SUBMISSION TO THE REVIEW
OF
PART X OF THE TRADE PRACTICES ACT

Maritime Division
Department of Transport and Regional Services
Canberra
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REVIEW OF PART X OF THE TRADE PRACTICES ACT 1974

1. OVERVIEW

1.1 GENERAL

During March 1999 officers of the Department of Transport and Regional Services ("the Department") held discussions with members of the team established by the Productivity Commission ("the Commission") to undertake the review of*Part X of the Trade Practices Act 1974.* The Department provided the Commission with copies of previous review reports on Part X, an initial contact list of users and suppliers of liner shipping services, and other papers that may be relevant to the current review.

In December 1993 a panel chaired by Mr Patrick Brazil (a former Secretary of the Attorney-General's Department) issued a report reviewing Part X. That report contains a wide range of factual material that is relevant to the current review.

1.2 KEY POINTS

The key points that should be taken into account when considering Part X are:

- Part X provides a legislative framework within which exporters are provided with countervailing powers to enable them to negotiate outcomes with liner shipping conferences that result in standards of service that meet their needs; and are provided at internationally competitive freight rates;
- liner shipping comprises regular scheduled services for non-bulk general cargoes, most of which is carried in containers;
- importers are not covered by Part X but, like exporters, use the services provided by shipping conferences as well as those provide by non-conference lines. Shipping conferences servicing import trades are subject to the regulatory regime in the country/area of export (eg. European Union, USA, Japan);
- Australia's major trading partners (EU, USA, Japan, Korea, Taiwan and NZ) provide varying degrees of predictable exemptions to facilitate conference arrangements; and
- wwhether or not Part X achieves a better outcome for exporters than would be the case under the Part VII authorisation procedures of the TPA, taking into account both price and standard of service.

1.3 COMPETITION

Competition in the Australian liner trades exists between conference carriers and independent shipping lines which operate outside the conferences. A major element of competition is provided by transhipment services via Singapore, where independent lines such as Evergreen provide large scale East West container services to European, American and Japanese markets.

Information available to the Department indicates that, as an average over all liner trades, conferences currently carry about 55% (by value) of Australia's liner cargoes, with the balance being carried by non-conference carriers. The share of liner cargo carried by non-conference shipping (in value terms) has increased from about 23% in 1982 to about 45% in 1998.

Information from conference lines indicates that considering both Australia's export and import trades over the past 10-15 years, average liner freight rates have fallen by about 50% in real terms.

The Part X process does not require freight rates charged to be notified to the Department. Actual freight rates charged by individual companies operating within conferences or independently are commercial in confidence matters between the parties concerned. The review team will need to consult with liner shipping companies and exporters to obtain detailed freight rate information.

1.4 OPERATION OF PART X

Through the provisions of Part X, international liner cargo shipping companies can be assured of conditional approvals to collaborate as conferences. The conditions include requirements to: register their agreements; negotiate with designated exporter bodies on minimum service levels and freight rates; and provide information reasonably necessary for negotiations when requested by exporter groups.

Failure to meet Part X conditions and to provide efficient and economical services can result in an investigation by the Australian Competition & Consumer Commission (ACCC). On the basis of an ACCC report the Minister responsible for shipping can order the de-registration of a conference agreement, thus removing the Part X exemptions.

From the viewpoint of regulation of industry, Part X is a simple system that relies on conferences and exporters reaching commercially acceptable outcomes through negotiations. It is largely a self regulating system and involves significantly less government intervention and regulation than the Part VII authorisation procedures.

Part X has been subject to periodic reviews. To date, those reviews have led to decisions to retain Part X on the basis that the features of conference agreements, together with the countervailing powers given to exporters, justify the exemptions from general competition policy provided by Part X.

1.5 OPTIONS

Options for Australian regulation of international liner shipping could include:

1) Repealing Part X and making international liner shipping subject to the Authorisation procedures of Part VII of the TPA.

2) Repealing Part X and making international liner shipping and exporter groups subject to the Notification procedures of Part VII of the TPA.

3) Retaining Part X with amendments to enhance the bargaining position of Australian exporters and importers.

4) As for option 3 but also transferring the Minister's powers to de-register a conference agreement to the ACCC.

5) No change.

The above options are discussed in detail in **Section 3** of this submission.

2. ISSUES

2.1 CURRENT SITUATION

2.1.1 General

Australia's total freight bill for liner shipping is approximately $3.5 billion per year, about $2 billion (or 60%) of which is for the carriage of Australia's liner imports (mainly manufactured goods) and about $1.5 billion (or 40%) for the carriage of Australia's liner exports (mostly wool, cotton, metals, meat, dairy and horticultural produce.).

A feature of liner shipping is the conference system. Conferences have operated since 1875 in international liner shipping, and in the Australian liner trades since 1884. Conferences are organisations in which shipping lines agree to collaborate on matters such as freight rates, container slot sharing agreements, shipping schedules and capacity offered.

2.1.2 Overcapacity and declining freight rates

World container traffic continues to grow at an impressive rate despite the recent global slowdown in economic growth (although less rapidly than growth in containership capacity):

Year	*Total (TEU)*	*% Change*	***Year***	*Total (TEU)*	*% Change*
1984	52.7m	15.7%	**1991**	93.6m	9.3%
1985	55.8m	5.8%	**1992**	102.9m	9.9%
1986	59.4m	6.6%	**1993**	113.2m	10.0%
1987	67.3m	13.1%	**1994**	128.3m	13.3%
1988	73.8m	9.7%	**1995**	137.2m	6.9%
1989	78.5m	6.3%	**1996**	147.3m	7.4%
1990	85.6m	9.1%			

Source: *Containerisation International Yearbook and ISL Yearbook*

Note: An 8 foot by 8 foot by 20 foot container is 1 TEU (Twenty foot Equivalent Unit)

The gap between supply and demand for vessels is increasing. World cellular containership fleet capacity of 2 million TEU slots in 1992 had increased to 3.6 million TEUs in 1997 (with 0.9m then on order). New buildings of 543,000 TEU slots capacity (equating to about 14% of capacity) were delivered in 1998.

Given the low rate of scrapping (0.5% in 1996), containership capacity has doubled in 6 years, an average rate of growth of over 12% from 1992 to 1998. During the period 1992-1996, the average rate of growth in world container traffic was just over 9%, a rate likely to have fallen somewhat in the last couple of years due to the Asian crisis.

This surplus capacity inevitably creates pressure to lower freight rates and returns, and this will continue while the imbalance of supply and demand continues. Although the supply/demand imbalance seems likely to improve from 1999 (when only 193,000 TEUs slot capacity is scheduled to be delivered), this improvement is likely to be gradual.

2.1.3 Indicative freight rate information

North and East Asia

Rates remain under downward pressure and, overall, have fallen by over 47% in real terms since 1982, and by 40% since 1989.

South East Asia

There is substantially increased competition on the Australia/SE Asia route with the introduction of new services by major carrier groups. New tonnage has been introduced in response to trade growth and transhipment opportunities, and freight rates have come under downward pressure. Since 1989 rates have fallen by 60% in real terms (and by 75% since 1982).

Trans-Tasman

Since the introduction of containerisation in the late 1960s rates have continually fallen. Currently there is intense competition in this trade and increasing levels of cross trading, which has led to freight rates falling by around 50% in the last several years in the main Sydney/Melbourne/Auckland trade routes.

The union accord is weakening as evidenced by union decisions to accept BHP and P&ONedlloyd as cross traders, using their international ships with foreign crews. BHP has withdrawn from the dedicated (ie. Australia/NZ only) Trans -Tasman trade and the South Pacific Shipping Line has been liquidated.

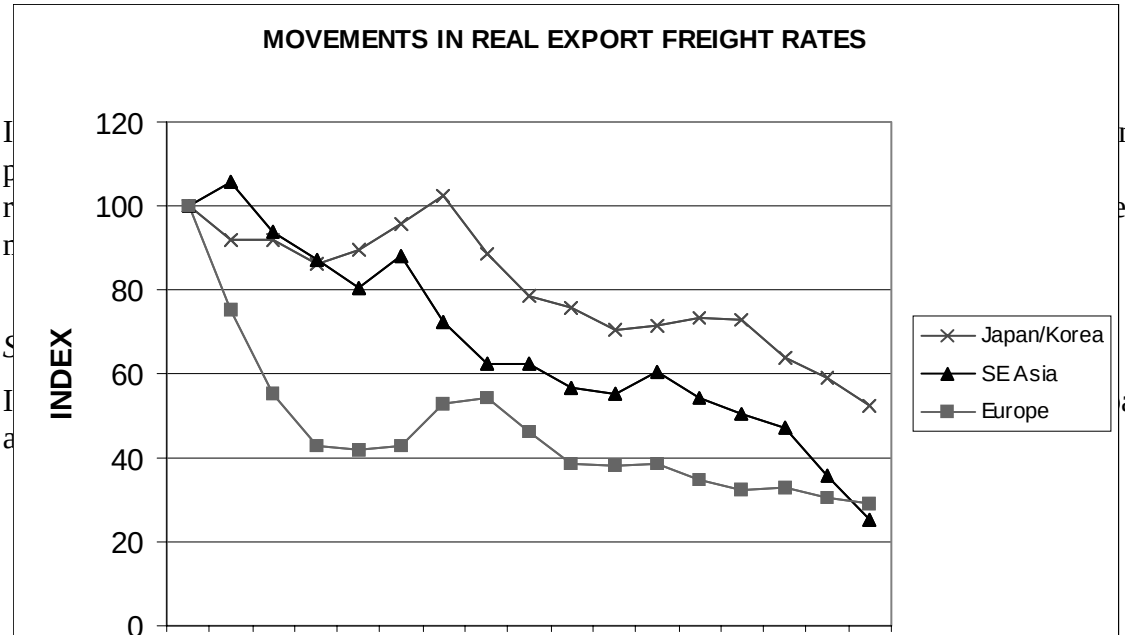
Europe

Freight rates to Europe have fallen by 37% in nominal terms since 1982 and by 70% in real terms. In real terms rates have fallen by 47% since 1989.

Selected Export Freight Rate Indices

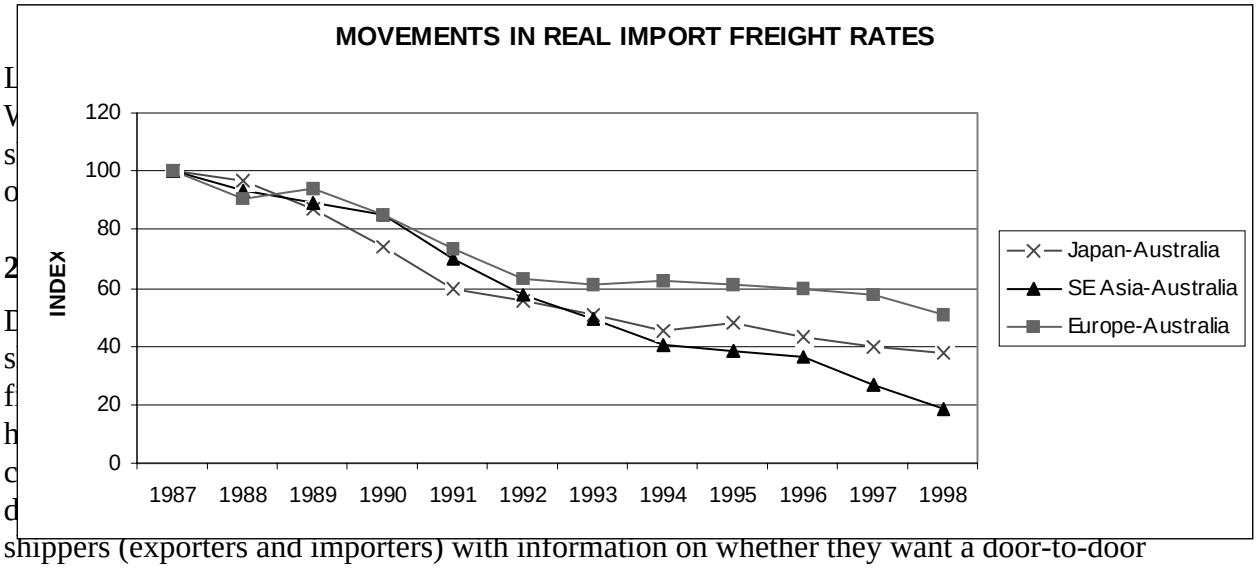
Year	*82*	*83*	*84*	*85*	*86*	*87*	*88*	*89*	*90*	*91*	*92*	*93*	*94*	*95*	*96*	*97*	*98*
CPI	*100*	*109*	*114*	*123*	*133*	*143*	*153*	*164*	*176*	*186*	*187*	*190*	*195*	*205*	*212*	*217*	*218*
Europe	*100*	*82*	*63*	*53*	*56*	*61*	*81*	*89*	*81*	*72*	*71*	*73*	*68*	*66*	*70*	*66*	*63*
SE Asia	*100*	*115*	*107*	*107*	*107*	*126*	*102*	*102*	*110*	*105*	*103*	*115*	*106*	*103*	*100*	*78*	*55*
N Asia	*100*	*100*	*105*	*106*	*119*	*137*	*157*	*145*	*138*	*141*	*132*	*136*	*143*	*149*	*135*	*128*	*114*

Source: Liner Shipping Services Ltd



Year	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*	*1995*	*1996*	*1997*	*1998*
CPI	100	107	115	123	131	131	133	137	144	149	152	153
Japan-Australia	100	104	100	91	78	73	68	62	69	64	60	58
SE Asia-Australia	100	100	103	105	92	75	66	55	55	54	41	28
Europe-Australia	100	97	108	105	96	83	81	85	88	89	88	78

Source: Liner Shipping Services Ltd



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shippers (exporters and importers) with information on whether they want a door-to-door service, which is in effect an 'intermodal service', or whether they wish to make their own arrangements, possibly through freight forwarders, for the land transport legs of international trade carried by sea.

In practice, the most common arrangement has been for shipping lines to provide a "terminal gate to terminal gate" service which includes blue water (ie. sea leg) charges and stevedoring charges.

While Part X may only have a limited impact on intermodalism, it does not get in the way of the development of such services (eg those provided by logistics management enterprises).

A related issue is the question of whether the Part X exemptions should allow shipping conferences to negotiate as a 'block' with stevedoring companies. Some suggestions have been made that the Part X exemptions, through allowing shipping companies to collude as cartels, has reduced their incentive to put pressure on stevedoring companies to reduce costs and improve efficiency.

The Brazil report (p151) contains an alternative view to the effect that conferences/consortia can obtain a lower charge per TEU because of the large volume of cargo they can offer, and also the fact that conferences/consortia generally present efficient ships with a reputation for cargo stowage expertise.

On the issue of stevedoring, the Brazil report (para 8.4.3) stated that "Part X of the TPA has minimal impact on the provision of stevedoring services to the industry".

While some doubt has been expressed as to whether sections 10.14 and 10.22 provide an exemption for conferences to negotiate as a "block" with stevedoring companies, this has been the practice for many years. Accordingly, any changes to the Part X regime should clarify whether or not conferences should be allowed to negotiate as a " block" with stevedoring companies in Australia.

2.2 DEVELOPMENTS

2.2.1 Mega-carriers

The top 20 liner operators (includes conference and non-conference carriers) have continued to increase their fleets in recent years and in April 1996 owned around 50% in number and 60% in capacity of the world fleet of container ships over 1,000 TEUs.

An increase in the size of individual ships is also part of the top companies' strategy. This is illustrated by the fact that of a recent sample of 119 new building orders, 42 ships were of 5,000 TEU and over. Building larger ships is an attempt to reduce operating costs through economies of scale. Japanese research suggests that a 6,000 TEU ship can be built for only 50% more than a 3,000 TEU ship, with fuel costs only 30% more and crew size remaining unchanged.

While the largest mainline vessels now launched are said to have an actual box capacity of 8,000 TEU, the average size of vessels in the so-called "thin" Australian trades is much smaller to allow a reasonable frequency, despite our relatively low trade volumes. In 1993, vessels in the long-haul Australia-Europe trades averaged 2038 TEU, and in the shorter Australia-SE Asia trades ships averaged only 1135 TEU capacity. Although vessel size in the Australian trades is increasing, the higher costs per TEU of smaller vessels is still a factor that must be remembered when comparing freight rates in the Australian trades with those overseas, especially with freight rates on mainline trades.

2.2.2 Formation of global alliances

A strategic alliance in liner shipping involves a small number of major lines, often having strengths in different trades or regions but with the objective of providing global coverage, cooperating closely to provide joint transport or logistics services covering a variety of major trades. By doing this, they are able to minimise the risks of operating on a global scale by: (1) influencing which other firms they must directly compete with, and (2) by allowing more rapid re-positioning of ships and equipment for changing market conditions than could be achieved through internal growth.

One of the driving forces behind the formation of strategic liner alliances is the desire of large liner operators to be able to offer the global scale and scope of services demanded today by large transnational corporations. These large shippers (exporters and importers) are often much larger entities than even the largest liner operators, and are in a good position, in terms of countervailing power, to negotiate satisfactory service contracts with the global alliances.

The appropriate treatment of strategic liner alliances is a major competition policy issue for Governments around the world.

2.2.3 Mergers and takeovers

Although strategic alliances are intended to be for the medium term at least, it is not clear whether they will be more than just a transient stage in the development of liner shipping. It may well be that mergers and takeovers to form mega-carriers will yield greater cost reductions, a major consideration in an environment of generally weak freight rates.

The major mergers and takeovers that have occurred in the liner shipping industry during the past three years include:

- P&O merged with Nedlloyd to form P&O Nedlloyd;
- P&O Nedlloyd purchased Blue Star Line's liner services, and Tasman Express Line;
- Evergreen purchased Lloyd Triestino;
- CGM purchased ANL's liner business;
- CP (Canadian Pacific) Ships purchased ANZDL, Contship and Lykes Line;
- Neptune Orient Line purchased American President Lines; and
- Maersk purchased Safmarine.

2.2.4 Implications of developments

Under present day conditions the option of increasing freight rates as a means of improving reported low rates of return in liner shipping appears limited. In light of this situation liner shipping companies have been pressured into finding ways to improve returns. Alliances and mergers to form mega-carriers are ways of cutting costs through economies of scale and rationalisation of services, to manage the amount of shipping capacity offered so that it is more in line with demand.

Too stringent a competition policy approach to alliances by major trading nations could encourage more mergers, which could have greater anti-competitive effects than the alliances, especially if the resulting mega-carriers were to cooperate with others in discussion agreements or trade stabilisation agreements, or remained as conference members in the various trades.

If strategic alliances are a stage on the road to more fundamental consolidation in liner shipping through mergers and takeovers, then the outcome could be a relative handful of mega-carriers (much larger than those to which the term is currently applied) which have the strength and scope to operate globally on an independent basis if they so choose, or if restrictions under national competition policies make independent operations a more attractive option. These developments may suggest a need for regular reviews of relevant legislation.

National competition policy regimes for liner shipping should provide measures to prevent discrimination by alliances, mega carriers, and by carriers generally, against small and medium sized shippers. Section 10.05 of Part X contains provisions which prohibit discrimination between shippers, except that which makes only reasonable allowance for differences in the cost of providing services based on different ports or different quantities or types of cargo. Section 10.03 of Part X enables Australian exporters to act in concert via Government-designated shipper bodies in their dealings with carriers.

2.3 RATIONALE FOR PART X

Part X provides the regime for regulating the conduct of those international liner cargo shipping companies which collaborate as conferences under registered agreements. Non-conference carriers with substantial market power can be made subject to similar regulations as apply to conferences. Unfair pricing practices are prohibited. Part X also contains provisions to ensure that parties to a conference agreement do not unreasonably hinder efficient Australian flag shipping.

The regime governing liner shipping conferences had its origins in the early part of this century and resulted from concerns that Australian exporters should have access to adequate and efficient liner shipping services with reasonable freight rates.

In 1929 the then Government convened "The Overseas Shipping Conference" to consider issues of concern to Australian exporters arising from the operation of liner shipping conferences. As a result of the conference, exporter organisations and overseas shipping companies formed the Australian Overseas Transport Association (AOTA);

- the principal objective of AOTA was to ensure "adequate and efficient transport services to meet the needs of the Australian export trade, both general and refrigerated."

This was followed by *the Australian Industries Preservation Act 1930*, which gave Australian exporters significant countervailing powers to negotiate acceptable freight rates with shipping conferences;

- the role for government was kept to a minimum and of a non-interventionist nature, involving general oversight of the arrangements.

The basic approach to regulating shipping conferences has remained much the same to this day, but with several changes to legislation aimed at enhancing the bargaining position of exporters, and limiting shipping conference exemptions from competition rules to the minimum needed for them to operate efficiently and provide services of adequate frequency, capacity, port coverage and reliability.

It is important to note that Part X has been designed to protect the interests of exporters and not to meet the interests of shipowners.

While there are currently around 60 conference agreements registered under Part X, the range of conduct agreed on covers a limited number of activities, including:

1. provision of minimum levels of service, including the collective maintenance by conference members of an agreed capacity of general and refrigerated containers to service the trade to which the agreement applies;
2. number and regularity of sailings per year and the ports of loading and discharge of such sailings;
3. slot sharing arrangements and the rights of members of an agreement to the amount of cargo to be carried by each member;
4. fixing common and uniform freight rates;
5. charging agreed common and uniform freight rates;
6. discussing freight rate levels, agreeing on a range of freight rates and minimum rates;
7. entering into loyalty agreements with exporters;

8. arrangements for pooling revenues and sharing costs; and
9. conditions for the admittance and resignation of shipping lines from conference agreements.

2.4 EFFECTIVENESS OF PART X

The competitiveness of Australian exports on international markets depends to a large extent on the price and reliability of shipping services to deliver goods at overseas destinations in accordance with predictable timetables and in good condition.

Quality of service (especially frequency, reliability, standards of cargo care and access to refrigeration equipment) is particularly important for Australian exporters.

The Brazil report (page 66) noted that conferences generally provide a higher level of service than do non-conference operators, and exporters who select this higher level of service do so in the knowledge that they may have to pay more than they would for a lower level of service. However, discussions the Department has had with relevant industry parties indicate that differences between conference and non-conference levels of service, at least for non-refrigerated (reefer) cargoes, have narrowed in recent years to the extent that both appear to satisfactorily meet the requirements of most exporters.

Australia's liner exports contain a substantial proportion of perishable reefer and time sensitive cargoes which need to be delivered according to schedule to meet 'Just in Time' requirements of our overseas customers. 'Just in Time' methods of operating require the delivery of goods at time intervals that suit patterns of consumption and avoid the need for buyers to maintain large stockpiles of goods to protect themselves from irregular and/or unreliable deliveries. If exporters cannot meet these requirements, there is a risk of loosing markets to overseas competitors.

The efficient carriage of reefer cargo requires considerable investments in equipment which is provided mostly by conference shipping lines. ABS statistics prepared by the Bureau of Transport Economics (BTE) indicate that in 1997-98 Australia exported about AUS$ 5.5 billion worth of reefer cargoes. Of this total, conference lines carried about 73%.

Conferences tend to provide more direct services between Australian ports and overseas cargo destinations as distinct from transhipment services. Exporters generally prefer direct shipping services, especially for the carriage of reefer cargoes, although transhipment services via Singapore appear to be providing a cost/effective alternative to direct services. Transhipment through some smaller ports can add significantly to the time goods are in transit.

2.5 TO WHAT EXTENT DOES PART X RESTRICT COMPETITION?

2.5.1 Extent of exemptions

The limited exemptions provided by Part X to shipping lines collaborating under conference agreements are in relation to section 45 of the Trade Practice Act (TPA), covering contracts, arrangements or understandings restricting dealing or affecting competition; and section 47 of the TPA, covering exclusive dealing;

- there is no exemption for conferences in relation to section 46 of the TPA covering misuse of market power.

Part X provides exemptions for inwards conference agreements without requiring these to be registered or imposing obligations towards importers. In order to avoid conflicts of jurisdiction, these matters have been left for regulation by the country of export.

Through the provision of countervailing market powers, Australian export shipper bodies have been granted exemptions under Part X which allow them to act in concert in their dealings with the liner shipping conferences. Importers are not covered by Part X but, like exporters, can rely on the services provided within the Part X framework by both conference and independent non-conference liner shipping operators.

Non-conference carriers with substantial market power can be made subject to similar obligations as apply to conferences. Unfair pricing practices by ocean carriers are prohibited. Part X also contains a provision in section 10.45 (a) (v) that requires parties to a conference agreement, or non-conference carriers with substantial market power, not to unreasonably hinder efficient Australian flag shipping.

A description of the Part X process is given in **Appendix 1.**

2.5.2 Impact of competition

The current arrangements governing liner shipping facilitate a market structure in which conference carriers compete with non-conference carriers in the Australian liner trades. There is substantial, and increasing, non-conference competition in most of the Australian liner trades, including all the major trades.

Information from the Bureau of Transport Economics (based on ABS statistics) indicates that non-conference shipping lines currently carry about 45% of Australia's liner exports (by value); this has increased from about 23% in 1982. Information from Liner Shipping Services indicates that, coincidentally with this increase in liner cargo share by non-conference carriers, average freight rates across all trades have decreased by at least 50% in real terms between 1982 and 1998.

Recent discussions the Department has had with exporters indicate that there is now very little difference between freight rates charged by conference and non-conference carriers. This is a significant change from some of the differences reported in the Brazil report (pp 74, 76). These indicated that conference rates were generally 10-15% higher than non-conference rates.

In respect of air freight services, it could be said that at the margin such services compete with liner shipping. However, it appears that air freight caters mainly for "niche" markets comprising high value goods and fresh produce that have an urgent delivery time that could not be met by sea freight. Fresh vegetables, crayfish, and lobsters are examples.

It is suggested that one of the main issues for the review should be to determine if the conference system, which is facilitated by Part X, has resulted in overall net benefits to Australian exporters, or whether other approaches could produce better outcomes. In this regard, compatibility with overseas regulatory regimes needs to be taken into account.

Various reports published in shipping journals (eg. American Shipper), and information from industry sources, indicate that the overall financial return liner operators have received for their high capital commitment and business risk, is generally very low compared to other industries with similar risks. A major obstacle to sustainable high financial returns, despite the existence of liner conferences, is the ease with which new competitors can enter the industry and compete down profit margins.

In 1996 Mr Hiroshi Takahashi, Senior Vice Chairman of the major Japanese liner operator NYK said:

> *'These days carriers do not pay special attention to the creeping danger of a widening gap between supply and demand. In recent years carriers engaged in the transpacific and Far East/Europe trade have been busy setting up their new alignments of consortia, selecting new match mates and partners and mostly concentrating on renewing or renovating their fleets with bigger and more modern type vessels so that they can be winners in the survival game'.*

In a recent Annual Report of Japan's NYK Line, the Chairman and President commented on performance in 1996 stating:

> *'In the shipping markets, although liner cargo volume grew briskly in Asia, competition remained severe on major North American and European routes and freight rates declined'.*

There is no evidence that the Part X arrangements have allowed conference lines to maintain artificially high freight rates to offset the effects of excess capacity. For example, available freight rate information indicates that freight rates have fallen significantly in real terms as compared with 1982.

An indication of what might have happened if conferences had not been allowed to operate in Australia's liner trades can be obtained from Chapter 4 of the paper titled "An Assessment of the Economic Issues", prepared by Mark Harvey (*et al*) of the BTE. The paper was prepared in December 1993 and included as Appendix C of the Brazil review report. A conclusion could be drawn from that paper, that without conferences it is probable that Australian exporters and importers would not have been provided with reliable, regular, and frequent shipping services.

As regards freight rates, these could have fluctuated significantly in line with an over supply of shipping alternating with shortages, together with cut throat and destructive competition. Even if average freight rates over time had been lower than has been

the case with conferences, it is doubtful if exporters and importers would have been better off, given the possibility that resultant lower levels of service could have led to loss of customers.

2.6 INTERNATIONAL ISSUES

2.6.1 General

Conditional exemptions from competition rules similar to Part X are provided by a number of major trading economies including the USA, European Union, New Zealand, Japan, and

Korea. There are also a number of economies (eg. Singapore and the Philippines) which do not regulate the commercial operations of liner shipping conferences.

The OECD's Common Principles of Shipping Policy for Member Countries, adopted in 1987, include references (Principle 10) to the need for governments to give adequate consideration to the way their measures will affect foreign companies or interfere with the competition policies and interests of other OECD members. It states (Principle 11) that the normal commercial activities of shippers, shipowners and conferences should not be unduly impeded or distorted.

Although changes to competition policy regimes have been made in recent years, a major feature that the national regimes adopted by OECD member States have in common is that they give conference agreements some form of predictable, but conditional, exemption from national competition legislation. This allows the conferences to exist and operate subject to meeting various conditions and obligations towards shippers (ie. exporters and importers).

2.6.2 OECD Maritime Transport Committee

Recognising the fundamental importance of compatibility of liner regimes to international trade, the OECD through its Maritime Transport Committee (MTC) has placed a priority on work to create a common understanding among members of the need for compatibility of regimes.

After comprehensive discussions, and with extensive input from its members, the MTC has developed its "Conclusions on Promotion of Compatibility of Competition Policy Applied to International Liner Shipping and Multimodal Operations that Include a Maritime Leg", - Document DSTI/SI/MTC(98)1.

The Conclusions have six main themes, which may be summarised as follows:

1. *General principles*

    - OECD members agree on the need to **promote compatibility** of competition policies and, in the interests of international trade, to seek practical solutions to problems which arise.
    - OECD members agree that competition rules should be applied effectively to promote efficient and competitive shipping services.
    - Key objectives are: efficiency, fair competition, maintenance of contestability and market access, transparency, legal certainty, adaptability to changing circumstances and international compatibility.
    - Members agree that commercial parties should resolve differences through commercial negotiations where possible.
    - Exemptions from general competition policies that are provided to liner shipping should be regularly evaluated.
    - The effects of proposed changes in legislation on liner shipping should be evaluated before being made.

2. Member countries should periodically review their policies to ensure that they adjust to future changes in shipping, paying particular attention to compatibility, and assess the commercial and economic impact of proposed changes in legislation on relevant

industry parties. Members should also regularly review conditions governing multimodal transport in their countries.

3. Members should consider consultations with each other when doing such reviews of laws and regulations, or when evaluating the effects of particular shipowner agreements, with an aim of promoting compatibilityand economic efficiency, and eliminating barriers to multimodal transport.

4. Members should notify the MTC of forthcoming public reviews, should give consideration to consultations proposed by another member country, and should seek the views of industry on a regular basis.

5. OECD members should consider whether their public interest requires a specialist administrative body dealing with the maritime industry.

6. Member countries should periodically review the implementation of the above principles in full consultation with relevant industry parties.

As a member of the OECD, and an active participant in the MTC, Australia should give full consideration to these principles in deciding which type of liner shipping regulatory regime best serves Australia's interests.

2.6.3 National competition policy regimes

Europe

During 1994 the European Commission's Competition Directorate undertook extensive consultations with affected parties and other Governments on issues related to agreements between liner shipping companies that impact on competition. The outcome of this exercise was a new regulation introduced in 1995 (870/95), which covers conditions for automatic exemptions (or anti-trust immunities) for joint service agreements that exclude price fixing (known as consortia).

The 1995 EC regime for "consortia" restricts the availability of block exemptions. Consortia having a market share of under 30% receive a blanket exemption. Consortia with market shares between this limit and 50% must be notified to the Commission, but will receive exemption unless the Commission decides within 6 months of notification to oppose such exemption.

The EC retained the existing regulation 4056/86 covering conditions for automatic exemptions for agreements that do include price fixing (conferences). That regulation provides a "block exemption" for conference agreements (for both outwards and inwards services) and has many other features broadly parallelling those of Part X (eg. in relation to pooling, negotiation with shippers, discrimination, and misuse of market power).

USA

In the USA, the *Shipping Reform Act 1998* has recently been approved by both houses of Congress after more than three years of debate, and will come into effect on 1 May 1999. The new Act retains the existing anti-trust immunities applying to shipping conferences, while introducing a range of modifications to the previous regime which are similar to the ones provided under Part X. However, the USA legislation continues to regulate both outward and inward conferences.

The main policy objectives stated in the new Act are to provide a regime that is in harmony with international shipping practice, and which also promotes the growth and development of United States exports.

New Zealand: "Outwards shipping competition law"

The NZ regime (*Shipping Act 1987*) is based on the premise that shipper/carrier relations should be self-regulating, subject to some safeguards (such as holding an investigation when it appears that an unfair practice is detrimental to NZ shipper interests, requiring reasonable notice to be given to NZ shippers of changes to the terms and conditions of outward shipping services, and requiring proof that carriers have entered into reasonable negotiations with shippers).

The *Shipping Act 1987* provides that nothing in Part II (Restrictive Trade Practices) or Part IV (Control of Prices) of the *Commerce Act 1986* shall apply to outwards shipping.

NZ does not require registration of conference agreements or the filing of freight tariffs. NZ has no regulation of conference entry or withdrawal, loyalty arrangements, discussion agreements or service contracts.

The Minister of Transport may initiate investigations, and if an unfair practice is found that the Minister is satisfied will disadvantage any NZ shipper, the Minister may issue directions to carriers. These directions may be to provide details of carrier agreements, to give reasonable notice to NZ shippers, or to provide evidence that the carrier has entered into reasonable consultations or negotiations; (Australia's Part X provides for these requirements to apply routinely to all registered agreements.)

Like Australia's Part X of the TPA, the NZ *Shipping Act 1987* has provisions for the defence of NZ shipping. However, while the NZ Act also encompasses "trading interests" as well as NZ shipping in these provisions, the provisions are directed only towards the actions of foreign governments or their agencies.

Japan: Marine Transportation Law

Japanese legislation under the Maintenance of Fair Trade Law No. 54 of 1947 governs the application of competition policy. Subsequently, the Maritime Transport Law provided an exemption for conferences under certain conditions.

Conference agreements have to be filed with the Fair Trade Commission, which is entitled to raise objections, but formal approval for such agreements is not required before they may be implemented. Outward conference agreements must include details of freight rate tariffs so that the authorities can check that the prohibition of unduly discriminatory freight rates against certain exporters is upheld.

Korea: Maritime Law

Under Korea's Maritime Law a block exemption is granted to conference agreements notified to the Korea Maritime and Port Administration, subject to conditions regarding unfair provisions in agreements and hindering Korean shipping.

The Korean Government may take action to suspend agreements or alter their provisions.

Shipper/carrier consultative committees are allowed to exchange information and discuss service arrangements, but not freight rates. Filing of freight rates is required.

2.6.4 Compatibility of regimes

While there has been extensive debate in the European Union and the USA on the form and extent of anti-trust immunities for the liner shipping industry, the need to apply specific arrangements to that industry continues to be widely accepted. This acceptance recognises that liner conferences play an important role in providing efficient and reliable scheduled services for the carriage of international trade. It is also a recognition that the application of normal domestic competition regimes to international shipping could be counterproductive, given the ease with which shipping lines can change their shape and operations and the legal jurisdictions under which they operate.

The shipping lines servicing Australia's international liner trades consider that for the orderly and efficient operation of their services, it is very important that the regime applied by Australia be compatible with that of its major trading partners.

The application of various national regimes to an international industry, which must comply with several jurisdictions in each trade, means that the compatibility of such regimes is an important issue. Barriers to trade can be created where jurisdictional problems exist as a result of overlapping and conflicting regulatory regimes applying to shipping conferences. Problems arise mainly where a country seeks to apply regulations to inwards shipping which conflict with the regulations of countries for which these services are outward liner services.

In most cases, conferences can comply with the requirements of more than one regime in each trade, by adopting the simple approach of "jumping the higher of the two hurdles". However, there is the potential for such requirements to be incompatible, especially where one regime prohibits something which is permitted by another regime as being in the interests of its shippers and consumers.

Harmonisation of regimes may or may not be a desirable long term goal, given the differing geographic and market situations faced by various states. Compatibility is of more immediate importance, especially when some major jurisdictions, notably the US and the European Union, wish to regulate liner trades both inwards and outwards to a greater or lesser degree.

With rapid and continuing growth in international trade, compatibility of national regimes for international liner shipping is an increasingly important goal, and there is a need for liner shipping issues to be resolved in a way that avoids future conflicts of law and policy between national regimes.

2.6.5 Open/Closed conferences

Open conferences are those which place no restriction on admitting new members; anyone who wants to join can do so and there is no restriction on the amount of capacity that may be provided. Closed conferences on the other hand are conferences which require the consent of existing members before a new shipping line can be admitted; conditions such as the amount of capacity that may be provided and service levels to be maintained are also features of closed conferences.

Part X and similar legislation in most overseas countries do not contain provisions which mandate whether or not conferences must be “closed” or “open”. In Australia Registered conference agreements are “closed” with the exception of agreements covering the Australia to USA trade (USA law requires inward and outward conferences to be “open”).

The issue of open/closed conferences was referred to in various parts of the Brazil report including section 3.1.3, which refers to a Trade Practices Tribunal investigation in 1975, and on page 72 of Appendix C (BTE report by Mark Harvey *et.al.*).These references indicate that open conferences can result in wasteful duplication of services and chronic excess capacity; and closed conferences, through requiring commitments from new entrants, may facilitate a greater capability to provide adequate, economic, and efficient shipping services as required by Part X..

OPTIONS

3.1 SUMMARY OF OPTIONS

The main options for Australian regulation of international liner shipping appear to be:

1) Repealing Part X and making international liner shipping and exporter groups subject to the Authorisation procedures of Part VII of the TPA.

2) Repealing Part X and making international liner shipping and exporter groups subject to the existing Notification procedures of Part VII of the TPA.

3) Retaining Part X with amendments to enhance the bargaining position of Australian exporters and importers.

4) As for option 3 but also transferring the Minister's powers to de-register a conference agreement to the ACCC.

5) No Change.

DESCRIPTION OF THE OPTIONS

Option 1. Authorisation

Under this option shipping companies wishing to collaborate as conferences, in outward and inward trades, would have to apply to the ACCC for authorisation of activities or conduct that may restrict competition, but which applicants considered had a net public benefit. Exporters who wished to enter into a collaborative arrangement with each other for the purpose of increasing their bargaining power in negotiations with liner shipping companies, would also have to first seek authorisation to do so from the ACCC.

Authorisation replaces commercial negotiations (in which exporters are given countervailing powers to deal with conferences) with a Government run process. The direct cost is higher than Part X for the application for authorisation. There are also indirect costs through uncertainty and the delays that may occur. A comparison of Part X with Part VII authorisation is given in **Appendix 2.**

Option 2. Notification

This option would provide automatic exemption arrangements for shipping conferences and exporter groups similar to those currently applying to Exclusive Dealing, and could also include pricing and an appeal provision to cover the certainty criteria.

Exemptions under the notification procedures would continue in force unless reviewed and revoked on public benefit grounds by the ACCC (this differs from option 1 which requires a net public benefit to be demonstrated **before** an exemption is granted).

A notification regime for liner shipping would involve extending and modifying the existing notification regime (presently limited to Exclusive Dealing). Conferences would be required to notify the ACCC of their agreements, which would then be given automatic exemptions to operate (similar to the current registration process under Part X). This option provides initial certainty of exemption, but the ACCC could at any time require the parties to a conference agreement to demonstrate a public benefit from the agreement.

By extending the current application of the notification procedures from Exclusive Dealing to liner shipping conferences, this option may create pressures from other industries to be given similar treatment.

Option 3. Retain Part X with amendments to enhance the bargaining position of Australian exporters and importers

This option involves making amendments to Part X to deal with a number of enhancements suggested by importers and exporters. These include greater restrictions on the imposition of terminal handling charges, the operation of accords and discussion agreements, and increasing the rights of Australian importers to challenge conference charges payable in Australia.

Terminal Handling Charges (THCs)

THCs cover stevedoring costs attributable to operations in the terminal and exclude costs attributable to cargo handling operations on the ship. Typically THCs represent about 80% of the total stevedoring costs.

Conferences claim that charging separately for THCs provides for transparency and will apply pressure to reduce the level of future stevedoring cost increases, and facilitate monitoring of whether benefits of waterfront reform are being passed on to shippers. Exporters and importers have rejected this view and have sought all inclusive freight rates that are subject to negotiation under Part X.

In December 1995, the Importers Association of Australia (IAA) complained to the ACCC about the imposition of THCs in a number of Australian import trades. The ACCC carried out an investigation into whether the collective imposition of THCs by conferences on imports was exempted by Part X from sections 45 and 47 of the TPA. In July 1996 the ACCC advised the Department that, based on legal advice from the Attorney-General's Department, the legislation was less than clear on whether the collective imposition of THCs by conferences, as a separate charge to the freight rate, was covered by the Part X exemptions.

The collective imposition of THCs is a significant issue for both shipping conferences and shippers (exporters and importers). Any changes to the current arrangements should take account of industry views on this matter.

Accords and Discussion Agreements

Accords and discussion agreements differ from traditional conference agreements in that they can cover both conference and non-conference carriers in a trade. As such, accords and discussion agreements have the potential to restrict competition between these groups. This issue was covered extensively in Chapter 7 of the Brazil report.

It should be noted that accords can impose binding conditions on parties to the accord, while discussion agreements are non-binding. To date, a number of discussion agreements have been registered under Part X, but no accords have been submitted for registration.

Given the marked difference between accords and discussion agreements, it is important that these be considered as separate issues, taking into account industry submissions to the Productivity Commission.

Increasing the rights of importers under Part X

At present Part X, (section 10.22) provides a blanket exemption for liner shipping companies to collaborate as conferences in respect of Australia's inwards trades. However, these conferences are not subject to the conditions and obligations imposed on conferences servicing Australia's outward trades. The rationale that underpins this arrangement is that conferences servicing inward trades are subject to regimes applying in the countries of export, and conflicts of jurisdiction could arise if Australia were to legislate to cover inward conference services.

The issue of the extent to which Australia should seek to regulate the conduct of conferences servicing Australia's inwards trades was canvassed in Chapter 6 of the Brazil report. The then Government decided not to make any changes to the current arrangements governing inwards conference services.

Complaints from importers concerning the imposition of THCs suggests there is a case for providing importers with at least some of the countervailing powers provided to exporters under Part X. In this regard it could be reasonable to require inward conferences to negotiate with importers over charges for Australian land-based services.

Other Changes

There are a number of other enhancements which were recommended in the Brazil Review report. The ones the Department considers merit attention by the Productivity Commission are mentioned in Section 9 of this submission.

Option 4 As for Option 3, but also transferring the Minister's powers to de-register a conference agreement to the ACCC

Involves transferring to the ACCC the powers of the Minister responsible for shipping to revoke exemptions under Part X, where this is justified on public interest grounds. It would also give the ACCC powers to initiate reviews of conference agreements where there are grounds for complaint against the conduct of a particular conference. Such a review would require the parties to the conference agreement to demonstrate a net public benefit if they wished to retain the exemption.

This option would bring shipping conference conduct further within the ambit of the competition policy regulator and keep the Minister at arms length from the enforcement of Part X conditions and sanctions. It would have similar effects to Option 2, but without the need to expand the mainstream notification procedures especially for the liner shipping sector. Under this option the ACCC would not only have the power to investigate an exporter complaint against a conference (as at present), but would also have the power to enforce remedial action. However, such action should be subject to appeal.

Option 5 No Change

This option would simply continue the present arrangements.

4. IMPLICATIONS OF REPEALING PART X

A number of issues that should be taken into account in considering whether or not Part X should be repealed, are given below.

4.1 POSSIBLE REACTION OF SHIPPING CONFERENCES

Some industry parties have indicated that if Part X were repealed, shipping conferences may handle their conference arrangements offshore, possibly in conjunction with inwards conference agreements operating within the jurisdiction of the country of export. If this were to happen, exporters would lose the significant countervailing powers provided by Part X, and the ACCC could have difficulty in controlling conference arrangements made under another jurisdiction.

Given the regulatory regimes that apply overseas and the exemptions they make from national competition policy for international liner shipping, there will be a natural tendency for arrangements that may impact on the Australian trades being handled in overseas jurisdictions. There would be less transparency of these arrangements, and obtaining evidence of any misdemeanours would be that much more difficult.

4.2 CERTAINTY OF OUTCOME AND CONTROL

Any recommendations to repeal Part X should be accompanied by sound and convincing arguments that alternative arrangements would provide improved outcomes for the Australian community, including exporters.

The National Competition Council has noted that:

> "Where the net benefit of reform is unclear, decisions about whether reform is appropriate would need to be based on rigorous and transparent examination of costs and benefits" (*Public Interest Under the National Competition Policy*, p.11).

To date there has been no convincing evidence that repeal of Part X, would lead to any increase in public benefits over and above those achieved with the present arrangements.

Interests which oppose Part X generally favour the authorisation procedures, arguing that the parties to any arrangement that might restrict competition should have to demonstrate a public benefit before being allowed to operate. However, the loss of predictability which would occur with a change from Part X to an authorisation regime may restrict significantly the ability of liner shipping companies to make long term plans to meet service levels required by Australian exporters. This effect is difficult to assess or quantify; the problem would be that having made a change to the laws, there would be a subsequent effect, the nature and magnitude of which is almost impossible to predict. This 'risk' would be worth taking only if it was demonstrated that the current arrangement is too costly and inefficient in competition policy terms.

Of particular concern to liner shipping companies is uncertainty of the outcome of applications for authorisation under Part VII of the TPA. Shippers, as well as carriers, are concerned that authorisation processes can be protracted and expensive, requiring considerable inputs of management time and of legal and financial or economic advice.

While it is recognised that other industries in Australia have to meet the cost of the authorisation procedures if they wish to engage in activities that might substantially lessen competition, this of itself is no justification for imposing the authorisation system on shipping. Justification for changing the present system should be based on whether alternative arrangements provide a more cost effective outcome taking into account the welfare of the community as a whole.

4.3 PRICE SETTING

It is understood that most of the conduct involved in typical conference agreements (joint service provision, self regulatory schemes and collectives of users to achieve a countervailing balance of power) can be allowed under the authorisation process. However, it is by no means clear that joint price setting, a key factor in some conference agreements and one which is a *per se* offence under Part IV of the TPA, would be authorised.

4.4 AUSTRALIAN FLAG SHIPPING

Section 10.45 (a) (v) of Part X contains a clause that prohibits actions by liner shipping conferences that prevent or hinder Australian flag shipping from engaging efficiently in the provision of outwards liner shipping services, to an extent that is reasonable. This is essentially a fair trading clause and does not restrict competition. If Part X is repealed, consideration should be given to whether this clause should be retained in another part of the Trade Practices Act.

4.5 TRANSITIONAL ARRANGEMENTS IF PART X IS REPEALED

In order to avoid undue disruption to shipping arrangements, any decision to repeal Part X should be accompanied by transitional arrangements. Such arrangements could include provisions which allowed all current exemptions under Part X to continue for a sufficient time to allow conferences to apply for authorisation, and for the ACCC to make decisions on those applications.

4.6 EXTENT OF REGULATION

Repealing Part X and subjecting the liner shipping industry to the authorisation procedures under Part VII of the Trade practices Act would significantly increase the level of regulation applying to that industry.

While Part X is largely self regulating with outcomes determined by commercial negotiations, Part VII would require shipping conferences to prepare and present submissions to a government regulator (ie the ACCC), with the outcome determined by the government regulator. A similar situation would apply to exporters that wished to form groups for the purpose of increasing their market power in dealing with shipping lines.

Whether imposing the authorisation procedures on the liner shipping industry and its customers could be justified on public interest grounds, is of course a major issue for the current review.

5. PREFERRED OPTION FOR REGULATION

5.1 GENERAL

Although there are important issues of international compatibility which must be considered, the Department believes that, in the interests of Australia's international trading performance, the preferred option for regulating liner cargo shipping should be the one that the majority Australian exporters consider to be in their best interests.

Considerable weight should be given to industry's views (particularly those of exporters) concerning the benefits and costs of the Part X regime, especially with some of the enhancements recommended in the Brazil review report.

The Department is not aware of any fundamental problems in the longstanding current arrangements applying to Australia's liner trades that warrant major changes, although improvements can be made to those arrangements, particularly in respect of strengthening the rights of importers.

In real terms, liner freight rates are significantly lower now than ten years ago and the competition from non-conference operators, and different conferences in the same trade, has increased. Despite these decreases in freight rates, conference service levels have been negotiated which adequately meet the needs of Australian exporters.

Part X has a number of significant features which are outlined below.

5.2 FLEXIBILITY AND COMPATIBILITY

Part X is capable of dealing with a wide range of liner arrangements. The definition of a "conference" in Part X is very wide, and a variety of types of agreements, including discussion agreements, joint management agreements and slot exchange agreements, as well as the more traditional liner conferences, have been scrutinised and registered.

Part X provides a flexible means of dealing with changes in the way the shipping industry operates, and is compatible with most of the regimes of our major trading partners.

5.3 EFFICIENCY AND EQUITY

For any particular industry, there may be a number of ways of achieving efficiency and equity, and when considering a variety of very different industries this is almost certainly the case. In the real world, there are likely to be different approaches to regulation which are best suited to different business situations.

The "one shoe fits all" approach to regulation is not necessarily the best. For example, Austel in Australia, Ofgas, Oftel and Ofwat in the UK, and the Federal Maritime Commission in the USA are cases of special arrangements for industry regulation. This must be borne in mind when considering applying Australia's domestic competition policy regime to international liner cargo shipping, which, unlike international aviation, has no legislative barriers to entry or Government-to-Government capacity controls.

5.4 INTERNATIONAL CONTEXT

The international liner shipping industry is widely recognised around the world as having some unique features which need to be taken into account when considering the most

appropriate competition regime to apply to that industry. International shipping is an openly contestable industry, operating as a linkage between national economies for the purpose of servicing the needs of the international trading community.

In a recent commentary on proposed action by China to impose unilateral controls on liner shipping, US maritime administrator Clyde Hart Jr. made the following statements:

- "Experience tells us that international maritime services can never be controlled by one trading partner. Unilateral efforts provoke retaliation when the economic interests of other trading partners are adversely affected."

6. INCREASING THE OVERALL EFFICIENCY OF PART X

Submissions to the Brazil review of Part X by Australian exporters suggested a variety of legislative enhancements to Part X, and the review report made recommendations in this regard.

In the event that the Government decides to retain Part X, it would be appropriate for the Department of Transport and Regional Services, the Treasury, and the ACCC to consider those proposals and prepare draft amendments aimed at improving the efficiency of Part X. In undertaking that task consideration should be given to the following:

- Increasing the role of the ACCC as mentioned in Option 4 of this submission.
- Providing importers with adequate countervailing powers as outlined in Option 3.
- Strengthening the provisions for providing information to shippers (ie. importers & exporters).
- Extending Part X exemptions to container depots not within the limits of a wharf so as to be consistent with the principle of facilitating intermodal transport and door-to–door services.
- Increased controls over accords and discussion agreements.
- Extending the application of penalties and civil remedies.
- Providing low cost dispute resolution measures.
- Confirming that the Part X exemptions extend to the collective negotiation of stevedoring contracts; and clarifying whether or not sections 10.14 and 10.22, extend to the collective setting of terminal handling charges (THCs) or other land-side (ie. non-blue-water) surcharges in Australia.

Given the role and availability of the ACCC, the Department does not see any need for a Liner Cargo Shipping Authority as recommended in the Brazil review report.

APPENDIX 1

DESCRIPTION OF THE PART X PROCESS

Part X provides that the parties to a conference agreement in respect of outwards liner cargo shipping may apply to the Registrar of Liner Shipping for its registration, upon which certain conditional exemptions from sections 45 and 47 of the Trade Practices Act (TPA) are granted.

Registration is a two-stage process, so as to allow the parties to a conference agreement and shipper bodies to negotiate without contravening the TPA.

Provisional registration is granted provided that the agreement meets prescribed standards, including application of Australian law to questions arising from the agreement, provision for parties to withdraw from the agreement on reasonable notice without penalty, and a requirement that any exclusionary provision that substantially lessens competition must deal only with certain matters, and, together with any exclusive dealing provisions, must be of overall benefit to Australian exporters and necessary for the effective operation of the agreement. The ACCC receives a copy of the agreement at the provisional registration stage.

On provisional registration (fee $360), the parties to the agreement must negotiate minimum levels of shipping services with the Australian Peak Shippers Association (APSA). The shipper body may accept the levels proposed by the parties and decline the opportunity to negotiate. The minimum levels of service proposed to be provided must form part of the agreement when finally registered.

The parties may then apply for final registration (fee $210). If all requirements have been complied with, the exemptions come into force 30 days after final registration is completed. The Registrar then notifies the parties, APSA and the ACCC. A copy of the finally registered agreement is supplied to the ACCC, and the agreement is placed on a public register (except those parts which are commercial-in-confidence and where an application for confidentiality has been made and granted by the Registrar).

The parties to a registered conference agreement must accept certain obligations in return for the exemptions granted. Parties must negotiate the terms and conditions of shipping arrangements, including freight rates, with relevant shipper bodies when reasonably requested to do so. The parties must make available to shipper bodies information reasonably necessary for negotiations, and must permit an authorised officer of the Department of Transport and Regional Services to be present at such negotiations and consider such suggestions as the officer might make.

Parties to a conference agreement must not discriminate between shippers, except where a reasonable allowance is being made for differences in cost of providing services or in good faith to meet competition from other carriers.

Variations to registered conference agreements must also be registered; a not infrequent occurrence in an industry where vessels can be easily switched to other trades which may offer higher returns.

Once a conference agreement has come into effect, a person adversely affected by the operation of the agreement may apply to the ACCC for an investigation of whether grounds exist for the Minister (for Transport and Regional Services) to deregister the agreement, wholly or in part. If, as a result of an ACCC report, the Minister is satisfied that the parties to the agreement had not met their obligations under Part X, he/she may order the deregistration of the agreement. In practice the threat of de-registration has been sufficient to induce conferences to cease any activity complained of by exporters that breach the conditions of the Part X exemptions.

De-registration removes the exemptions from Part IV of the TPA, and the authority for the shipping lines concerned to operate as a conference.

As at 31 March 1999, there were 64 conference agreements registered under Part X, with the Registrar of Liner Shipping, an officer of the Department of Transport and Regional Services.

APPENDIX 2

COMPARISON OF PART X AND AUTHORISATION APPROACHES

PART X of the Trade Practices Act 1974 (TPA)	AUTHORISATION under Part VII of the TPA
SCOPE A specialist regime for international liner cargo shipping.	A general regime used primarily for Australian domestic industries.
OUTCOME Assured exemption from certain sections of Part IV of the TPA on condition that requirements to negotiate with exporters, on levels and standards of service, and on freight rates and charges, are met.	ACCC may grant exemption from Part IV of the TPA provided the applicants can demonstrate a net public benefit from the proposed arrangements. The ACCC may issue interim authorisations while these processes take place.
PHILOSOPHY Based on giving exporters countervailing powers to collectively negotiate commercial solutions which provide internationally competitive service and freight rate outcomes, with minimum government regulation.	Based on the ACCC (as the Government regulator) determining whether certain anti-competitive conduct is in the public interest.
APPROACH Subject to periodic reviews of whether Part X is achieving its objectives, and unless the operation of the agreement generates shipper complaints, a liner conference agreement is presumed not to be detrimental to exporter interests.	Parties to each international liner cargo shipping conference agreement must satisfy the ACCC that the agreement provides a net public benefit before exemptions from the TPA would be granted.
SAFEGUARDS A person affected by the operation of a registered conference agreement can apply to the ACCC for an investigation. The ACCC reports to the Minister as to whether there are grounds to de-register the agreement (thus removing exemptions). In practice the threat of de-registration has been sufficient to induce conferences to cease any activity complained of by exporters that breach the conditions of the Part X exemptions.	When considering an application for authorisation, the ACCC will seek submissions from interested parties. The ACCC puts a time limit on the authorisation. The ACCC can revoke the authorisation if there has been a material change in circumstances in the industry. Appeals against an ACCC decision can be made to the Australian Competition Tribunal.
METHOD Conference agreements concerning outwards liner services are, once registered, given certain exemptions from Part IV of the TPA for some arrangements or conduct concerning "blue water" parts of services and activities outside Australia that might otherwise breach the restrictive trade practices provisions, subject to conference lines accepting obligations towards Australian exporters. Conference agreements concerning inwards liner services are given certain exemptions for some arrangements or conduct concerning "blue water" parts of services and activities outside Australia that might otherwise breach the restrictive trade practices provisions, without requiring such agreements to be registered or imposing obligations towards shippers. Such agreements are regarded as matters for regulation by the various exporting countries, in accordance with principles of international comity.	The ACCC has power to grant immunity for some arrangements or conduct that might otherwise breach the restrictive trade practices provisions of the TPA. The ACCC must publish a draft determination and provide the opportunity for a conference of interested parties, before making a final decision whether to grant authorisation. The ACCC would, during a transitional period, require the parties to existing outwards liner conference agreements to apply for authorisation. The ACCC submission to Brazil stated: "In theory, the activities of inwards conferences are matters that can be examined under the TPA. In reality the question of whether they will be applied is a matter that involves careful consideration, depending on the jurisdiction involved."

PART X	**AUTHORISATION**
CRITERIA In considering an application for (final) registration, the Registrar of Liner Shipping must be satisfied that: (i) any provision that may substantially lessen competition or is an exclusionary provision only deals with certain listed matters (which may include fixing of freight rates and charges) or is necessary for the effective operation of the agreement and is of overall benefit to Australian exporters; (ii) any party to the agreement must be able to withdraw on reasonable notice without penalty; (iii) Australian exporters have been given the opportunity to negotiate the minimum levels of service that must be specified in the agreement; and (iv) Australian law applies to questions arising under the agreement.	In considering an application for authorisation, the ACCC is required to apply one of two tests, depending on the conduct in question: For agreements that may substantially lessen competition, the applicant must satisfy the ACCC that the agreement results in a benefit to the public that outweighs any anti-competitive effect. For primary and secondary boycotts, third line forcing, resale price maintenance and mergers, the applicant must satisfy the ACCC that the conduct results in a benefit to the public such that it should be allowed to occur.
REGISTERS The Registrar of Liner Shipping must keep a public register of conference agreements (amongst other registers). However, the Registrar may exclude commercially sensitive material from the register if requested.	For both authorisation and notification procedures the ACCC is required to keep a public register of all related documents. However, the ACCC may exclude commercially sensitive material from the register if requested.
ROLE OF EXPORTERS Designated shipper bodies are granted exemptions to negotiate collectively with conferences in regard to minimum levels of service to be provided, and in relation to negotiable shipping arrangements, including freight rates and charges. Exporters may utilise the complaints procedures built into Part X.	Exporters would be able to attend a conference of interested parties before the ACCC made a final decision as to whether to grant authorisation. Exporters could apply for authorisation to negotiate collectively with the parties to authorised conference agreements.
NON-CONFERENCE CARRIERS An ocean carrier may be determined, by the Trade Practices Tribunal on referral by the Minister, to have a substantial degree of market power. It may then be registered as such, and Part X imposes on such carriers obligations paralleling those imposed on conferences.	No special provisions.
AUSTRALIAN FLAG SHIPPING Part X prohibits ocean carriers from unreasonably hindering Australian flag shipping from normal commercial participation in any outwards liner cargo shipping trade.	No special provisions.
FEES Fees are $360 for Provisional Registration and $210 for Final Registration of a conference agreement or to register a variation to a registered agreement.	Fees for authorisation applications are $7500 (and $1500 for additional related applications).
TIMING About 2 months from receipt of application for Provisional Registration to exemptions coming into force (30 days after Final Registration), on average.	Authorisation processes have previously been estimated to have taken about 10 months on average. This could be less for agreements covering conduct previously approved in other agreements.

APPENDIX 3

KEY QUOTES FROM SUBMISSIONS TO THE 1993 REVIEW OF PART X

SUBMISSION	Sector	Attitude	KEY QUOTES
Australian Peak Shippers Association	Peak body for liner shippers	Retain Part X	"APSA believes that the removal of Part X exemptions … would only serve to promote domination by major lines or strategic alliances in Australia's export trades ..." (p19) "APSA believes that the shipping conferences do not currently dominate the trades however under Part IV they would drive out the independents and carry all the cargo." (p20). "Unless authorisation can be processed quickly APSA believes that carriers will opt out of an authorisation procedures, and will be tempted to operate their Australian services without regard for Australian law, by for example, using the US Federal Maritime Commission Tariff registration process as a means of circumventing any allegations of contravention of Part IV." (p21) "From correspondence with various Shippers Councils worldwide they are envious of Australia's exporters having the protection of Part X. Our trading partners could assist their exporters by introducing similar legislation to Part X." (p24) "It is APSA's view that to withdraw the exemptions currently enjoyed by conferences and shipper bodies would not work to the advantage of Australia's export industry but rather the reverse would be the case." (p40) COMMENT: APSA's members account for about 80% of Australian exports via liner shipping.
Wool Industry Shipping Group	Exporter body	Retain Part X	"WISG submits that the central issue of the effectiveness of Part X has been realised and the objectives met. Wool has experienced the rights of exporters where carriers have definite obligations placed on them in the marketplace …." (p5) "… the achievement of the objectives of Part X provide a very good base and framework for Wool to go about its own business and negotiate Wool Shipping levels of service, freight rates and terms and conditions." (p14) "the wool industry is better served through having a stable freight rate regime…" (p15)
Australian Dairy Industry Council	Exporter body	Retain Part X	"The Australian Dairy Industry Council considers that Part X of the TPA should be retained and its operations improved ..." (p1) "Significant benefits of Part X also apply to shipping on the Australian/USA route... Australian shippers in the absence of Part X would have no ability to influence USA port or shipping charges …" (p3)
Western Australian Shippers Council Incorporated	Shipper body	Retain Part X	"The Western Australian Shippers Council Inc supports the retention of Part X …." (p1) "[Part X] operates at minimal cost to Shippers and Shipowners" (p3) "[Part X] does not prevent the Trade Practices Commission or any other person from taking action under the Act for conduct which is not specifically exempted by reason of Part X." (p3) "Trade practices litigation is generally complex and expensive." (p6)
Western Australian Dept of Transport		Retain Part X	" … the removal of Part X is not supported because … a possibility exists that Western Australian shippers could lose some conference services and the alternatives to Part X under the Trade Practices Act appear to have some shortcomings; … the legislation requires strengthening from shippers' point of view." (p4)
NSW Shippers Council	Shipper body	Mixed	"Should all of the current exemptions available under Part X to conference members and designated shipper bodies be removed? Yes, in relation to conferences. No, in relation to designated shipper bodies." (p7) COMMENT: In 1995, the Secretary of the NSW Shippers' Association proposed Part X as a model law for Asian countries to adopt in regimes to protect Asian shippers.

APPENDIX 3 (cont.)

SUBMISSION	Sector	Attitude	KEY QUOTES
Australian Horticultural Corporation	Industry body	Mixed	"In summary, the production sector is generally supportive of the removal of the exceptions under Part X …but exporters, particularly those who are trading exporters (compared to those who have an investment in growing and packing operations as well), are, on balance, more inclined to maintain the conference arrangements under Part X." (p2)
Cotton Trading Corporation Pty Ltd	Exporter	Retain Part X	"We believe that it is essential to retain a commercial approach, and would be very concerned if Part X was withdrawn because, at the very least, we would be faced with increased uncertainty and undoubtedly disruption in our shipping services. Given that Part X provides a good counter-balance for shippers against any possible abuse of market power by conferences, there is no need to alter in any major way the existing approach." (p2)
Australian Dried Fruits Board	Industry body	Retain Part X	"The ADFSA [Australian Dried Fruit Shippers' Association], in general, supports the APSA submission …" (p1) "Generally, the service levels currently provided are satisfactory; however, if service levels were reduced there would be an unfavourable impact on our export business. It is most important that a structure exists for negotiations to take place to maintain and improve service levels relative to cost." (p1)
National Farmers' Federation	Producer body	Repeal Part X	"Recommendations 1. That there be a measured and predictable withdrawal of the protection offered by Part X of the TPA. 2. NFF recommends that limiting the impact of conferences should initially be tested by deregistration of conferences on those routes with high traffic volume and substantial non-conference competition … 4. NFF recommends the removal from Part X of all clauses giving preference or special consideration to Australian flag shipping operators. It is essential that this assistance be removed before ANL is privatised." (p1) COMMENT: The tentative nature of the NFF proposal reflects the dichotomy between its exporter and producer constituents on this issue.
Metals and Minerals Shippers Association of Australia Ltd	Exporter body (non-ferrous metals and minerals)	Retain Part X	"It is our belief that Part X has been and remains of considerable benefit to Australian shippers and should be retained in an enhanced format." (p0) "… Part X legislation has contributed very significantly to the success of Australia's liner exports …" (p1) "… the three stated principal objectives of Part X have been and are continuing to be realised." (p3) "Removal of Part X exemption for exporters would introduce a highly destabilising influence in the market place which MAMSAAL believes would be much more likely to impact adversely on the exporter fraternity than on shipping conferences or consortia." (p3) "… excellent achievements on minimum level of service negotiations which benefit all Australian exporters." (p3) "MAMSAAL sees only disadvantages in the Part VII authorisation process which is both costly and lengthy" (p7)
Southern Copper	Producer	Repeal Part X	"As an exporter out of Sydney there was sufficient frequency and availability of cargo space, that the preferred status offered under conference agreements provided no tangible benefit." (p1) "…the repeal of Part X would remove a major inefficiency … that is currently borne by the shipper." (p1) "conference agreements … become a major benchmark which limits normal competitive forces" (p2) "conferences and shipper bodies …should be subject to the normal competition provisions of the Trade Practices Act." (p2) COMMENT: Southern Copper was associated with Mr Mark Rayner, a member of the National Competition Policy Review (Hilmer Committee).

APPENDIX 3 (cont.)

SUBMISSION	Sector	Attitude	KEY QUOTES
Comalco	Producer	Repeal Part X	"…Comalco … believes … it would be to the long-term advantage of Australian exporters as a whole if Part X is repealed." (p3) "Comalco supports the removal of Part X exemption as a matter of principle and sound public policy than from the narrow view of an individual shipper who may have received benefits under the existing arrangement." (p3) "The TPA should be required to develop general principles and procedures to facilitate applications for clearance and to avoid unnecessary, legalistic, lengthy and expensive hearings." (p3) COMMENT: Comalco was associated with Mr Mark Rayner, a member of the Hilmer Committee.
Treasury		Repeal Part X	"… it is relevant to note the principles agreed by Heads of Government in establishing the National Competition Policy Review … it was agreed that any changes to competition policy should be consistent with the general thrust of reforms to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition." (p3) "The authorisation process would place the onus on liner operators desirous of maintaining conferences to justify to the Trade Practices Commission the public benefit of particular practices and arrangements. It would also enable the views of shippers affected by those same practices and arrangements to be assessed." (p9) "Treasury recommends that inward liner trades be subject to the normal application of the Trade Practices Act, and that no modification of the Act is necessary." (p11)
Trade Practices Commission		Repeal Part X	"The Commission's submission is predicated on the view that: consistent with Government policy, the provision of liner shipping services to and from Australia should, to the greatest extent possible be exposed to competitive forces; and that the established scheme of regulation found under the general provisions of the Trade Practices Act dealing with restrictive trade practices and their possible authorisation should be the model for this to occur." (p5) "By all indications … international liner shipping has been characterised by intense competition and excess capacity, leading to substantial losses in profitability." (p10) "Some modifications to the TPA will be required to address the matters noted above [non-conference carriers and unfair pricing practices]" (p17) "Problems that might arise in regard to these matters [freight rate dumping and safeguards for Australian flag operators] are not of the kind that should be resolved within a framework of general competition law. Accordingly, they need to be resolved within another separately drafted legislative framework, specially suited for those purposes." (p18) "In theory, the activities of inwards conferences are matters that can be examined under the TPA. In reality the question of whether they will be applied is a matter that involves careful consideration, depending on the jurisdiction involved." (p24) "The authorisation provisions could be modified to impose time limits on the Commission's deliberation process and to extend protection in the event of an appeal to the Trade Practices Tribunal." (p28)
Law Council of Australia, International Trade and Business Committee, International Section	Legal practitioner body	Retain Part X	"In our view, the exemptions should not be removed on the grounds of international comity. No other trading nation, of which we are aware, has taken the radical step of applying its own anti-trust law to international liner shipping and shipping bodies. There is a strong consensus internationally against such an approach." (p1) "It is submitted that such action would be impractical as it would be unworkable for international liner shipping to be conducted otherwise than pursuant to a Part X regime, whether by way of a process of authorisation or otherwise. The repeal of Part X would result in the abolition of shipping conferences as the Trade Practices Act without Part X is not designed to control the activities of shipping conferences." (p1) COMMENT: these views deserve careful consideration in relation to the important technical issues of international comity and compatibility of approaches to regulating liner shipping.

APPENDIX 3 (cont.)

SUBMISSION	Sector	Attitude	KEY QUOTES
Law Council of Australia, Trade Practices Committee, Business Law Section	Legal practitioner body	Repeal Part X	"The competition provisions (Part IV) of …the TPA should be of general application … throughout Australia unless exceptional circumstances require particular industries to be treated differently." (p1) "No such special circumstances have been demonstrated to exist in relation to international liner cargo shipping …" (p1) "To the extent that international liner cargo shipping has special characteristics, they can be adequately taken account of by relatively minor modifications in the application of Part IV to shipping agreements …" (p1) COMMENT: this Committee's support for the competition policy "party line" was to be expected.
ACTU		Retain Part X	"To date Part X … has facilitated the involvement of efficient and competitive Australian flag shipping in Australia's liner trades." (p1) "The commercial position of ANL should not be compromised or substantially altered by legislative change such as the abolition of Part X … This is particularly so when it is known that [ANL] will be sold by the Government in the near future as an ongoing business and employment provider." (p1)
ANL	Conference participant	Retain Part X	"ANL believes that Part X … has provided, and continues to provide, an appropriate regulatory framework for the conduct of Australia's liner shipping policy." (pi) "part X operates to the benefit of Australian flag shipping on two levels. Firstly, by permitting conference operation, it makes Australian participation in the liner trades feasible. … Secondly, Part X safeguards ANL and other Australian flag participants from unfair behaviour on the part of conference colleagues and commercial practices on the part of competing lines. Part X does not protect ANL from normal commercial competition; nor do we think it should." (pii) "We do not think that this [authorisation] provides an acceptable alternative." (pii) "Although we strongly support the retention of Part X, we do not believe that it is perfect." (piii) COMMENT: The potential for repeal of Part X to adversely impact the sale of ANL still exists (see also P&O and ANZDL segments below).
BHP Transport	Non-conference carrier and shipper	Retain Part X	"BHP's view of Part 10 is that it provides a forum for open discussion amongst shippers; an opportunity for ship operators to rationalise services and a framework in which both sides can negotiate on a relatively equal basis, leading to a more efficient planning of Australia's exports. Yet it does not prevent shippers negotiating directly with operators nor does it prevent independent owners entering the trade or competition on rates between operators." (p5) "We believe this rationalisation of schedules and collaboration between operators will take place whether Part 10 exists or not and that the major disadvantage of its removal will be relative weakening of the shippers position." (p6) "the advantage for BHP with Part X is the availability to work with APSA in securing Minimum Levels of Service (MLS) from conferences." (p9) "It is our view, if there are two competing lines there will be competition, even if they belong to a Conference or have an internal 'Agreement'. …. It has also been our experience that some of the best competition has been between conference members." (p15) "Partial or total removal of Part 10 will adversely impact on shippers to a greater extent than on shipping lines." (p19) "Australia's unique legislation ensures dominant carriers cannot adjust conditions without consultation and ensures Australia's export interests have suitable coverage." (p21) "We are aware of the very high costs to enter an Australian liner trade and the continual servicing costs as experienced with our two dedicated liner services." (p26)

SUBMISSION	Sector	Attitude	KEY QUOTES
P&O	Conference participant	Retain Part X	"The granting of authorisation applications would depend on the determination of 'net public benefit' made by the TPC and the result of the application would be unpredictable. Given the history of the TPC's determinations of the few authorisation applications in the domestic shipping and container stevedoring sectors, given the TPC's expressed opposition to price fixing (a per se offence under the Act) and to discussion agreements, and given the power of the TPC under s.91 to condition, revoke and vary authorisations, liner shipping operators could have no confidence that their exemptions would be granted or maintained." (piii) "Adequate and effective exemptions and a predictable, stable climate for reinvestment are especially important at this time, when many conference lines, like P&O, are facing large investment decisions regarding replacement of ageing conference tonnage which has been purpose-built to meet the predominantly reefer requirements of the outwards Australian trades." (p6) "Removing or undermining conferences' essential competition law exemptions only militates against the ability of conferences to deliver efficient shipping services." (p9) COMMENT: P&O is a potential purchaser of ANL.
ANZDL	Conference participant	Retain Part X	"In the absence of Part X the liner shipping industry might be characterised by destructive competition, with serious implications for Australian exporters;" (p13) "… a requirement to apply for authorisation under Part VII would be analogous to the regulations applying in the United States prior to 1984. Under the 1916 Shipping Act, conferences were required to apply for exemptions under anti-trust provisions. Such a requirement was found to be unworkable, being replaced in 1984 by an automatic exemption … except where the FMC seeks an injunction on the grounds that an agreement might produce an unreasonable reduction in transportation service or increase in cost." (p15) "ANZDL argues that, given the low profitability of the industry, any instability following withdrawal of the present Part X exemptions would be likely to lead to bankruptcies and/or a wave of consolidations. The long run outcome might well be fewer liner operators, each able to wield considerable market power." (p15) COMMENT: ANZDL is a potential purchaser of ANL.
Australian National Maritime Association (now the Australian Shipowners Association)	Shipowner body (most members in the tanker and dry bulk ie. non-liner trades)	Retain Part X	"At the outset we should declare that we do not regard conference arrangements under Part X as having excessive market power. They provide a form of service that customers want and are prepared to buy in a market that offers many alternatives from independent operators." (p1) "There is no doubt that COSCO's knowledge of the impending action [under s53 of Part X] was critical in the later discussions between ANL and COSCO, in which COSCO repeatedly requested that ANL withdraw its complaint to the Minister. As a result … COSCO did agree to moderate its behaviour… " (p6,7) "Because of the scope of economies of scale in the provision of a frequent, regular service with a large number of ships, a dominant supplier could, in the absence of conference arrangements, emerge in each trade where there was sufficient volume of a homogeneous cargo such as containers." (p9) "We seriously doubt whether the Trade Practices Commission could ultimately impose conditions unacceptable to a dominant foreign supplier, without placing a major sector of the trade in jeopardy by a withdrawal of the service of the provider." (p10)
Council of European & Japanese National Shipowners' Associations	Shipowner body	Retain Part X	"Stability is therefore vitally important to the provision of reliable services. The stability provided by conferences has been recognised by OECD governments as the key determinant in allowing anti-trust exemption." (p3) "… the group exemption under Part X is working but a case-by-case exemption procedure would lead to uncertainty; problems in securing investment capital; and consequent fluctuations in service levels to the detriment of the trade." (p3) "Australia should remain in step with the way in which her OECD trading partners apply competition policy principles to liner shipping;" (p5) COMMENT: Submissions from shipping lines and Shipping Conference Services (the lines' secretariat) supported Part X.