Liner conferences – the money and the box

Stephen Thompson
Partner, Middletons

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Competition Regulation in Australia, USA and Singapore

Stephen Thompson

Partner

Anita Chrismas

Solicitor

Further information

Stephen Thompson

Partner
T: +61 2 9513 2369
F: +61 2 9513 2399
E: stephen.thompson@middletons.com.au

Anita Chrismas

Solicitor
T: +61 2 9513 2456
F: +61 2 9513 2399
E: anita.chrismas@middletons.com.au

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Introduction

Most developed economies prohibit a range of anti-competitive behaviours, including in particular price fixing and manipulation of supply among competitors.

Those economies, however, which engage in international shipping trade (whether categorised as "nations of carriers" or "nations of shippers") also recognise the desirability of regular, reliable and predictable shipping services, particularly on containerised liner trades.

In free market economies, therefore, there is a tension between the pre-disposition in favour of rigorous competition, and the potential benefits of promoting more orderly supply by allowing limited collaboration among competitors.

Competition regulation in many countries has resolved this policy tension by providing exemptions for certain behaviours in favour of collusive groups of carriers.

This paper will examine:

» The recent adoption of a liner shipping exemption in Singapore.

» How liner conference exemptions are regulated by the United States, Singapore and Australia (the position in the European Union is covered in John Fallon's companion paper, which also addresses the economic theory behind much of this regulation).

» The Australian Productivity Commission's review of Part X of the *Trade Practices Act 1974*.

» The Australian government's response to the proposed amendments to the statutory regulation of liner shipping agreements.

» The future for competition regulation of the liner industry.

Recent developments in Singapore

Competition Act 2004

The relevant anti-trust legislation in Singapore is the *Competition Act 2004*.

Section 34 of the Act is in the following terms:

> "... agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect

> the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part."

The section clarifies the circumstances in which competition may be adversely affected, in the following terms:

» directly or indirectly fixing purchase or selling prices or other trading conditions;

» limiting or controlling production, markets, technical development or investment;

» sharing markets or sources of supply;

» applying dissimilar conditions to equivalent transactions;

» making the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts.

Clearly, liner conference agreements have the potential to place their participants in breach of section 34.

Section 36 of the Act provides a mechanism under which the Competition Commission of Singapore may recommend to the Minister that a block exemption order should be made in respect of certain categories of agreements which satisfy criteria under the Act. The effect of the block exemption order would be to excuse those agreements from contravention of section 34. The criteria for the recommendation of a block exemption order are that the agreements contribute to:

» improving production or distribution; or

» promoting technical or economic progress,

but which do not:

» impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

» afford the undertakings concerned the possibility of eliminating competition in respect of substantial part of the goods or services in question.

Economic and structural philosophy

In considering the effect of the Competition Act on liner shipping in Singapore and the potential for a block exemption in respect of liner shipping, Singapore was very conscious of its status as a regional hub. Eighty percent of liner cargo which arrives in Singapore has a final destination outside Singapore. The trade routes passing through Singapore are both short (regional feeder services) and long (trans-continental trade lines). Singapore was conscious that it was not in a position to impose a regime with regulatory requirements more stringent or liberal than those of its key trading partners, notably the European Union, Japan and the United States. Careful consideration was also given to the likely review of liner shipping regulation in the European Union within the next 5 years.

Accordingly, in considering the necessity for, and content of, any block exemption in respect of liner shipping, Singapore was mindful both of its domestic interests, and of its place within the broader international ocean trade community.

Competition (Block Exemption for Liner Shipping Agreements) Order 2006

On 12 July 2006 Singapore's Minister for Trade and Industry made the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 (**BEO**). A copy of the BEO is attached to this paper.

Notable features of the BEO are that:

- it does not distinguish between conferences and consortia. Rather, as is required under the Competition Act, the focus is on the agreements themselves, described in the BEO as "liner shipping agreements";
- there are two layers of regulation, differentiated on the basis of whether the parties of the liner shipping agreement have in aggregate more or less than 50 percent of the relevant market share;
- for liner shipping agreements where parties have less than the market share limit, the agreement is exempt provided it allows:
  - individual confidential contracting;
  - penalty-free withdrawal;
  - no mandatory adherence to tariffs; and
  - no compulsory disclosure of customised service arrangements;

» parties to a liner shipping agreement who collectively exceed the market share limit still have the benefit of the exemption, provided:

  » their agreement is registered; and

  » the tariff details (and any changes to the agreement and tariff details) are available to the public.

Comparative jurisdictional analysis

Introduction

The past 7 years have seen significant steps taken by both the United States and the European Union to promote greater competition within their liner industries. Australia has also signalled its intention to revise its regulatory regime by conducting an inquiry into Part X. Singapore's BEO is reflective of this recent evolution.

The global nature of the liner industry subjects carriers and potentially some shippers to multiple competition regulatory regimes. While Australia, the United States and recently, Singapore, all confer certain exemptions on agreements between liner operators, and on shippers in their dealings with conference carriers, each of these jurisdictions regulate these exemptions differently.

Trends in Australia, the United States and Singapore

Several recent and significant international developments in competition policy regarding the regulation of the liner shipping industry have resulted in:

» wider disclosure and greater public availability of tariffs; and

» entrenching the freedom of conference members to negotiate individual service contracts with shippers.

Australia

Part IV of the *Trade Practices Act 1974* (**TPA**) prohibits:

» contracts, arrangements or understandings restricting competition such as market sharing arrangements, exclusionary provisions (that limit or exclude dealings with particular suppliers or customers) and price fixing agreements (section 45); and

» exclusive dealing (imposing restrictions on one party's freedom to choose with whom, or in what, it deals) (section 47).

Subject to certain conditions, Part X of the TPA affords specified exemptions from these restrictive trade practices prohibitions to:

» ocean liner carriers, allowing them to collaborate through registered conference agreements to coordinate their delivery of scheduled services, co-share capacity and agree on freight rates and other tariffs; and

» exporters and importers, designating certain representative bodies competent to negotiate collectively with ocean carriers.

The objectives of Part X include ensuring Australian exporters (and importers) have access to optimal liner cargo services at competitive rates and encouraging stable access to export markets.

The immunity is restricted to liner cargo services but also extends to agreements regarding ancillary services such as inter-terminal transport, stevedoring and cargo transport services provided outside Australia. To be eligible for such immunity, carriers must:

» specify the minimum services proposed to be offered to shippers which include frequency of sailings, cargo carrying capacity, and ports of call provided or proposed;

» ensure that the agreements relate only to permitted activities;

» negotiate with designated shipper bodies upon request;

» allow parties to withdraw with reasonable notice without penalty; and

» ensure that Australian law governs the agreement.

The types of agreements that enjoy protection under Part X are defined broadly, with "conference" considered to be any type of unincorporated association of 2 or more liner carriers. This definition encompasses more than just traditional shipping conferences and also includes shipping consortia, discussion agreements and slot exchange agreements.

Conference agreements may only regulate:

» freight rates;

» pooling or apportionment of earnings, losses or traffic;

» the quantity or kind of cargo to be carried by parties to the agreement;

» the entry of new parties to the agreement; and

» provisions that are necessary for the effective operation of the agreement and of overall benefit to Australian exporters or importers.

Although this is an exhaustive list, the inclusion of paragraph (v) above provides some latitude in the range of restrictive trade activities that can be included in an agreement eligible for registration under Part X.

The United States

Liner carriers are granted exemptions to the United States' antitrust laws by the *Shipping Act of 1984* which was significantly modified by the *Ocean Shipping Reform Act of 1998* (**OSRA**).

OSRA permits carriers to undertake specified conduct that would otherwise contravene the United States' antitrust laws, including the negotiation and regulation of transport rates and confidential individual service contracts with shippers and allowing reasonable entry and exit to conference agreements by its members

Importantly, OSRA:

» prohibits conferences from restricting or precluding their members from negotiating confidential individual service contracts with 1 or more shippers;

» eliminates the obligation for tariffs to be filed (although they must still be made public) or freight rates negotiated with individual shippers to be disclosed; and

» authorises carriers to negotiate services with rail, road and air hauliers.

The passage of OSRA has resulted in a shift away from conference carriage on United States routes in favour of carriage under individual service contracts.

Jurisdictional comparisons

Capacity management

To enable shippers to remove inefficiencies by reducing freight and thereby lowering overall costs, capacity management provisions are permitted in agreements by the United States, Australia and Singapore.

The management of capacity in Australia is permitted through carriers regulating:

» the quantity or kind of cargo to be carried by parties to the agreement; and

» the entry of new parties to the agreement.

Rates

Like OSRA, Part X of the TPA permits "the fixing or other regulation of freight rates" by conferences operating under a conference agreement. In both the United States and Australia, there is no enforcement of either maximum or minimum rates.

In Singapore, prices and other forms of remuneration may be agreed between liner operators, subject to certain conditions. The BEO provides that an agreement cannot require liner parties to adhere to mandatory tariffs.

Inland rates

Ocean carriers were previously precluded by the United States regime from jointly purchasing land transport haulage services however, OSRA now permits groups of carriers to negotiate rate and service contracts for land transport.

In contrast, the TPA provides only limited immunity for carriers to agree on the provision of inland transport services in Australia. Collective negotiations with land transport providers for stand alone port to inland terminal transport are not eligible for exemption while agreements on such rates where the land transfer is included in the liner ocean service are eligible. Part X extends the exemptions to all ancillary services including land transport in countries other than Australia.

Liner shipping services are defined by the BEO as the transport of goods between ports and include inland carriage occurring as part of through transport. Therefore, to the extent that inland transport is part of through transport, it may attract protection under the BEO.

Non-container services

Unlike the European Union regime, the exemptions conferred by OSRA extend beyond containerised cargo liner services to services offered by ocean common carriers. The definition of "common carrier" however, would exclude bulk and "ocean tramp" operations. Similarly, the exemptions provided for in the BEO are not restricted to containerised cargo.

The immunity given by Part X is limited to liner shipping operations and includes containerised cargo, break-bulk and vehicular services (although excludes bulk carriers and the transport of general cargo on unscheduled vessels). Otherwise, the nature or form in which cargo is carried by such liner services is not restricted.

Individual service contracts

One of the most significant amendments introduced by OSRA was to afford carriers and shippers greater autonomy to negotiate individual service contracts. To attract immunity from antitrust laws, carrier agreements must not restrict or prohibit conference members from negotiating individual contracts. Confidentiality is also preserved by OSRA with parties no longer required to file details of:

» freight rates;

» service commitments;

» liquidated damages for non-performance; and

» origin/destination areas covering inter-modal movements.

As a result of the introduction of individual and confidential agreements, the FMC has indicated a 200 percent increase in the number of new service contracts filed between 1999 and 2001.

Singapore has taken the United States' lead and embraced these individual dealings, requiring that exempt agreements allow carriers to negotiate such agreements unimpeded.

Although the TPA does not prohibit conference agreements from restricting members negotiating individual service contracts they are nevertheless reasonably prevalent in Australia. A proportion of agreements registered in Australia however, do include provisions specifically limiting the ability of members to offer different freight rates or services to individual shippers.

Loyalty contracts

A loyalty agreement is defined by the TPA as an agreement between an ocean carrier or conference and a shipper or designated shipper body that confers benefits to the shipper if they ship with the carrier or members of the conference either all or particular cargo, a particular portion, or a particular quantity of cargo.

Such agreements attract the protection of Part X although on condition that they are voluntarily entered by shippers.

Loyalty contracts containing a deferred rebate arrangement do not attract the immunity provided by OSRA although individual service contracts committing the shipper to provide a percentage-based portion or volume of cargo are eligible for the exemption once filed with the FMC.

Singapore's BEO does not prohibit loyalty agreements whereas these contracts are not eligible for antitrust immunity under OSRA.

Independent rate action

OSRA has removed the power previously conferred on conferences to veto members from taking independent action on filed tariff rates. Members are now competent to amend tariff rates or charges upon giving 5 days' notice. The BEO prohibits agreements from requiring carriers to adhere to mandatory tariffs therefore, implicitly allows independent rate action.

Conference agreements are not prevented by the TPA from prohibiting independent rate action by members.

Negotiation with shippers

The collective negotiation of service contracts between shippers and conference carriers was previously deemed collusive in the United States and therefore prohibited. OSRA however now permits such negotiation.

Not only is negotiation between carriers and shippers permitted under the Australian regime, it is mandated.

Part X requires that negotiations be undertaken whenever reasonably requested by shippers, or whenever significant changes are made in respect of:

» proposed minimum levels of service; or

» aspects relating to the quality, terms and conditions of the service proposed to be provided.

The conference must also provide the information reasonably required to make these negotiations meaningful.

For the purpose of these sanctioned negotiations, certain representative shipper bodies are formally recognised by the Minister and given negotiating capacity. "Peak Shipper Bodies" are recognised as representing the interests of Australian importers and exporters generally and "Secondary Shipper Bodies" are designated as representing the interests of subgroups of shippers with common characteristics such as industry membership.

Although these negotiations represent a significant concession to shippers under Part X and are conditions precedent to a conference agreement being accepted for registration, registration is not conditional upon agreement or consensus being reached.

Singapore's BEO is silent on any requirement for negotiations between carriers and shippers.

Filing and publication

Conference agreements must be filed in the United States although tariffs must simply be made publicly available via the web or by other electronic means.

Conference agreements registered in Australia are made publicly available when not otherwise protected by the confidentiality provision of Part X (section 10.37). Unlike the United States regime, tariffs are not required to be filed or published in Australia or otherwise disclosed. Such disclosure may be necessitated, however, by the requirement to supply reasonable information to shipper bodies for the purpose of entering negotiations.

Where the aggregate market share of the parties to the agreement exceeds 50 percent, the BEO obliges parties to:

» file the agreement;

» publish details of tariffs and service levels; and

» provide certain other documents and information requested by the Commission.

Otherwise there are no filing or publication requirements under the BEO.

Regardless of whether carriers to an agreement collectively exceed the specified market share limit, the Commission may nonetheless require disclosure of documentation and details to substantiate that the conditions for exemption in the BEO are satisfied.

Investigations into conference agreements

Shippers in the United States may submit their complaints for investigation by the FMC by lodging:

» an informal verbal complaint;

» a complaint with the ombudsman; or

» a formal complaint with the FMC.

Where negotiations fail to provide shippers with a satisfactory outcome in Australia, they may complain:

» to the Minister (who may subsequently initiate an action by the ACCC); or

» directly to the ACCC (which is empowered to act on a complaint and to provide a recommendation to the Minister).

In each scenario, where the Minister is satisfied that any of the parties to a conference agreement have failed to meet their obligations, the Minister may cancel the registration. Such action would render the parties to that agreement liable to all restrictive trade penalties provided by the TPA and thus open to prosecution.

While both Australia and the United States have statutory power to remove the immunity granted to carriers' agreements, the FMC has additional power to impose fines for non-compliance without resorting to deregistration.

Agreements that on their face meet the conditions outlined in the BEO are deemed to have immunity and will not generally be examined by the Commission. Where a condition of the BEO is breached or where the agreement is considered to impede competition, however, the exemption conferred by the BEO may be cancelled.

Review of Part X in Australia

Introduction

The viability of retaining Part X within Australia's competition regulatory regime has for some time been called into question. In 1991, the Productivity Commission's review of Part X found that, on balance, it was supportive of Australia's interests and therefore, should be retained subject to certain amendments. In light of changes within the regulatory regimes of the United States and the European Union, particularly having narrowed the immunities granted to carriers, and in light of a tighter international market, Part X was again the subject of review by the Productivity Commission in 2005.

The Productivity Commission's mandate was to consider:

» whether such industry-specific exemption from key provisions of the TPA regulating restrictive trade practices is justified and in particular, whether Part X should be retained;

» alternatives (both legislative and non-legislative) to Part X if it were to be abolished; and

» improvements to Part X if it were to be retained.

Net public benefit considerations have formed the basis of the Productivity Commission's view that Part X no longer serves Australia's interests. It is of the view that these interests, of both shippers and the greater community, would be better served by

repealing Part X and relying on the existing regime of authorisation contained in Part VII of the TPA.

The Productivity Commission's findings

In reviewing the operation of Part X, the Commission highlighted the 2 predominant conditions to carrier immunity for conference agreements:

» the agreements must be registered; and

» carriers must negotiate with designated peak shipper bodies over proposed minimum service levels.

Registration

In submitting a conference agreement for registration under Part X, the Commission noted that carriers are not required to demonstrate any net public benefits from their potentially anti-competitive agreements nor are any time limits attached to the exemption. Although an assessment is undertaken of the agreement proposed to be registered, the factors given consideration are procedural rather than substantive and do not involve an evaluation of the actual service proposed to be offered or the public benefits derived. On this basis, it formed the view that registration was essentially automatic.

In the Commission's view, operational agreements between carriers with limited market share on a trade route focussed on providing cost savings by the coordinated use of assets and joint scheduling are likely to provide a net public benefit and minimal anti-competitive risk. On the other hand, agreements between carriers with a high market share focussed on fixing prices and controlling the supply of shipping presents a much larger threat to competition in Australia and therefore, minimal, if any, public benefit.

The Commission found that Part X is based on the assumption that so few agreements registered under it will fail to provide a net public benefit that the added cost of individual authorisation has been deemed not to be warranted. This approach has resulted in a much wider immunity provided in Australia than in the United States or the European Union.

The Commission has proposed that evaluation of agreements and then selective registration is more likely to ensure that only those agreements that provide a net public benefit to Australia are permitted to be registered.

Obligation to negotiate

The predominant obligation imposed on parties seeking the registration of a conference agreement pursuant to Part X is to negotiate with a designated peak shipper body or designated secondary body in respect of:

» Minimum services levels at the time of registration

Where a shipper body is not satisfied with the minimum service proposed to be offered by a conference, it may require the conference parties to enter negotiations. Registration may proceed irrespective of whether agreement is reached between the shippers and conference carriers so long as the agreement sets out the minimum service level proposed.

The Commission took issue with this condition on the basis of the scope given for "gaming" by conference agreement members seeking registration. Its view was that it provides an incentive to members to propose a level of service less than that actually planned with consequences that shippers would be satisfied with any outcome exceeding this artificially low level and carriers could assume less onerous obligations.

» Proposed amendments to an agreement already in operation

In addition to partaking in negotiations whenever reasonably requested by shipper bodies, parties to a registered agreement must notify each relevant designated shipper body of any amendments to negotiable shipping arrangements. These matters include freight rates (including base rates, surcharges, rebates and allowances), sailing frequency and ports of call.

In each scenario, there is no obligation on the carriers, beyond simply participating in negotiations if requested, to either reach agreement or to abide by any agreement that is reached. Because any negotiations that proceed do not in any way impede the carriers' entitlement to implement proposed amendments, the Commission formed the view that although this is perceived as a countervailing power invested in shippers (along with the immunity which allows them to collude and form designated shipper bodies to negotiate with carriers), it is of little relevance to large shippers and to some 80 percent of trade shipped under individual contracts. As a consequence, this power to negotiate would only be meaningful to small shippers who are subject to freight rates on a take-it-or-leave-it basis. Collectively, shippers have limited influence over the level of shipping services provided to Australia.

Despite this finding, and although the Commission considered these as more akin to "consultations" than "negotiations", it nonetheless is of the opinion that they serve a useful purpose in maintaining communication channels between carriers and shipper bodies.

The Productivity Commission's recommendations

Repeal Part X

In the Commission's opinion, the most effective way to ensure selective approval of carrier agreements and the promotion of net public benefits would be to repeal Part X.

In the absence of the "automatic" immunity conferred by Part X, agreements would be subject to scrutiny under Part IV and carriers would be required to rely on the authorisation process of Part VII to legally implement the agreement. Part VII has the effect that an agreement's net public benefit is evaluated on an individual basis by the ACCC and where that benefit outweighs any anti-competitive detriment, the agreement is exempt from penalties for contravention of Part IV. Such process is relied on by industries other than international liner shipping, and varies considerably from the near "automatic" registration process under Part X.

The Commission considered the Part VII process for authorisation desirable not only because it ensures that the net public benefit is evaluated but that the benefits and risks are regularly reviewed as a result of the time limits attached to the authorisation.

Modify Part X

The Commission proposed that a less preferable alternative to the repeal of Part X would be to improve the existing Part X regime by either:

» selectively registering 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

» excluding from registration, and by revoking the registration of, discussion agreements, together with providing for the protection of confidential individual service contracts between carriers and shippers; or

» if no selectivity is introduced into Part X, in the least, the Commission recommended that confidential individual service contracts between carriers and shippers be protected.

The Australian government response

In response to the Commission's findings and recommendations, the Australian Government has taken the decision to retain Part X while planning to amend certain provisions to facilitate further competitive reform of the liner shipping industry.

The Minister for Transport and Regional Services indicated that the amendments to Part X would include:

» clarifying its objectives;

» removing discussion agreements from its scope;

» protecting individual confidential service contracts between carriers and shippers; and

» introducing a penalty regime for breaches of Part X.

The Government committed to a further independent review of Part X again in 5 years in respect of any steps taken in other jurisdictions towards removing regulatory protection for liner cargo shipping.

The future of Part X

One of the reasons identified for re-convening the Productivity Commission for further review of Part X was the evolution of both the United States' and European Union's competition regimes in respect of liner shipping. Given that these jurisdictions are tending towards a tightening of the once generous exemptions conferred on the industry, and the Australian government's concern to streamline its own regime with that of its major trading partners, it is likely that Part X will follow this trend.

There will be further reviews of the EU position within the next five years. Developments there are likely to have a significant influence on the future of liner shipping regulation in Australia and elsewhere in the world.

No. S 420 —

COMPETITION ACT
(CHAPTER 50B)

COMPETITION (BLOCK EXEMPTION FOR LINER SHIPPING AGREEMENTS) ORDER 2006

ARRANGEMENT OF PARAGRAPHS

Paragraph
1. Citation and commencement
2. Duration
3. Definitions
4. Market share limit
5. Exempt agreements
6. Grace period
7. Cancellation of exemption

In exercise of the powers conferred by section 36 of the Competition Act, the Minister for Trade and Industry hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 and shall be deemed to have come into operation on 1st January 2006.

Duration

2. Unless earlier varied or revoked in accordance with the Act, this Order shall continue in force until 31st December 2010.

Definitions

3.—(1) In this Order, unless the context otherwise requires —

"liner operator" means an undertaking which —

(*a*) provides liner shipping services; and

(*b*) is a party to a liner shipping agreement;

"liner shipping agreement" means an agreement between 2 or more vessel-operating carriers which provide liner shipping services pursuant to which the parties agree to co-operate in the provision of liner shipping services in respect of one or more of the following:

(*a*) technical, operational or commercial arrangements;

(*b*) price;

(*c*) remuneration terms;

"liner shipping services" —

(*a*) means the transport of goods on a regular basis on any particular route between ports and in accordance with timetables and sailing dates advertised in advance and made available, even on an occasional basis, by a liner operator to any transport user against payment; and

(*b*) includes any inland carriage of goods occurring as part of through transport;

"market" means any market for liner shipping services in which the parties to a liner shipping agreement operate under the agreement;

"price" —

(*a*) means the price for which a liner operator performs or offers to perform liner shipping services; and

(*b*) includes any charge, other than the base freight rate, that is incidental to or reasonably connected with the provision of liner shipping services, whether arising by reason of the provision of the liner shipping services or by reason of the occurrence of an uncertainty;

"remuneration term" means any term affecting payment or the amount of the price in relation to the provision of liner shipping services (including a reduction thereof);

"service arrangement" means an agreement concluded between one or more transport users and a liner operator under which, in return for an undertaking from the transport user to commission the transportation of a certain quantity of goods over a given period of time, a transport user receives an individual undertaking from the liner operator to provide an individualised service which is of a given quality and specially tailored to the needs of the transport user;

"tariff" —

(*a*) means a list of prices and remuneration terms for which, pursuant to a liner shipping agreement, liner operators agree they may offer liner shipping services to transport users; but

(*b*) does not include prices and remuneration terms under a service arrangement;

"through transport" means continuous transportation by a combination of sea and inland carriage from a point of origin to a destination —

(*a*) which is undertaken by a liner operator;

(*b*) which is performed by the liner operator undertaking the transportation —

(i) on its own;

(ii) partly on its own and partly through one or more other carriers; or

(iii) through one or more other carriers, at least one of which is a liner operator; and

(*c*) for which a single amount is charged by the liner operator undertaking the transportation;

"transport user" means —

(*a*) an undertaking which has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a liner operator for the shipment of goods; or

(*b*) an association of shippers.

(2) Where any provision of this Order is applicable to an agreement, such provision shall also be applicable, with the necessary modifications, to any decision that is made by an association of undertakings or a concerted practice.

Market share limit

4.—(1) For the purpose of this Order, the parties to a liner shipping agreement do not exceed the market share limit if they hold, in a market, an aggregate market share of not more than 50% calculated by reference to —

(*a*) the volume of goods carried; or

(*b*) the aggregate cargo carrying capacity of the vessels operating in the market measured by freight tonnes or 20-foot equivalent units.

(2) The parties to a liner shipping agreement shall be deemed not to exceed the market share limit if they hold, in a market, an aggregate market share of not more than 55% calculated by reference to the matters referred to in sub-paragraph (1)(*a*) or (*b*) for a period of not more than 2 consecutive calendar years.

Exempt agreements

5.—(1) A liner shipping agreement is, in respect of a market, exempt from the section 34 prohibition if —

(*a*) the parties to the agreement do not exceed the market share limit in the market;

(*b*) the agreement allows liner operators —

(i) to offer, on the basis of individual confidential contracting, their own service arrangements; and

(ii) to withdraw from the agreement on giving any agreed period of notice without financial or other penalty such as, in particular, an obligation to cease providing liner shipping services in a market, whether or not coupled with the condition that such activity may be resumed only after a certain period has elapsed; and

(*c*) the agreement does not require any of the following activities to be undertaken by the liner operators:

(i) mandatory adherence to a tariff;

(ii) the disclosure, whether to other liner operators or otherwise, of confidential information concerning service arrangements.

(2) Where the parties to a liner shipping agreement exceed the market share limit in a market, the agreement is, in respect of the market, exempt from the section 34 prohibition if —

(*a*) the agreement satisfies the conditions specified in sub-paragraph (1)(*b*) and (*c*);

(*b*) subject to sub-paragraph (3), the parties file with the Commission, in such mode and manner and within such period of time as may be specified by the Commission —

(i) a copy of the agreement and any variation or amendment thereto; and

(ii) where any variation or amendment is made to the agreement from time to time subsequent to the filing of the documents referred to in sub-paragraph (i) —

(A) such variation or amendment; and

(B) the agreement and all preceding variations or amendments thereto;

(*c*) the parties make available upon request to the Commission, in such mode and manner and within such period of time as may be specified by the Commission, documents and details relating to —

(i) any tariff;

(ii) the structure and service level of the liner shipping services; and

(iii) other aspects of the liner shipping services,

under the agreement relevant to the market;

(*d*) the parties make available to transport users, within such period of time as may be specified by the Commission, information concerning —

(i) any tariff; and

(ii) the structure and service level of the liner shipping services,

under the agreement relevant to the market, as the Commission may specify —

(A) by allowing for the examination of documents at the offices in Singapore of the parties or their agents; or

(B) at a publicly available internet website,

and, in any event, upon request at a reasonable cost in paper or electronic form; and

(*e*) the parties notify —

(i) the Commission of the details of any variation or amendment made from time to time to the documents and details referred to in sub-paragraph (*c*); and

(ii) transport users of the details of any variation or amendment made from time to time to the information referred to in sub-paragraph (*d*),

in such mode and manner and within such period of time as may be specified by the Commission.

(3) For the purpose of sub-paragraph (2)(*b*), where a liner shipping agreement, or any variation or amendment thereto, or any part of such agreement, variation or amendment, is not in writing, the parties to the liner shipping agreement shall file a memorandum providing a full description of the details of the agreement, variation or amendment, or part thereof, that is not in writing.

(4) The parties to a liner shipping agreement claiming the benefit of the exemption under sub-paragraph (1) or (2) shall, upon notice

being given by the Commission and within such period of time as may be specified by the Commission, demonstrate that sub-paragraph (1) or (2), as the case may be, is satisfied.

Grace period

6.—(1) Where the parties to a liner shipping agreement exceed the market share limit but do not satisfy paragraph 5(2), the exemption under paragraph 5(1), if applicable, shall continue to apply for a period of 6 months following the end of the calendar year during which the limit was exceeded.

(2) The period in sub-paragraph (1) shall be extended for another 6 months if the excess is due to the withdrawal from the market of an undertaking which is not a party to the liner shipping agreement.

(3) After the expiry of the period referred to in sub-paragraph (1) or (2), as the case may be, the exemption under paragraph 5(1) shall cease to apply.

Cancellation of exemption

7.—(1) Where there has been a breach of any condition specified in paragraph 5(1)(*b*) or (*c*), the exemption under paragraph 5(1) or (2), as the case may be, shall be cancelled from such date as the Commission may specify.

(2) Where —

(*a*) there is a failure to comply with any obligation specified in paragraph 5(2)(*b*), (*c*), (*d*) or (*e*); or

(*b*) the Commission finds in a particular case that the agreement has effects which are incompatible with the provisions of section 41 of the Act,

the Commission may cancel the exemption under paragraph 5(1) or (2), as the case may be, from such date as the Commission may specify.

Made this 12th day of July 2006.

PETER ONG
Permanent Secretary,
Ministry of Trade and Industry,
Singapore.

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