Global Shippers' Forum
Policy Submission

International Freight Transport Services Inquiry
New Zealand Productivity Commission
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27 February 2012

Via Email

Dear Sir/Madam,

Global Shippers' Forum Submission to the International Freight Transport Services Draft Report

1. Introduction

As the international organisation representing the interests of shippers' organisations in 50 countries world-wide, the Global Shippers' Forum (GSF) welcomes the opportunity of commenting on New Zealand Productivity Commission International Freight Transport Services Draft Report dated January 2012. This report makes supplementary comments to its submission to the Commission on 8 September 2011.

These comments are made to supplement comments made by the New Zealand Shippers' Council. The New Zealand Shippers' Council is an active member of the GSF.

As in GSF's earlier response to the Productivity Commission's inquiry, the GSF restricts its comments to Chapter 11 of the Draft Report's findings covering international sea freight competition.

2. The Draft Report's Findings and Recommendations

The GSF commends the Productivity Commission for the thoroughness of its inquiry and Draft Report, and extensive nature of its investigations.

The GSF supports the key conclusions of the Draft Report, in particular the Commission's overall recommendation to remove anti-trust exemptions provided for shipping services under the *Shipping Act 1987*.

Further comments are made below in relation to points contained in Chapter 11 of the Draft Report.

2.1 Onus of Proof

The Commission notes that the onus of proof is usually on the parties to such agreements to prove that their agreements outweigh any anti-competitive detriments. In the case of liner shipping this has effectively been removed by virtue of the historic exemption for cooperation agreements between international shipping lines from the full application of New Zealand domestic competition laws. In view of the Commission's findings, and more recent international inquiries and studies into international liner shipping, the assumption that the public benefits outweigh the anti-competitive practices and detriments of shipping cooperation agreements, in particular price fixing and discussion agreements on pricing and capacity, is no longer sustainable or acceptable.

In Chapter 11 of the Draft Report, liner carrier groups continue to make general and unsubstantiated assumptions regarding the public benefits of liner shipping exemptions, in particular stability of pricing, availability of regularly and reliable services and investments. The GSF commented in detail on this issue in its earlier submission to the Commission dated 8 September 2011, and it has been dealt with extensively else where, in particular by the OECD (2002) and the European Commission. The GSF strongly asserts that the onus of proof must rest with carrier groups who continue to make these claims.

2.2 Evidence of the Use of the Exemptions in New Zealand

The GSF shares the Commission's conclusion that New Zealand liner shipping trades are competitive. Indeed, this view is supported by carrier groups such as the International Container Lines Committee (ICLC) who state that:

"The international shipping market is highly competitive to the extent though that freight rates have declined over the past five years".

The Draft Report notes the demise of conferences and rate-making agreements in recent years[1], and the ICLC confirms that: "Discussion agreements are the modern form of the conferences. These promote individual action on rules and freight rates and any collective agreement is purely by consensus".

These are useful confirmations as it clearly demonstrates that conferences and other forms of rate making agreements are not indispensible to the provision of competitive liner shipping services[2], or the availability of regular and reliable services, investments in vessels, equipment and related infrastructure to meet trade demands as asserted by the Asian Shipowners' Forum[3].

The Productivity Commission is therefore correct in its impact assessment, namely [1] rate making agreements are not overly prevalent in New Zealand but nevertheless the

[1] All New Zealand- Europe conferences were discontinued with the removal of the EU conference block exemption from 18 October 2008.
[2] "One discussion agreement is dormant, namely the Pacific Island Agreement, and has not met for over two years (International Container Lines Committee, sub.48, p.10.)
[3] Asian Shipowners' Forum, sub. 2, p1.

market appears reasonably well served at an aggregate level [2] In summary, the evidence on competitiveness of the industry suggests that rate-making agreements are not in widespread use, indicates that the removing the exemptions is unlikely to result in a decisive improvement in shipping services. The benefit of removal is more likely to lie in insurance against a future degradation of outcomes for New Zealand through carrier collusion as the market moves into a position of more constrained supply, and [3] there appears to be little evidence that automatically exempting all rate making agreements from the application of the Commerce Act is necessary to ensure continued services to New Zealand.

Moreover, the Draft Commission Report's observation that under current market conditions shipping services are competitive in spite of the existence of the exemptions merely serves to illustrate that there is no need for the exemption to remain in force.

Nevertheless, the New Zealand Productivity Commission is right to be cautious with regard to future potential anti-competitive conduct at other stages of the business cycle. In that respect, the OECD report on 'Hard Core Cartels' has noted that recent cases have illustrated that the harm done by hard core cartels is often underestimated and that one of the most serious impediments to effective anti-cartel activity is that most government officials, legislators, and members of the public are not aware of the amount of harm done by cartels[4].

2.3 Discussion Agreements

The Draft Report considers the role played by so called 'Discussion Agreements", in particular their emergence as alternatives to traditional liner shipping conferences. The GSF stresses that these are not a lesser or more benign form of carrier cooperation rate and making and capacity agreement. Indeed, they are "hard core" cartel anti-competitive agreements capable of fixing and raising prices, restricting output and supply of capacity.

In the recent FMC Study into the impact of the EU liner conference exemption repeal on U.S. shippers and trades[5], the Study appears to suggest that capacity was tighter in the U.S transpacific trade where carriers in the Transpacific Stabilization Agreement (TSA) are able to discuss market trends and have voluntary guidelines through discussion agreements, compared with the Asia-Europe trade where liner discussion agreements are prohibited under EU Competition law.

The EU Competition Commission stated in the review of the liner conference block exemption that discussion agreements were unacceptable because they involved the exchange of commercially sensitive information in the form of prices. A view fully supported by shippers.

As liner discussion agreements conduct in hard core restrictions, they have the capability to restrict competition and should be included in the Productivity

[4] Hard Core Cartels, OECD 2000, p7 and p20.
[5] Federal Maritime Commission, Bureau of Trade Analysis-study of the 2008 repeal of the liner conference exemption from European Competition Law, February 2012.

Commission Draft Report recommendation to remove the exemption for liner shipping agreements.

2.4 Non- Rate Making Agreements

In the GSF's earlier submission, the GSF indicated that non-rate making agreements, consortia and vessel sharing agreements (VSA) were in general terms a less restrictive form of cooperation, and can under certain conditions provide potential benefits to shippers in terms efficiency, cost savings and in the frequency of sailings, for example. However, capacity restricting agreements clearly have the potential of being as restrictive of competition as price fixing or information sharing agreements between competitors.

In response to the APEC study on non-rate making agreements, the GSF said that such liner shipping agreements should be treated in the same manner as cooperation agreements in other industry sectors. In view of this, the GSF supports the Commission's Draft Report recommendations, particularly as the proposed clearance and authorisation procedures under the Commerce Act do not appear to be onerous. As the Draft Report indicates, the shipping industry is no more important than other industries in New Zealand that would justify special or different treatment.

3. Removing the Exemption

The Draft Report properly raising the implications for New Zealand of removing the anti-trust exemption for liner shipping cooperation and rate fixing agreements.

The GSF believes the Draft Report's detailed factual analysis of prevailing conditions in New Zealand liner shipping markets, in particular, both open and tacit acceptance that liner conference agreements are no longer effectively in use or of utility, dispels wider concerns regarding removal of the New Zealand exemptions for liner shipping agreements.

These concerns appear to be somewhat over played, not least because, as highlighted in GSF's earlier submission, nearly 50 per cent of the world's total TEU tonnage capacity is now conducted in an exemption free environment following the EU repeal of the liner conference block exemption from 18 October 2008, including New Zealand trades to and from Europe. Withdrawal of the New Zealand exemption will not therefore impose more restrictive requirements than elsewhere, as the world's leading carriers' have already adapted to, and changed their operating practices, as a result of the repeal of the EU liner shipping exemption.

Moreover, since release of the Productivity Commission's Draft Report, the U.S. Federal Maritime Commission has published its staff study on the impacts of the EU repeal of the liner conference exemption. This is a very detailed study, but the key significant conclusion of the study is that U.S. shippers and trades have not been harmed by the removal of anti-trust immunity in Europe.

This bears out GSF's analysis and our earlier response to the Productivity Commission that European shippers have experienced a competitive and flexible market since the EU repeal of the liner conference block exemption.

Anti-trust exemption is, therefore, no longer the international norm, and in light of this submission, and our previous response to the New Zealand Productivity Commission's inquiry, as well of the Productivity Commission's own findings in the Draft Report, the GSF has seen no evidence that removal of the New Zealand exemption would harm New Zealand trade.

On the other hand, as the Productivity Commission's Draft Report and earlier scoping report highlighted, New Zealand transport costs are significant, higher than Australia and days to market is behind international best practice. New Zealand industry's longer-term international competitiveness for its manufactured goods and commodities in global markets is clearly heavily dependent on efficient and competitive international freight transport services. The repeal of the New Zealand exemption for shipping agreements is, therefore, likely to be a key factor in supporting New Zealand's longer-term international competiveness.

The GSF remains available to discuss any aspects of this and our earlier response to the New Zealand Productivity Commission, and to give any further evidence and information that would assist the inquiry.

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