
# Submission to the Productivity Commission

# International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974

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# Table of Contents

# 1. INTRODUCTION

Part X of the Trade Practices Act 1974 (TPA) provides a legislative framework within which shipping conferences and their exporting customers can resolve problems through commercial negotiations. Through the provisions of Part X liner shipping companies can be assured of conditional approval to collaborate as conferences. The conditions include the requirements to negotiate with exporter groups on conditions such as minimum service levels and freight rates. Failure to meet Part X conditions and provide efficient and economical services can result in investigation by the Australian Competition and Consumer Commission (ACCC). In the case of an investigation the ACCC makes a recommendation to the Minister for Transport and the Minister decides upon the action to be taken. Registration of conference agreements and other administrative functions specified as conditions of Part X are handled within the Department of Transport.

Part X also contains provisions to ensure that: parties to a conference agreement do not unreasonably hinder efficient Australian flag shipping; non-conference carriers with substantial market power can be made subject to similar obligations as apply to conferences, and unfair pricing practices are prevented.

The ACCC has a small area of actual responsibility within the current framework of Part X of the TPA. Nevertheless the ACCC is the independent statutory authority charged with the role of administering the TPA, as well as the State and Territory Applications Acts and the Prices Surveillance Act 1983. This limited role is in marked contrast to other areas of the TPA. It is the Commission's view that this exceptional treatment of the regulation of the liner shipping industry is not justifiable nor consistent with the fundamental tenets of Australian competition policy that provides for consistency of regulatory approach from a national rather than sector specific regulator.

## 1.1 Submission to the Brazil Review

In 1993 the Trade Practices Commission (TPC), a forerunner to the ACCC, made a major submission to the review of Part X of the TPA chaired by Mr Patrick Brazil AO and his panel (the Brazil Review). In that submission, the TPC recommended that agreements between shipping lines be a matter for general assessment under the provisions of Parts IV, VI and VII of the TPA. Specifically, the provisions of Part VII were the means of resolving the question of which agreements are in the public interest. A number of other general conclusions about an appropriate regulatory regime for liner shipping were made:

- A transparent and public process is essential for any scheme that is constructed to assess whether exemption should be granted to collective agreements between competitors.

- An appropriate procedure must exist which recognises the differences in liner shipping agreements and allows for a range of appropriate measures to test if exemptions should be granted and maintained.

- The onus for proving public benefit in industry segments should be placed on those seeking exemption and made subject to the same public benefit test that applies for authorisation under Part VII.

- Remedies available to parties detrimentally affected by liner shipping agreements should be extended to more than simply the removal of protection for the agreement. Appropriate remedies need to be made available for parties that have suffered commercial detriment as a result of the agreements.

- Sanctions for breaches of conference obligations should address the root causes of the breaches and act as a deterrent for future behaviour.

- The mechanisms available to parties in a dispute with a non conference operator having substantial market power, should also equate to a large extent with those available to the wider community, such as those found under the general provisions of the TPA.

- As the overall scheme of regulation found in Part X can be more closely characterised as self regulation, the cost of administering the various aspects of the scheme could be more appropriately borne by the industry as a whole, ie shippers and the lines alike.

These conclusions made in the TPC submission to the Brazil Review in 1993 remain the position of the ACCC in 1999. In fact, with the passage of time, the Commission's argument has been strengthened.

## 1.2 Developments in Competition Policy and the Coverage of the TPA

The Report by the Independent Committee of Inquiry into *National Competition Policy* (Hilmer Review) argued that there were two main rationales for the universal and uniform application of competition conduct rules: that of efficiency and equity.[1] Competitive conduct rules are aimed at protecting the competitive process and thereby avoiding misallocation of resources and inefficiency that adversely affects community welfare. Exemption of particular businesses, sectors of businesses or kinds of conduct has the potential to induce inefficiency and disadvantage consumers. Exemptions from market conduct rules could also be inequitable as between businesses. It then follows that any exemptions from the application of competitive conduct rules should only be justified on the showing of a clear public interest.

The *Competition Policy Reform Act (1995*) signalled a commitment amongst the Federal, State and Territory Governments to, among other things, a national market with uniform rules and rights for consumers and business, regardless of State borders

[1] Report by the Independent Committee of Inquiry *National Competition Policy*, August 1993, AGPS, pp 86-89.

and form of ownership of the enterprise. The ACCC was established as the national regulator.

Since 1995 there has been a progressive transition from sector-specific to competition-oriented regulation in key areas of the economy. The first full year of universal application of the TPA was in 1996-97. Previously exempt areas such as unincorporated enterprises, including professional businesses, and State/Territory government business enterprises - and the diverse markets they operated in - came within the reach of the Act.

In conjunction with this movement towards a general national regulatory framework the TPA has been amended to adopt industry specific modifications relevant for an industry in transition, such as in telecommunications. Part XIB is a telecommunications specific regime which aims to prevent carriers and service providers with a substantial degree of market power from engaging in anti-competitive conduct in telecommunications markets. However, while this regime is telecommunications specific, a carrier or carriage service provider's conduct remains subject to ss 45, 45B, 46, 47 and 48 of Part IV of the TPA.

Shipping is the only industry that currently enjoys special status in terms of the market conduct rules of the TPA. Other industries engaged in similar forms of activity, including the aviation industry, in which alliances are typical, have the authorisation process available to them if the parties desire exemptions, on public benefits grounds, from Part IV prohibitions of anti-competitive arrangements or conduct (ss 45 and 47).

There is no clear reason for liner shipping to operate under a regulatory regime different to all other sectors of the economy.

## 1.3 Recent Role of ACCC in Investigating Conference Conduct under Part X

In the last three years the ACCC has only been asked to conduct one investigation under s. 10.45(a) (iv) of Part X.

In May 1996 the Australian Peak Shippers Association (APSA) asked the Commission to conduct an investigation into whether parties to the registered conference agreement, known as 'Australia to United States Discussion Agreement' (AUSDA), had given effect to or applied, or proposed to give effect to or apply, the agreement without due regard to the need for outwards cargo shipping services provided under the agreement to be efficient and economical.

APSA informed the Commission that in 1994 two refrigerated shipping lines, Scaldis and Cool Carriers, entered the Australia to US refrigerated cargo market, competing with lines that had formed a conference known as the Australia United States Container Line Association (AUSCLA).

As a result of the non conference entry, the AUSCLA lines began a series of rate reductions, mainly directed at the metal trade, which accounts for the major share of the

Australia to United States containerised export trade. The conference rates on offer were described in the press as the lowest for over 30 years and 'causing major headaches for their rivals'.

Scaldis and Cool Carriers formed a joint venture known as C & S to compete against AUSCLA but subsequently joined the above AUSDA discussion agreement, prompting the complaint from APSA.

The Commission called for submissions and contacted relevant parties for information. The AUSDA group made a detailed submission but only one submission was received from an exporter group. The relevant exporter group on whose behalf the complaint was made, was not willing to provide the information necessary for the Commission to form a view on this matter. The Commission consequently decided to cease further investigations.

The Commission formed the opinion that in the environment of the time, when the Australian meat industry was subject to intense international competition, there did not appear to be sufficient incentive for exporters to become involved in a complex and time consuming complaints procedure that would have an unknown effect on the liner services being offered to them. Rather, shippers put a premium on the stability and reliability of existing services and did not wish to suffer further disadvantage. However, without the shippers' involvement, the information necessary to assess the effects of anti-competitive practices was not forthcoming.

## 1.4 Conclusion

The Commission's experience in its most recent investigation (1996) of conference conduct has heightened its concerns about the investigation provisions under Part X. In it's previous submission to the Brazil Review the Commission argued that the provisions under Part X lead to outcomes that were neither efficient nor equitable. Here the argument was made that the right for redress under the TPA for market participants in other economic sectors, when faced with collective conduct that has caused any commercial detriment, is at a variance to that available to shippers dealing with lines operating under protected agreements. The right of action under the TPA is an important weapon that can be used to assist market participants in ensuring that the commercial transactions they enter into are not unfairly conducted.

The only remedy available for shippers in circumstances where parties to a conference agreement have not observed their obligations, is to seek deregistration or variation of the agreement. This is time consuming, inflexible and, in any event, does not provide equitable commercial redress.

The first investigation in 1993 was of the AUSDA lines, following a complaint from APSA alleging that the manner in which Terminal Handling Charges were introduced to the trade was in breach of the conference's obligations to negotiate with shippers. The investigation was completed and a report to the Minister recommended that the AUSDA agreement be deregistered. Some of the parties to the AUSDA agreement subsequently formed AUSCLA which was duly registered as a conference agreement (because there

are no ex ante provisions allowing for the Commission to scrutinise the agreements for anti-competitive effects) and the Minister decided not to follow the Commission's recommendation to deregister the agreement.

Rather than argue for the modification of these arrangements the Commission maintains the position taken in its submission to the Brazil Review in 1993 that agreements between shipping lines should be a matter for general assessment under the provisions of Parts IV, VI and VII of the TPA. Within this broad structure there is considerable scope to develop a set of processes that will satisfy **realistic** industry and user needs for a regulatory process that is flexible, cost efficient and timely as well as one that provides some certainty.

# 2. Commission's Preferred Option – Authorisation

The objectives of the TPA clearly relate to promoting the competitive operation of the market, although it also has a variety of other objectives. In general, conduct that is likely to substantially lessen competition in a market would contravene the Act. However, it is recognised that sometimes anti-competitive conduct may also yield benefits to the public. Exemptions for most of the conduct prohibited by the TPA can be provided through authorisations when the conduct is likely to result in a benefit to the public which exceeds the associated detriment.

A move to apply the authorisation process to liner shipping is not intended to result in the dismantling of shipping conferences. The conduct involved in typical industry agreements (joint venture provisions, price fixing, income pooling, self regulatory schemes and collectives of users to achieve countervailing balance of power) can all be allowed under the authorisation process. The relevant shipping companies would be required, like any other business, to demonstrate the benefits that offset the anti-competitive costs if the arrangements were to remain.

In addition to the arguments made above about consistency and the role of the public benefit the advantages of authorisation as the regulatory process overseeing liner shipping conferences are:

- Public scrutiny - it would allow closer public scrutiny of the justification for anti-competitive practices, and

- Uniformity - other than the removal of Part X it would require no substantiative change to the TPA and would not require special provisions for a specific industry.

Nevertheless, while authorisation is the Commission's preferred option it is recognised that the authorisation process is a detailed process, requiring significant input from the organisation requiring authorisation. Additionally, costs are involved. Separate applications (and separate fees) are required for exemptions from different provisions of Part IV. A single authorisation is subject to a lodgement fee of $7500. When two or more authorisation applications are lodged within 14 days of each other, and they relate to conduct in the same or related markets a concessional fee of $1500 is payable in respect of all but the first application.

The point should, however, be made that fewer authorisations would be required than there are currently registered agreements under Part X. The Commission believes that the current Part X registration process suffers from a surfeit of detail, with a considerable number of similar agreements being registered without the opportunity of real public scrutiny.

In recognition of industry concern about an unmodified authorisation process replacing Part X, a range of other options have from time to time been identified. These are outlined in Appendix 1.

## 2.1 Conclusion

Since the Brazil Review a range of suggestions have been made for various regulatory alternatives to Part X of the TPA. From the ACCC's perspective there is considerable scope to develop an alternative regulatory regime that will meet Australia's needs for a shipping service of adequate frequency, capacity and reliability and contain the following fundamental characteristics:

- The framework would be subject to the broad principles of the TPA so that agreements between shipping lines are a matter for assessment under the provisions of Parts IV, VI and VII of the Act.

- When the impact of identified anti-competitive conduct is assessed it is subject to a public benefit test to determine whether the balance of public benefit outweighs the anti-competitive effects.

- This assessment process would be public and transparent with public submissions, agreements placed on a public register and the option of a pre-decision conference.

- Enforceable undertakings are a necessary part of a regulatory regime to discourage breaches of conference obligations entered into as a part of the regulatory exemption process.

- Alternative dispute resolution processes should be established and funded by the industry.

In the past there has been reluctance by many within the industry to remove Part X and replace it with an alternative regulatory regime. This reluctance has been based upon the arguments that an alternative regime might not provide the certainty, flexibility, timeliness and cost effectiveness of the current regime.

However the need for certainty, timeliness and cost effectiveness has to be balanced with the need to take account of change and with the requirement that anti competitive practices have to be assessed after detailed public consultation.

The contribution that the current independent review by the Productivity Commission can make is to assess whether industry concerns are reasonably held. It could identify the level of flexibility and certainty that is required from the regulatory regime and the costs that ought reasonably to be borne to maintain the regulation required to achieve Australia's needs for a shipping service of adequate frequency, capacity and reliability.

# 3. RECOMMENDATION

The Australian Competition and Consumer Commission recommends:

- that the exemptions from Part IV provided by Part X which allows liner shipping to collaborate as conferences be abolished. While a number of options which could meet industry needs are outlined in this submission the Commission's preferred option is that conferences which seek exemptions from parts of the TPA do so through the authorisation process.

# APPENDIX I

**Modified Notification Process for the Liner Shipping Industry**

This model provides for a new notification procedure (s93B) specific to the liner shipping industry that would encompass many of the provisions covered by Part X.

The scope for the notification process in the TPA is currently limited to providing exemptions from the exclusive dealing provisions of the Act. The proposed modified notification process to be extended to the liner cargo shipping industry would cover the existing range of matters that are exempt under Part X.

Notification is a less formal procedure than authorisation. Only one notification would have been required for each conference. The notification fee currently ranges between $100 and $2,500 - the lower end of the fee scale being applicable to small businesses and of proprietary limited companies. Given the less formal nature of the process less input would be required by the notifying organisation.

A detailed outline of this model is presented below, updated to refer to the ACCC rather than the TPC.

**A Notification Procedure for Liner Shipping**

Parties to a conference agreement would be required to notify the agreement to the ACCC in order to receive exemption for certain anti-competitive practices that would otherwise contravene the Trade Practices Act.

Exemption would take effect upon notification and remain unless the notification was revoked following review by the ACCC.

**Scope of Exemption**

The exemptions provided by notification would extend to all practices currently granted protection upon registration under Part X including fixing of freight rates.

**Exemption of Shipper Bodies**

Associations of shippers engaging in coordinated negotiations with shipping lines would be required to notify the coordinating arrangements to the ACCC.

**Exemption for Loyalty Agreements**

Conferences entering into loyalty agreements with shippers would be required to notify their agreements to the ACCC (when there is substantial anti-competitive purpose, effect or likely effect). Agreements would normally be given confidential status if the arrangements are adequately described in the notification. It is unlikely that separate

notification would be required for each agreement – protection is likely to be available if the range of conduct and proportion of the market affected are sufficiently described.

**Pre-Requisites for Notification**

In a notification process tailored to the needs of the shipping industry, certain criteria would need to be met before a conference agreement could be validly notified.

(a) The agreement would need to include specified provisions (as currently required by Part X)

  (i) minimum service levels that had been the subject of negotiations with a notified shipper body

  (ii) reasonable provisions for a party to withdraw from the agreement

  (iii) all questions arising under the agreement to be determined in Australia under Australian law.

(b) The notification would also need to include a range of undertakings by the conference parties

  (i) not to discriminate between similarly situated shippers

  (ii) to provide the notified shipper body with 30 days' advance notice of changes to negotiable shipping arrangements (such as ports of call, freight rates, frequency of sailings)

  (iii) to negotiate with a notified shipper body on negotiable shipping arrangements whenever reasonably requested and to also provide information reasonably required for negotiation purposes

  (iv) to adhere to a carrier/shipper agreed dispute resolution process.

These obligations would be considered to be enforceable undertakings to the ACCC.

**Types of Agreement Requiring Notification**

Notifications would be required only for those agreements with provisions that give rise to substantial anti-competitive purpose, effect or likely effect. Associated agreements would not need to be notified if they entailed no new or additional anti-competitive provisions.

**Review of Agreement**

**Circumstances of review:**

There would be provision for review of notified agreements (or parts of an agreement) by the ACCC, either

(a) in the event of a complaint that is not able to be resolved by an industry-funded dispute resolution process (see below under 'Complaints Procedure'); or

(b) (possibly) upon the initiative of the ACCC

(i) with or without a "phase in" period during which existing agreements would be immune from review, except on complaint.

**Review criterion**

Review by the ACCC would involve applying the standard TPA test applicable to present review of notifications under s.93 of weighing anti-competitive detriment against public benefit.

**Review outcome**

If the ACCC determined that the conduct under review failed the net public benefit test (above), it would issue a notice to revoke either the whole or part (if the conduct were severable) of the notification applying to the particular conference agreement. This would remove the parties' exemption for the conduct.

**Appeal mechanism**

The ACCC review decision would be appellable to the Australian Competition Tribunal.

**Complaints Procedure**

Two broad types of complaint are envisaged and these would give rise to different processes:

- complaints relating to a failure by conference parties to comply with undertakings given in connection with notification eg failure to provide necessary notice of changes in freight rates/service arrangements; failure to engage in negotiations with shipper bodies; and

- complaints raising the possibility, in the light of available evidence, that the operation of the arrangements has substantial anti-competitive effects that are not outweighed by public benefit.

Either type of complaint would be required to be the subject of a dispute resolution process before it could come before the ACCC.

In the event of a complaint in the first category coming before the ACCC, it is envisaged that the ACCC could bring the matter before the Federal Court for remedial action. Consultation would normally precede recourse to the courts. The ACCC would look to see whether the issues could be resolved by the parties through negotiation.

In the event of a complaint in the second category coming before the ACCC, it is envisaged that the review process outlined above would be invoked.

## Other Options

Other options have also been suggested, including the idea that conferences and peak shipper bodies could devise and then seek authorisation for an industry code of practices. The negotiation procedures could be modelled on the current Part X but with independent dispute resolution provisions as well as provisions for enforcement mechanisms.

Industry authorisation has been suggested - industry could draft an authorisation application covering core restrictive practices, adhered to by all conferences. Alternatively, amendments could be made to enhance the procedural flexibility of the ACCC's authorisation power to streamline the process for varying, revoking and substituting authorisations.

Various transition measures have also been suggested, so that, for example, the repeal of Part X is managed in such a way that the authorisation process across the industry can be finalised before Part X is repealed. An alternative applicable to the notification model outlined above, is that current registered agreements in effect in the industry could be deemed to be notifications.