

4 May 2022

Commissioner Julie Abramson
Commissioner Stephen King
Productivity Commission
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SUPPLEMENTARY FTA/APSA SUBMISSION (REVIEW OF AUSTRALIA'S MARITIME SYSTEM) - CONTAINER DETENTION

Dear Commissioners,

Thank you once again for the opportunity for ongoing direct engagement and your agreed participation at the Australian Peak Shippers Association (APSA) conference (Wagga Wagga on 30 / 31 August 2022) to share with members critical developments in the Productivity Commission's Review into Australia's Maritime Logistics System.

As previously discussed and outlined in the initial joint APSA and Freight & Trade Alliance (FTA) [submission](#) to this review, serious concerns have been raised regarding container detention fees imposed on importers and exporters by foreign owned shipping lines.

Container Detention

As outlined in the FTA/APSA submission, container detention is a charging practice deployed by shipping lines globally to incentivise the return (dehire) of the empty container within contracted periods from the time of import. Container detention can also apply to export empty containers deemed to have been held for too long by exporters prior to loading the full container onto a vessel for export.

The "contract" is between the shipping line and the entity (shipper) who engages the shipping line to carry the import or export container to/from Australia. This is set out in the shipping line's Bill of Lading terms of carriage which incorporate a clause specifying that the terms and conditions of the Ocean Carrier's Tariff that applies to container demurrage and detention.

While shipping lines have every right to be recompensed for extended equipment use, shippers should not be forced to pay for events that are outside of their control.

Supply Chain Disruption

Since providing the FTA/APSA submission on 11 February 2022, the operational environment has worsened as outlined in FTA/APSA member notices:

- [Operational update - Depots remain congested](#);
- [OMICRON IMPACTS ON LOGISTICS - Safety, new surcharges](#); and
- [Operational impacts from catastrophic weather events](#).

Furthermore, excessive delays to booking requests and inspection timings by the Department of Agriculture, Water and the Environment is adding to shippers' woes. FTA / APSA is actively engaging with the department in terms of reforms to improve efficiency and to meet the increasingly complex biosecurity protection task.

Shipping lines disregard calls for relief

In response to industry concerns, FTA/APSA wrote to major shipping lines with all refusing a request for a blanket extension of detention free days. While most conceded they will assess the quantum of penalties on a “case by case” basis, member feedback has indicated in practice, little (if any) relief has been offered by shipping lines.

The unreasonable administration of penalties was witnessed with the period of weekends and public holidays during April 2022 (including Easter and ANZAC Day) whereby many empty container parks contracted by shipping lines were closed and / or operated limited hours, yet those same shipping lines treated these days as working days in administering container detention penalties.

In addition, the following circumstances are also questionable as to their “*reasonableness*”:

- the practice by some shipping lines to start the “*detention clock*” from the time of discharge of the import container despite the container not being physically available to the importer / transport provider until the container terminal allows this to occur;
- the nominated return location does not have the gate or facility capacity to accept the return in a timely manner (i.e. not being able to secure a return timeslot in what would be considered a reasonable timeframe, or the facility has effectively reached capacity);
- redirections of empty de-hires to an alternative facility from that nominated originally by the shipping line (empty container park or container terminal) - this causes a time lag in being able to secure a de-hire timeslot at the alternative facility, which in turn can lead to the container not being returned within the imposed “*free time*”; or
- In the case of container detention applied to exports, under circumstances where the export container is “*rolled*” by the shipping line (i.e. not loaded onto the intended vessel and rebooked on a subsequent vessel), yet the shipping line in many instances still charges the exporter container detention for the delay in the export of the container.

Further exemplifying the unreasonable application of fees, container detention has been charged to Expeditors, an international freight forwarder who suffered a well-publicised, global cyber-attack on 20 February 2022.

US protections for shippers

In contrast to Australia whereby supply chain participants have no protections from container detention penalties, the United States Federal Maritime Commissioners Sola and Bentzel put the spotlight on the actions of shipping lines and port operators in response to the Expeditors predicament with a formal [statement](#) on 13 April 2022.

“While every potential demurrage and detention fee should be assessed based on the facts surrounding the transaction, and in accordance with the FMC’s Interpretive Rule on Demurrage and Detention under the Shipping Act, we believe that given the malicious nature of the attack that caused the transportation events delaying pick-up of cargo, that care should be given in the assessment of fees that resulted from this cyber-attack.”

Accordingly, we would urge ocean carriers and marine terminal operators to exercise restraint in the assessment of demurrage and detention fees given the nature of the actions causing the commercial operational challenge”

In its initial Interpretive Rule, the US Federal Maritime Commission (FMC) neatly set out an overarching Incentive Principle that *“In assessing the reasonableness of ... detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.”*

With that overarching Incentive Principle in mind, in relation to empty container return, the US FMC Interpretive Rule states that *“absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.”*

International Precedent

In November 2021, the FMC issued an order of investigation and hearing to determine whether Hapag-Lloyd was in violation of the Shipping Act by its practice of assessing detention charges when it failed to provide an equipment return location, appointments were unavailable for equipment return during the allocated free time, or shipper-disputed charges related to these issues were not waived.

The case involves 11 empty containers that were returned from one to 11 days after free time expired.

In her decision, the FMC’s Chief Administrative Law Judge Erin Wirth found that, *“on some of the days for which detention was charged, there were not sufficient appointments to return the containers, and Hapag-Lloyd’s policy and practices regarding detention charges were unreasonable.”*

Along with a cease-and-desist order, Hapag-Lloyd was ordered to pay US\$822,220 as a civil penalty for 14 *“wilful and knowing violations of section 41102(c) of the Shipping Act.”*

Evidence of Unfair Practices

FTA / APSA have been inundated by members providing examples of unreasonable practices.

Many were concerned about repercussions, fearing that foreign owned shipping lines may further restrict the commercial viability of their operations if they were found to be supplying evidence to the Productivity Commission.

Having stated that, we are pleased to provide the attached examples provided in STRICT CONFIDENCE.

Need for regulation

FTA/APSA provided a separate [supplementary submission](#) to the Productivity Commission on 19 April 2022 pertaining to “Terminal Access Charges”. It is conservatively estimated that these charges, combined with container detention fees, are costing Australia’s international trade sector \$1 billion + annually.

It is important to note that this cost is on top of record high shipping line surcharges and freight rates that are combining to create inflationary pressures and significantly adversely impacting the Australian economy.

In line with this evidence, FTA / APSA restates its recommendation as outlined in its original submission:

RECOMMENDATION 5 (regulation of container detention practices) – the need for federal government action and potential regulation, similar to US Federal Maritime Commission (FMC), to ensure reasonable container detention policies are administered.

FTA/APSA calls on the Productivity Commission to lead the way for regulation to end the scourge of unreasonable container detention practices.



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