4 November 2022

OPENING STATEMENT

Productivity Commission (PC) public hearing - Australia's Maritime Logistics System

Thank you Julie and Stephen - my name is Paul Zalai and I am a Director at Freight &Trade Alliance (FTA) and the secretariat to the Australian Peak Shippers Association (APSA).

FTA is a peak body for the international trade sector representing 477 businesses including Australia's largest logistics service providers and major importers.

On 1 January 2017, FTA was appointed the Secretariat role for APSA - importantly, APSA is the peak body for Australia's containerised exporters and importers under Part X of the Competition and Consumer Act 2010 as designated by the Federal Minister of Infrastructure and Transport.

APSA is also a member and has board representation on the Global Shippers Forum (GSF) that represents shippers' interests and that of their national and regional organisations in Asia, Europe, North and South America, Africa and Australasia.

Up front I would like to sincerely thank you and your team for engagement with both FTA and APSA, and importantly, direct with our members including at our recent regional event in Wagga Wagga.

Steven, you stated during your presentation at that conference that you were in a position, prior to the release of the draft report to only speak about what you have heard during the consultation process in preparing the report.

The subsequent release of the draft report on 9 September 2022 clearly demonstrated that you and Julie have not only heard our concerns, but have also responded positively with well-considered recommendations, largely aligned to those outlined in our initial and supplementary submissions.

As you will recall, the focus of our submissions centred on:

- the need for minimum services levels and notification periods (in particular following the US benchmark requiring a 30 day notice for variations in pricing / surcharges)
- infrastructure investment
- the economic and reputational impacts of waterfront industrial action and the need for business continuity – these issues have not gone away – right now we are extremely concerned about the potential impacts should there be an escalation of the dispute between the Maritime Union of Australia and tug operator Svitzer,
- Biosecurity document and inspection delays – our concerns have also been separately addressed via the Senate Rural and Regional Affairs and Transport References Committee and their *Inquiry into the Adequacy of Australia's Biosecurity Measures and Response Preparedness*,
- **a need for container shipping competition reform,**
- **regulation of terminal access charges,** and
- **regulation of container detention practices.**

Freight & Trade Alliance (FTA) Pty Ltd
68 Brooker Ave Beacon Hill NSW 2100
02 99751878 www.FTAlliance.com.au info@FTAlliance.com.au ABN 59 160 523 384

In the interests of time, I will recap our position on the latter three items:

SHIPPING COMPETITION REVIEW

Over the last three years, the container trade market dominated by foreign owned shipping line alliances, has been void of any genuine competitive tension. We support your draft recommendation 6.1 to repeal Part X placing an onus on shipping lines to show that their agreements provide a net public benefit to gain “authorisations” whilst facilitating class exemptions allowing businesses to collectively bargain in negotiating terms with shipping lines.

Our position aligns with the views of the Global Shippers Forum (GSF) and those of multiple international associations advocating to the European Commission not to continue its Consortia Block Exemption Regime (CBER) beyond the current period (expiration in 2024) believing its benefits have not been fairly shared with users of liner shipping services in the time since it was last renewed in 2020.

REGULATION OF TERMINAL ACCESS CHARGES

In response to your Information Request 6.2, we are of the opinion that the introduction of a third stevedore operator in Brisbane, Sydney, and Melbourne during the last five years has created a highly competitive environment resulting in reduced quayside revenue charged to the stevedore commercial client (shipping lines) presumably to retain existing and / or attract new business. According to ACCC stevedore monitoring reports, and as referenced by the Maritime Union of Australia earlier today, this has been offset by commensurate increase in landside charges administered against transport operators.

We firmly agree with your draft recommendation 6.2 that Terminal Access Charges (TACs) and other fixed fees for delivering or collecting a container from a terminal should be regulated so that they can only be charged to shipping lines and not to transport operators.

Furthermore, we recommend that similar regulation be extended to Empty Container Parks (ECPs) and potentially to LCL depot facilities, that in recent years have mirrored the stevedore model of rapidly increasing vehicle booking system changes administered against transport operators rather their commercial client (shipping lines).

REGULATION OF CONTAINER DETENTION PRACTICES

We support the intent of your draft recommendation 6.3 to offer protection for importers and exporters, noting your commentary acknowledging the US Federal Maritime Commission, when faced by a similar predicament, issued a rule that they will consider the reasonableness of the conditions attached to fees in interpreting the relevant law.

With due respect, we do however question your position that detention charges may be an “unenforceable penalty” as this has held not to be the case in past Australian cases and more recent English cases.

Based on legal advice we have obtained, the fundamental problem is that for an amount to be an unenforceable penalty, the amount must be payable on the occurrence of a breach of contract.

Container detention charges do not require a breach to be payable. Importers are entitled to hold a container as long as they want, they simply have to pay an amount per day. As payment is not conditional on the occurrence of a breach of contract, an importer cannot establish that container detention charges are an unenforceable penalty.

We remain of the view that the only realistic solution is for regulatory intervention to impose limits on when, or the amount of, container detention that can be charged.

Some options to protect importers could be:

- requiring shipping lines to offer to sell the container to the consignee after a set period and that the sale would end the detention period;
- cap the amount of detention to the lesser of the value of the container or the actual loss suffered by the shipping line;
- place a limit on shipping line's being able to charge detention where the delay in returning the container was due to:
  - border or biosecurity intervention (not due to a breach of law by the importer)
  - Force majeure event;
  - any act of the shipping line (or their contractors);
  - restricting the daily charges to an amount equal to set amount - for instance, the provision could provide that the maximum daily charge cannot be greater that an amount equal to 5% of the replacement value of the container.

Similar considerations are also required in context of exports whereby some shipping lines start the free detention time from the time of container collection to the time it boards the vessel for export. Again, this is unfair in circumstances whereby vessels bypass ports or face delays. We see the need for some form of safeguard for the detention clock to stop once the export container is received by the stevedore.

Julie and Steven, we trust that this additional detail is helpful to you in preparing your final report.

I am more than happy to provide any extra detail to you now, or as required, come back to you after the hearing with further evidence – thank you.

Freight & Trade Alliance (FTA) Pty Ltd
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02 99751878 www.FTAlliance.com.au info@FTAlliance.com.au ABN 59 160 523 384