Introduction

Submitter – profile and contact details
The submitter, Brian Makins, is a member of the academic staff of the Australian Maritime College, where he lectures in Maritime Policy and Law and in Commercial Shipping. He has had over 20 years experience in the liner shipping industry as Company Secretary and Legal Counsel of ACTA (1976-1991) and as a solicitor in private practice and maritime consultant (1992-1997). A detailed profile of the submitter is given in Attachment 1.

The submitter's contact details are as follows:

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Single issue submission
This submission is concerned with a single issue – the provision of adequate and effective exemptions from competition law so as to enable conference lines to deliver efficient shipping services to the Australian community.

Source of material
The submission is based on material which the submitter prepared for the P & O Containers submission and the North American conference lines submission to the Brazil Review of Part X in 1993. The single issue to which this present submission is directed is substantially the same now as in 1993.

Efficient shipping services
Where used in this submission, the expression 'efficient shipping services' means shipping services of adequate frequency and reliability at internationally competitive freight rates.

Rationale for Part X

Rationale

Underpinning the existing Part X is the Australian government's policy decision that conferences which provide efficient shipping services are in the public interest and should be allowed to operate, subject to certain safeguards.

Policy decision reaffirmed

This policy decision has been reaffirmed by the government on at least three occasions, following government-initiated reviews of Part X. (See the Grigor Report 1977, the Liner Shipping Report 1986, and the Brazil Report 1993).

Australia's major trading partners

A policy decision to similar effect has been made by the governments of virtually all of Australia's major trading partners and in recent times has been reaffirmed in the United States, Canada, Japan, European Community, and New Zealand.

Effectiveness of Part X

Conference lines' expectation
Conference lines serving the Australian trades have a legitimate expectation that the Australian government will provide adequate and effective exemptions from competition law so as to enable the lines to deliver efficient shipping services to the Australian community.

Automatic exemptions and safeguards
In Part X, the Australian government has given conferences up-front *automatic* competition law exemptions to enable conferences to operate (Division 5 and s.10.08). The exemptions are subject to the safeguards in Division 8: conferences that do not provide efficient shipping services may have their conference agreements cancelled. Additionally and very importantly, s. 46 (misuse of market power) is made to apply to conference lines in both the outwards and inwards trades (s.10.04). These safeguards protect Australian shippers and the wider Australian community.

Sensible approach to regulation
This approach to regulation – and specifically the granting to conferences of automatic competition law exemptions – is sensible and consistent with typical international practice.

Nature of exemptions
Essentially, the exemptions given to conferences by Division 5 are from s. 45 (contracts, arrangements or understandings restricting dealings or affecting competition) and s. 47 (exclusive dealing) and are limited to:

(i) the fixing or other regulation of freight rates;
(ii) the pooling or apportionment of earnings, losses or traffic;
(iii) the restriction or other regulation of the quantity or kind of cargo to be carried by parties to the agreement;
(iv) the restriction or other regulation of the entry of new parties to the agreement; and
(v) entry into loyalty agreements with shippers. (s10.08)

Automatic exemptions promote certainty
These are all traditional and essential conference activities. If not given exemption they would contravene Part IV. The automatic exemptions promote certainty and are of fundamental commercial importance. They enable conference lines to anticipate with a high degree of certainty that their conference agreements will be registered and that they will be able to operate under them. They make for a predictable and stable environment in which conference lines can more effectively manage the substantial financial risks associated with the operation of vessels and with tonnage replacement decisions.

Principle of certainty

The principle of certainty is important in commerce and especially in international shipping:

> Certainty enables predictability.
> Predictability enables effective risk management.
> Effective risk management enables efficient resource allocation.
> Efficient resource allocation enables community welfare.
>
> (That is, the economic and social well-being of the Australian community.)

There is a price for uncertainty and that price is paid, not just by shippers, but by the whole community.

Automatic exemptions essential to the effectiveness of Part X

The automatic competition law exemptions allow conferences to operate effectively and enable conference lines to discharge their major obligation under Part X – the provision of efficient shipping services to the Australian community. Automatic exemptions are essential to the effectiveness of Part X.

(See also Brazil Report (1993), pp. 89, 97-100, and 118 - Recommendation (c).)

Other ways to achieve the objectives of Part X

ACCC agenda

In essence, what the Australian Competition and Consumer Commission (ACCC) proposes is:

- the removal of conferences' Part X exemptions;
- thus bringing conferences under Part IV (which would render unlawful conference formation and operation, with penalties for breach of up to $10 million); and
- thereby forcing conferences to seek their competition law exemptions through the authorisation and notification procedures of Part VII.

ACCC discretion commercially unacceptable

It would then be entirely a matter for the ACCC to determine, in the exercise of its discretion, which conference activities to allow and which to disallow. This is a completely different situation from that which now exists under Part X, where specific legislative policies and determinations concerning exemptions have been made by Parliament and expressed in Part X in a way intended to promote commercial certainty (s.10.08 (1) (c) and Division 5).

Making conferences 'more competitive'

If the ACCC is not successful in removing conferences' exemptions, the ACCC may attempt to remove or otherwise limit as many of the exemptions as it can – in the belief that conferences' market power will thereby be reduced and conferences will become 'more competitive'. This is a misguided notion and potentially damaging to the interests of Australian shippers. Today, conferences have negligible market power. Removing or undermining conferences' essential competition law exemptions only militates against the ability of conferences to deliver efficient shipping services: it does not make conferences 'more competitive'.

Effect of removing Part X exemptions

If the existing Part X exemptions for conferences were removed wholly, conferences would fall under Part IV and would have to rely for their essential exemptions on the authorisation (and notification) procedures of Part VII. The Liner Shipping Report (1986) found that this approach to regulation would be administratively cumbersome, costly and time consuming' (para. 3.46). The Brazil Report (1993) recommended:

> *Reliance on case-by-case authorisations under Part VII of the TPA would not be a satisfactory or acceptable way of allowing ocean carriers to combine to provide adequate, economical and efficient services*.
> (Brazil Report (1993) pp. 93-95, 118)

Part VII authorisation unworkable

Depriving conferences of their Part X exemptions and subjecting them to the authorisation (and notification) provisions of Part VII would be unworkable in practice. Under this approach, there would be no automatic exemptions as given now in Part X. Instead there would be a determination of 'net public benefit' made by the ACCC on a case-by-case basis. That determination might take several months to finalise – and the outcome would be unpredictable. Given the history of previous TPC/ACCC determinations in the shipping and container stevedoring sectors; given the ACCC's opposition to price fixing (a *per se* offence under the Act) and to discussion agreements; and given further the power of the ACCC under s. 91 to condition, revoke and vary authorisations – liner shipping operators could have no confidence at all that their authorisations would be granted or maintained.

'Streamlined' authorisation procedures

Even if the authorisation procedures could be streamlined, such an approach to regulation would not be a politically or commercially sensible alternative to the approach adopted in the existing Part X. Moreover, the application of a further net public benefit test is unnecessary. In taking the threshold policy decision that conferences that provide efficient shipping services are in the public interest, Parliament has effectively applied the net public benefit test up front and, most importantly, in a way that promotes commercial certainty.

A separate Australian Shipping Act?

Part X does not sit comfortably in the Trade Practices Act. This may well be a source of irritation to the ACCC but it is not a ground for removing Part X from the Act and dropping conference shipping into Part IV. It may however be a ground for repealing Part X and re-enacting it in a separate Australian Shipping Act. In fact, this was the approach preferred in the Liner Shipping Report (1986 at pp. 35-38).

Heavy onus on proponents of change

There is a heavy onus on the ACCC and on any others who advocate the repeal of Part X to demonstrate an approach to regulation that is politically and commercially superior to that adopted in the present Part X. This onus is the heavier in the current environment, where conference market power has been declining for over 20 years, where there is no evidence of misuse of market power by conference lines, and where conference freight rates in all trades are at low and declining levels.

Australia's dependence on maritime transport

Australia's geographical location is such that Australia is and will always be heavily dependent for its economic and social well-being on efficient maritime transport. Conferences carry (by value) over 55% of Australia's liner exports and over 65% of liner imports (Issues Paper, p.10). Australia's international liner cargo shipping legislation

should create a regulatory environment that is conducive to the provision of efficient shipping services to the Australian community. Part X does that: Part VII cannot.

Conclusion

ACCC- watchdog or Frankenstein !

> *Competition is not an end in itself. Competition is only a means to an end, and competition is useful only to the extent to which it helps attain that end, the economic welfare of the community.*
> (Brazil Report (1993), p.100)

It is a legitimate question to ask whether the ACCC – whose predecessor (TPC) described itself as 'the national watchdog for breaches of competition law' and saw its mission as 'influencing industry to adopt more competitive structures' – has any credible role to play in the regulation of international liner cargo shipping.

The Brazil Report recommended that a new authority, the Liner Cargo Shipping Authority, with appropriate expertise and experience in the liner shipping industry should be established to exercise the existing functions of the Trade Practices Commission (now the ACCC), the Trade Practices Tribunal and the Administrative Appeals Tribunal (Brazil Report (1993) p.180). In 1986, the Liner Shipping Report made a recommendation to similar effect. (See Liner Shipping Report (1986), pp. 85-87.)

Both the Brazil Report (1993) and the Liner Shipping Report (1986) recognised that it was undesirable – some would say absurd – to make the national competition watchdog the regulator of liner shipping conferences! They saw the need to substitute a more appropriate authority.

There is otherwise the danger that the 'watchdog' may indeed become a Frankenstein.

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4 May 1999

ATTACHMENT 1

PROFILE

Brian Makins joined the academic staff of the Australian Maritime College in December 1997. He lectures in Maritime Policy and Law and in Commercial Shipping. He has had over 20 years experience in the liner shipping industry as Company Secretary and Legal Counsel of ACTA (1976-91) and as a solicitor in private practice and maritime consultant (1992-97).

Makins holds a Master of Laws degree from the University of Sydney and a Graduate Diploma in Business (Shipping) with distinction from the Australian Maritime College. He is a former chair of the Maritime Law Association of Australia and New Zealand (NSW Branch) and of the Australian Council of the International Chamber of Commerce.

He was a consultant (representing the Australian Chamber of Shipping) to the Australian Law Reform Commission reference on Admiralty jurisdiction (1987-88). He was a member of industry consultative groups advising the Australian government on Part X (1988-89) and on marine cargo liability (1990-91).

In 1993, Makins prepared the P&O Containers submission and the North American conference lines' submission to the Brazil Review of Part X.

INTERNATIONAL LINER CARGO SHIPPING

REVIEW OF PART X OF THE TRADE PRACTICES ACT

submission to the

PRODUCTIVITY COMMISSION

by

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