Trans-Tasman Economic Relations Study
New Zealand Productivity Commission
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8 June 2012

Via Email

Dear Sirs/Madams,

New Zealand Shippers Council (NZSC) Submission on Strengthening economic relations between Australia and New Zealand

1. Scope of the NZSC Response

1.1 The New Zealand Shippers Council welcomes the opportunity to submit to the joint study by the Australian and New Zealand Productivity Commission into trans Tasman economic relations.

1.2 The New Zealand Shippers' Council is an association of major cargo owners (importers and exporters) in New Zealand. The current membership of the Council includes companies and organisations with major interest in industries such as forestry, wood products, fruit, steel, dairy, meat and pulp and paper. Collectively the Council accounts for over 50% of New Zealand's total container exports by volume annually, a significant volume of imports and major spends in domestic transport.

1.3 The New Zealand Shippers' Council is a member of the Asian Shippers Council which in turn is a regional member of the Global Shippers Forum representing shippers throughout the world. Both organisations have contributed to this submission and support the views stated.

1.3 This submission will not seek to answer the questions posed in the Issues Paper but concentrate on the report from the NZ Productivity Commission (NZPC) on International Freight Transport Services which has parallel's for Australia.

The International Freight Transport Inquiry was one of the first two inquiries undertaken by the NZPC and spanned over a year with the final report released to the public on 24 April 2012. It was a comprehensive review of factors influencing international transport to and from New Zealand was asked to pay particular attention to;

- The effects of distance from overseas markets and reliance on overseas providers of international freight transport services

- The costs, efficiency, productivity level and growth of all components of NZ's international freight services supply chain, with international comparisons; and
- the effectiveness of current regulatory regimes (for air and sea) and the potential costs and benefits of alternative regulatory arrangements, with international comparisons.

All three factors are relevant for Australia but it is the latter that our submission will focus on due to its importance globally.

Also given most of our members do not utilise air freight to any large degree we specifically do not comment on international air freight although it is important to compare the relativities of air and sea freight environments and regulatory regimes. However, it is important to note that the air transport industry, in particular, the air cargo industry, operates effectively in an open and competitive market subject to antitrust oversight by the New Zealand Commerce Commission.

More, the OECD and the European Competition Directorate, amongst others, have drawn attention to the close structural similarities between the liner shipping and the aviation industries. For example, both exhibit high capital investment and fixed costs. They also provide fixed scheduled services and operate within cyclical and seasonal markets.

The conclusions and recommendations are covered well on Pages 237 to 239 of the final report which I have copied below in italics. Where we disagree or have additional comments we have used the a red font in the relevant sentence.

11.5 Recommendations

The Commission recommends several changes to the current exemptions.

Exemptions for ratemaking agreements should be repealed

New Zealand's exemptions for the types of agreement with the higher risk of anti-competitive detriment –ratemaking agreements – should be removed. Such agreements could still be 'cleared' (if the clearance regime for cartel provisions is enacted), or authorised under the Commerce Act.
An exemption for non-ratemaking agreements should be retained.

The Commission's conclusion rests on a number of considerations:

- *There appears to be no strong reason to conclude that the shipping industry is more important than other major industries in New Zealand which are currently exposed to the Commerce Act and the authorisation regime.*
- *There appears to be little evidence that automatically exempting all ratemaking agreements from the application of the Commerce Act is necessary to ensure continued services to New Zealand.*
- *Alongside indications that international shipping services to and from New Zealand are competitive there is case-study evidence of New Zealand shippers paying higher prices than Australian counterparts, which is not fully explained by higher costs.*
- *There is merit in being armed with a regime that can cope well with other stages of the shipping cycle when the supply-demand imbalance tilts in favour of sellers.*
- *Removing the exemptions and relying on the Commerce Act and the clearance and authorisation regimes for ratemaking agreements is consistent with EU law, with the APEC Guidelines, and with the 2005 Australian Productivity Commission recommendations in relation to Part X of the CCA.*
- *The case for removing the exemption for ratemaking agreements will become stronger if:*
    - *the proposed low-cost clearance regime for cartel conduct is introduced (which is expected in the current parliamentary term); and*

- *the APC's recommendations in relation to Part X of the CCA are enacted – either full removal of the current exemptions (the APC's first recommendation), or partial removal with respect to higher-risk agreements (the APC's alternative recommendation).*

- *The cost of seeking authorisations from the Commerce Commission is considerable and seems unjustifiable in the case of agreements having low risk of anti-competitive detriments. The cost also risks deterring agreements with net value to New Zealand shippers.*

The concerns expressed by submitters about New Zealand moving too far ahead of its major trading partners, especially Australia, are unlikely to be justified if the exemption removal is limited to ratemaking agreements.
Coordination between New Zealand and Australia in relation to the proposed change would be desirable (and may reduce the potential costs of removing the exemptions for each party), *but the Commission does not judge it to be essential.*
A further issue is that any change will require a transitional period to allow the continuation of agreements in place at the time the exemption is repealed, pending them being authorised, cleared, or amended to ensure compliance with the Commerce Act.
Lastly, some submitters expressed a concern about shipping lines serving the Pacific Islands. The low volumes of cargo on these routes militates against commercially-competitive supply. Moreover, examination of the net benefits of a collaboration agreement for these services under the Commerce Act would overlook its consequences for Pacific Islands (other than for those islands technically part of New Zealand). For this reason, the Government may wish to treat Pacific Island services as a special case. In this regard, so-called "thin routes" are likely to be more restrictive of competition, so it would seem appropriate for the Competition Commission to assess such situations on a case by case basis.

Recommendation 11.1

> ***Rate making agreements – ones involving price fixing or limiting capacity with the intent of raising prices – have a high risk of anti competitive detriment. Exemptions for such agreement should be removed and authorisation mechanisms should be relied upon for assessing whether these agreements are in the public interest.***
>
> ***There should be a transitional period to allow the agreements in place at the same time the exemption is repealed to continue until their compliance with the Commerce Act 1986 has been tested****.*

The recommendation's wording with regard to capacity-limiting agreements is important. As the New Zealand Shippers' Council and the Meat Industry Association note, the Commission needs to ensure that the removal of an exemption does not create a barrier to cooperation relating to vessel and slot sharing agreements that under certain conditions may provide benefits to shippers in terms of cost reductions and the provision of ~~*more*~~ *shipping capacity serving New Zealand (sub.DR69; sub. DR84).*

The EU's approach is informative here. EU competition law reflects a distinction between capacity-limiting and capacity-sharing agreements in its block exemption for consortia. It does so by drawing a distinction between 'hard core' cartel conduct, which is not permitted, and capacity sharing, which is permitted under certain conditions including market share thresholds *on the basis it is pro-competitive.*

The Commission's recommendation is in line with practice recommended for Australia

While the APC in 2005 recommended the complete removal of the exemptions in Australia, no amendments have yet been made. It is not clear when or indeed if that recommendation will be followed.
The APC also put forward an alternative recommendation to amend Australia's exemption. The Commission's recommendation for New Zealand is close to this alternative

recommendation in that the basic thrust of each is to remove exemptions for ratemaking agreements because they carry a higher risk of anti-competitive detriments.
The APC alternative also recommends not exempting discussion agreements.
The APC's alternative recommendation is broadly consistent with the EC block exemption for consortia agreements.

The remaining exemption for non-ratemaking agreements should be modified

The exemption for non-ratemaking agreements that would remain in place under the Commission's recommendations should be widened to include inwards shipping as well as outwards shipping.
The Commission accepts that there is at least potential for this to raise international law issues which, although beyond the scope of this report, would need to be assessed as part of an evaluation of this step. However, there is no reason in principle why importers should not be afforded the same protection as exporters.
A registration scheme should be implemented. A registration regime would enable the ~~Ministry of Transport~~ Commerce Commission as the competent regulation authority with detailed antitrust expertise to assess such agreements *to monitor the existence and prevalence of agreements. This would inform policy decisions in the future and would bring New Zealand into line with Australia and the United States.*
The Commerce Commission would remain responsible for investigations and prosecutions in relation to agreements that potentially breach the Commerce Act. ~~The Ministry of Transport's register of agreements would enable the Commerce Commission~~ to and investigate agreements believed to be problematic more easily.
~~*While non-ratemaking agreements do not, by definition, cover pricing of services, they could still include a provision that the parties agree to reveal the pricing details of their individual contracts. The US experience under OSRA – whereby agreements must not only allow individual contracts but also protect their confidentiality – is that this provision strongly supports competitive behaviour. For this reason, the Commission recommends a similar provision apply for non-ratemaking agreements in order to qualify for exemption.*~~
This would effectively make the agreement 'hard core' (any exchange of pricing information between competitors is a hard core) and should therefore be prohibited by removal of the exemption. The danger in accepting discussion type agreements under the OSRA is It could legitimise anti-competitive arrangements such as the TSA use whereby members agree "voluntary guidelines'. the only exemption should be for consortia and pure non-rate making agreements.
Noting the recommendation to have only one exemption and given the role the Ministry of Transport is likely to have under this recommendation, it seems sensible that the exemption be retained in the Shipping Act. If the Commerce Commission is the responsible agency overseeing international shipping the legislation it is logical that it be included in the Commerce Act.

Recommendation 11.2

> ***The exemption for non-ratemaking agreements should be retained in the Commerce Act and be conditional on filing agreements with the ~~Ministry of Transport~~ Commerce Commission for placing on a public register.***
>
> ***The exemption and remedial regime should apply equally to outwards and inwards shipping.***
>
> ~~***To be eligible for exemption, agreements must allow and protect confidential individual service contracts.***~~
>
> ***The exemptions for international shipping in the Commerce Act should be repealed.***

The above extract and our comments demonstrates that both the Australian and New Zealand Productivity Commissions have had similar views on international shipping regulation. Both countries are share characteristics like distance to markets. Each country is a significant trading partner with the other. So it makes logical sense that both have standardised shipping regulation and we believe the approach outlined by the NZPC is the right one.

Yours faithfully

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