

FTA's recommendations to the Productivity Commission

FTA/APSA gave a presentation at the Productivity Commission's public hearing, which was part of its review of Australia's maritime logistics system. Paul Zalai summarises FTA/APSA's main points

OVER THE PAST THREE YEARS, the container trade market dominated by foreign-owned shipping line alliances has been void of any genuine competitive tension. FTA/APSA supports the commission's draft recommendation 6.1 to repeal Part X of the *Competition and Consumer Act 2010*, 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.

The FTA/APSA position aligns with the views of the Global Shippers Forum and those of multiple international associations advocating to the European Commission not to continue its Consortia Block Exemption Regime 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.

TERMINAL ACCESS CHARGES

FTA/APSA are of the opinion that the introduction of a third stevedore operator in Brisbane, Sydney, and Melbourne during the past five years has created a 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, this has been offset by commensurate increase in landside charges administered against transport operators.

FTA/APSA firmly agree with the commission's draft recommendation 6.2 that terminal access charges 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, FTA/APSA recommend that similar regulation be extended to empty container and potentially to LCL depot facilities, which 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).

REGULATING DETENTION PRACTICES

FTA/APSA support the intent of the commission's draft recommendation 6.3 to offer protection for importers and exporters, noting their 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.

of contract, an importer cannot establish that container detention charges are an unenforceable penalty.

Some options to protect importers include: 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; and place a limit on shipping lines being able to charge detention where the delay in returning the container was not something the importer could have prevented.

FTA/APSA 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.

While our expectations are managed, following the line of questions and

FTA/APSA questions [the PC's] position that detention charges may be an "unenforceable penalty".

With due respect to the commission, FTA/APSA questions its 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 FTA/APSA has 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 for 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

responses from participants, we are increasingly confident that we will see the commission retain and potentially strengthen their draft recommendations for incorporation in their final report which is due to provide its final report to the federal government by December 2022. ■



Paul Zalai, director, Freight & Trade Alliance; secretariat, Australian Peak Shippers Association