REVIEW OF
PART X OF THE *TRADE PRACTICES ACT 1974*

Comments on the
Productivity Commission's Position Paper of June 1999

Cross-Modal and Maritime Transport Division
Department of Transport and Regional Services
Canberra
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1. General

The Commission's position paper provides a comprehensive coverage of the issues concerning Part X of the Trade Practices and the situation faced by the international liner shipping industry in servicing Australia's international trade.

The Commission has noted (p.129) that the interests of shippers (ie. exporters and importers) broadly coincide with the national interest. The approach taken by the Department of Transport and Regional Services (DOTRS) in its 3 May submission to the Productivity Commission is consistent with that assessment of the national interest. DOTRS' 3 May submission notes on page 26 that;

> "… the preferred option for regulating liner cargo shipping should be the one that the majority Australian exporters consider to be in their best interests".

Specific comments on the position paper are given below.

2. Protecting the interests of Australian shippers (page XXVI)

The position paper notes that " a regulatory regime should be able to protect the interests of Australian shippers were global competition to abate substantially."

Division 8 of Part X contains a range of provisions under which affected parties can seek redress in the event that a conference fails to comply with the conditions under which the Part X exemptions are granted. For example the Australian Competition and Consumer Commission (ACCC) can be asked to undertake an investigation and report on matters such as failure of a conference to:

- negotiate adequately with shipper representatives; and
- provide services that are efficient and economical and at the capacity, and frequency reasonably required to meet the needs of shippers.

Any enforcement action that may be required (as a result of an ACCC report) currently rests with the Minister with portfolio responsibility for liner shipping matters. Enforcement powers currently available to the Minister include withdrawal of the Part X exemptions, or acceptance of undertakings from a conference to cease behaviour that has given rise to a shipper complaint.

3. Impact on competition (page 169)

In respect of the reference to the Australian Chamber of Commerce and Industry (ACCI) at the bottom of page 169, it should be noted that the ACCI also stated that:

> "…there is also a strongly held view amongst members actively engaged in sea transport-based trade and commerce, both as agents and users, that retention of Part X is essential given the realities of international trade."; and
>
> "Taken as a whole, while the ACCI philosophically supports termination of Part X, we also recognise the realities of international sea transport and trade which necessitates the retention of Part X for the foreseeable future."

4. Block authorisation (page 108)

DOTRS does not see any advantages in Australia adopting the block exemption arrangements that operate in the European Union (EU) under Regulations 4056/86 (for conferences) and 870/95 (for consortia with under 50% market share). These arrangement do not seem to offer exporters any more protection than the Part X arrangements.

Also, it appears that Part X involves less regulatory intervention than the EU system. Part X provides exporters with sufficient countervailing powers so that most problems can be resolved through direct commercial negotiations between exporters and the shipping conference concerned.

From a public policy perspective and for reasons of transparency for shippers, the public filing of agreements that is involved in the current process has merit. Registration of agreements and variations to agreements gives certainty about who has exemptions, who has obligations to shippers, and which parties may be liable for penalties under the Trade Practices Act. Also, shippers have a well-defined access to copies of conference agreements.

The current Part X provides a simple, well-understood, and largely self-regulating system. On the other hand the block authorisation system in the EU appears to have involved a relatively high level of intervention by the Competition Directorate (DGIV) to deal with disputes and alleged breaches of Regulation 4056/86. Proposals are currently being developed to provide a less confrontationist regime.

5. Conference negotiation of stevedoring charges (page 124)

The Commission's position paper refers to the issue of whether the Part X exemptions should be extended to the collective negotiation of stevedoring contracts by conferences.

Apart from the points made in the position paper, information available to DOTRS indicates that under current practice (where collective negotiations take place) stevedoring charges per TEU are now about 55% lower in real terms than in the mid 1980's. While there may have been some variability on a year by year basis (with charges rising in some periods), the trend over the past 15 years has been downwards.

Coincidentally with the reduction in stevedoring charges, freight rates over the past fifteen years have fallen by around 50% in real terms. In light of this situation, the Commission may wish to examine further the issue of whether there are benefits for shippers from allowing conferences to negotiate collectively with stevedores.

6. Regulatory responsibilities (page 128)

The Commission has canvassed the issue of whether the whole of the administration of Part X should be consolidated within the ACCC.

There is a relatively small workload in administering Part X. The function of Registrar of Liner Shipping requires about 20% of one staff year and that of an "authorised officer" a further 5% of a one staff year.

Administration of Part X has synergies with other transport related functions such as monitoring liner shipping services, and preparing policy advice for the Government. These, together with participation in activities related to reviews of Part X, require about

1 staff year on average. Accordingly, Part X and related functions require an average of about 1.25 staff years.

The workload associated with functions other than that of Registrar of Liner Shipping fluctuates considerably. While exporters and shipping conferences are able to deal with issues through commercial negotiations, Part X is largely a self regulating system, but when disputes about shipper rights or carrier obligations etc. do arise and/or work with reviews of Part X is required, additional resources have to be allocated to these tasks.

In dealing with the issue of regulatory responsibilities, it may be appropriate to consider the merits of keeping the administration function separate from the investigation and reporting function under Part X. The latter might be augmented by having Part X provide that the ACCC may initiate investigations where appropriate.

Further comments on the administration of Part X are at **Annex 1.**

7. A separate shipping Act (page 129)

The operation of Part X has important links to other parts of the Trade Practices Act and the current arrangements appear to be well understood by industry. DOTRS agrees with the Commission's assessment that, at this stage, there does not seem to be sufficient arguments to justify a separate shipping Act.

Canberra
July 1999

Annex 1

COMMENTS BY THE REGISTRAR OF LINER SHIPPING ON THE PC POSITION PAPER CONCERNING THE ADMINISTRATION OF PART X

Page 80: *"… the process for registering conference agreements is not open to public input."*

While the registration process is not open to public input, the Registrar sends the ACCC a copy of the agreement (after removal of material subject to a request for confidentiality) at both the provisional and the final registration stages. The ACCC thus has the opportunity, before the final registration stage, of giving its views about whether the agreement meets the criteria for registration. DOTRS is not aware that the ACCC has found this necessary in the past.

As well, the parties to the agreement send a copy to APSA after provisional registration, so that minimum levels of service can be negotiated. Thus the section of the public that is most directly affected by the registration of the agreement has an input into the final form of the agreement, and an opportunity to express a view if it thinks that the agreement does not meet the criteria for registration.

However, Part X is predicated on registration of a wide range of agreements, and action on complaints if shippers believe that the agreement is not operating in their interests.

Files containing registered conference agreements (after removal of material subject to a request for confidentiality) kept by the Registrar are open to public inspection, and a copy of the agreement can be obtained on payment of a $30 fee, or a copy of the whole agreement file for a fee of $60.

Page 81: *"The regulatory costs of Part X include administrative costs and delays incurred by shippers, the ACCC and DTRS …"*

The meaning of this sentence is not clear in regard to delays in relation to shippers.

Page 82: *"… dispute resolution process and penalty provisions may be somewhat limited and inflexible."*

While this may be true for penalty provisions, there is a degree of flexibility in dispute resolution. Parties to registered agreements are required to negotiate with relevant designated shipper bodies. There is scope for:

- persons to complain to the Minister about a registered conference agreement;
  - for the Minister to consult with the parties to the agreement to obtain action or undertakings that would make deregistration unnecessary;
  - for the Minister to instigate an investigation and report by the ACCC; and
- for a person adversely affected by the agreement to complain directly to the ACCC.

Page 97: *"…registration of conference agreements took two months on average …"*

It should be made clear that the 2 months was from date of application to the time the exemptions came into force, and thus includes the 30 day period after final registration before exemptions come into force. Thus the actual registration process took about 1 month on average, including provisional registration, negotiation of minimum levels of service, and final registration.

A sample of 20 recent registrations had an average time of 14 days for the registration process from signature of application for provisional registration to final registration. (These were mostly variations of existing agreements, for which APSA accepted the minimum levels of service proposed and thus declined the opportunity to negotiate.)

Page 98: *"… so the total cost to carriers has been about $34,000…."*

From August 1989 to July 1999, the total amount collected in fees by the Registrar has been $156,475, or an average of some $15,650 per year. Apart from relatively minor amounts for Registration of Part X agents, and for copies of agreements, the remainder has been for registration of agreements.

At an average cost of approximately $500 per registration over time, this means there has been some 300 registrations of agreements and variations of agreements.

Page 101: *"… though the Minister can also initiate an investigation by the ACCC."*

This might be better expressed along the lines of: "While the Minister must initiate an investigation and report by the ACCC in order for him to be able to direct the deregistration of an agreement (in whole or in part), it is open for a person adversely affected by the operation of a conference agreement to apply to the ACCC directly."

Page 104: *"Even if deregistration occurs there appears to be nothing to stop shipping companies immediately lodging a new agreement…"*

In this regard, it should be noted that the exemptions under Part X do not commence until 30 days have elapsed from final registration. The Registrar has 14 days in which to register an agreement at each stage. In such circumstances, negotiations with APSA could take several weeks.

So that there would be a "window" of 2 to 3 months when collusive arrangements which had been covered by a deregistered agreement would be open to action as being in breach of Part IV if they were still in place after deregistration. Carriers would be forced to suspend joint arrangements in the interim if they wished to avoid the risk of ACCC action after a deregistration.

Nevertheless, DOTRS notes that the Brazil report recommended action to make this type of reregistration subject to Ministerial consideration of whether undertakings should be required of the parties to the agreement before it could be registered.

Page 106: ***"…****Part X explicitly assumes that conference arrangements are desirable****…"***

While the various reviews of Part X over the years have concluded that, on balance, conferences are desirable, it is not clear that Part X itself explicitly assumes this. It is probably fairer to say that the assumption is implicit in Part X's provisions, such as s10.01(2)(a) which refers to "permitting continued conference operation while enhancing the competitive environment …", or s10.45(a)(iv) which refers to "the parties to the agreement ….apply, the agreement without due regard to the need for …services…to be: (A) efficient and economical; …"

Part X is designed largely on the premise that "the proof of the pudding is in the eating". That is, rather than needing to determine , *a priori*, whether an agreement will be advantageous or detrimental to the interests of Australian shippers, Part X provides that any person adversely affected by the operation of a conference agreement to apply to the ACCC directly, or that the Minister can respond to any complaints made to him about the agreement by initiating consultations, seeking undertakings or initiating ACCC action.

However, in order that shippers may challenge the registration of the agreement or its provisions before the agreement comes into effect, there is a 30-day period after final registration before the exemptions commence.

Page 116: *"Whether all these agreements meet the Part X criteria for inclusion as conference agreements has not been independently tested."*

The criteria for a "conference agreement" are very broad, "conference" being an unincorporated association of two or more ocean carriers, and a "conference agreement" being any contract, agreement, arrangement or understanding between members of a conference.

Under s10.28, the Registrar has very restricted grounds for refusing to register a conference agreement. Provided that the application is properly made (a clerical test), that the agreement complies with Australia law, and that registration is not prevented by refusal of confidentiality, or the existence of varying agreements or affecting events (as defined in the legislation), the Registrar shall, within 14 days provisionally register the agreement

The above is subject to s10.08, to the effect that conference agreements may include only certain restrictive trade practices. If the agreement includes exclusionary provisions or substantially lessens competition, then the exclusionary provisions must either deal only with freight rates, pooling etc., cargo sharing or entry of new parties, or be necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

As regards discussion agreements, it seems clear that they are conference agreements under Part X. Although they have the potential to significantly lessen competition, being open to all operators, it is not clear that their provisions, based on a non-binding consensus, are exclusionary, or that if they are, the exclusionary provisions fall outside the allowable areas set by s10.08.

Accordingly, it seems that at present the Registrar has no grounds for refusing to register a properly made discussion agreement, and that shipper dissatisfaction with any such agreement must be through the complaints provisions once the agreement is in operation.

The Brazil review recommended that discussion agreement (and their binding counterparts, accords) should be subject, in exceptional cases, to the Minister, for consideration of possible ACCC scrutiny before final registration or for consultations seeking undertakings from carriers about the agreement.

Page 124: re varying the registration process

DTRS is of the view that where there is any material change to a registered agreement, including a change of parties following a takeover or merger, then a variation should be registered on the same basis as the legislation now requires.

There is scope now for notifying affecting events (s10.43) without the need for registration of a variation, but this cannot be resorted to where the change involves a change in the provisions or parties (see s10.01 for a definition of 'vary' in relation to a 'varying conference agreement').

DOTRS notes the Brazil review (report p182) recommended "that no change be made to the definition of varying conference agreement or to the requirement for the registration of minor amendments to conference agreements."

Neil Kelso
Registrar of Liner Shipping
1 July, 1999