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The future of liner shipping conferences in Australia

A comparison with the justifications and laws of the European Union

Candidate number: 8006

Submission deadline: 1 November 2017

Number of words: 17 993

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1 INTRODUCTION

1.1 OBJECTIVE

In 2006 the European Union (EU) unilaterally changed the status quo of liner shipping by repealing their regulatory protection for conference activity.[1] Conferences have existed in shipping for over one hundred and thirty years and received significant and unique exemptions from the application of competition laws in many jurisdictions. At this time the European Union is the only jurisdiction to have removed existing conference exemptions, but Australia looks set to take the same road. A recent review of competition law policy in Australia has recommended that this protection be removed, effectively making conferences illegal on Australian trade routes.

The EU competition policies and removal of the conference block exemption have been discussed liberally in the literature. However, the Australian policies and approach have not received the same level of analysis. Further, any existing discussion of the Australian laws applicable to liner shipping does not encompass new developments such as the proposed class exemption for consortia agreements. Extending the applicability of commentary on the EU laws to Australia may provide a starting point for filling in the vast gap in legal analysis surrounding the Australian competition legislation as it applies to cooperative agreements in liner shipping.

It is for this reason that this research will compare the EU and Australian liner shipping legal systems and their justifications for removing competition law exemptions for conference agreements. This comparison will take place with the view to answering three research questions. Firstly, why are cooperative agreements given exemptions from competition laws? Secondly, are these justifications common between the EU and Australia? Thirdly, is the Australian regulation of competition in liner shipping approaching similarity with the EU system for competition in liner shipping?

1.2 OUTLINE

This research has been structured to fulfill the objective by addressing each research question in a number of sections with comparison between the EU and Australian systems taking place throughout.

In order to answer the first research question, section 2 summarises the history and development of the laws with sections 3 and 4 explaining the present form of the laws as they relate to cooperative agreements in liner shipping. The policy discussion begins with Section 5 that provides a shallow but broad explanation of the policy reasons behind cooperative agreements and their regulation.

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[1] First united as the European Economic Community, and then the European Community, European Union (EU) will be used throughout this research irrespective of time.

The second research question is discussed in sections 6 and 7 that explain how the policy reasons have been recognised by the EU and Australia in order to justify their liner shipping regulation laws.

Reflecting on the discussion of the policies and their applicability, the Australian solution to these problems is explored in section 8. A final comparison is made in section 9 between the EU laws as they are and the potential future Australia laws in order to answer the third research question.

1.3 DELIMITATION

There are several clarifications to be made in relation to the limits of this research. Firstly, it applies only to the international liner shipping industry. Liner shipping refers to scheduled maritime transport services of container freight and excludes any application to internal shipping or tramp shipping. Secondly, only laws relating to the competition issues of anticompetitive agreements are discussed. The scope is not extended to abuse of dominant market position or merger regulations. Thirdly, this discussion relates only to the laws of the EU and Australia, to the exclusion of all third country laws, including laws of members of the EU.

1.4 DEFINITIONS

As identified by the Organisation for Economic Co-operation and Development (OECD) in 1998, a significant difficulty in the regulation of anti-competitive activity is a lack of international consistency.[2] This inconsistency begins with terminology. In the context of liner shipping there are two fundamentally different agreements; conferences and consortia. The primary distinction is that while conferences involve price fixing and supply limitation, consortia limit their agreements to operational conduct.[3] Other types of agreements exist also, the term *cooperative agreements* will be used throughout this research to refer to all agreements collectively.

1.4.1 CONFERENCES

Conferences are defined vastly differently by the EU Council than in Australia. The EU Council adopted their definition of conferences from the United Nations Convention on a Code of Conduct for Liner Conferences (UNCTAD Code);

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[2] OECD Council, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels' (Report no C(98)35/Final, Organisation for Economic Co-operation and Development, 14 May 1998).

[3] Hongyan Liu, *Liner Conferences in Competition Law: A Comparative Analysis of European and Chinese Law* (Dissertation, International Max Planck Research School for Maritime Affairs, 2010) 220; Directorate for Science Technology and Industry Division of Transport, 'Competition Policy in Liner Shipping', (Report No DSTI/DOT(2002)2, Organisation for Economic Co-operation and Development, 16 April 2002) 25 (‘*OECD 2002’*); Felix Dinger, 'What shall we do with the drunken sailor? EC Competition Law and Maritime Transport' (2002) 61 *European Institute of University of Basel* 57, 25.

> A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.[4]

Australia is not a signatory to the UNCTAD Code, the competition laws applicable to liner conferences are set out in pt X of the *Competition and Consumer Act 2010* (Cth). A conference is defined to mean;

> An unincorporated association of two or more ocean carriers carrying on businesses that includes, or is proposed to include, the provision of outwards liner cargo shipping services or inwards liner cargo shipping services.[5]

The pt X definition is very broad and differs from the working definition of conferences, the definition used by the Productivity Commission is more accurate:

> A conference is a route-specific agreement between carriers on conditions for the carriage of cargo. Under a conference, the carriers agree to apply uniform or common freight rates, coordinate the scheduling of sailings and ports of call, regulate capacity, and allocate cargo and revenues.[6]

1.4.2 CONSORTIA

The European Commission defines a consortium as:

> An agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements.[7]

In contrast to the clear differentiation in EU law between conferences and consortia, Australian legislation applies the same definition to both conferences and consortia. However, the Productivity Commission again provides a good working definition;

> Operational agreements (consortia) typically involve cooperation among different carriers of their operating services by means of technical, operational or commercial coordination. Their scope can

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[4] *United Nations Convention on a Code of Conduct for Liner Conferences,* opened for signature 1 July 1974 to 30 June 1975, 1334 UNTS 15 (entered into force 6 October 1983) pt 1 ch 1; *Council Regulation (EEC) No 4056/86 of 22 December laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport* [1986] OJ L 378/4, art 1(3)(b) ('*Council Regulation (EEC) No 4056/86*').

[5] *Competition and Consumer Act 2010* (Cth) s 10.02.

[6] Productivity Commission, Parliament of Australia, Review of Part X of the Trade Practices Act 1974: *International Liner Cargo Shipping: A Productivity Commission Inquiry Report 32* (2005) XXXI ('*Productivity Commission Report 2005*').

[7] *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31, art 2.

vary from simple slot chartering or vessel sharing arrangements to consortia or more extensive operational agreements that include managing port installations and marketing activities.[8]

1.4.3 Other Cooperative Agreements

Cooperative agreements can vary from highly integrated agreements requiring significant levels of investment, to flexible slot exchange agreements. To use the words of the European Commission "The legal form of the arrangements is less important than the underlying economic reality that the parties provide a joint service."[9] The full variety of agreements used in the liner shipping industry will not be considered in this research, a short summary follows for the sake of contrast.

Discussion agreements provide a forum where carriers can coordinate their actions by discussion and sharing commercial information relevant to a specific trade route.[10] Such discussion can include service arrangements, predicted supply and demand forecasts, fees, capacity and freight rates. The discussion and any consensus reached in discussion agreements is not binding on the participants.[11] Discussion agreements are not provided any exemptions in the EU and so are effectively illegal. While in Australia they are still able to be registered for exemption from competition laws, it has been recommended that this protection be removed.[12]

Technical agreements aim exclusively at the technical improvement of liner shipping services, such technical improvements may include implementation of environmental standards.[13]

Strategic or Global Alliances involve cooperation between carriers worldwide across multiple trade routes. Most often these alliances are operational in nature sharing investment risks and vessel capacity.[14] Depending on the individual alliance agreements they may be treated the same in the law as consortia or conferences, but due to their global reach they are a new form of operation.[15]

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[8] *Productivity Commission Report 2005*, above n 6, XXXI.

[9] *Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)* [2009] OJ L 256/31, Preamble para 3 ('*Commission Regulation (EC) No 906/2009*').

[10] Dinger, *What shall we do with the drunken sailor?*, above n 3, 7.

[11] *Productivity Commission Report 2005*, above n 6, XXI.

[12] Ibid XLVI.

[13] Dinger, *What shall we do with the drunken sailor?*, above n 3, 22; Costas Stamatiou and Panayiotis Neocleous, 'The New Era of EC Competition Law in the Shipping Industry' (2009) 20 International Company and Commercial Law Review 1 (2009) 5.

[14] Directorate for Financial and Enterprise Affairs Competition Committee, 'Competition Issues in Liner Shipping: Note by the Secretariat' (Report no DAF/COMP/WP2(2015)3, Organisation for Economic Co-operation and Development, 27 November 2015) 28 ('*OECD 2015*').

[15] Premti, Anila, 'Liner Shipping: Is there a way for more competition?' (Discussion Paper No 224, UNCTAD, March 2016) 4; *OECD 2002*, above n 3, 26 [56].

2 HISTORY OF LINER SHIPPING REGULATION

The history of conferences in liner shipping explains why cooperative agreements that so clearly violate modern competition laws are excepted from those laws and permitted to operate.

Until the 19th century ships did not sail with a set timetable or at regular frequencies, they sailed as the need arose for them to do so. Industrialisation brought with it the steamship and the demand required for scheduled sailing times to begin. Voyages were now more punctual, achieving increased scheduling, but larger vessels were creating overcapacity and price undercutting.[16] This destructive pattern led to the first conference agreement, the Calcutta (India) route, being established in the United Kingdom.[17] The aim of this conference was to eliminate competition among the members, but also to control competition from outside of the conference.[18]

The liner shipping industry successfully established the dogma that conferences were required for secure stable services.[19] Liner shipping was indispensable to world trade and the efficient service provided by conferences could not be put at risk by prohibitive laws.[20] Fast-forward as conferences spread throughout the world, they came to the attention of courts in the United Kingdom and legislators in the United States, and in 1974 the UNCTAD Code was introduced.[21]

2.1 EUROPEAN UNION

The introduction of the UNCTAD Code in1974 placed the EU in a difficult position. The historical existence of liner conferences, and their acceptance in the UNCTAD Code, could conflict with the competition laws of the EU. The EU Council used this time of uncertainty to create the first EU maritime policy. Regulation 954/79 was adopted encouraging Member States to ratify the UNCTAD Code as a means to preventing breaches of EU competition laws and also in recognition of the role of conferences in stabilising services to shippers.[22] The development of significance to

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[16] Felix Dinger, *The Future of Liner Conferences in Europe* (Peter Lang, 2004) 20; William Sjostrom, 'Ocean Shipping Cartels: A Survey' (2004) 3(2) *Review of Network Economics* 107, 111.

[17] Felix Dinger, *The Future of Liner Conferences in Europe*, above n 16, 22.

[18] Luis Ortz Blanco, *Shipping Conferences Under EC Antitrust Law: Criticism of a Legal Paradox* (Hart Publishing, 2007) 17.

[19] Francesca Munari, 'Liner Shipping and Antitrust after the Repeal of Regulation 4056/86' [2009] *Lloyd's Maritime and Commercial Law Quarterly* 602, 44.

[20] *Opinion of the European Economic and Social Committee on the 'White Paper on the review of Regulation No. 4056/86, applying the EC competition rules to maritime transport'*, [2005] OJ C 157, 131.

[21] *United Nations Convention on a Code of Conduct for Liner Conferences,* opened for signature 1 July 1974 to 30 June 1975, 1334 UNTS 15 (entered into force 6 October 1983); Blanco, above n 18, 30; Liu, above n 3, 5.

[22] *Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences* [1979] OJ L 121/4.

modern liner shipping was the EU Regulation Package of 1986. This package of four regulations formed the centre of EU maritime transport policy. [23]

2.1.1 CONFERENCES

Not all EU member states followed the encouragement of the Council to ratify the UNCTAD Code. But it nonetheless became the basis for Regulation 4056/86 establishing the block exemption for liner conferences.[24]

Regulation 4056/86 provided protection for liner shipping conferences until in 2003 when the process began for removal of the Regulation. The European Commission instituted a review, producing the Commission White Paper in 2004, and the Commission proposal for an EU Council Regulation repealing Regulation 4056/86 in 2005.[25] The Commission concluded that three of the four cumulative conditions of art 101(3) of the *Treaty on the Functioning of the European Union* (TFEU)[26] were not adequately justified for the industry to merit continued protection from the regular competition laws.[27] Regulation 1419/2006 was adopted after unanimous agreement in the EU Council and Regulation 4056/86 was repealed.[28]

2.1.2 CONSORTIA

The European Commission realised the importance of consortia as a vehicle for cooperation between carriers during discussions in 1984. The Commission recognised that the EU shipping industry needed to be competitive on the world liner shipping market and that cooperation with the objective of achieving economy of scale was necessary.[29] At the time of adoption of Regulation 4056/86 the EU Council and Commission were already in communication about a similar regulation regarding consortia.[30] In 1990 the first report supporting a block exemption for consortia was

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[23] Liu, above n 3, 17.

[24] Dinger, *What shall we do with the drunken sailor?*, above n 3, 11.

[25] Commission of the European Communities 'White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport' (White Paper, Com (2004) 675 final, 13 October 2004) 5 (‘*White Paper on the review of Regulation 4056/86*’).

[26] Originally the *Treaty Establishing the European Community*, now the *Treaty on the Functioning of the European Union,* accordingly the numbering of these provisions has changed over the time of existence. The content of the relevant provisions has remained the same and the current article numbers will be used.

[27] Blanco, above n 18, 137.

[28] *White Paper on the review of Regulation 4056/86*, above n 25, 5.

[29] Commission of the European Communities, ‘Communication by the Commission Report on the possibility of a group exemption for consortia agreements in liner shipping’ (Com(90) 260 final, 18 June 1990) 6.1 (‘*European Commission consortia exemption report*’).

[30] Liu, above n 3, 25; *Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services* [2006] OJ L 269/1, art 1 (‘*Council Regulation (EC) No 1419/2006*’).

produced, along with a draft.[31] Following consultations with the European Parliament, United Nations Economic and Social Council, and the Commission, the EU Council adopted Regulation 479/92 giving the European Commission the power to legislate for a consortia block exemption.[32] As a result Regulation 870/95 was passed and has had its period of application continuously amended, most recently by Regulation 697/2014, extending the validity to 2020.[33]

2.2 AUSTRALIA

Australian competition laws are contained in the *Competition and Consumer Act 2010* (Cth).[34] Liner shipping is individually legislated for in pt X of the *Competition and Consumer Act 2010* (Cth). The *Trade Practices Act 1965* (Cth) was introduced originally with an exclusion for overseas liner shipping.[35] The first review of these laws was in 1977 by the Department of Transport, the Grigor Report.[36] At this time amendments were suggested, but a Parliamentary bill introduced in 1980 did not proceed.

The liner cargo shipping competition laws were next reviewed by an Industry Task Force in 1984 by instruction of the Government. The report issued in 1986 recommended a separate Shipping Act allowing cooperative agreements between carriers to continue but with stronger pro-competitive safeguards, and the establishment of a shipping industry tribunal.[37] Following this report the Trade Practices Act 1974 was amended to include a minority of recommendations.

A third review was commissioned in 1993 led by Mr Patrick Brazil AO. It was during the Brazil review that the Australian Competition and Consumer Commission (ACCC) first suggested the repeal of pt X.[38] Through a change of Government in 1996 the Brazil Review received no further

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[31] *European Commission consortia exemption report*, above n 29.

[32] *Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)* [1992] OJ L 55/3 ('*Council Regulation (EEC) No 479/92*').

[33] *Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92* [1995] OJ L 89/7 ('*Commission Regulation (EC) No 870/95*'); *Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application* [2014] OJ L 184/3, art 1.

[34] Previously the *Trade Practices Act 1974* (Cth).

[35] Shipping Australia Limited, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review*, June 2014, 17.

[36] Aldcroft, Derek, 'Overseas Cargo Shipping Legislation Report' (1979) 1 *The Great Circle* 46, 36.

[37] Bureau of Transport Economics, Parliament of Australia, *A Study of Liner Shipping Services Into and Out of Australia* (1986).

[38] Productivity Commission, Parliament of Australia, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974: Inquiry Report No. 9* (1999) 42.

attention and another review was undertaken in 1999 by the Productivity Commission.[39] The 1999 Review found that pt X generally satisfied Australia's national interest, but also made some recommendations, a number of which were implemented.[40]

Around the same time of the *OECD 2002* Report, a fourth review in Australia began to make the same recommendations. The 2005 Productivity Commission review recommended that pt X be repealed in favour of assessment of individual agreements for their net public benefit.[41] However, a change in government again paused progress until the Competition Policy Review was instituted, and completed in 2015.[42] It is this review that will receive significant attention throughout this research.

[39] Stuart Hetherington, 'Shipping Conferences - The End of the Line?' (27 May 2015) on Lexology <https://www.lexology.com/library/detail.aspx?g=26cc9714-1398-4dd8-b221-1676208c9025>.

[40] Shipping Australia Limited, above n 33, 18.

[41] *Productivity Commission Report 2005*, above n 6, XXVIII.

[42] Competition Policy Review Commission, Parliament of Australia, Final Report: Part 4 - Competition Laws (2015).

3 EUROPEAN UNION COMPETITION LAWS

Continuous scrutiny is applied to cartel activity and it is said that the EU Council holds the shipping industry to the highest standards of competitive practices, of all jurisdictions.[43] Administered by the European Commission, EU competition law is built on three pillars; 1. Prohibition of all agreements that have the objective to prevent, restrict, or distort competition; 2. The prohibition of abuse of dominant market position; 3 A regime for controlling mergers.[44]

3.1 PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS

Cooperative agreements in liner shipping are concerned with the first of these three principles: the ability for cooperative agreements to possibly prevent, restrict, or distort competition. The prohibition of anticompetitive agreements is contained in art 101 of the *TFEU*.[45] Article 101(1) is the main rule and expressly prohibits all agreements that may restrict competition in trade between Member States. Article 101(2) declares that any agreements or decisions in contravention of art 101(1) are automatically void. Article 101(3) is an exception provision for agreements, decisions or practices that provide an overall benefit to consumers.

3.1.1 ARTICLE 101(1) PROHIBITION RULE

Article 101(1) prohibits all agreements, decisions and concerted practices between undertakings that may affect trade between member states and have as their object, or effect the prevention, restriction, or distortion of competition within the internal market.[46] The objective of this article is to enhance consumer welfare and ensure an efficient allocation of resources by means of protecting internal market competition.[47] Article 101(1) includes a distinction between the restriction of competition by object or effect. An anti-competitive objective is sufficient to determine that the agreement is restricting competition.[48] However, if an agreement is not restrictive of competition by object then the likely effects of the agreement must be examined.[49]

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[43] Anthony Woolich and Daniel Martin, 'Competition and Regulatory Law' in James Gosling and Tessa Jones Huzarski (eds), *The Shipping Law Review* (Gideon Roberton, 2016) 1, 1.

[44] Only the first of these pillars will be discussed, as explained in section 1.2.1 the second two pillars are outside of the scope of this research.

[45] *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)* [2012] OJ C 326/47, art 101(1).

[46] Ibid.

[47] *Communication from the Commission Notice of Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C 101/97, 98 (‘*Commission Guidelines on the application of Article 101(3)*’).

[48] *Communication from the Commission of the European Communities Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ L 11/1, [24].

[49] *Commission Guidelines on the application of Article 101(3)* [2004] OJ C 101/97, [24].

Activities prohibited by art 101(1) include, but are not limited to: fixing of purchase or selling prices, or any other trade conditions; limiting or controlling production or markets, applying dissimilar conditions to similar transactions with other parties, and creating a competitive disadvantage.[50] EU Courts have clarified the scope of art 101(1) by deciding that activities that allow undertakings "to create a climate of mutual certainty" as to their future market policies fall within the scope of art 101(1).[51] The *Commission Guidelines on the application of Article 101(3)* have further formulated that the scope encompasses agreements that are likely to have an appreciable adverse impact on price, output, product quality, product variety, and innovation in the market.[52]

Article 101(1) provides a prohibition against the above described types of agreements, decisions, and concerted practices. But, where such activities are undertaken, or brought into existence, art 101(2) provides that they are void.[53] This means that in the law, the agreement, decision, or concerted practice never existed.

3.1.2 ARTICLE 101(3) EXCEPTION RULE

Article 101(3) declares the provisions of art 101(1) inapplicable if the agreement, decision, or concerted practice is on the balance, pro-competitive.[54] The exception provided for in art 101(3) applies to individual cases, or can be utilised to create block exceptions for categories of agreements, decisions, and concerted practices. The consortia block exemption, Regulation 906/2009, is an example of this utilisation. An undertaking will self-assess whether an agreement falls within the consortia block exemption and then only if art 101(1) is enforced against it must the undertaking prove that it is covered by the block exemption rather then proving that it satisfies art 101(3).[55]

Article 101(3) is a practical addition recognising that although some practices may be *prima facie* anticompetitive, they may nonetheless provide customers with benefits through greater efficiency and technical progress.[56] This benefit is calculated through the evaluation of four requirements, two positive and two negative. The positive requirements are; firstly, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;

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[50] *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)* [2012] OJ C 326/47, art 101(1)(a)-(e).

[51] *Tate & Lyle and Others v Commission* (T-202/98) [2001] ECR II-2035, [60].

[52] *Commission Guidelines on the application of Article 101(3)* [2004] OJ C 101/97, [16].

[53] *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)* [2012] OJ C 326/47, art 101(2).

[54] *Commission Guidelines on the application of Article 101(3)* [2004] OJ C 101/97, [2].

[55] Ibid [35].

[56] Woolich and Martin, 'Competition and Regulatory Law', above n 43, 3; Julia Dietrick, 'Economic and legal foundations of EU competition law' in Moritz Lorenze (ed), *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 1, 30.

and secondly, consumers must receive a fair share of the benefits. The negative requirements are that the agreement must not: impose restrictions which are not indispensable to the attainment of the objectives; and provide undertakings with the possibility of eliminating competition in respect of a substantial part of the services in question. Thus, when an agreement creates efficiencies or benefits that satisfy these four conditions of art 101(3), it is excepted from the art 101(1) prohibition.

Article 101(3) differs from the main rule of art 101(1) because the exception will apply to all agreements that fulfill the four criteria described above, regardless of whether it is the object or the effect that is anti-competitive.[57] However, in the case that an agreement covered by a block exemption has certain effects incompatible with art 101(3) then the Commission can withdraw the cover of the exception from the individual agreement.[58]

3.2 CONSORTIA BLOCK EXEMPTION

Regulation 906/2009 provides a class exemption for carriers to utilise consortia arrangements due to their benefit to EU shippers and carriers.[59] A class exemption is seen as the most suitable vehicle for these laws as consortia agreements vary greatly in their diversity and so individual evaluation would be complicated and produce uncertainty.[60]

Regulation 906/2009 only applies to consortia that provide international liner shipping services from or to the EU ports.[61] The exemption allows liner shipping services to be jointly operated by consortium including for example; coordination of sailing timetables and points of call, slot or space chartering on vessels, pooling of vessels and port installations, use of common offices, and provision of containers and other equipment.[62] Consortia are able to adjust capacity in response to fluctuation and demand, and jointly operate port terminals and stevedoring services, and any other activity necessary for the implementation of these activities. Hardcore competition restrictions such as price fixing and limitation of capacity (other than in response to demand) and allocation of markets or customers, are not permitted.[63]

These exemptions apply to consortia, provided that they have a combined market share in the relevant market that does not exceed 30%, as calculated by total volume of goods.[64] The relevant market is specific to the type of behavior in the market and the competition issue being examined,

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[57] *Commission Guidelines on the application of Article 101(3)* [2004] OJ C 101/97, [20].

[58] Ibid [36].

[59] Regulation 906/2009 has had its period of application extended until 2010 by Regulation 697/2014.

[60] Alla Pozdnakova, 'New liner consortia block exemption: a legislative comment' (2010) 31(10) European Competition Law Review 415, 415.

[61] *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31 art 1.

[62] Ibid art 3.

[63] Ibid art 4.

[64] Ibid art 5.

therefore it is complex to define.[65] It is for this reason that a one tenth contingency is provided for consortia to exceed the market share limit for any period of two consecutive calendar years.[66] Where limits relating to market share or the one tenth contingency are exceeded, the exemption continues to apply for twelve months after the end of the calendar year during which it was exceeded.[67]

Finally, the exemption provides that consortia members must have the right to withdraw from the agreement free from financial or other penalty provided notice is given.[68] The notice period may be set at up to 6 months, or 12 months if the consortium is highly integrated. Additionally, consortia may require an obligatory 24 month initial membership, this may also be extended to 36 months if the consortium is highly integrated.[69] These provisions are important to balance the ability for consortia to operate with certainty, and for carriers to operate with a level of freedom.

3.3 Removal of Conference Block Exemption

Until 2006 Regulation 4056/86 provided a block exemption for conference agreements operating to and from the EU. Regulation 4056/86 has been described as "wholly exceptional" in nature due to the following; it is unlimited in time, does not contain a review requirement, and it was passed directly by the EU Council.[70] Regulation 1419/2006 repealed Regulation 4056/86 with a two year transition period. Despite no longer being active law, it is worth discussing the 4056/86 block exemption for the sake of comparison with the Australian laws that are also possibly facing repeal.

The conference block exemption was implemented by the EU Council through the art 101(3) exception, the same legal base as the consortia block exemption. Regulation 4056/86 allowed conferences to engage in the coordination of; shipping timetables, frequency of sailings, allocation of sailings, services, cargo or revenue among members.[71] This was with the condition that conferences shall not cause detriment to ports, transport users or carriers by applying discriminatory rates and conditions of carriage, unless those conditions are economically justified.[72]

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[65] *Commission Notice on the definition of relevant market for the purposes of Community competition law* [1997] OJ C 372/5, 6 [12].

[66] *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31, art 5(3).

[67] Ibid art 5(4).

[68] Ibid art 6.

[69] Ibid.

[70] Dinger, *What shall we do with the drunken sailor?*, above n 3, 12; Marco Benacchio, Claudio Ferrari and Enrico Musso, 'The liner shipping industry and EU competition rules' (2007) 14 *Transport Policy* 1 (2007) 4; *Compagnie generale maritime and Others v Commission of the European Communities* (T-86/95) [2002] ECR II-01011 [254].

[71] *Council Regulation (EEC) No 4056/86* [1986] OJ L 378/4, art 3.

[72] Ibid art 4.

Regulation 4056/86 provided that conferences were obliged to consult with transport uses and conferences for the purpose of seeking solutions, particularly concerning rates, condition and quality of scheduled services.[73] Loyalty arrangements were permitted provided they complied with the conditions that; rebates were offered, a clear list was provided of cargo and portion of cargo that were agreed, a list of circumstances was provided under which users were released from the loyalty obligations, transport users were entitled to freedom of inland transport operators, and tariffs and related conditions were available to transport users. Importantly, the art 102 abuse of dominant position rules were always applicable, with no exception provided.[74]

Due to the unique fact that Regulation 4056/86 was introduced without a review period, it was not brought into review until 2003, and this was as a result of the *OECD 2002* Competition Policy in Liner Shipping Report.[75] The EU Council began with Regulation 1/2003 repealing the procedural provisions of Regulation 4056/86, meaning that the maritime transport sector became subject to common competition enforcement rules.[76] Following public input, a commission paper and legislation proposal, Regulation 1419/2006 removed the conference block exemption.[77] The EU Council provided reasons for this decision echoing largely the wording of the *OECD 2002* Report. These reasons are discussed in section 6 below.

[73] Ibid art 5.

[74] Ibid art 8.

[75] *OECD 2002*, above n 3; Blanco, above n 18, 144.

[76] *White Paper on the review of Regulation 4056/86*, above n 25, [17].

[77] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1.

4 AUSTRALIAN COMPETITION LAWS

4.1 AUSTRALIAN CARTEL PROVISION LAWS

The Australian competition laws are designed to enable consumers to get the best product or service at the lowest price possible by promoting competition.[78] These laws are contained in the *Competition and Consumer Act 2010* (Cth), previously the Trade Practices Act 1974. The pt IV legislation relating to cartels has largely retained the same form since its introduction in 1974, however it now contains both civil and criminal penalties for participating in cartel activity.[79]

In summary that law states that;

> A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision. And a cartel provision is a provision relating to; price fixing, restricting outputs in the production and supply chain; allocating customers, suppliers or territories; or bid-rigging; by parties that are, or would otherwise be, in competition with each other.[80]

Liner shipping cooperative agreements engage in practices that would usually be against Australian competition cartel prohibition laws. Protection is provided under pt X of the same legislation and will be explained below. The laws explained in this section do not fully encompass the competition laws that could apply to liner shipping conduct in Australia, only those sections expressly mentioned in pt X relating to liner shipping are explained.

4.1.1 DEFINITION OF A CARTEL PROVISION

Cartel provision prohibitions are defined by s 44ZZRD and apply to provisions within a contract, arrangement or understanding (hereafter agreement).[81] The courts have kindly provided guidance on this question indicating that these words potentially indicate a spectrum of collusion, from contracts with formality and certainty to less precisely determined understandings.[82]

According to s 44ZZRD, a provision must either satisfy the purpose/effect condition of sub-s 2 or the purpose condition of sub-s 3. The sub-s 2 purpose/effect condition means that a provision has the purpose, or is likely to have the effect of directly, or indirectly fixing, controlling, or maintaining the price, discount, allowance, rebate, or credit in relation to services supplied, or likely to be supplied. The sub-s 3 purpose condition pertains to a provision that has the purpose of directly

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[78] Explanatory Memoranda, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 5.

[79] *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth).

[80] *Competition and Consumer Act 2010* (Cth) s 44ZZRA.

[81] Ibid s 44ZZRD(1).

[82] *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321, 331 [24].

or indirectly preventing, restricting or limiting the capacity or supply of services. Or, that allocates between any of the parties the persons who shall supply the services, or the geographical areas in which they shall be supplied. A cartel provision must also satisfy the competition condition of sub-s 4 meaning that at least two of the parties; are, or are likely to be, in competition, or but for any agreement would be, or likely to be, in competition.

While the drafting of s 44ZZRD is neither simple or easily understood, it can be simplified to mean: a deal by a person in trade or commerce that fixes prices.[83] The intended definition of a cartel provision is one "that effectively fixes prices, restricts outputs in the production or supply chain, allocates customers, suppliers or territories between competitors, or rigs a bidding or tendering process."[84]

Mercifully, the following operative provisions illegalising cartel provisions are simpler in their communication. An undertaking is in contravention of the *Competition and Consumer Act 2010* (Cth) if they make an agreement containing a cartel provision or give effect to a cartel provision contained within an agreement.[85] However, a distinction is made between criminal conduct and civil conduct based on the element of knowledge or belief. If an undertaking engages in the same conduct with the element of knowledge or belief then a criminal offence has been committed.[86]

4.1.2 Agreements Restricting Dealings or Affecting Competition

In addition to individual cartel provisions, whole contracts, arrangements or understandings that restrict dealings or affect competition are also in contravention of the *Competition and Consumer Act 2010* (Cth) by virtue of s 45. A corporation shall not make, or give effect to an agreement which contains an exclusionary provision, or has the purpose or effect of substantially lessening competition.[87]

Exclusionary provisions are defined by s 4D to be a provision of an agreement that have the purpose of preventing, restricting or limiting the supply or acquisition of goods or services, from particular persons or in particular circumstances.[88] Section 4D also explicitly requires that for an exclusionary provision to exist the agreement must be made between any two or more persons who

[83] Justice Steven Rares, 'Competition, fairness and the courts' [2014] *Federal Judicial Scholarship* 10, [38].
[84] Explanatory memoranda, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill (Cth) 2008, 45.
[85] *Competition and Consumer Act 2010* (Cth) ss 44ZZRJ, 44ZZRK.
[86] Ibid ss 44ZZRF, 44ZZRG.
[87] Ibid s 45.
[88] Ibid s 4D.

are competitive with each other.[89] The issue with s 4D and the definition for exclusionary purpose is that it may in fact overreach.[90]

Price fixing agreements and exclusionary provisions are prohibited *per se*, where as all other agreements covered by s 45 are conditional upon the substantial lessening of competition test.[91]Agreements that are not prohibited *per se* must be proved to substantially lessen competition. This involves identifying an agreement exists, defining the relevant market, and proving that competition in that market has been *substantially* lessened.[92]

4.1.3 Exclusive Dealing

Section 47 prohibits exclusive dealing, making it illegal for corporations to engage in the conditional supply of goods or services.[93] There are two broad categories of exclusive dealing; the first is third line forcing that occurs when a corporation will only supply goods or services, or refuses to supply goods or services, based on whether the customer agrees to acquire goods or services from a third party.[94] This conduct is prohibited *per se* meaning that its effect on competition does not need to be considered. Broadly, the second category is all other types of exclusive dealing, this may involve a supplier refusing to supply goods or services unless a customer agrees not to buy from, or resupply to any competitor, this is known as full line forcing. Conduct falling within the second category must be proved to have the effect of substantially lessening competition.[95]

4.2 Part X Exemptions for Liner Shipping Agreements

While the EU competition laws distinguish between conferences and consortia the Australian pt X laws apply equally to all types of cooperative agreements.

The, above explained, laws are based on the premise that cartels harm consumers, businesses and the economy by increasing prices, reducing choice and distorting innovation processes.[96] However, liner shipping conferences are given special exemption under the pt X liner shipping provisions. The objectives of these exemptions are to provide Australian exporters with access to a reliable,

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[89] Ibid s 4D(1).

[90] See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ).

[91] Nigel Wilson, 'Competition law in Australia under review - antitrust reforms in the age of Asia, ageing and the digital revolution' (2015) 36 (3) *European Competition Law Review* 132 (2015) 134.

[92] *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 1381 [Burchett, Hely JJ] [12].

[93] *Competition and Consumer Act 2010* (Cth) s 47(1).

[94] Ibid s 47(6)-(7).

[95] Ibid s 47(10).

[96] See section 1.1.1; Explanatory memoranda, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 5.

competitive, frequent, and efficient liner cargo shipping service.[97] Part X has existed in its current form since 1989, which is why it still retains the numbering system of previous legislation. This section will explain how these exemptions function, and the following section will attempt to explain the policy and justification.

First, conferences, as they are defined in Australia, are not necessarily cartels. In Australian law a conference is quite innocently defined as an unincorporated association of two or more ocean carriers carrying on two or more businesses providing liner cargo shipping services.[98] As such, technically the existence of a conference is not *prima facie* reason for a contravention of Australia's competition laws. It is only when a conference engages in certain activities that it is at risk of contravening these laws. Such activities include the setting of freight rates; an activity that is almost intrinsic to the operations of conferences, the UNCTAD Code defines conferences as an agreement to operate under common freight rates.[99] This conduct could very clearly be a criminal offence.[100]

Part X provides that conferences may engage in anti-competitive behaviour on the basis that they meet certain minimum conditions that have the objective of promoting the interests of Australian shippers.[101] Conference agreements must expressly provide that Australian law applies, with the only exemption being provided expressly through written communication from the Minister.[102] They must also specify the minimum level of liner shipping services to be provided. These minimum service levels are to be negotiated with associations who represent the interests of Australian shippers generally, identified as designated shipper bodies.[103]

Part X does not provide protection to conferences for all activities that contravene the *Competition and Consumer Act 2010* (Cth). Conferences may engage in fixing freight rates; pooling or apportioning earnings, losses or traffic; restricting the quantity or kind of cargo to be carried; or restricting the entry of new parties to the agreement by reason of pt X s 10.08.[104] The only conduct permitted, outside of this specific list, is that which is necessary for the effective operation of the agreement and of overall benefit to Australian importers or exporters.[105]

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[97] *Competition and Consumer Act 2010* (Cth) s 10.01(1).

[98] Ibid s 10.02.

[99] *United Nations Convention on a Code of Conduct for Liner Conferences,* opened for signature 1 July 1974 to 30 June 1975, 1334 UNTS 15 (entered into force 6 October 1983) ch 1, pt 1.

[100] See section 4.1.1; *Competition and Consumer Act 2010* (Cth) ss 44ZZRF, 44ZZRG.

[101] Mark Tapley, *Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000*, Bills Digest No 29 of 2000-01, 21 September 2000, 3.

[102] *Competition and Consumer Act 2010* (Cth) ss 10.03, 10.06(1).

[103] Ibid s 10.29.

[104] Ibid s 10.08(1)(c).

[105] Ibid s 10.08(1)(d).

Conduct that constitutes exclusive dealing and would be considered illegal pursuant to s 47 is also exempt from the application of that section if it is necessary for the effective operation of the agreement and is of overall net benefit to Australian importers and exporters.[106]

Where a conference agreement meets all the requirements of pt X it can be registered with the Registrar of Liner Shipping. Only after final registration do the competition law exemptions begin to apply.[107] The registration process provides advantages to shippers and competition regulators. Registered documents are open to public inspection allowing shippers advanced notice of the service and therefore the chance to participate in the negotiations.[108] Additionally it allows the regulator time to investigate any complaints prior to final registration. This open process is one of the safeguards against the abuse of the conference exemption.[109]

Finally, if a conference agreement meets the minimum standards, and is successfully registered, it is granted exemption from a selection of the cartel prohibition provisions of pt IV of the *Competition and Consumer Act 2010* (Cth). Registration permits carriers to make agreements containing cartel provisions and give effect to cartel provisions that would usually contravene pt IV laws.[110] Freight rate agreements are provided specific exemption from the application of cartel provisions, protecting one of the key aspects of liner shipping conferences.[111] Additionally registered liner shipping agreements are permitted to engage in exclusive dealing.[112]

These exemptions only apply to the liner cargo shipping services that take place by sea, stevedoring services, and activities that take place in Australia.[113] Inter-terminal transport services may be included in the exemption if they are part of the liner cargo shipping service.[114]

4.3 Application of Australian Competition Laws to Consortia Agreements

While the EU competition laws distinguish between conferences and consortia the Australian pt X laws apply equally to all types of cooperative agreements. Consortia are within the definition of conferences provided by s 10.02, but as explained above, it is only when their agreements constitute

[106] Ibid s 10.08(2).
[107] Ibid s 10.15.
[108] Ibid s 10.10.
[109] Tapley, above n 101, 2.
[110] Specifically, *Competition and Consumer Act 2010* (Cth) ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, and 45.
[111] *Competition and Consumer Act 2010* (Cth) s 10.17A.
[112] Ibid s 10.18.
[113] Ibid s 10.14(1).
[114] Ibid s 10.14(2).

cartel provisions that they contravene Australian competition laws.[115] The existence of consortia in itself is not illegal conduct, as such, the laws apply the same to consortia as they do to conferences. The difference is that, by their international definition, consortia partake in less competition-restricting activities than conferences. It is unlikely that the provisions of a consortia agreement, which are characterised as operational in nature, would contain a cartel provision. In this case carriers are not required to register their agreements, as they do not need protection from any competition provisions.

If they do wish to engage in any of the activities prohibited under ss 44ZZRD, 45 or 47 then they can do so once they are registered. Liner Shipping Services explain that most, if not all, consortia in the Australian liner trade operate under the umbrella or conferences of discussion agreements.[116] This is because registration of the agreement provides safety, protection and certainty for the carriers involved.

4.4 COMPETITION POLICY REVIEW

The Competition Policy Review was announced in December 2013, headed by Professor Ian Harper, the final report was released in March 2015.[117] The Competition Policy Review Panel considered submissions from stakeholders and previous reports, particularly the Productivity Commission Inquiry Report of 2005 into international liner cargo shipping.[118] The Panel of the Competition Policy Review did not receive any information to cast doubt on the conclusions of the Productivity Commission 2005 report and thus they arrived at the same conclusions, supporting the repeal, or at least amendment, of pt X.[119]

4.4.1 PRODUCTIVITY COMMISSION REPORT 2005

The Productivity Commission conducted a comprehensive inquiry into liner shipping activities in 2005 to assess whether the pt X regulations were achieving their objects. It was conducted in accordance with the Competition Principle Agreement, meaning that the onus of proof rested on those who supported the retention of the anticompetitive laws to produce evidence justifying the anticompetitive protection.[120] Failure to prove that pt X competitive exemptions were of net benefit to the Australian community as a whole would result in a recommendation that pt X be repealed or modified. This is effectively what was concluded, there was insufficient evidence to support

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[115] Ibid s 10.02.

[116] Liner Shipping Services Ltd, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review*, May 2014, 5 [1.27].

[117] Competition Policy Review Commission, above n 42.

[118] *Productivity Commission Report 2005*, above n 6.

[119] Competition Policy Review Commission, above n 42, 385.

[120] *Productivity Commission Report 2005*, above n 6, XXVII.

continued special treatment of the liner shipping industry.[121] The reasons for this conclusion will be discussed in the following section on policy.

4.4.2 SUBMISSIONS

During the Competition Policy Review, the Panel received submissions from relevant shipping bodies representing carriers and shippers. Of these, only two, the ACCC and Global Shippers Forum supported the repeal of pt X.[122] As such, the Panel have concluded contrary to the submissions of the Australian Peak Shippers Association (APSA), International Chamber of Shipping (ICS), Shipping Australia, and Liner Shipping Services.[123] The submissions presented views across a variety of issues, with the prominent themes being; the impact of setting freight rates, geographic location of Australia, the benefits and disadvantages provided by pt X.

4.4.3 RECOMMENDATIONS

The Panel recommended that the Australian Government repeal pt X. The review observed that there is an international trend toward removing the special exemptions from competition laws for liner shipping conferences, as was concluded in the Trans-Tasman Australian and New Zealand Joint Study Report of 2012.[124]

The Panel is of the opinion that if pt X were repealed then the authorisation procedure under the *Competition and Consumer Act 2010* (Cth) would enable the ACCC to assess conference agreements using the public benefit test.[125] This would increase the focus on the competitive effects of conference agreements while allowing full input from shippers. Additionally, the Panel agreed that the ACCC is the preferable body to determine whether agreements and practices are pro- or anti-competitive, rather than the Liner Shipping Registrar.[126]

The Panel recommended that exemptions be introduced for categories of agreements, specifically for operational agreements or consortia.[127] For example, the Panel recommended a block exemption

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[121] Competition Policy Review Commission, above n 42, 383.

[122] Australian Competition and Consumer Commission, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review,* 25 June 2014; Global Shippers Forum, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review*, July 2014.

[123] Australian Peak Shipping Association, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review*, 2014; International Chamber of Shipping, Submission to Competition Policy Review Panel, Parliament of Australia, *Australian Competition Policy Review*, April 2014; Shipping Australia Limited, above n 35; Liner Shipping Services Ltd, above n 112.

[124] Australian Productivity Commission and New Zealand Productivity Commission, Parliament of Australia, *Strengthening trans-Tasman economic relations, Joint Study, Final Report* (2012) 119.

[125] Competition Policy Review Commission, above n 42, 382.

[126] Ibid 384.

[127] Ibid 385.

power be granted to the ACCC in order for liner shipping agreements that meet a minimum standard of pro-competitive features, and exclude price fixing to be categorically authorised.[128]

In the alternative, all cooperative agreements should be required to seek individual authorisation and undergo the normal net public benefit test.[129] The liner shipping industry would then be subject to the standard *Competition and Consumer Act 2010* (Cth) provisions. The Panel recommended a two year transition period be put in place to allow agreements to be modified to align with the new rules, and for new provisions to be introduced.

4.4.4 FUTURE OF PART X

This is not the first time that the repeal of pt X has been recommended. However, there have been several past instances where recommendations and proposed changes have been ignored by the parliament, or subsequent governments.[130] The present Australian Government in 2015 stated that it remains open to repealing pt X and that it supports measures to ensure the competitiveness and efficiency of liner shipping.[131] However no certain indication for pt X has yet been made.

The Government has expressly stated that any options considered would have to be consistent with Australia's international law obligations.[132] This is an issue that has been raised by various interested parties. Competition law exemptions exist in much of the Asia-Pacific for all types of cooperative agreements, additionally, Singapore, the US and EU have class exemptions in place.[133]

Finally, the Government stated that it would introduce a class exemption power and communicate with the ACCC and relevant stakeholders, including shippers and carriers as to how this class exemption could be applied to liner shipping.[134] This intention has progressed from a bill introduced on the 30th March 2017, to being passed by both houses on the 18th October 2017 as the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (the Competition Policy Review Bill).[135] The Competition Policy Review Bill now awaits only the assent of the Governor-General.

It is possible that the class exemptions will act alongside pt X, or that they will replace a repealed pt X, or complement an amended pt X. In the case that a class exemption is implemented alongside pt

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[128] Ibid.

[129] Ibid.

[130] For example the Grigor Review 1977, Brazil Review 1993, and Productivity Commission Review 2005.

[131] Australian Government, *Australian Government Response to the Competition Policy Review* (2005) 6.

[132] Ibid.

[133] Shipping Australia Limited, above n 35, 7; International Chamber of Shipping, above n 123, [4], [12]; *Productivity Commission Report 2005*, above n 6, XXVII.

[134] Australian Government, above n 131, 6.

[135] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) s 95(AB)(1).

X there will be a duplication of laws and this appears unlikely. If pt X is repealed then carriers will need to have their agreements authorised under pt IV, and the class exemptions will provide a category of agreements meeting a standard set of minimum requirements that do not have to be authorised. And, in the case that the class exemptions complement an amended pt X, agreements meeting a minimum standard will be able to self-assess, while agreements exceeding those standards will be registered through pt X.

5 POLICY REASONING

This section provides a summary of the policies for the historical and current use of cooperative agreements in liner shipping in order to answer the first research question; why are cooperative agreements given exemptions from competition laws?

The policies for cooperative agreements, and their exception from competition laws have been discussed and evaluated in the literature and also by the EU and Australian research and legislature bodies. These policies are common between the different types of cooperative agreements, they include; containerisation, economic efficiency, improved service for shippers, stability, and the unique structure of the liner shipping industry.

5.1 CONTAINERISATION

Cartels have existed in shipping long before containerisation occurred in the 1970s, but widespread adoption of containers changed the industry. Containerisation meant that liner shipping engineering including vessels, port infrastructure and stevedoring equipment, could be streamlined to one design, to be used by all liner shipping carriers. Uniformly shaped cargo brought efficiency to cargo handling also, decreasing port time. This culminated in the ordering of larger ships, increased capacity, and requiring greater capital.[136] This may have appeared to benefit conference carriers, but the new standardised technology actually provided easier entry to the industry for new carriers.[137]

New carriers were entering the trade and larger ships were emerging that resulted in overcapacity and competition at levels never before experienced.[138] Heightened competition levels encouraged cooperation in order to spread the costs of investment, share operational costs, and cooperate internally to compete externally.[139] Technical and commercial cooperation were utilised in order to share vessel space, equipment and landside facilities.[140]

Containerisation facilitated increased cooperation, and also necessitated it, but other benefits of cooperation were realised in the process. Economic efficiency is one of those benefits, and it is now used to justify the cooperation that takes place in the liner shipping industry.

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[136] Mark Clough, 'The devil and the deep blue sea (EC competition law and liner shipping consortia)' 7 *European Competition Law Review* 417, 419; Bernard Gardner, 'EU Competition Policy and Liner Shipping Conferences' (1997) 31(3) *Journal of Transport Economics and Policy* 317, 321.

[137] M Doi, H Ohta and H Itoh, 'A Theoretical Analysis of Liner Shipping Conferences and Strategic Alliances' (2000) 12(3) *Review of Urban and Regional Development Studies* 228, 229.

[138] Doi, Ohta and Itoh, above n 137, 229; Gardner, above n 136, 321.

[139] Gardner, above n 136, 321; Doi, Ohta and Itoh, above n 137, 229; *Council Regulation (EEC) No 479/92* [1992] OJ L 55/3, 3.

[140] Clough, above n 136, 419.

5.2 ECONOMIC EFFICIENCY

The pursuit of efficiency is an oft-used policy justification for cooperation among carriers. In the economic climate that has existed since the 2008 financial crisis the liner shipping industry has experienced an oversupply of capacity. This overcapacity, among other economic factors has contributed to continuously low freight rates, a peril of which Hanjin Shipping is now the poster child.[141] As such, carriers have found it more important than ever to find efficiency in their vessel operation.[142] Economy of scale can be achieved through both larger vessels, and also horizontal cooperation.

Economy of scale justifies horizontal cooperation among carriers because a single vessel can provide a given service at higher efficiency and lower average cost than two vessels in competition.[143] Larger ships also achieve efficiency due to their impressive fuel-efficiency and minimised per-unit cargo cost. However, these larger ships are only efficient if their capacity is fully utilised.[144]

Panayides and Wiedmer analysed global alliances and market dynamics and found that the main activity was merging of parallel lines in order to reduce overall capacity in the market.[145] Larger fleet size is effective for increasing economies of scale through improved container logistics, port call combinations, and network economics.[146] Shippers expect regular sailings and in order to gain market share carriers must offer at least a weekly departure from each port of call on the service route.[147] If each carrier provides multiple ships to improve the service, the result is over-capacity, but if carriers cooperate on the scheduling, overcapacity can be reduced without compromising on the service offered.[148] Such cooperation can take place through slot chartering, and capacity sharing agreements.[149]

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[141] Wolf Richter, 'Here's the collateral damage from the collapse of one of the largest shipping companies in the world' on *Business Insider* (8 September 2017) <http://www.businessinsider.com/what-happened-to-hanjins-ships-and-freight-rates-2017-1?r=US&IR=T&IR=T>; Caroline McDonald, 'Low Margins Put Shipping at Risk' on The Risk Management Society, *Risk Management* (1 March 2017) <http://www.rmmagazine.com/2017/03/01/19164/>.

[142] *OECD 2015*, above n 14, 10; Michael Fusillo, 'Some notes on structure and stability in liner shipping' (2006) 33(5) *Maritime Policy and Management* 463, 464.

[143] *Productivity Commission Report 2005*, above n 6, 44.

[144] Seok-Min Lim, 'Economies of scale in container shipping' (1998) 25(4) *Maritime Policy & Management* 361, 362; *European Commission consortia exemption report*, above n 29, 2.2.

[145] Photis Panayides and Robert Wiedmer, 'Strategic alliances in container liner shipping' (2011) 32 *Research in Transportation Economics* 25, 36.

[146] *Productivity Commission Report 2005*, above n 6, 43.

[147] *OECD 2015*, above n 14, [113].

[148] *Commission Decision of 16 September 1998 relating to a proceeding pursuant to Article 85 and 86 of the EC Treaty* [1998] OJ L 95/1, [330]; *OECD 2002*, above n 3, 18 [33]; *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31, Preamble para 5; *Productivity Commission Report 2005*, above n 6, 51.

[149] Tapley, above n 101, 2.

Economic efficiency can also be achieved if carriers invest their collective resources in the improvement of technology or infrastructure. Cooperation is justified in this way as the collective wealth of carriers can improve technology more efficiently than each carrier pursuing their own individual projects.[150] This cooperation may be through shared port terminals where their collective investments allow improved technology and larger more efficient installations. Carriers may also cooperate on the implementation of environmental standards, and the operation of ships more efficiently reduces environmental impact in itself.[151]

Whether this efficiency has actually been achieved as a result of the anti-competitive exemptions for cooperative agreements is shrouded in doubt. The OECD explains that price-fixing is not necessarily required to deliver economic efficiency, and may actually decrease it.[152] This is explained by the theory that conferences will fix freight rates at the level of their least efficient member.[153] This provides for their survival in the market, but also perpetuates the lowest level of efficiency throughout the market. This was also observed in the Trans-Atlantic Agreement (TAA) case, where the court made clear that the TAA incorrectly placed interest in maintaining more than freight rates, but "the trade of all of the TAA members, even the least efficient".[154] Regular market competition drives all carriers toward greater efficiency, and those who are not efficient enough will exit the market, reducing the capacity available. Conference pricing protects the least efficient, preventing their exit from the market, sustaining the state of overcapacity in the market.[155] The justification for protecting the least efficient member is that they are required to deliver sufficient service to shippers.

5.3 Improved Service for Shippers

The initial introduction of Regulation 4056/86 was justified on the grounds that "liner conferences have a stabilising effect, assuring shippers of reliable services; … contribute generally to providing adequate efficient scheduled maritime transport services".[156] And further, the preamble to Regulation 4056/86 states it is the opinion of the EU Council that this could not be achieved without the cooperation that occurs within conferences.

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[150] Clough, above n 136, 3; Alla Pozdnakova, *Liner Shipping and EU Competition Law* (Wolters Kluwer, 2008) 43, 133; Shipping Australia Limited, above n 35, 8.

[151] Stamatiou and Neocleous, above n 13, 5; Directorate for Financial and Enterprise Affairs Competition Committee, 'Summary of Discussion of the Roundtable on Competition Issues in Liner Shipping' (Report no DAF/COMP/WP2/M(2015)1/ANN2/FINAL, Organisation for Economic Co-operation and Development, 25 November 2015) 31; International Chamber of Shipping, above n 123, 1.

[152] *OECD 2002*, above n 3, 69.

[153] *OECD 2002*, above n 3, 69; Benacchio, Ferrari and Musso, above n 70, 2.

[154] *Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty* [1994] OJ L 376/1, 43 [394].

[155] Pozdnakova, above n 150, 127.

[156] *Council Regulation (EEC) No 4056/86* [1986] OJ L 378/4, 4.

As explained in the previous section, the delivery of more frequent and reliable sailings is a justification for cooperation between shippers.[157] Additionally, according to the Productivity Commission, "the most important determinant of customer loyalty may be the provision of reliable and timely service".[158]

However, the European Commission has clearly explained that liner shipping services are intrinsically regular and scheduled, "liner services are, by their nature, regular in the sense of an evenly-spread timetable".[159] This is part of what distinguishes liner shipping from tramp shipping, and is offered as a standard service of the industry whether the carrier is within a cooperative agreement, or an independent carrier. Thus, this is not a legitimate justification for cooperation among carriers. Further, the OECD noted in their investigation that the trend for improvement in quality has been accompanied by a decline in conference power.[160]

5.4 STABILITY

The most steadfast justification for allowing cooperative agreements to restrict competition has been that in turn these agreements ensure freight rate stability. Stability is the maintenance of freight rates at a relatively constant level over a substantial period of time. [161] The stability policy justification is based on the premise that freight rates will be extremely unstable without the control provided through liner conferences.[162]

Stability is beneficial for both carriers and shippers as it facilitates route and tonnage planning into the future, reduces investment uncertainties and permits freight rate foresight.[163] It is a beneficial objective for liner shipping, but the means must justify the ends.

The economic explanations for the ability of cooperative agreements to stabilise freight rates in the liner shipping industry are well discussed in the literature, with two theories arriving at the forefront; avoidance of destructive competition and core theory. This research will not make any substantial attempts to discuss these theories, as this is best left to the economists, the following is limited to a short summary.

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[157] Pozdnakova, above n 150, 126-7.

[158] *Productivity Commission Report 2005*, above n 6, 59.

[159] *Commission Decision of 16 September 1998 relating to a proceeding pursuant to Article 85 and 86 of the EC Treaty* [1998] OJ L 95/1 [330].

[160] *OECD 2015*, above n 14, 13.

[161] *Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty* [1994] OJ L 376/1, 94 [388].

[162] Blanco, above n 18, 321; Dinger, *What shall we do with the drunken sailor?*, above n 3, 5; *OECD 2002*, above n 3, [33]; Benacchio, Ferrari and Musso, above n 70, 3.

[163] Fusillo, above n 142, 472.

5.4.1 Destructive Competition

Without cooperation controlling the industry, carriers fear that price cutting and destructive competition would destabilise the industry.[164] Destructive competition could impact the industry by reversing the very characteristics referred to above, of frequency, quality and reliability.[165]

This explanation reflects on the fact that in the liner shipping industry, a large proportion of the carrier's costs are sunk, thus the prices of service would have to fall substantially before sellers would leave the market, this means that the market is almost continuously in over capacity.[166] Over capacity in shipping is required in order to always have a service to offer the shipper. The argument is as follows; over capacity can lead to destructive price wars leading to the exit of carriers from the market, reducing capacity and increasing rates. As rate prices reach a desirable level, entry to the market is attractive and new capacity is introduced, at which time rates fall again. Destructive competition refers to the repetition of this pattern and leads not only to continuously unstable, volatile rates but also to unreliable services for shippers.[167]

The OECD in their 2015 report doubt the applicability of this theory to liner shipping. The OECD points out that when any responsible business enters a trade, they base their decision not on where the rates are at the time, but where the rates will be upon their entry.[168] It is therefore unlikely that such volatility would arise in the market if free competition were to resume control.

5.4.2 Empty Core

The liner shipping industry is an ideal candidate in which the empty-core theory could be applicable. An industry with high fixed costs, overcapacity, similar products, inelastic market demand, and varying market demand, or costs over time is more likely to have an empty core.[169] This theory describes that a market has a 'core' when there are a set of agreements that are optimised for both the buyers and the sellers.[170] And in a market exhibiting an 'empty core' every agreement is capable of improvement, and so there is continued possibility of disrupting existing agreements with other modified agreements.[171]

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[164] *OECD 2002*, above n 3, [34]; Benacchio, Ferrari and Musso, above n 70, 4; Chris Sagers, 'The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics' (2006) 39 *Vanderbilt Journal of Transnational Law* 779, 805.

[165] Pozdnakova, above n 150, 127; Benacchio, Ferrari and Musso, above n 70, 2; Fusillo, above n 142, 471.

[166] Sagers, above n 164, 803 n 110.

[167] Benacchio, Ferrari and Musso, above n 70, 2; Pozdnakova, above n 150, 127; Competition Policy Review Commission, above n 42, 381; *Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty* [1994] OJ L 376/1, [388].

[168] *OECD 2015*, above n 14, 14 [54].

[169] *Productivity Commission Report 2005*, above n 6, app D, 292.

[170] Sagers, above n 164, 806; *Productivity Commission Report 2005*, above n 6, 50.

[171] *OECD 2002*, above n 3, 61.

Proponents of the empty core theory state that an industry with an empty core is incapable of reaching equilibrium. The lack of a set of standard optimised agreements means that industry participants are continuously changing the agreements and creating instability. Thus, without price fixing and cooperation the liner shipping industry would be destined to experience volatility.[172] However, while certain research views this theory as suitable to liner shipping, on the whole it is considered problematic in application.[173]

5.4.3 CONCLUSION

Regulators and commentators alike are not convinced that conferences are required to maintain stability in the liner shipping market. In fact, in their submissions to the *OECD 2002* Report, associations of shippers from the United States, Canada and Europe each submitted that rates are more volatile than stable under the systems in place at that time, supported secondly by the results from survey numbers.[174]

The OECD has observed that "the inefficiency inherent in the conference system is often described as the price to be paid for stability".[175] However, the provision of more frequent sailings can take place without conference activity. Consortia can deliver the same outcomes of regular predictable services, sufficient capacity for transport of their desire, and greater stability of rates.[176] Further, consortia are able to deliver these outcomes without engaging in the hard core competition restrictive activities such as price fixing, and thus may be determined to be sufficiently beneficial to the public.[177] In the context of consortia, there is no price to be paid for the stability and efficiency achieved.

5.5 CONTROLLING CAPACITY

The liner shipping market is defined by capacity, or more so overcapacity. Overcapacity is intrinsic to the industry as there must always be capacity for shippers to use. Low freight rates, low demand levels, imbalances in trade, and overcapacity are all challenging to carriers and risk their reliability, and existence. Overcapacity can be managed through cooperation among carriers to achieve efficiency.[178]

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[172] William Sjostrom, 'Competition and Cooperation in Liner Shipping' (Working Paper No 2009-02, University College Cork, December 2009), 14.

[173] *OECD 2002*, above n 3, 61-2; Sagers, above n 164, 807-8; *Productivity Commission Report 2005*, above n 6, 59.

[174] Dinger, *The Future of Liner Conferences in Europe*, above n 16, 157.

[175] *OECD 2002*, above n 3, 52.

[176] *OECD 2002*, above n 3, 19.

[177] Dinger, *What shall we do with the drunken sailor?*, above n 3, 31.

[178] Lim, above n 144, 362; World Shipping Council, European Communitiy Shipowners' Association and International Chamber of Shipping, The Liner Shipping Industry Supports the Commission's Proposed Extension of Commission Regulation (EC) No 906/2009 (2014) 6.

An excess of overcapacity is inefficient and detrimental for carriers. In order to manage capacity and protect themselves, carriers utilise cooperation claiming that it allows them to better cope with sudden and severe imbalances in trade flows, as a result of seasonal fluctuations or supply and demand variations.[179] Additionally, cooperation acts to protect carriers from demise, and ensure sufficient capacity remains in the market to regularly and reliably provide the service for shippers.[180]

However, as discussed similarly in section 5.2, such cooperation prevents the exit of less efficient operators, perpetuating overcapacity and decreasing the overall efficiency of the industry.[181] As such, cooperation may actually be an impediment to the establishment of a supply and demand balance.[182]

5.6 Unique Structure of the Industry

While all other industries are subject to the regular competition rules, liner shipping has been exempted by reason of its unique economic characteristics.[183] Such unique characteristics are; capital intensive, large indivisible assets, high fixed costs, unbalanced trade flows, large demand fluctuations, guaranteed scheduled services, and low marginal costs.[184]

This justification is relied on especially in Australia.[185] As a geographically isolated destination, the trade route is referred to as long line trade characterised by low volumes and imbalanced demand, but still seeking reliability and frequency.[186] Historically, pt X was the comfort that convinced carriers to cooperate and provide Australian exporters with an efficient and reliable service.[187] One can reasonably see that carriers would allocate their resources and services to more financially lucrative and consistent trade routes than to service Australia.[188] Australian trades represent less than 3% of the world container trade, but 80% of the $93 billion worth of imports arriving to

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[179] *OECD 2002*, above n 3, 19; Shipping Australia Limited, above n 35, 10; International Chamber of Shipping, above n 123, [6]; Enna Hirata, 'Contestability of Container Liner Shipping Market in Alliance Era' (2017) 33 *The Asian Journal of Shipping and Logistics* 27, 27.

[180] Pozdnakova, above n 150, 127.

[181] *OECD 2015*, above n 14, 14.

[182] Fusillo, above n 142, 471.

[183] Doi, Ohta and Itoh, above n 137, 228.

[184] Competition Policy Review Commission, above n 42, 381; *OECD 2002*, above n 3, 18, 75; Shipping Australia Limited, above n 35, 8; Benacchio, Ferrari and Musso, above n 70, 2; Doi, Ohta and Itoh, above n 137, 228; *Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)* [2009] OJ L 79/1, Preamble para 4 ('*Council Regulation (EC) No 246/2009*').

[185] See also; Liner Shipping Services Ltd, above n 112, 37; Global Shippers Forum, above n 122, 5; Australian Peak Shipping Association, above n 123, 6; Shipping Australia Limited, above n 35, 8.

[186] Shipping Australia Limited, above n 35, 26; *Competition and Consumer Act 2010* (Cth) pt X, s 10.01.

[187] Competition Policy Review Commission, above n 42, 381.

[188] Australian Peak Shipping Association, above n 123, 3.

Australia by sea, do so via liner ship.[189] Thus shipping is important to Australia, but Australian shipping trade is not vital to the industry as a whole. Australian legislators are not alone, the EU Council referred to the uniqueness of the industry when introducing the consortia block exemption in 1992, and it has been reiterated in each five year extension regulation since.[190]

However, the sentiment that the liner shipping industry is in fact not so unique is echoing across the industry. The OECD have stated that the unbalanced trade flows are not unique, and such market conditions "are faced by any capital intensive industry providing a guaranteed and/or scheduled service" providing examples such as air cargo and power generation.[191] Additionally, APSA, Global Shippers Forum, Shipping Australia Limited and ACCC submitted that these obstacles could be overcome through the use of consortia and that hard-core competition practices adopted by conferences such as price fixing were not necessary.[192] The Australian Productivity Commission reiterated how liner shipping shares parallel economic characteristics with road and rail freight in offering regular scheduled services, and high fixed costs.[193] The market characteristics discussed are sufficient to present liner shipping with special challenges, however, they are not unique solely to liner shipping.[194]

5.7 CONCLUSION

This section is a summary of the policies behind the exemption of liner shipping cooperative agreements from competition law, providing an answer to the first research question. The author does not offer a judgment as to whether these policies are still accurate, or accepted in liner shipping policy presently. That is an evaluation left to the decision making bodies of liner shipping regulators. The following sections discuss how the EU and Australia have used these policies in their decisions regarding regulation of competition in liner shipping.

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[189] Liner Shipping Services Ltd, above n 112, 9 [2.7]; above n 39, 8; *Productivity Commission Report 2005*, above n 6, XXIX.

[190] *Council Regulation (EC) No 246/2009* [2009] OJ L 79/1, [6]; *Council Regulation (EEC) No 479/92* [1992] OJ L 55/3, 3.

[191] *OECD 2002*, above n 3, 18, 75.

[192] Global Shippers Forum, above n 122, 4; Shipping Australia Limited, above n 35, 8; Australian Peak Shipping Association, above n 123, 6; Australian Competition and Consumer Commission, above n 122, 49.

[193] *Productivity Commission Report 2005*, above n 6, XXXIII.

[194] Alla Pozdnakova, above n 150, 126; Benacchio, Ferrari and Musso, above n 70, 9.

6 JUSTIFICATIONS FOR CONFERENCE AGREEMENTS

Both the Australian Government and the European Commission expressly comment that maritime transport is important for the development of their trade, and international competitiveness.[195] The maintenance of international trade and fair and equal participation in international commerce have, historically, been given priority over competition law policies.[196] It follows, that conferences were not subject to competition laws prohibiting cartels as this would have jeopardised the growth, and even existence of the industry.[197]

This status quo is changing, in 2006 the EU Council decided that the justifications for a conference block exemption were no longer sufficient and repealed Regulation 4056/86. Recommendations have been made in Australia to make the same decision and repeal or amend the pt X conference competition law exemptions.

This section intends to explain and compare the justifications between the EU's repeal, and Australia's recommendation for removal of conference agreement exemptions. This will address the second research question and whether the justifications are common between the EU and Australia. The EU conference block exemption was provided under art 101(3) with four conditions that must be met in order for the exemption to be valid.[198] These are that the restrictive agreement must: 1. Improve the production or distribution of goods or promote technical or economic progress; 2. Provide benefit to customers in return for the restriction of competition; 3. Not impose restrictions on undertakings that are not indispensable to the attainment of the objectives; and 4. Not allow undertakings the possibility of eliminating competition.[199]

6.1 IMPROVE AND PROMOTE

The Australian Productivity Commission and EU Council doubt that conference agreements are improving the service by creating economic efficiency and stability. The EU Council describes that capacities are being decided by individual carriers and conference tariffs are no longer enforced by conferences, as such there is no evidence that they contribute to efficiency, or to more reliable shipping services, a conclusion also reached by the OECD.[200]

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[195] *European Commission consortia exemption report*, above n 29, 6.1; Explanatory Memorandum, Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000 (Cth) 4.

[196] Francesco Munari, 'Liner Shipping, Antitrust and the Repeal of Regulation 4056/86: A New Era of Global Maritime Confrontation?' in Antonis Antapassis, Lia I Athanassiou and Erik Røsæg (eds), *Competition and Regulation in Shipping and Shipping Related Industries* (Martinus Nijhoff Publishers, 2009) 7, 9.

[197] Munari, above n 196, 9; Benacchio, Ferrari and Musso, above n 70, 2.

[198] See section 3.2.1.

[199] *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)* [2012] OJ C 326/47, art 101(3).

[200] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, [4]; *OECD 2015*, above n 14, 14 [54].

The EU Council noted that carriers are increasingly offering their services through individual service agreements with individual exporters, and this produces greater stability in the current market conditions.[201] On transatlantic trade routes more than 90% of cargo was transported via contract, rather than on a conference tariff, and on the route between Australia and Europe above 75% was carried off-tariff. [202] The EU Council thus concluded that conference agreements are not delivering stability for shippers either.

The Productivity Commission provides the same justification as the EU Council, explaining that in order for conferences to deliver stability, they must have complete control of competition on the route.[203] The presence of independent carriers, and negotiation of individual contracts is evidence that this control is not present. The Productivity Commission states "there is no clear evidence that rate-fixing agreements among carriers reduce rate volatility or improve service delivery".[204]

6.2 Benefit to Customers

The OECD has labeled price fixing as a hard-core cartel activity one of "the most egregious violations of competition law".[205] A fair share of the benefits of conference practices must be passed on to consumers in return for the restriction of competition. Global Shippers Forum, representing shippers worldwide, submit that "customers receive no benefits from such price fixing and discussion agreements".[206]Both the European Commission and the Productivity Commission have expressed that price fixing is a hard core restriction and so the positive effects must be equally as significant for this condition to be satisfied.[207]

The EU Council is concerned that price fixing can result in conferences setting prices that accommodate their least efficient member, as explained in section 5.2. The EU Council concluded that no clearly positive effects were identifiable for conferences.[208] As such, the second condition of art 101(3) was not satisfied.

Similarly to the EU council, the Productivity Commission also values this justification and on the evidence before it came to the conclusion that many of the agreements in the Australian register

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[201] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, Preamble para 4.

[202] Benacchio, Ferrari and Musso, above n 70, 7.

[203] *Productivity Commission Report 2005*, above n 6, 51.

[204] Ibid 52.

[205] OECD Council, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels', above n 3, 2.

[206] Global Shippers Forum, above n 122, 1.

[207] *Compagnie generale maritime and Others v Commission of the European Communities* (T-86/95) [2002] ECR II-01011 [393]; *Productivity Commission Report 2005*, above n 6, XXXVI.

[208] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, [5].

would pass a net benefit test, but equally as many would have trouble proving a net benefit.[209] This is likely a result of the fact that the assessment process under pt X is essentially procedural and doesn't actually test the net benefit of an agreement to Australia. It is for this reason that the Productivity Commission also cites public benefit as a reason for the repeal of pt X.[210]

6.3 Avoid Restrictions that are not Indispensable

The EU Council noted that there are alternative strategies that can be used to achieve the same objectives while using less restrictive means, such as consortia.[211] The Productivity Commission also considered that benefits achieved through cooperation could be achieved by less anticompetitive means.[212] Presently, pt X applies the same laws to all agreements, however the Productivity Commission recommended amendments providing that agreements presenting greater anticompetitive risks be differentiated from those that are aimed at achieving operational efficiency.[213] The Productivity Commission observed in support of this that "the European and American amendments have demonstrated that, for their markets (including those to and from Australia), price fixing is not needed for the supply of liner cargo services."[214] The Competition Policy Review also suggests distinguishing between price fixing and operational agreements.[215]

The OECD suggests that other options can provide improved efficiency, quality and profitability.[216] The EU Council refers to the use of individual service agreements as they provide benefits to exporters and do not restrict competition, while also establishing a constant freight rate.[217]

6.4 Retain Competition

This condition requires that conferences should not have the impact of eliminating competition on a substantial part of the market. The EU Council did not make a determination of whether this condition was satisfied or not, remarking that "determining the extent to which conferences are subject to effective internal and external competition is a very complex exercise and one that can only be done on a case by case basis."[218] This is perhaps the only condition of the four that continued to be fulfilled. One can logically ascertain that competition remained in the market due to

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[209] *Productivity Commission Report 2005*, above n 6, XXXVII.
[210] Ibid 102.
[211] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, [6].
[212] *Productivity Commission Report 2005*, above n 6, 189.
[213] Ibid 189.
[214] Ibid, XXXII-XXXIII.
[215] Competition Policy Review Commission, above n 42, 385.
[216] *OECD 2002*, above n 3, 76.
[217] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, 2 [4].
[218] Ibid [7].

the participation of conferences, independent carriers, and independent contracts for carriage of cargo.

The Australian Competition Policy Review considered the impact of pt X on the competitiveness of the liner shipping market. The conclusion was clearer than that in the EU. The problem arises from the fact that the pt X registration system does not require consideration of the competitiveness of an agreement. In some situations there is a requirement that the agreement does not substantially lessen competition, but this requirement is not standard. The Australian Competition Policy Review recommends that this condition be given greater consideration than it has received in the past and that all agreement should be evaluated by the ACCC for their pro- or anti-competitiveness.[219]

6.5 Uniqueness of Industry

As addressed in section 5.6 there are certain characteristics of the industry that have led regulators to believe that the liner shipping industry is unique and worthy of special regulation. The EU Council states that the industry is in fact not as unique as it was once considered, and should therefore not receive a unique exemption from the EU competition laws.[220] The Productivity Commission, and the Competition Policy Review Panel agree with OECD and the EU Council in concluding that the liner shipping industry is by no means unique. They further draw parallels between it and other transport industries such as airlines, road transport and rail freight.[221] The Productivity Commission finds that these other industries have undergone deregulation successfully.[222] This view is supported widely in the literature, on almost all accounts, with the exception of submissions made by carriers themselves, or carrier associations.[223]

6.6 Conclusion

The justifications for the EU Council decision to remove the conference block exemption, and justifications for the recommendations of the Competition Policy Review and the Productivity Commission in Australia are largely aligned. Each of the above headings shows that the Australian Competition Policy Review, and highly influential Productivity Commission reports are discussing the same justifications for removing the conference agreement competition exemptions, as the EU Council discussed before repealing Regulation 4056/86.

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[219] Competition Policy Review Commission, above n 42, 384.

[220] *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, [3].

[221] *Productivity Commission Report 2005*, above n 6, 60; Competition Policy Review Commission, above n 42, 384.

[222] *Productivity Commission Report 2005*, above n 6, 60.

[223] Dinger, *What shall we do with the drunken sailor?*, above n 3, 16; *Council Regulation (EC) No 1419/2006* [2006] OJ L 269/1, [3]; Also see section 5.2.

7 JUSTIFICATIONS FOR CONSORTIA AGREEMENTS

Conferences must now comply with regular EU competition laws, and consortia have had their block exemption regulation extended in validity through to 2020, so why are these two cooperative agreements treated differently? The key distinguishing feature between consortium and conference behavior, is the fixing of freight rates.

7.1 EUROPEAN UNION

The justifications for the introduction of Council Regulation 479/92 enabling Commission Regulation 870/95 establishing the consortia block exemption are very similar to those for the conference block exemption already discussed. The European Commission and the EU Council cite the uniqueness of the industry, containerisation, economy of scale, promotion of technical and economic progress, regularity, improved vessels and equipment.[224] The European Commission consider all of these justifications to continue to be valid, they were reiterated in Regulation 906/2009 following the most recent review.[225]

From Council Regulation 479/92 and Commission Regulation 870/95, through to Council Regulation 246/2009 and Commission Regulation 906/2009, price fixing has been expressly excluded from the activities of consortia. This illustrates the intention of the EU to limit hard core competition restrictions. Thus, the justification for the continued exception provided to consortia is actually their lack of competition restriction measures.

The Commission states in Regulation 906/2009 that unjustified limitation of capacity and sales, as well as rate fixing and customer allocation (all hard core competition restrictions) are unlikely to bring any efficiency and are not covered by the consortia block exemption.[226] The consortia block exemption covers only those agreements that would in any case satisfy the conditions of art 101(3).[227] This illustrates that the EU Council are not seeking to adopt extraordinary exceptions for consortia agreements. The consortia block exemption is rather a simplification of procedure allowing carriers to proceed through self-assessment.

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[224] *Council Regulation (EEC) No 479/92* [1992] OJ L 55/3, Preamble; *European Commission consortia exemption report*, above n 29, 6.1; *Commission Regulation (EC) No 870/95* [1995] OJ L 89/7, Preamble para 4.

[225] *Council Regulation (EC) No 246/2009* [2009] OJ L 79/1, Preamble paras 5, 6.

[226] *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31, Preamble para 5.

[227] Ibid Preamble para 4.

7.2 AUSTRALIA

The Productivity Commission referenced similar justifications when suggesting alternative models for the Australian liner shipping laws. The Productivity Commission recommends a system of automatic exception for agreements with low-risk features (consortia) while agreements with increased restrictions on competition, such as conferences, would have to satisfy a more stringent evaluation.[228]

The Productivity Commission made similar explanations to those used by the EU Council; efficiency, economy of scale, scheduling and management of vessels. But as with the EU Council, the Productivity Commission has concerns about the higher risk anti-competitive agreements involving rate fixing or capacity control and recommends that they be classified separately.

The Australian Competition Policy Review has made a recommendation for a class exemption for agreements engaging in operational cooperation. The explanation for this recommendation is that the historical justifications, such as efficiency, stability and reliability, are not sufficient to rationalise the anti-competitive effect of conferences. However, agreements cooperating operationally are less anti-competitive, or even pro-competitive, while potentially providing the same positive outcomes.

7.3 CONCLUSION

This section is again speculative with regard to Australia's potential regulation of consortia agreements separately from conferences. However, the justifications relied on in Australia for their possible future choices are, again, aligned with the justifications of the EU for their current treatment of consortia agreements.

[228] *Productivity Commission Report 2005*, above n 6, 192.

8 THE AUSTRALIAN SOLUTION

The two most recent reviews, being the Productivity Commission Report 2005 and the Australian Competition Policy Review, both made recommendations for amendments to the current Australian liner shipping competition laws.[229] As explained, pt X is no longer justified in exempting conferences from the regular Australian competition laws due to the hard core competition restrictions it permits. Several alternatives have been suggested, with three coming to the forefront; 1. Authorisation, 2. Class exemption, 3. Retaining and modifying pt X.

8.1 AUTHORISATION

If pt X were to be repealed then liner shipping would be subject to the authorisation procedures under pt VII of the *Competition and Consumer Act 2010* (Cth). Agreements approved under pt VII receive similar exemptions to under pt X. Part VII requires that agreements are submitted for approval by the ACCC upon evaluation of their competitiveness. The Australian Competition Policy Review considers it more appropriate that the ACCC determine whether agreements are anti-competitive.[230] The present system requires only that the Liner Shipping Registrar evaluate agreements for their net benefit and the competitiveness of the agreement is not assessed.[231]

Liner Shipping Services and Shipping Australia Limited submitted that authorisation under pt VII is an unsatisfactory alternative, highlighting that it would increase uncertainty for carriers operating on Australian trade routes, increase administrative burden and costs, and discourage future cooperation that could provide technological or efficiency improvements.[232] However, the Productivity Commission justifies the increased administrative costs for carriers due to the anticompetitive detriment of collusive agreements.[233]

According to the most recent Australian Government Response to the Competition Policy Review, the Australian Government is open to the repeal of pt X, however, at this time has not expressed an intention to do so.[234] The Australian Government has declared that a class exemption power will be introduced into the *Competition and Consumer Act 2010* (Cth).[235]

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[229] *Productivity Commission Report 2005*, above n 6, LII; Competition Policy Review Commission, above n 42.

[230] Competition Policy Review Commission, above n 42, 384.

[231] Ibid; *Competition and Consumer Act 2010* (Cth) ss 10.08(1)(d), 10.08(2).

[232] Shipping Australia Limited, above n 35, 25, 28; Liner Shipping Services Ltd, above n 112, iii, 6.

[233] *Productivity Commission Report 2005*, above n 6, 155.

[234] Australian Government, above n 131, 6.

[235] Ibid.

8.2 CLASS EXEMPTION

The Competition Policy Review favoured the introduction of a class exemption for agreements that co-ordinate scheduling and exchange of capacity and do not engage in tariff setting or pooling of revenues and losses, by another name consortia.[236] The Productivity Commission Report 2005 held the view that the adoption of block exemptions was not possible within the framework of Australian competition laws.[237] The Competition Policy Review Panel recommended that the ACCC be given the power to create class exemptions for agreements that meet a set of minimum pro-competitive features.[238] Both houses of the Australian parliament have recently passed the Competition Policy Review Bill, giving effect to this recommendation.[239] More than an intention, class exemptions may soon be an addition to liner shipping regulation in Australia.

Under the Competition Policy Review Bill the Commission will determine which provisions of pt IV do not apply, creating what is being explained as a "safe haven" for certain classes engaging in certain conduct.[240] This will remove the need for individual applications from carriers reducing the compliance and administrative costs, while increasing the all-important certainty.[241] The onus will be on parties, however, to self-assess whether their conduct falls within the class exemption.[242] The Competition Policy Review Bill also provides for the withdrawal of the benefit of the class exemption from individual persons if their conduct would likely substantially lessen competition or fail the public benefit test.[243]

According to the proposed s 95AA(a) of the Competition Policy Review Bill, class exemptions may be issued if they pass the competition test or the welfare test. The competition test means that the conduct would not have the effect of substantially lessening competition, and the welfare test means that the conduct would result in a benefit to the public that would outweigh the detriment.[244] The so called competition test seems generally to follow the same theme as art 101(1), while the welfare test is comparable with art 101(3).[245]

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[236] Competition Policy Review Commission, above n 42, 385.

[237] *Productivity Commission Report 2005*, above n 6, 155-6.

[238] Competition Policy Review Commission, above n 42, 385.

[239] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) passed by both houses on the 18th October 2017.

[240] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) sch 9 pt 1 div 3.

[241] Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) 57 [9.9].

[242] Ibid.

[243] Ibid.

[244] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) 95AA(1).

[245] *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)* [2012] OJ C 326/47, art 101.

To be clear, the Competition Policy Review Bill provides only the power to create a class exemption, so proposal for a liner shipping class exemption has yet been put forward. The Australian Government response to the Competition Policy Review stated that the Government would work with the ACCC, relevant stakeholders, including shippers and carriers, to investigate the option of a class exemption for liner shipping. The emphasis has always been on providing a reliable and competitive service for Australian importers and exporters, and the Government has reiterated this intention.[246]

8.3 RETAINING AND MODIFYING PART X

The compromise to repealing pt X, is to retain and modify, this formed a significant part of the Productivity Commission recommendations in 2005. The Productivity Commission recommended that if pt X were retained, then the criteria for registration should differentiate between agreements that include price and capacity fixing (conferences), which would require a higher level of scrutiny due to their greater level of anticompetitive risk. While other agreements that aimed toward achieving operational efficiencies (consortia) have a more lenient registration procedure.[247] This recommendation was not addressed or suggested by the Competition Policy Review and as yet it appears it is not in consideration to progress.

[246] Australian Government, above n 131, 6.

[247] *Productivity Commission Report 2005*, above n 6, 189-90.

9 THE AUSTRALIAN SOLUTION COMPARED

The future of Australian competition regulation of liner shipping is speculative at this stage, however the intention for change is apparent. This section will evaluate the third research question of whether the Australian regulation of competition in liner shipping is approaching similarity with the EU system for competition in liner shipping. The author observes that the Australian laws may be beginning to resemble those of the EU. This is with particular reference to the recommendations of the Australian Competition Policy Review. This section will compare the possible future characteristics of Australian liner shipping competition laws, with the current EU laws.

The *OECD 2002* Report was the springboard for a change in policy in both the EU and Australia. It was at this time that the European Commission conducted their review into the conference block exemption that had never before been reviewed, and chose to repeal Regulation 4056/86. In Australia, the Productivity Commission began their inquiry into liner shipping competition laws that culminated in their 2005 report recommending the repeal of pt X. As both the EU and Australia were responding to the same stimulus, it is perhaps not surprising that they are moving in the same direction. It is obvious that if Australia follows the recommendation to remove conference protection from competition laws, this will be a significant similarity between the two systems. The more interesting comparison to draw is how the laws are managing this change.

9.1 CONFERENCES AND CONSORTIA

Part X has previously applied to all cooperative agreements without distinguishing between price fixing agreements and operational agreements. This is easily observed with reference to the definition of conferences as explained in section 1.4. The EU uses a clear differentiation between conferences and consortia, and has done so for the last thirty years. It is a divide that is even more critical now that the conference block exemption has been repealed. Australian laws may begin to make this distinction in the coming years if the recommendations outlined in section 8 are adopted.

9.2 BLOCK EXEMPTIONS

The EU has always utilised block exemptions in the form of regulations to provide the liner shipping industry with protection from standard competition laws. Australia has previously provided the liner shipping industry with protection from the competition laws through a registration system, however it is now contemplating the repeal of this system. Additionally, the Competition Policy Review Bill, introducing the power for the ACCC to adopt class exemptions, has been passed. While Europe is not the only legislature utilising block exemptions, this is a substantial shift for the Australian system toward the EU structure.

The EU Council can permit the implementation of a block exemption, by the European Commission, if it satisfies the four conditions of art 101(3), as described in section 3.1.2. The failure of the conference block exemption to satisfy the four conditions is explained by the EU

Council to be the reason for its repeal. Equally, the consortia block exemption continues to satisfy the conditions and so its application has been extended to 2020. These conditions are pivotal in the application of competition laws to liner shipping in the EU, does Australia consider similar conditions to be of importance?

The first of the art 101(3) conditions is that the agreement must improve the production or distribution of goods or promote technical or economic progress. This requirement is not reflected anywhere in the Australian competition laws.

The next requirement is that customers receive a fair share of the benefits. This requirement is applied to liner shipping cooperative agreements only in limited circumstances in the current Australian laws.[248] Presently, cooperative agreements and their provisions need not pass a public benefit test if they are price fixing, pooling earnings or losses, restricting the quantity or kinds of cargo or entry of new parties to agreements.[249] However, pursuant to the Competition Policy Review Bill the public benefit test will be applied to class exemptions, the same as is required by art 101(3).[250]

The third requirement in EU law is that the consortium does not impose restrictions that are not indispensable to the agreement. This applies also only in limited circumstances in the current pt X laws, however if recommendations are followed and pt X is repealed it will no longer be a consideration for applying competition laws to cooperative agreements. This is perhaps an incongruous omission as the inclusion of extraneous provisions may be harmful, however such provisions will then be caught by the strengthened public benefit requirement.

The fourth requirement under art 101(3) is that the agreement does not afford undertakings the possibility of eliminating competition. This requirement is not currently encompassed by the Australia competition law relating to liner shipping, however the Competition Policy Review Bill requires that class exemptions satisfy the ACCC that they do not substantially lessen competition.[251]

9.3 SELF-ASSESSMENT

Since the adoption of *Council Reguation (EC) No 1/2003* carriers have had to self-assess whether their conduct would contravene art 101(1), and then whether they are eligible for exception due to a block exemption regulation.[252] The European Commission have provided generous guideance in the

[248] *Competition and Consumer Act 2010* (Cth) ss 10.08(1)(d), 10.08(2).
[249] Ibid s 10.08(1)(c).
[250] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) s 95AA(1)(b).
[251] Ibid s 95AA(1)(a).
[252] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* [2003] OJ L 1/1.

form of guidelines to assist carriers with their self-assessment.[253] Self-assessment reduces the administrative costs both for carriers and regulators. However, the burden and risk is then on carriers to correctly understand and apply the exemption conditions to their agreements.[254]

Self-assessment has not yet been used in the Australian regulation of competition in liner shipping, however the Competition Policy Review Bill provides the power to adopt a liner shipping class exemption, under which, self asssessment may become an obligation of carriers on Australian trade routes also. This is of course speculatory, but as the class exemption power has now been adopted, it appears that this characteristic of the EU system will soon be shared by the system in Australia.

9.4 AUTHORISATION

Tied closely to the previous discussion of self-assessment is the system of authorisation. Previously in the EU, carriers could apply for exemption and have peace of mind by way of confirmation letter.[255] *Council Reguation (EC) No 1/2003* removed the possibility for this authorisation of agreements. Australia has always used a version of authorisation, that being their registration system.

As the Australian law is currently in transition, it is speculative as to which scenario will apply. The passing of the Competition Policy Review Bill indicates that the time of authorisations for all cooperative agreements in Australia may soon be over. However, in the case that pt X is repealed, cooperative agreements, not covered by a class exemption will need to be authorised and pass the public benefit and competition tests of pt VII.[256] This is an increase in competitive requirements for cooperative agreements in Australia, but also a step away from the EU system, where authorisations are a mechanism of the past.

9.5 MARKET SHARE

One feature that has always been an inclusion of the EU system, and is not a recommendation for the Australian system is the market share condition. As described in section 3.2 in order for consortia on EU routes to receive competition law exception consortia must not have a market share above 30% in the relevant market.[257] Australian competition law does not have a market share

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[253] Peter D Camesasca, 'European Commission's Post-Conference Maritime Transport Guidelines – True Guidance to Navigate through Antitrust Compliance' in Philip Wareham (ed), *Competition Law and Shipping: The EMLO Guide to EU Competiton Law in the Shipping and Port Industries* (CMP Publishing, 2010) 35, 37.

[254] Philip Wareham, 'The Challenges of Self-Assessment' in Philip Wareham (ed), *Competition Law and Shipping: The EMLO Guide to EU Competiton Law in the Shipping and Port Industries* (CMP Publishing, 2010) 123.

[255] Ibid 121.

[256] *Competition and Consumer Act 2010* (Cth) s 90(5A).

[257] *Commission Regulation (EC) No 906/2009* [2009] OJ L 256/31 art 5.

restriction. The Productivity Commission considered such a provision, arriving at the conclusion that the expenditure in administrative and compliance costs are not justified, and that the other recommendations are sufficient.[258] A market share condition was not considered by the Competition Policy Review.

The EU have recently found justification for strengthening their market share condition, decreasing the permitted consortia market share from 35% to 30%.[259] It appears that this amendment was made on reflection of view that liner shipping is not a unique industry and so is not entitled to market share limits higher than other block exemptions.[260]

This is a significant diversion between the EU and Australian systems. The lack of justification for the EU market share amendment is in common with the lack of justification found by the Productivity Commission in the adoption of a market share limit.

[258] *Productivity Commission Report 2005*, above n 6, 305.

[259] *Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)* [2000] OJ L 100/24, art 6.

[260] Matthew Levitt, 'Liner Consortia, Liner Mergers and Individual Exemption' in Philip Wareham (ed), *Competition Law and Shipping: The EMLO Guide to EU Competiton Law in the Shipping and Port Industries* (CMP Publishing, 2010) 46.

10 CONCLUSION

10.1 RESEARCH QUESTIONS

The liner shipping industry experienced unmistakable change when the EU removed their competition law protections for conferences in 2006. Ten years on from this, Australia could potentially make the same change. This shift in Australian liner shipping policy gave rise to the questions pursued through this research. Section 2 explained that liner conferences have historically been considered vital to global trade and above competition laws. Sections 3 and 4 explained the competition laws of the EU and Australia, and how they currently apply to liner shipping. Following these introductory sections the first research question is discussed in section 5 where the historical and current policy reasons for the exemption of cooperative agreements from competition law are explained. The explanation summarises the impact of containerisation, the economic theories seeking to explain the need for cooperation, and the benefits that can be achieved. However, each policy discussed in section 5 is accompanied by a paragraph raising doubt as to the modern acceptance of these policies. For the most part, the policies for the special treatment of cooperative agreements in competition law do not hold water.

The policies discussed in section 5 are explained differently by different stakeholders in liner shipping. The views of the EU and Australia are the subject of this research and sections 6 and 7 focus on comparing the use of the policies to justify the regulation of liner shipping in each jurisdiction. To answer the second research question, the justifications for the removal of exemptions for conferences are common between the EU and Australia. This similarity extends also to the justifications for retaining protection for consortia agreements in both the EU and Australia.

The Australian system for regulation of cooperative agreements in liner shipping is currently in review and could undergo significant changes in the near future. Section 8 described the potential solutions for regulating liner shipping in Australia. The third research question is then addressed in section 9 where these possible Australian solutions are contrasted with the position in the EU. It is found that while some regulatory aspects of the Australian solutions are in contrast with the EU, the more substantial changes, such as differentiating between conferences and consortia, and the introduction of a class exemption are in common with the EU system. This research finds that Australia is approaching greater similarity with the EU system for competition regulation in liner shipping cooperative agreements.

10.2 LIMITATIONS AND FUTURE CONSIDERATIONS

The nature of this research allowed only a summary of the topics pursued. Any single section of this research could be developed into a full research thesis on its own. As such, much of the detail achieved in this research is insufficient. Be that as it may, a comparison, as undertaken here, has not

before been written in relation to this topic. Thus a summary is also a useful place to begin in order to evaluate where the research should develop in the future.

This research was also limited by the fact that the Australian system is currently in review and is likely to change in the near future. This prevented clear comparison between the EU and Australian systems as it is yet unclear as to the progress of the Australian laws in the next one or two years. This limitation most significantly affected the third research question addressing whether the Australian system is becoming more similar to the EU system for regulating cooperation in liner shipping. This being the case, the first two research questions are unaffected by this limitation.

Limitations are an excellent place to begin when undertaking future research. Conducting a similar comparison once the current review and amendment of Australian regulation of liner shipping is complete would be useful. The insight would then be concrete rather than speculative.

One specific area of future research was identified by the author during this research and has also been picked up by UNCTAD in their most recent Review of Maritime Transport 2017.[261] There is concern that the removal of protection for conferences will encourage consolidation in the industry.[262] There is therefore a case to be made that conferences are in fact important to prevent consolidation in the industry. The author suggests that a valuable future area of study will be as to whether the current laws known as abuse of dominant position in the EU, and misuse of market power in Australia, could be a protection from the dangers of consolidation in the industry.

10.3 CONCLUSION

This research explains that the Australian and EU systems of regulating liner shipping cooperative agreements have been divergent in the past. However recent reviews and recommendations for the amendment of the Australia system could see the Australian system adopting mechanisms in common with the EU system. Carriers, shippers, and the author will watch closely to see what steps the Australian government will take in the coming years.

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[261] United Nations Conferences on Trade and Development (UNCTAD), 'Review of Maritime Transport 2017', (Report UNCTAD/RMT/2017, United Nations Conferences on Trade and Development, 25 October 2017) 49.

[262] Ricardo J Sanchez and Lara Mouftier, 'The puzzle of shipping alliance in April 2017' on *Port Economics* (20 April 2017) < http://www.porteconomics.eu/2017/04/20/the-puzzle-of-shipping-alliances-in-july-2016/>; Costas Paris, 'Cargo Alliances Make Waves – Containership lines join hands to ride out trade slump; clients fear fewer choices' on Wall Street Journal (4 January 2017) <https://search.proquest.com/docview/1854982031?accountid=14699>.

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