SUPPLEMENTARY SUBMISSION BY THE SEA FREIGHT COUNCIL OF WESTERN AUSTRALIA ON THE PRODUCTIVITY COMMISSION'S REVIEW OF PART X OF THE TRADE PRACTICES ACT

30 JULY 1999

1 Introduction

1.1 In its original submission the Sea Freight Council of Western Australia ("**SFCWA**") expressed the view that Part X represents a potential source of stability during a period of uncertainty and offers shippers a level of security which may not exist without Part X of the Trade Practices Act (**"TPA"**). Part X provides commercially oriented countervailing power for Australian shippers to negotiate reasonable outcomes for Australian interests. SFCWA continues to support those views and submits that Part X should be retained, but amended to reflect the changes referred to in paragraph 8 below.

1.2 Issues raised by the Commission in the Position Paper dated June 1999 are commented on below.

2 National Competition Policy ("NCP")

2.1 The retention of Part X would not be contrary to NCP principles, namely, that legislation should not restrict competition unless it can be demonstrated that:

(a) the benefits to the community as a whole outweigh the costs; and

(b) the objective of the legislation can only be achieved by restricting competition.

2.2 SFCWA agrees with the preliminary view of the Commission set out in the Position Paper, that in the context of international shipping, the community interest and the interests of exporters and importers broadly coincide. Relevantly, the interests of Australian exporters are to have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive, and to promote conditions that encourage stable access to export markets for exporters in all States and Territories (see section 10.01 of the TPA).

2.3 As to whether the objects of Part X can only be achieved by restricting competition, the position is that reviews of Part X were and are premised on the proposition that some exemptions from domestic competition law are necessary in the context of the international shipping trade. What is under review is the means by which the exemptions are to be allowed and/or regulated. In other words, the issue is whether the certainty of Part X is to be replaced with the relative uncertainty of assessment by the Australian Competition and Consumer Commission ("**ACCC**"). The question appears to be not whether some exemptions from domestic competition law should be allowed, but rather the means by which they are to be

approved. SFCWA is of the opinion that Part VII does not provide equal protection to that available under Part X to both shippers and Conferences in an easily accessible and low cost manner. Therefore SFCWA submits that the retention of Part X satisfies not only the guiding principles of NCP but also achieves this outcome in the most cost effective and operationally efficient manner within the context of the Trade Practices Act as it currently stands.

3 Competitiveness of shipping freight rates

3.1 Shipping rates have been very competitive over the past five years. SFCWA considers that this is a global phenomena brought about by excess capacity, larger ships and cascading of smaller vessels to the north south routes and the Asian economic downturn. However, the size and range of such price reductions are unsustainable in the longer term.

3.2 Concentration in the shipping industry and an apparent growth in conference and non-conference carriers' use of discussion forums such as Trade Facilitation Group in relation to capacities and rates, indicate carriers' concerns about the unsustainability of the current low rates. SFCWA is concerned that any short term benefits presently received by shippers do not detract from the need for consideration of the longer term issues, namely, the continuance and reinforcement of countervailing market power by shippers vis a vis shipping conferences and other alliances. The longer term interests of shippers requires not only low rates and efficient and reliable service, but a framework of certainty to ensure to the greatest extent possible that fair deals are done. There is no objection to the carriers obtaining a fair rate for their services. But there is some concern about whether shippers are currently provided with sufficient information by conferences to satisfy themselves that the rates are fair, are calculated on proper and reasonable bases, and that conferences give due consideration to relevant matters raised by shipper bodies.

3.3 Fair and sustainable rates are more likely to be achieved by commercially oriented negotiation where shippers have sufficient countervailing power to meet the potential or actual market power held by conference members. The "loose rein" approach of Part X appears to be a more appropriate means of achieving these outcomes than is likely to be achieved by more formalised case by case assessment of conference and/or shipper agreements.

4 Reliability of conference and non-conference shipping

In general the experience of SFCWA is that conference carriers has been slightly more reliable than non-conference carriers in terms of frequency and certainty of service. This is not to say that non-conference carriers have not improved their performance, but it does appear that conference carriers generally retain an edge over non-conference carriers in terms of reliability and efficiency of service over the long term.

5 International regulatory regimes

So far as SFCWA is aware the shipping regimes of Australia's major trading partners are reasonably compatible with Part X in that they emphasise commercially oriented regulation rather than case by case adjudication and/or enforcement. These regimes have been in place for a long time and are largely supported by nations, carriers and shippers as a necessary means of achieving some certainty in international shipping. A unilateral heavier handed, more formalised and costly regime by Australia could be expected to be of concern to carriers , shippers and other jurisdictions in terms of certainty of outcomes and compatibility of shipping regulation regimes. SFCWA does not see that a unilateral move away from the major current international regimes would achieve any practical benefits, and may be disadvantageous in that some carriers may reconsider their Australian services in the face of the cost and effort of dealing with tighter regulation.

6 Inwards trade

While acknowledging that there may be limitations on Australia's jurisdictional influence because contracts by importers would generally be subject to the law of exporting countries, SFCWA sees some merit in importers having access to the sort of information and consideration exporters are entitled to receive from conferences, especially if the use of FOB contracts by importers is growing. To that end, the SFCWA suggests that the Australian Peak Shippers' Association should be nominated to act on behalf of importers if so requested.

7 Should conferences be open?

SFCWA is not aware of any strong argument for conferences to be open.

8 Adequacy of remedies in relation to conference negotiations

8.1 The remedies available for non-compliance within the negotiation provisions of Part X are inadequate to deal with the situation where conferences do not comply with

both the spirit and the letter of the negotiation process under section 10.41. Conferences have the opportunity under the current provision to simply go through the motions of compliance by providing less than full information, and not properly considering relevant matters raised by shipper bodies. If conferences provide less than full information critical for shipper bodies to make fully informed decisions about rates and service issues, and/or fail to give due consideration to relevant matters raised by shipper bodies, the only remedy for non-compliance is deregistration of conference agreements. This is a heavy-handed action which would not necessarily produce the desired result and may result in a conference being disbanded, and services being withdrawn.

8.2 Shippers' countervailing power, which section 10.41 supports, should be strengthened to ensure that meaningful discussions take place, that critical information and documentation is provided by conference members and that they give due and proper consideration to relevant matters raised by shipper bodies. The information should, for instance, include full written particulars of freight rates to be charged for both blue water and land parts of carriers'service including each element of the rates, the method of calculation and the evidence relied upon to justify proposed rates. Conference members should also provide full written particulars of other proposed collective terms and conditions, including but not limited to the frequency of sailings and ports of call together with any known reason why there may be changes to those matters, and if so, why the changes may occur. The negotiating process should ensure that all participants are fully appraised of the issues involved and that all relevant information is on the table. To this end, SFCWA suggests that section 10.41 be amended to provide more clarity as to the obligations of conference members.

8.3 It is also suggested that a dispute resolution mechanism be included in Part X in the form of an "umpire" to adjudicate claims that a party is not negotiating in good faith and/or has not provided relevant information or documentation to support that party's negotiating stance. This is a role SFCWA considers could be undertaken by the ACCC, and that its ability to seek injunctions and accept enforceable undertakings be extended to conferences and shipper bodies should they fail to negotiate in good faith and provide relevant information and documentation necessary for good faith negotiations to take place. It is also suggested that persons who suffer loss or damage as a result of a contravention of Part X be entitled to commence proceedings in the Federal Court to recover such loss or damage.