseas markets such in the export of rice and meat to Japan and meat to China. Whilst the Free Trade Agreements with Japan and Korea announced this year provides some alleviation; there is still a way to go. There is also a strong case to push forward with an FTA with China. New Zealand has an FTA with China that will see its import duties on sheep meat, for example, fall to zero compared to Australia still facing a 12 to 20% import duty on its sheep meat. The return by the previous Federal Government to full cost recovery for inspection services and export certification for the meat export industry has imposed an added burden at a time of serious cost pressures and restricted potential export volumes.

INFRASTRUCTURE SECTORS WITH A HISTORY OF HEAVY GOVERNMENT INVOLVEMENT

3.1 Under paragraph **3.9** on page 19, mention is made that there appears to be scope for further reform in the transport sector amongst others and on page 20, the table under the heading of transport makes reference to reforms to cabotage arrangements, removal of separate competition exemptions under Part X for international shipping and Tasmanian shipping. We would draw to the Panel's attention that the Federal Department of Infrastructure is currently undertaking a detailed review of Australia's coastal shipping legislation and we hope that whatever recommendations are made will increase competition in our domestic transport sector and provide more opportunities for an increase in coastal shipping.

3.2 SAL has made a specific and detailed submission on the beneficial operation of Part X (see Part A) but importantly Part X has never had a history of heavy Government involvement. On the contrary, the regulatory regime in Part X is a light handed one with very little government involvement. It is misleading for the Issues Paper to suggest otherwise.

3.3 In the table on page 20, it is noted that the Productivity Commission sent its final report on Tasmanian Shipping and Freight to the Australian Government on 7 March, 2014. That report has not yet been released publicly but SAL supported the recommendations in the draft report, especially those supporting extension of the Tasmanian Freight Equalisation scheme to Tasmanian exports and increasing competition in the Bass Strait coastal shipping trade.

ARE CURRENT COMPETITON LAWS WORKING EFFECTIVELY?

4.1 Under paragraphs 5.1 to 5.3 on page 27, the question is raised "whether current competition laws are working effectively to promote competitive markets, given increasing globalisation, changing market structures, and technological change?" From SAL's perspective, the current competition laws as outlined in the CCA are working effectively including the substantive Part X of the Act. As pointed out in the SAL submission on Part X, it does work effectively to promote competition in international liner shipping serving Australia, and assists Australian container exporters and importers cope with increasing globalisation, changing market structures and technological change by offering stable and efficient shipping services, at very competitive rates of freight, using the latest technology within a regulatory system that avoids jurisdictional conflicts.

QUESTIONS RAISED ON PAGES 32 TO 34 OF THE ISSUES PAPER

5.1 Under paragraph 5.21 on page 32, the question is raised "whether primary boycotts operate effectively and do they work to further the objectives of the CCA?" A similar question is raised relating to secondary boycotts under paragraph 5.28 on page 34. SAL is not an industrial organisation and is, therefore, not a registered employer body with standing before any industrial tribunal. SAL's primary objective and focus remains facilitation of Australia's international trade. In this respect, SAL would be concerned if the primary boycott provisions were removed from the Act because suppliers of services who are competitive should not have the ability to agree collectively not to supply services to a particular person or class of person in order to promote competition. Similarly, SAL would have serious concerns if Sections 45D-45DB of the CCA relating to secondary boycotts were removed. It is acknowledged that the CCA exempts certain conduct from the prohibition on secondary boycotts, for example where the dominant purpose of the conduct relates to remuneration or conditions of employment but this prohibition is still worth preserving. In the1980's and

1990's there were a number of cases where these provisions were effectively used and Court injunctions issued which resulted in the secondary boycotts being removed. This, in turn, facilitated Australia's overseas trade. Details can be provided and whilst there have been no recent cases; SAL believes the reason has been their past effectiveness.

5.2 SAL believes there would be serious ramifications if these provisions were removed from the CCA.

5.3 The question is raised under paragraph 5.22, on page 32, "whether the price signalling provisions of the CCA should be retained, repealed, amended or extended to cover other sectors?" In SAL's view, it is questionable whether these provisions are effective even though they are currently restricted to banking services. It is difficult to envisage how they could operate in our modern economy and whether there would be confusion within the wider community on what would constitute a breach of this law. SAL believes they should be repealed but if not repealed, then certainly not extended to sectors other than banking.

5.4 Regarding two other issues raised in this section, SAL supports retention of the joint venture provisions of the CCA (paragraph 5.23 refers) as we are not aware of any evidence that they have not been effective and have not worked to further the objectives of the CCA. In addition, the third line forcing provisions in the CCA (Paragraph 5.25 refers on page 33) appear to have been effective on a number of fronts and in our view have worked to further the objectives of the CCA. SAL would support their retention.

IN SUMMARY

6.1 Aside from issues relating to Part X and expressing the view that the current competition laws as far as shipping is concerned are working effectively and the comments on the policy issues of cabotage and Tasmanian shipping, Shipping Australia recommends:

- Further work be undertaken by the Government to increase the international competitiveness of our exports, especially our primary goods exports, by reducing Government charges that are of step internationally and increasing access in overseas markets, especially via Free Trade Agreements;
- Retention of the provisions relating to the prohibition of both primary and secondary boycotts in the CCA because of their ability to promote competition and facilitate Australia's international trade;
- Repeal of the price signalling provisions because of the confusion that can be caused in the wider community without a clear definition of what would constitute a breach of the law in the modern economy but if not repealed, then no extension of these provisions to sectors other than banking;
- SAL supports the current joint venture provisions in the Act as there appears to be no evidence that they have not been effective;
- Retention of the Third Line Forcing provisions in the Act as they appear to have been effective in furthering the objectives of the CCA.

Appendix 1

SHIPPING AUSTRALIA LIMITED

MEMBERS – May 2014

APL Company Pty Ltd
A.P. Moller-Maersk A/S
Asiaworld Shipping Services Pty Ltd
Austral Asia Line Pte Ltd
BBC Chartering Australia Pty Ltd
CMA CGM & ANL Agencies (Australia & New Zealand)
Evergreen Marine Australia Pty Ltd
Five Star Shipping & Agency Co Pty Ltd
Gulf Agency Company (Australia) Pty Ltd
Hamburg Sud Australia Pty Ltd
Hapag-Lloyd (Australia) Pty Ltd
Hetherington Kingsbury Pty Ltd
Hyundai Merchant Marine (Aust) Pty Ltd
Inchcape Shipping Services Pty Limited
"K" Line (Australia) Pty Limited
Mediterranean Shipping Company (Aust) Pty Ltd
Mitsui OSK Lines (Australia) Pty Ltd
Monson Agencies Australia Pty Ltd
NYK Line (Australia) Pty Ltd
OOCL (Australia) Pty Ltd
Pacific Asia Express Pty Ltd
PB Towage (Australia) Pty Ltd
Royal Caribbean Lines Cruises Ltd
Seaway Agencies Pty Ltd
Ship Agency Services Pty Ltd
Svitzer Australia Pty Ltd
The China Navigation Company Pte Ltd
Wallenius Wilhelmsen Logistics A/S
Wilhelmsen Ships Service A/S

Contributing members

ANL Container Line Pty Ltd
China Shipping Container Liner Co. Ltd
Hanjin Shipping Co Ltd
Neptune Shipping Line Pty Ltd
Pacific Forum Line (NZ) Ltd
Sinotrans Container Lines Co Ltd
T.S. Lines Ltd
Yang Ming Marine Transport Corp