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*SAL:22-004 SAL supplementary submission to PC AMLS (unfair terms)*

*07 November 2022*

Commissioners J Abramson & Dr S King  
Inquiry into Australia's Maritime Logistics System  
Productivity Commission  
Level 8, Two Melbourne Quarter  
697 Collins Street  
Docklands VIC 3008

By online contact submission form:

<https://www.pc.gov.au/inquiries/current/maritime-logistics/make-submission#lodge>

Dear Commissioners

**Supplementary submission to Productivity Commission Australian Maritime Logistics System: follow-up to Commissioner Dr King's queries re: extension of unfair terms law into shipping contracts**

1. Shipping Australia is an industry association that represents the participants in Australia's international supply chain.
2. During the recent hearing on Friday 04 November 2022 of the Productivity Commission's inquiry into Australian Maritime Logistics Systems, Shipping Australia was asked what the difference is between marine cargo carriage and insurance and aviation cargo carriage and insurance.
3. It was suggested by the Commission that there is no difference between aviation cargo markets and marine cargo carriage markets for insurance purposes and, therefore, there is no reason not to alter Australian law (in respect of unfair terms legislation) as such an alteration would not affect international marine cargo insurance.
4. Shipping Australia disagrees.
5. Fundamentally, marine cargo carriage and insurance and air cargo carriage and insurance are different in fact. They are different modes of transport and so they have different risk profiles and risk exposures. Accordingly, marine and air cargo would be (and, in fact are) subject to their own discrete cargo liability and insurance systems / regimes.
6. The level of insurance premiums, terms and conditions of cover, and whether or not insurance is even offered is based on a wide range of factors, such as total losses, average losses, payout patterns, statistics, matters unique or peculiar to an industry and the like.
7. There is a wide variety of inherent differences in the risk profiles between aviation and marine cargo carriage that indicate why the two sectors are not direct, nor even good, analogies. We have compiled a non-exhaustive list of differences relevant to risk profile and risk exposure on the next page.

8. Compared to air cargo, marine cargo is / has:
  - a) much bigger cargo volumes in total
  - b) many more ships involved compared to planes  
(about 92,803 ships (excludes fishing; Equasis) vs 28,576 planes (Ch-Aviation.com))
  - c) more cargo simultaneously exposed to risk (more cargo is carried on each ship voyage)
  - d) a longer transport risk as the voyage is much longer (weeks or months compared to hours)
  - e) a wider range of temperature variations for a much longer time
    - i. One study (<https://e-bi.com/2014/08/04/ocean-freight-containers-safe-product/>) found that the inside of containers can reach as low as -21C and as high as 57C (remember: aviation cargo reaches its destination quickly; marine cargo can be at sea for months)
  - f) subject to much more “container rain” or “container sweat” (moisture damage from condensation inside the container; aggravated by the duration of the voyage; while there is container condensation in air cargo, it is present for a much longer time in sea cargo)
  - g) more shipping container contaminants (oils, rusts, smells, vermin (insects etc)) – ocean shipping containers are extensively used, travel around the world, often far inland, have a wide range of goods placed inside them and are generally exposed to a wide range of contaminants – it’s a major problem for biosecurity)
  - h) unexpected loss of containers overboard (e.g., in storms, because of lashings failure etc)
  - i) exposed to **the inherent perils of the sea** (generally not present in air cargo)
    - i. maritime piracy
    - ii. foundering at sea; ships go missing and may never be seen or heard of again, possibly because of rogue waves, rogue holes, cargo liquefaction, over-heavy cargo, accident, or some other reason
      - i. striking by rogue waves – large, unpredictable, waves
      - ii. rogue holes (are possible and have been observed in wave tank tests e.g. <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2011JC007636>)
      - iii. rogue waves could also be possibly caused by the unforeseen sublimation of methane clathrates under a ship which would cause a sudden and catastrophic loss of buoyancy e.g. <https://www.abc.net.au/science/articles/2003/10/24/973492.htm>)
      - iv. cargo liquefaction (mostly for bulk cargo e.g., iron ore)
      - v. container ships can break up with overweight cargo; containers can still be mis-declared
    - iii. wreckage via collision or allision, sinking, grounding, stranding (reefs, coasts etc)
    - iv. can be subject to extensive heavy storms, cyclones etc (aircraft can avoid and fly around; ships sail through)
    - v. the effect of the sea on ships - pitching & heaving, rolling, yawing, swaying, and surging, potentially leading to cargo damage
9. In summary, the marine cargo market presents a much bigger, and a very different, risk profile and exposure when compared with the aviation cargo market.
10. Because the two sectors are different it is not valid or reasonable to assume that because a given set of laws (unfair contract terms law) applies in the international aviation cargo carriage and insurance markets does not mean that altering contract of carriage law in the marine sector would not cause an adverse response from the overseas marine cargo insurance markets.

11. It is also worth pointing out that, if there is an adverse response from the overseas insurance markets, then it would be Australian importers and exporters that would bear the burden in the form of higher premiums, or reduced cover, or withdrawn cover, demanding changes to terms and conditions of business, or some combination of the same.

## **12. New developments**

13. Incidentally, our view that removing the exemption for shipping from unfair contract terms law could have adverse impacts that are addressed by the overseas insurance markets is bolstered by the passage of the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 passed through the Senate on 27 October 2022 and which now awaits Royal Assent.
14. That new law will massively increase pecuniary penalties for breach of the law to the greater of AUD\$50 million; or (b) three times the value of the benefit obtained (when this can be determined); or (c) 30% of the corporation's adjusted turnover during the "breach turnover period".
15. Shipping contracts are currently excluded from unfair terms legislation. However, if shipping were to lose its exemption, then these new, bigger, penalties would apply. A legal regime that applies massive penalties is substantially different to a legal regime that does not apply massive penalties.
16. A legal regime that presents the possibility of massive penalties radically changes the risk and exposure profile of the market in question (specifically, the transport of goods to / from Australia by sea).
17. Overseas insurers will likely address this change in risk profile. They could do so by charging higher premiums, reducing cover, withdrawing cover, demanding changes to terms and conditions of business, or some combination of the same.
18. Shipping Australia again urges the Productivity Commission to carefully read our various submissions. We also urge the Productivity Commission not to recommend that Australian unfair terms law be extended to shipping contracts. We urge that existing exemptions be maintained.

### **Authorised by**

Capt. Melwyn Noronha

**CEO, Shipping Australia**