

14 October 2022

Commissioner Stephen King
Productivity Commission

CC: Commissioner Julie Abramson & Athena Wicks <mailto:maritime@pc.gov.au>

Dear Stephen,

The Australian Peak Shippers Association (APSA) and Freight & Trade Alliance (FTA) thank you for your detailed presentation and participation in the panel discussion with Mick Keogh [Deputy Chair, Australian Competition and Consumer Commission (ACCC)] at the APSA Conference in Wagga Wagga on 31 August 2022.

You stated during your presentation that you were in a position, prior to the release of the Productivity Commission (PC) draft report on *Australia's Maritime Logistics System*, 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 the PC has not only heard our concerns expressed during our engagement, but have also responded positively with well-considered recommendations, largely aligned to those outlined in the below FTA / APSA submissions:

- [FTA / APSA submission to the Productivity Commission - 11 Feb 2022](#),
- [FTA / APSA supplementary submission \(Terminal Access Charges\)](#),
- [Supplementary FTA/APSA submission \(Container Detention\)](#),
- [Supplementary FTA/APSA submission \(Landside Congestion\)](#), and
- [Supplementary FTA/APSA submission \(Shipping Competition Review\)](#)

The following feedback on the PC draft report has been structured in line with seven (7) key recommendations put forward in the FTA / APSA submission from 11 February 2022.

SHIPPING COMPETITION REVIEW

FTA / APSA RECOMMENDATION 1 – repeal of *Part X of the Competition and Consumer Act 2010* (CCA), with retention of shipper collective bargaining provisions, leaving two options:

- (1) foreign owned shipping lines to operate in line with competition laws faced by other businesses involved in Australian commerce; or
- (2) if deemed necessary for foreign owned shipping lines to have ongoing protections, expand the role of the ACCC (or introduce a federal maritime regulator) to administer processes to safeguard exporter and importer's interests, in particular, monitoring the appropriateness of shipping line (and contracted stevedore / empty container park) surcharges, fees and penalties.

FTA / APSA response to the PC Draft Report

Over the last three years, the container line market dominated by foreign owned shipping line alliances, has been void of any genuine competitive tension. In line with our above recommendation, FTA / APSA support the PC 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.

The FTA / APSA position aligns with the views of the Global Shippers Forum (GSF) and those of multiple international associations advocating to the European Commission (EC) 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.

- GSF correspondence to the EC (3 October 2022) - available [HERE](#)
- International associations correspondence to the EC (4 October 2022) - available [HERE](#)

MINIMUM SERVICE LEVELS AND NOTIFICATION PERIODS

FTA / APSA RECOMMENDATION 2 – introduction of an appropriate regulatory framework that provides exporters, importers and freight forwarders safeguards against 'exclusive dealings', ensuring minimum service levels and prescribed variation notification periods (minimum 30-day notice as per US regulation).

FTA / APSA response to the PC Draft Report

FTA / APSA note the extensive commentary in the PC Draft Report pertaining to skills, training, technology adoption, industrial relations reform, container port market power and the need to better measure the performance of Australia's container ports.

It is anticipated that these reforms will provide improved reliability in shipping services giving exporters in particular, predictability to manage supply chain operations rather than the current "moving target" environment of port by-passes and regular variations to schedules.

Exporters and importers also need predictability in costs. Should shipping lines require compensation for poor quayside performance, this should be sought direct from their contracted stevedore rather than the imposition of "congestion" surcharges.

In terms of the broader implementation of surcharges, FTA / APSA does not see a role for government to intervene in commercial pricing but again request that the PC reconsider our above recommendation for an appropriate regulatory framework that provides exporters, importers, and freight forwarders safeguards, ensuring minimum service levels and prescribed variation notification periods (minimum 30-day notice as per US regulation).

It is understood that the ACCC is closely monitoring any potential anti-competitive practice associated with shipping lines heading more towards vertical integration in areas such as landside transport, depot operations and customs clearances. FTA / APSA is committed to supporting the ACCC to ensure a fair operating environment exists with a focus on any "exclusive dealing" arrangements.

INFRASTRUCTURE INVESTMENT

FTA / APSA RECOMMENDATION 3 – increase investment in infrastructure to address inefficiencies in the supply chain caused by larger ships, lack of rail access to Australian container ports and shortage of space in empty container parks.

FTA / APSA response to the PC Draft Report

FTA / APSA note the commentaries in the PC Draft Report in terms of the adequacy of infrastructure investment.

While the recent APSA Conference showcased measures taken by ports, government and key sectors of commerce, panellist and delegate interaction highlighted the need for further investment in physical rail infrastructure, exposed during recent extreme weather conditions.

FTA / APSA question the broad statement in the PC draft report that transporting containers to and from Australian ports by train is more expensive than using trucks, and rail services are inherently limited in where they can deliver or pick up goods. This is incorrect for long haul regional services where rail is by far much more affordable than road. Having direct access to the port for regional rail services reduces the cost as there is no double handling the containers at other terminals.

It is also evident that further investment and port management of empty container parks is required. FTA / APSA does not share the same level of confidence as outlined in the PC draft report suggesting that ECP pressures are transitory and will reduce as pandemic pressures recede.

REGULATION OF TERMINAL ACCESS CHARGES

FTA / APSA RECOMMENDATION 4 – the scope of the National Transport Commission (NTC) review of Terminal Access Charges be expanded to examine the potential of regulation to force stevedores (and empty container parks) to cost recover directly against their commercial client (shipping line) rather than via third party transport operators.

FTA / APSA response to the PC Draft Report

In response to Information Request 6.2, FTA / APSA is 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, this has been offset by commensurate increase landside charges administered against transport operators.

In line with our above recommendation, FTA / APSA firmly agree with the PC 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, FTA / APSA recommend that similar regulation be extended to Empty Container Park (ECP) and 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).

- National ECP history of charges available (as at 11 October 2022) – available [HERE](#)
- National TAC history of charges available (as at 11 October 2022) - available [HERE](#)

REGULATION OF CONTAINER DETENTION PRACTICES

FTA / APSA RECOMMENDATION 5 – 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 response to the PC Draft Report

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

FTA/APSA does however question the PC 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 obtained by FTA / APSA, 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.

FTA / APSA remains 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 than 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. FTA / APSA see the need for some form of safeguard for the detention clock to stop once the export container is received by the stevedore.

WATERFRONT INDUSTRIAL RELATIONS REFORM

FTA / APSA RECOMMENDATION 6 – the Federal Government to initiate a formal waterfront industrial relations review to provide immediate and future business continuity for what is an 'essential service' and our international gateway for major supply chains.

FTA / APSA response to the PC Draft Report

In line with our above recommendation, FTA / APSA support the PC draft recommendation 9.1 to prohibit enterprise agreement content that imposes excessive constraints on productivity in the ports and costs on the supply chain.

IMPLEMENTATION OF BIOSECURITY REFORM PRIORITIES

FTA / APSA RECOMMENDATION 7– ongoing engagement and reporting between the Department of Agriculture, Water and the Environment and industry to achieve the four reform priorities identified in the Inspector-General of Biosecurity (IGB) report [Adequacy of department's operational model to effectively mitigate biosecurity risks in evolving risk and business environments](#) being:

- (1) Regulatory maturity;
- (2) Risk pathway partnership;
- (3) Frontline focus; and
- (4) Sustainable funding model.

FTA / APSA response to the PC Draft Report

In response to draft finding 11.3 FTA / APSA agree that Government should continue to overhaul cargo clearance systems. Clearance systems deployed by the Department of Agriculture, Fisheries and Forestry are convoluted, outdated, and are directly contributing to significant additional operational costs. One member alone has incurred more than 2 million dollars over the last 12 months in container detention costs due to delays (often taking several weeks) in inspection delays.

It is recommended that the PC more closely examine the impacts of DAFF processing delays and consider remedial action aligned with the FTA / APSA submission to the current Senate Rural and Regional Affairs and Transport References Committee – available [HERE](#)

FTA/APSA trusts that the above content will assist the PC in finalising recommendations in its final report to the Federal Government in December 2022. In the interim, FTA/APSA representatives are available for further ongoing engagement and look forward to participation in the upcoming public hearings on 4 November 2022.

yours sincerely



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