Australian Government

Department of Transport and Regional Services

Department of Transport and Regional Services

SUBMISSION
to the
Productivity Commission
Review of Part X
of the
TRADE PRACTICES ACT 1974

The views expressed in this submission are those of the Department and do not necessarily reflect those of the Minister for Transport and Regional Services or the Australian Government.

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CONTENTS

KEY POINTS

- Australia is virtually totally dependant on foreign carriers for its liner cargo shipping services.

- Australian shippers in all States and Territories require liner shipping services of adequate capacity, frequency and reliability to provide them with stable access to world markets. The level of freight rates may not be the prime consideration in many cases, although unforseen or rapid increases in rates are often a problem for shippers.

- The retention or repeal of Part X should depend on whether it is the best way to regulate the provision of liner cargo shipping services for Australian shippers.
    - The 1999 Part X review Inquiry Report stated[1] that "*the interests of Australian shippers are aligned with the national interest*".

- Therefore the views of shippers who use liner cargo shipping services, and their representative bodies, should be given careful consideration when weighing up the question of whether Part X should be retained or not, and if it is to be retained, what changes should be made to the existing legislation.

- Australia's major trading partners provide exemptions from their mainstream competition policy regimes for conferences to operate in international liner cargo shipping.

- Part X is compatible with the liner regimes of Australia's major trading partners. With continuing growth in international trade, compatibility of liner regimes 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.
    - The US moved in 1998 to make its regime more flexible, but still provides exemptions for conferences to operate. The EU is reviewing its liner exemptions and may move to reduce their scope.

- Australia's geographic situation and the relatively small size of its liner trades means that its liner services are long, thin north-south trades, and that a liner regime allowing collaboration between shipping lines may be more important to Australia than to other, larger economies that are served by the mainline east-west trades.

- If there was to be a widespread move by Australia's major trading partners to remove price fixing exemptions from national regimes for liner shipping, then Australia should also remove such exemptions from the scope of Part X, if, following detailed assessment, it was considered in the national interest to do so.

- Australia should not undertake such a move in advance of its major trading partners generally, as there would be a danger that Australian shippers would lose the countervailing power they exercise under Part X, especially if outwards conferences now managed in Australia were to be run entirely from overseas.

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[1] *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act* Report No.9, 15 September 1999, Productivity Commission, Melbourne, pxxxix

- Discussion agreements are based on reaching a non-binding consensus between carriers. Nevertheless, their typical breadth of membership means that they appear to be able to exercise significant market power, at least when the members agree on the need to abide by agreed rates. It appears that this may be the case at present, when there is the prospect of rate restoration as market conditions have improved (for the carriers) after a period of low or falling rates. Discussion agreements may be less effective at other stages of the freight rate cycle.

- The question of whether discussion agreements should be allowed to be registered as conference agreements under Part X is the principal issue for consideration if it were to be decided that Part X should be retained. This is because of the difficulty shippers have reported in negotiating with members of non-binding agreements, and the market power discussion agreements can wield, in many trades, because their wide membership commonly encompasses a large proportion of capacity.

- The extent of shippers' negotiating powers under Part X is another crucial issue. If it were to be decided that discussion agreements should continue to be registerable under Part X, then new provisions appear to be needed to deal with the difficulty shippers have reported in reaching satisfactory arrangements with them.

Conclusions

- Part X of the *Trade Practices Act 1974* should be retained, with amendments to strengthen shipper powers, as long as its retention is supported by Australian shippers.
    - At the next review of Part X, consideration should be given to removing exemptions for price setting and/or price discussion if our major trading partners have moved to do so.
    - In the interim, Australia should work within the OECD regarding common objectives for appropriate international liner cargo shipping regulation.

- Part X should be amended to address problems experienced by shippers in recent years, especially those relating to discussion agreements.
    - Part X should be amended to explicitly make offers made to shippers by the parties to a conference agreement, including a discussion agreement, in the course of negotiations conducted pursuant to s10.41, binding on those conference parties if accepted by the shippers, so long as the lines involved remain parties to the agreement.
    - Part X should be amended to require the parties to registered conference agreements to provide designated shipper bodies with adequate justification, including relevant quantitative data, for proposed increases in freight rate charges, as a separate obligation to the mutual obligation to exchange information under s10.41(1)(b).
    - Part X should be amended to require the parties to registered conference agreements to offer "all-in" freight rates (i.e. terminal-to-terminal without any surcharges) as an option for shippers to take up if they wish.
    - Part X should be amended to require the parties to registered conference agreements to offer freight rates fixed in Australian dollars as an option for shippers to take up if they wish, where the contract is an *eligible Australian contract* as defined in s10.41(3).

1: OVERVIEW

International liner cargo shipping refers to regular, scheduled shipping services that carry non-bulk cargoes, mostly in containers. It is an important facilitator of international trade. Traditionally, liner shipping operators have been permitted by governments to act in concert as "conferences" to provide joint services.

Internationally competitive liner cargo shipping services are crucial for Australia's international trading performance, especially for value-added products. Liner cargo shipping carried over $43 billion (47%) of Australia's seaborne exports, and over $74 billion (78%) of Australia's seaborne imports in 2002-03. The Figure on the following page shows the size of Australia's various international liner trades, based on the value data from table 1.1, which also gives tonnage figures.

TABLE 1.1 INTERNATIONAL LINER TRADE BY REGION, 2002–2003

Region of origin / final destination	*Value ($'000s)*		*Tonnes*	
	Imports	*Exports*	*Imports*	*Exports*
Europe	19 055 486	5 665 312	3 424 936	2 274 541
Japan & North Asia	15 449 167	7 888 224	2 049 363	3 948 550
East Asia	14 896 857	7 549 108	3 280 374	3 587 874
North and Central America	10 112 488	6 569 097	1 733 113	1 817 567
South East Asia	7 825 859	5 326 521	2 767 392	3 551 835
New Zealand	3 198 113	4 167 015	1 478 411	1 718 793
Middle East	391 055	2 743 599	229 193	763 982
Africa	1 033 306	946 558	327 820	424 446
South Asia	998 594	956 609	354 661	671 837
Pacific Islands and PNG	245 446	1 452 478	127 416	953 752
South America	628 528	234 915	270 909	62 681
Other/No trade area	323 493	43 361	60 607	10 727
Total	74 158 393	43 542 795	16 104 196	19 786 585

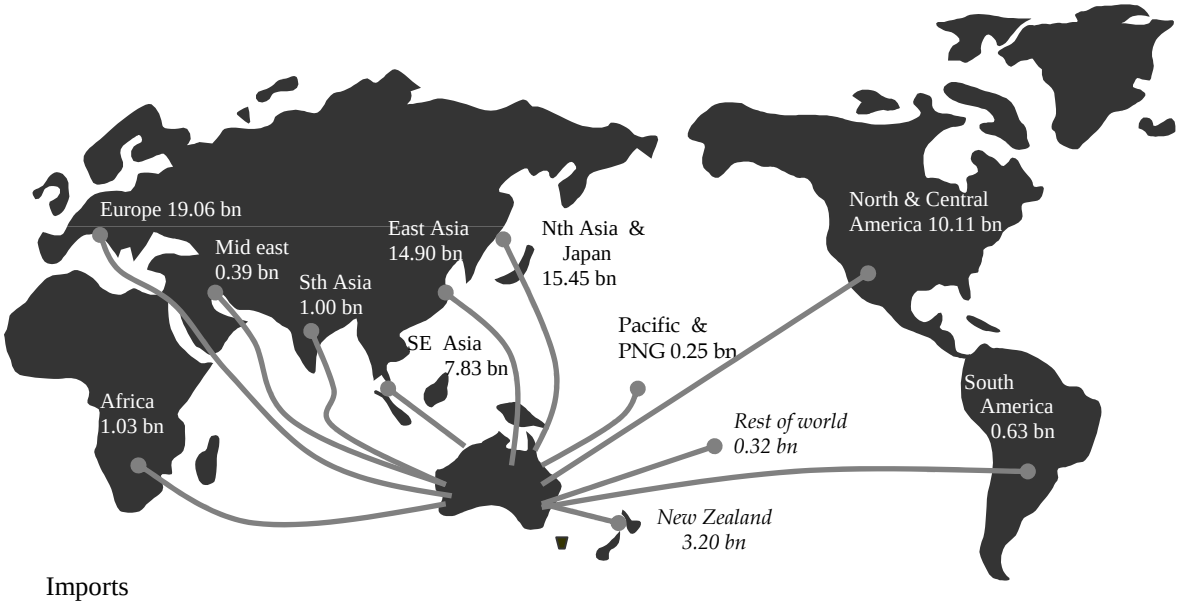
Source: ABS, International Cargo Statistic, unpublished, data supplied by the Bureau of Transport and Communications Economics, *pers. comm.*., July 2004.

Australia is almost completely dependent on foreign carriers for its liner shipping services. Less than $8m (or under 400 tonnes) of international liner cargoes in the Australian trades was carried in Australian flag vessels in 2002-03[2].

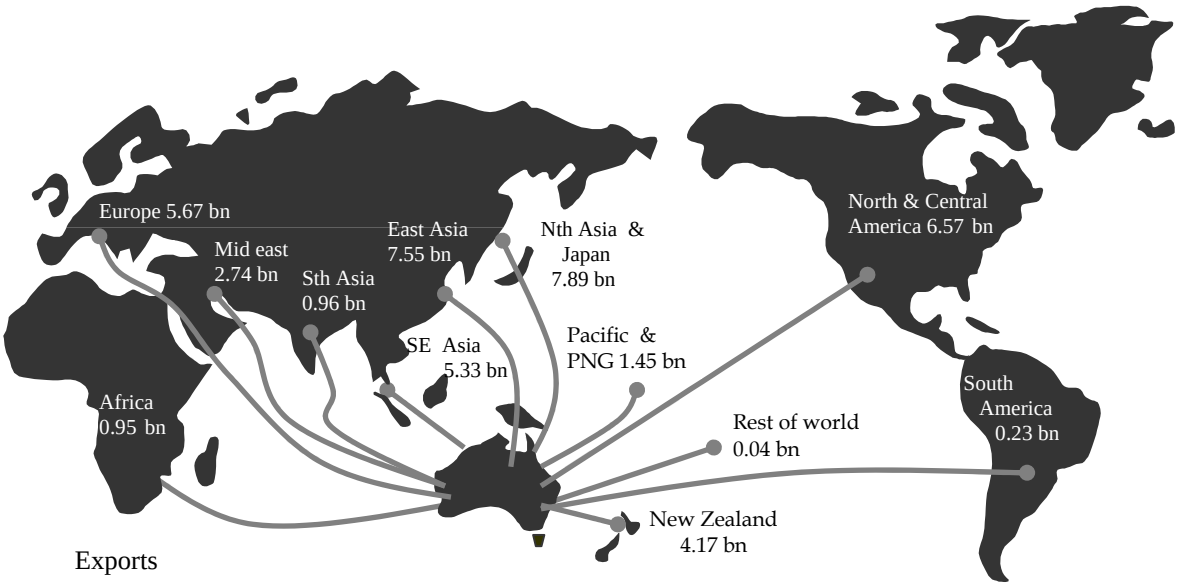
It is vital in the national interest that Australian shippers have access to reliable services of adequate frequency and capacity between the ports they wish to use, provided at reasonable freight rates that enable them to be internationally competitive. The Department notes that in its 1999 Part X review Inquiry Report, the Productivity Commission stated[3] that "*the interests of Australian shippers are aligned with the national interest*".

[2] Bureau of Transport and Regional Economics (based on ABS data), *pers. comm.*, 2 August 2004.
[3] Productivity Commission 1999, *op. cit.*, pxxxix

FIGURE INTERNATIONAL LINER FREIGHT EXPORTS AND IMPORTS BY REGION OF FINAL DESTINATION, 2002–2003. ($BN)



Imports



Exports

Source: ABS, International Cargo Statistics, unpublished, Bureau of Transport and Regional Economics, *pers. comm.*.July 2004.

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[4], operating as a linkage between national economies for the purpose of servicing the needs of the international trading community.

Governments of many major trading nations permit special competition policy treatment that allows ocean carriers to form "conferences" in order to collaborate to provide joint scheduled services for exporters and importers. Anti-trust immunities for liner shipping are provided by a number of major trading economies including the USA, Canada, the European Union, Japan, Korea, and Chinese Taipei. However, there are also a number of economies (eg. Singapore and the Philippines) that do not regulate the commercial operations of liner shipping conferences.

At present there is considerable international debate through the OECD and in the European Commission (EC) on the issue of anti-trust immunities for liner shipping conferences. Such special treatment is viable only as long as it is justified by the outcomes and enjoys the support of shippers.

Australia's liner cargo shipping regime

Part X of the *Trade Practices Act 1974* (TPA) provides the legislative framework for Australian exporters and importers using international liner cargo shipping services to interact commercially with liner shipping conferences (collaborative/collusive agreements between shipping lines), with only the minimum of government involvement. Part X provides exporters (and latterly, importers) with countervailing powers to strengthen their negotiating ability with conferences.

Part X of the TPA provides international liner cargo shipping operators with certain exemptions from Part IV of the TPA that allow them to collaborate to provide joint shipping services and set common prices. The exemptions are conditional on registration of their "conference" agreements under Part X[5].

In return for specific exemptions from Australia's domestic competition regime, international liner cargo shipping operators (carriers) and conferences must meet specified obligations. These include registering conference agreements, and negotiating with government-designated exporter and importer (to a more limited extent) shipper bodies[6] on matters such as minimum levels of service and freight rates.

[4] International civil aviation is still largely regulated by governments through aviation bilateral negotiations, with severe entry and capacity constraints, in contrast to the freedom of entry and unconstrained capacity of international liner shipping.

[5] A description of the Part X process is at Appendix 1.

[6] There are two Designated Peak Shipper Bodies – the Australian Peak Shippers Association for exporters and the Importers Association of Australia for importers. There are 13 Designated secondary Shipper Bodies – Dairy Industry Shippers Association, Australian Dried Fruit Shippers Association, Wool Industry Shippers Group, Meat Industry Shippers Association, South Australian Shipping Users Group, Western Australian Shippers Council Inc, Australian Onion Industry Association, Australian International Movers Association, Australian Malt Exporters Committee (Shipping), Australian Horticultural Exporters Committee, Australian Prawn Promotion Association, Australian Federation of International Forwarders and Federated Chamber of Automotive Industries (SASUG, AFIF and FCAI have been designated in respect of both outwards and inwards shipping – the others for outwards shipping only). Other shipper bodies, such as the Australian Cotton Shippers Association, have not been designated, but conduct negotiations using powers delegated by APSA to certain of its members.

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

Exercise of countervailing power by shipper bodies

Part X encourages commercial negotiations to resolve disputes with the backing of an effective legal regime. Part X is probably unique[7] among liner regimes in that it places certain obligations on conference members towards shipper bodies that have been designated by the Minister to exercise countervailing powers on behalf of shippers.

These powers (under s10.41) are exercised by peak shipper bodies on behalf of exporters or importers generally, and secondary shipper bodies on behalf of shippers of particular commodity groups or geographic areas. Shippers need not be members of the designated shipper bodies to benefit from their activities on behalf of shippers. For example, all exporters using liner shipping benefit from the work of the Australian Peak Shippers Association (APSA) in negotiating terminal handling charges, bunker surcharges etc.

Part X also provides remedies for shippers if conferences do not operate in accordance with the objectives and provisions of the legislation. Shippers may complain to the Australian Competition and Consumer Commission (ACCC) or to the Minister, who may refer the matter to the ACCC. Depending on the outcome of an ACCC investigation into a complaint, the Minister may deregister a conference agreement, but only after consultations with the parties to the agreement directed to seeking undertakings that would make deregistration unnecessary. Deregistration effectively removes the approval for the shipping companies concerned to operate as a conference.

In practice, the possibility of deregistration of a conference agreement has generally been found effective as a means of encouraging commercial resolution of shippers' complaints. The ACCC has only had to undertake an investigation and report to the Minister for Transport and Regional Services on a few occasions. One has recently been completed by the ACCC after importer complaints about a conference agreement, the Asia-Australia Discussion Agreement, in the N&E Asia trades. Deregistration by the Minister has not yet been found necessary, and in only one case has the threat of deregistration been necessary to achieve a settlement.

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 that are best suited to different business situations. The "*one shoe fits all*" approach to regulation is not necessarily the best. The Australian Communications Authority in Australia, Ofgas, Oftel and Ofwat in the UK, and the Federal Maritime Commission in the USA are examples of specialist arrangements for industry regulation.

Part X is a specialist regime for an international service industry with unique characteristics. The industry most closely analogous to international liner cargo shipping is probably international civil aviation, but even here there is a fundamental difference. Whereas capacity and entry of participants in international aviation is heavily regulated by governments under the aviation bilateral negotiation regime, in international liner

[7] The EU block exemption for conferences is subject to a condition that: "*There shall be consultations for the purpose of seeking solutions on general issues of principle between transport users on the one hand and conferences on the other concerning the rates, conditions and quality of scheduled maritime transport services.*", Official journal of the European Community No L378/7. However, Part X goes beyond this in setting up a system of designated shipper bodies that have rights to negotiate particular matters in detail.

shipping there is, by and large, freedom to vary capacity or to enter and exit various liner trades as lines see fit.

Predictability of outcomes

According to the Council of Australian Governments (COAG), predictability of outcomes is a principle of good regulation[8]. Part X provides conditional, but assured exemptions. Both the liner shipping industry and shippers consider that predictability of outcome and legal certainty in the Part X exemptions from general competition law are of major importance to the continued provision of reliable shipping services of adequate frequency.

Flexibility and compatibility

COAG states[9] that "*Regulatory measures and instruments should be the minimum required to achieve the pre-determined and desirable outcomes.*" Part X provides a legislative framework within which shipping conferences and their exporting customers can resolve issues through commercial negotiations, with only minimal government involvement. Australia's major trading partners (USA, European Union, Japan, Korea and New Zealand) at present have arrangements broadly similar to Part X.

Flexibility of standards and regulations is another COAG principle of good regulation[10]. Part X provides a flexible means of dealing with changes in the way the shipping industry operates, through the ability to have new agreements or variations in existing agreements expeditiously registered when services need to be changed to meet changing trade flows, and through the ability to deal with new forms of agreements.

Part X is capable of dealing with a wide range of liner arrangements, from highly integrated conferences to slot exchange agreements. In view of shippers' concerns regarding discussion agreements, the definition of a "conference" in Part X is perhaps too accommodating, and, as discussed in section 8, may need to be revised.

International compatibility

COAG states: "*Wherever possible, regulatory measures or standards should be compatible with relevant international or internationally accepted standards or practices in order to minimise the impediments to trade.*"[11] Part X is compatible with the regimes of our major trading partners. Liner shipping conferences have to conduct their business in accordance with the rules adopted by the many countries to which they provide services. It is clearly to the benefit of all parties to contracts for the carriage of goods by sea, to operate under similar competition rules.

Regular review

Another COAG principle of good regulation is regular review. Australia's specialist liner regime has been periodically reviewed (Department of Transport 1977, Rowland 1986, Brazil 1993, Productivity Commission 1999). After each review a specialist liner regime has been retained with support of Australian exporters.

8 Council of Australian Governments (COAG), Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies, as amended June 2004, p5.
9 COAG, *ibid*, p5
10 COAG, *ibid*, p6
11 COAG, *ibid*, p5

2: REGULATION OF LINER CARGO SHIPPING IN AUSTRALIA

Australia's regime[12] governing liner shipping conferences had its origins in the early part of last 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."[13]

This was followed by the *Australian Industries Preservation Act 1930 (AIP Act)*, 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 was 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 and provide services of adequate frequency, capacity, port coverage and reliability.

Special provisions for liner cargo shipping were inserted as Part XA in the *Trade Practices Act 1965* by the *Trade Practices Act 1966*. These replaced the AIP Act for liner shipping, exempted conferences from the general provisions of the 1965 TPA, provided for undertakings from shipowners to negotiate with a designated shipper body, and provided for disapproval of a conference agreement if there was not due regard for the need for services to be efficient, economical and adequate.

Part XA was reproduced as Part XII of the *Restrictive Trade Practices Act 1971*. A 1972 amendment provided for a single shipper body to be designated by the Minister to negotiate with shipowners in all outwards trades. The Australian Shippers Council (ASC) was designated.

Part XII was re-enacted as Part X of the *Trade Practices Act 1974*. Part X was reviewed in 1984 after representations by the ASC to the Minister. The subsequent report led to the *Trade Practices (International Liner Cargo Shipping) Amendment Act 1989*, which became known as Part X of the TPA, and provided Australia's liner regime until the 2000 amendments. Unlike the previous legislation, Part X did not provide a complete exemption from Part IV of the TPA, but only from s45 and most of s47. There is no exemption in relation to section 46 of the TPA, covering misuse of market power.

1999 Productivity Commission review and subsequent 2000 Part X amendments
Part X was last reviewed in 1999 by the Productivity Commission, which recommended its retention and enhancement, largely on the basis that exporters using liner cargo shipping services generally supported that outcome.

[12] The following summary is based on Chapter 3 of *Liner Shipping: Cargoes and Conferences* (Report of the 1993 Brazil Review of Part X), which contains more detail.
[13] *Ibid*, p35

Other significant recommended changes included:

- Extend Part X to cover importers as far as possible.
- Amend Part X to clarify that conferences' rate-setting exemption extends to land-based charges that are part of a terminal-to-terminal shipping contract.
- Shipping conferences be permitted to collectively negotiate with stevedores on stevedoring charges.
- Amend s10.14 and s10.22 to remove conferences' exemption to set door-to-door rates and to permit conferences to set terminal-to-terminal rates.
- Section 10.05 be repealed to allow conferences to price discriminate between shippers, so as to allow efficient price discrimination.
- Amend Part X to provide for more effective and flexible enforcement of undertakings, possibly using s87C of the TPA as a model.

The Productivity Commission's key messages in the 1999 Inquiry Report[14] included:

- Part X has served the national interest.
- Repeal of Part X is unlikely to deliver greater net national benefits.
- Liner conferences can be an efficient way of meeting shippers' diverse demands.

The Government later announced its decision to retain Part X and implement the amendments recommended by the Commission, plus a number of additional changes to strengthen Part X so as to bring it more into line with national competition policy. Part X was amended accordingly, in 2000.

Decisions taken by the Minister or the ACCC, and which affect the interests of shippers and/or shipping lines, were made reviewable by the Australian Competition Tribunal.

Rate setting exemptions were limited to 'terminal to terminal' type shipping arrangements, but the definition of 'terminal' was widened to include terminals located away from ports. Exemptions for door-to-door rate setting were withdrawn.

The Minister and the ACCC were granted increased powers to deal with concerns about conduct which has resulted in, or is likely to result in, a substantial lessening of competition and which is likely not to result in a public benefit. Such a situation could arise with the operation of discussion agreements that cover parties to traditional shipping conference agreements as well as independent operators.

The increased powers may only be used in 'exceptional circumstances', such as where the operation of an agreement results in an unreasonable reduction in shipping services and/or an unreasonable increase in liner shipping freight rates, and where the public benefit from the conference agreement may be lost. In these circumstances the Minister has the power to cancel, in whole or in part, the registration of such an agreement.

As a guideline for exercising the additional powers, the Minister's second Reading Speech stated that exceptional circumstances are taken to apply where:

- an agreement has the effect of giving its parties a substantial degree of market power;
- the conduct of the parties to the agreement has led to, or is likely to lead to, an unreasonable increase in freight rates or an unreasonable reduction in services; and

[14] *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act* Report No.9, 15 September 1999, Productivity Commission, Melbourne

- the anti-competitive detriment of the agreement outweighs the benefit to shippers flowing from the agreement.
- Exceptional circumstances will also be taken to apply where the agreement in question is substantially similar to one that has previously been deregistered pursuant to section 10.44 of Part X.

These new provisions were used when in 2003-04 the ACCC investigated the Asia-Australia Discussion Agreement in the North and East Asia southbound trades. The ACCC reported to the Minister for Transport and Regional Services, the Hon John Anderson MP, in July 2004 that it was unable to find a case establishing the exceptional circumstances that would warrant the Minister giving a direction to deregister the agreement.

3: OBJECTS OF PART X

Part X is intended to benefit Australian shippers by ensuring access by shippers in all States and Territories to quality liner shipping services at freight rates that are internationally competitive. It is designed to be a low cost, limited intervention regime, which permits continued conference operations while enhancing the competitive environment for liner shipping services through the provision of adequate and appropriate safeguards against abuse of conference power.

The objects of Part X are set out in the Act as follows:

10.01 Objects of Part

(1) The principal objects of this Part are:

(a) to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(b) to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories; and

(c) to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade; and

(d) as far as practicable, to extend to Australian importers in each State and Territory the protection given by this Part to Australian exporters.

(2) It is the intention of the Parliament that the principal objects of this Part should be achieved:

(a) by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power, particularly by:

(i) enacting additional restrictive trade practice provisions applying to ocean carriers;

(ii) requiring conference agreements to meet certain minimum standards;

(iii) making conference agreements generally publicly available;

(iv) permitting only partial and conditional exemption from restrictive trade practice prohibitions; and

(v) requiring conferences to take part in negotiations with representative shipper bodies;

(b) through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters; and

(c) by the exercise of jurisdiction, consistent with international law:

(i) over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services; and

(ii) to enable remedies for contravention of the provisions of this Part to be enforced within Australia.

Given that Part X is intended to benefit Australian shippers, and the alignment between the national interest and the interests of Australian shippers, the views of those shippers who actually use liner cargo shipping services provided under Part X as to whether Part X should be retained, or not, must be given careful consideration.

Many exporters and importers appear (on the basis of their apparent unwillingness to financially support various shipper bodies) not to place great priority on their shipping arrangements as a part of their overall operations. This may or may not be a reflection of a generally satisfactory state of shipping services and costs in the Australian liner trades under the Part X regime. Nevertheless, the Department would encourage the Productivity Commission to actively seek out the views of shippers who actually use liner cargo shipping services, and to encourage such shippers to make submissions to the review at the supplementary submission stage if they have not already done so.

4: EXTENT TO WHICH PART X SATISFIES ITS OBJECTIVES

The competitiveness of Australian exports on international markets depends to a significant extent on the price and reliability of shipping services to deliver goods at overseas destinations in accordance with predictable timetables and in good condition. This is especially true for refrigerated exports[15].

Regarding imports, Part X has a more restricted role and more limited objectives, in line with the traditional approach (USA excepted) that the country of export has the primary interest in regulating liner shipping. While inwards conference agreements must, since the 2000 amendments, now be registered, and the designated peak import shipper body has the right to negotiate minimum levels of service to be provided under the agreement, shipper bodies can only call for negotiations in respect of arrangements contracted in Australia, or to which Australian law is to apply, and in respect of land-side activities in Australia. In practice, most inwards shipping arrangements are contracted in the country of export. An assessment of the 2000 amendments is further below in this section.

Quality of service

Australia's liner exports contain a substantial proportion of perishable refrigerated ("reefer") and time sensitive cargoes which need to be delivered according to schedule to meet the health or 'Just in Time' requirements of our overseas customers. If exporters cannot meet these requirements, there is a risk of losing markets to overseas competitors.

[15] "Australia's ability to transport its product quickly, efficiently, in perfect condition and at a competitive cost, is a crucial component of its comparative advantage in the global marketplace.", Steve Martin, Australian Meat Industry Council, *Shipping Australia*, April/June 2004, p23.

Quality of service (especially frequency, reliability, range of ports served, standard of cargo care and access to specialised equipment, especially reefer containers) is particularly important for Australian exporters. While shippers overseas who are served by the east-west mainline trades may dispute the link between exemptions for conferences and quality of liner services[16], Australian shippers may have different views.

The Australian liner trades are north-south routes that are commonly[17], though not universally, characterised as "long and thin". The Australian Peak Shippers Association, in its submission[18] to the 1999 review, stated that removal of Part X exemptions would "destabilise current shipping services which are vital to the continuance and furtherance of Australia's export drive." The views of Australian shippers in this regard must again be carefully considered.

By and large, there appear to have been few significant issues with overall quality of service provided under the Part X regime, but this is an aspect on which the views of shippers need to be sought. The Department is aware of space shortage having been a problem in recent times in the inwards trade from North and East Asia[19] and of reported instances[20] in the inwards trade from Europe, often involving delays at transhipment ports. A rapid rise in imports with the rising Australian dollar appears to have been a major cause. Additional capacity[21] coming into the North and East Asia trades will ease space problems there.

Australian shippers have traditionally favoured direct services over transhipment or relay services, especially for export reefer cargoes[22]. By providing shipper bodies with the right to negotiate minimum levels of service between the stages of provisional and final registration of a conference agreement, and by providing them with the right to require conferences to negotiate regarding negotiable shipping arrangements, Part X plays a role in ensuring that Australian shippers get the type of services they require.

Part X, by facilitating the formation of designated secondary shipper bodies on a regional basis, also plays a role in ensuring that shippers using ports other than Melbourne and Sydney also have access to liner cargo shipping services. At the 1999 review, the Productivity Commission noted [23]that "*Shippers and State Governments have argued that Part X has been important in achieving the current regional spread of international liner shipping services.*" The views of shippers using ports other than Sydney and Melbourne need to be sought as to whether this situation still obtains.

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[16] *Review 4056/86 – discussion paper*, European Commission Competition Directorate 2004, p7 states: "Shippers contested that there is causality between conference price fixing and reliable, adequate and efficient services."

[17] See for example, ACCC 2003, *Container Stevedoring, Report No.8*, p4. The EC, however, has grouped the Australian trades with the east-west mainline trades, referring to them as "thick", (*Review 4056/86 – discussion paper*, p41). There would seem to be an order of magnitude difference between the mainline trades and the Australian liner trades, however.

[18] *Submission by the Australian Peak Shippers Association to the Productivity Commission*, Melbourne, May 1999., p3.

[19] A December 2003 submission to the ACCC investigation by the industry association Gift & Homewares Australia reported that 73% of respondents to its Shipping Cost Survey had experienced difficulty in securing shipping space.

[20] *American Shipper*, July 2004, p 71.

[21] Southbound capacity will increase by about 20%. *Lloyd's List DCN*, 6 May 2004, p3.

[22] Shippers tend to prefer direct services, other things being equal, because of the extra opportunities for cargo loss, damage or delay when cargo is subject to additional handling operations. Refrigerated cargo runs the risk of failure to reconnect reefer boxes to a power supply.

[23] Productivity Commission 1999, *op cit* p92.

Profitability, Investment and Quality of service

The provision of frequent and reliable liner services and the efficient carriage of reefer cargo require considerable investments in equipment by liner operators. The willingness of liner operators to make the investment to sustain quality services will depend, in the longer term, on the ability to earn an adequate level of profit. However, a major consideration for the Commission is whether the special treatment of liner shipping under competition regimes around the world has allowed liner operators to earn excessive profits, and whether this has happened in the Australian liner trades.

Various reports published in shipping-related journals (eg. *American Shipper*, a periodical directed to cargo interests) and information from industry sources, continue to indicate that the overall financial return liner operators have received for their high capital commitment and business risk, in recent times has generally not been high compared to other industries with similar risks. *American Shipper* regards the usual industry profit rate to be 4% to 6% of revenues[24]. The information in the following tables 4.1 and 4.2 is from *American Shipper*[25].

Table 4.1	*1994*	*1995*	*1996*	*1997*	*1998*
TEUs carried (million)	na	na	40	43	na
Average Revenue/TEU (US$/TEU)	na	na	1390	1270	na
Average Operating margin (US$/TEU)	na	*88*	*99*	*74*	na
Average Operating margin (% of revenue)	5.9%[1]	5.9%[1]	7.1%[2]	5.8%[2]	na
Average return on equity	6.3%[3]	5.7%[3]	na	na	na

1. Average for 10 major carriers. 2. Average for 9 major carriers 3. Average for 13 major carriers

Table 4.2	*1999*	*2000*	*2001*	*2002*	*2003*
TEUs carried (million)	55	57	58	61	66
Average Revenue/TEU (US$/TEU)	1300	1330	1260	1160	1300
Estimated container revenue (US$ million)	71,500	75,800	73,100	72,800	85,800
Estimated container Operating Income (US$ million)		5,300	3,300	2,500	6,000
Average Operating margin (US$/TEU)	71	93	57	41	91
Average Operating margin (% of revenue)	5.5%	7.0%	4.5%	3.5%	7.0%
Average return on equity*	5%	13%	3%	(8%)	na

*Calculated using a sample of 6 major liner carriers (CMA CGM, CP Ships, OO(I)L/OOCL, Evergreen Marine Corp., P&O Nedlloyd and NOL/APL).

The average return on equity in table 4.2 above for the (admittedly small) sample of 6 major carriers was around 3% over 1999-2002. However, 2003 was reportedly an "exceptional year"[26]. The figures for average return on equity in table 4.1 suggest that carriers were somewhat more profitable in the mid-1990s. Nevertheless, considered over a number of years, it seems unlikely that ocean carriers have been able to extract excessive profits from liner shipping operations despite being allowed to collaborate in conferences by governments around the world.

[24] *American Shipper*, July 2004, p64.
[25] *American Shipper*, Who's making money?, July 1997, p2 *et* seq, July 1998, p54 *et* seq, July 2003, p8 *et seq* and July 2004, p62 *et seq.*
[26] "Cargo boom, higher rates, administration costs cuts trigger record profits for carriers.": *American Shipper*, July 2004, p63.

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, and the tendency of existing ship operators to order new ships when the freight rate cycle is in their favour. Growth in the containership fleets of Newly Industrialising Countries has been a feature of the past several decades. However, it is supposed that the ongoing propensity of shipping lines to continue with investment in container operations, despite extremely variable rates of return that appear only periodically to approach rational "hurdle" rates of return, must be a long-term survival strategy based on achieving economies of scale through larger and larger cellular containerships.

The extent of projected investment in containerships from now until 2007, around 3.5 million teu or over 50% of world current containership capacity[27], suggests that capacity should be more than adequate to meet the needs of world trade[28]. Indeed, this prospective capacity overhang may presage a turn in the freight rate cycle in favour of shippers in the medium term.

Freight rates

Data on liner freight costs are difficult to find on a basis that provides an overall picture of liner service costs to shippers. There are a multiplicity of rates for different commodities, with different rates for cargoes involving special equipment (such as refrigerated containers, atmosphere-controlled containers, fan-tainers etc), different bases of carriage (port-to-port or terminal-to-terminal, or combinations of these, or door-to-door, and whether centralisation arrangements apply), many different origin and destination combinations, including inland destinations, different rates negotiated with larger shippers that may be substantially less than the tariff rates that small shippers may pay, etcetera.

In any event, the level of freight rates may not be the prime consideration in many cases[29], although unforseen or rapid increases in rates are often a problem for shippers.

Liner freight rates now (with the increased role of discussion agreements) display substantial volatility between different stages of the freight rate cycle. When there are shortages of cargo for the available space, rates may fall fairly rapidly to unsustainable levels as carriers "chase" cargo. Conversely, when space is tight rates can rise rapidly as "discount" rates are withdrawn and market rates rise towards the tariff rates, with lines then seeking to increase those tariff rates as a signal that market rates should rise further. However, in the absence of Part X it is likely that freight rates would be even more volatile, as service levels would likely be more variable, and this variability would be compounded with variability of cargo flows due to currency movements, seasonal factors and global market factors impacting on relative international competitiveness to intensify the operation of the freight rate cycle. Shippers' preference appears to be for more stable freight rates.

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[27] Five years ago the capacity of containerships on order was about a fifth of that currently on order, and represented about one-sixth of then current capacity. *Lloyd's List DCN Online*, 30 June 2004.

[28] World container traffic has increased from an estimated 57 million teus carried in 2000 to 66 million teus carried in 2003, an increase of some 16%. *American Shipper* July 2004, p64.

[29] *American Shipper*, December 1997, p26 *et seq* reported results of a survey of 80 medium and large shippers in Europe and North America ranking the importance of factors in transport mode selection. Reliability was ranked as critical by 62% of respondents (and important by 38%), whereas only 35% rated cost as critical. (62% rated it as important). Transit time was rated as critical by 29% of respondents, and information capability by 24% (and important by 64% and 61% respectively).

Surcharges typically form a substantial proportion of shippers' costs, and further complicate the freight rate picture. These surcharges have often included bunker adjustment factors (BAFs), Currency Adjustment Factors (CAFs), either separately or combined as a CABAF, imposed either on an ongoing or on an emergency basis, documentation fees, as well as origin and destination terminal handling charges (OTHCs and DTHCs), port pricing additionals (PPAs) etcetera. Shippers have long opposed the use of surcharges. Part X could be used as the vehicle for eliminating the use of surcharges in the Australian trades, and this issue is discussed in section 8.

The Part X process does not require freight rates charged to be notified to the Department, and information regarding liner freight rates is not available to it on any systematic basis. Although most conferences have a tariff showing freight rates for different commodities, most cargo probably travels at rates significantly below the tariff rates. In some trades, even small or casual shippers may be offered less than the tariff rates when market conditions do not favour the carriers. Accordingly, it may be necessary for the Productivity Commission to collect freight rate data directly from shippers in order to arrive at a view of how actual paid liner freight rates have moved in recent years under Part X.

The Commission will also need to judge whether freight rates overall would have been more favourable to Australian shippers under an alternative form of regulation, and whether there would have been offsetting disadvantages in terms of levels or quality of service under another regime.

Freight rates appear to have been firming in many trades worldwide over the last several years after a a period of "softness". The figures for average revenue per teu in tables 1 and 2 above indicate that rates in 2003 were about 6% less than those in 1996.

As an example, P&O Nedlloyd (a major containership operator active in the Australian trades) reported average freight rates for its 2003 financial year were 12% above those for the previous year (in line with the average in table 2), and 4th quarter 2003 average freight rates were 16% above those for the 4th quarter 2002. With such freight rate increases, plus major cost savings, P&O Nedlloyd reported an operating profit of US$96 million in 2003, whereas in 2002 it reported an operating loss of $206 million.

Freight rates in the Australian liner trades also appear to have been fairly "soft" overall until the last several years, when there appears to have been a concerted effort at "rate restoration" in most trades. These rate restoration attempts seem to have been most marked in the inwards trades, where high levels of imports have meant high levels of space utilisation on voyages into Australia.

Despite the low Australian dollar until comparatively recently, levels of liner exports in most trades appear not to have been such as to generate the same degree of pressure for rate restorations as that applying to imports, and the rises in freight rates achieved have probably been from a relatively lower base. Drought has also been a factor.

Nevertheless, the frequency and proposed size of the freight rate restorations attempted in the past several years have caused concern to shippers, on both the export and the import side. These rises have been one of the major factors that led to shippers calling on the Minister for the scheduled 2005 review of Part X to be brought forward to 2004.

Assessment of the 2000 amendments to Part X

Following the 1999 review of Part X, the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000* was passed by the Parliament.

Part X coverage was extended to require the registration of inwards conference agreements and to encompass importers within the countervailing power provisions of the Act (Part X had previously provided exemptions to inwards agreements, but without imposing any obligations towards inwards shippers). Registration of inwards agreements means that such agreements are subject to possible investigation and report by the ACCC, either on its own initiative, on referral by our Minister or, as in the case of the AADA investigation, after complaints from importers. It also follows that inwards agreements now are also subject to removal of exemptions through deregistration upon a recommendation of the ACCC to the Minister following such an investigation.

The Importers Association of Australia (IAA) applied to be designated as the Designated Inwards Peak Shipper Body, and was declared by the Minister on 3 December 2000. It does not appear that the IAA has availed itself of its powers to negotiate minimum levels of service proposed to be provided under the various inwards conference agreements that have been registered. Subsequently three bodies were declared as Designated Inwards Secondary Shipper Bodies: the Australian Federation of International Forwarders, the Federal Chamber of Automotive Industries, and the South Australian Shipping User Group. None of the designated inwards shipper bodies has requested the attendance of an authorised officer at negotiations held under Part X, so the Department has no knowledge of the extent to which the negotiating powers under Part X have been exercised by importers.

The obligations placed on parties to inwards agreements in relation to shippers are more limited than those in outwards shipping, being restricted to negotiable shipping arrangements in relation to "eligible Australian contracts". Such contacts are those entered into in Australia or those where Australian law is to determine questions arising under the contract. In practice, most inwards cargo would not come under such contracts, as the arrangements are most often made overseas with local law to apply.

Another source of difference between the inwards and outwards liner markets is the relative volume of cargo moving inwards and outwards, with the smaller volume leg often having lower freight rates (with an element of "backhaul" in the equation). Recently, with the rise of the Australian dollar and an import "boom", the drought, the revival of Asian economies and the takeoff in trade with China, cargo volumes have been strongest inwards, and inwards rates have risen more strongly than export rates.

The 2000 amendments also expanded the circumstances in which the Minister may exercise powers in relation to registered conference agreements to include an "exceptional circumstances" ground for deregistration. This provision sets a net public detriment test for deregistering a conference agreement that the ACCC has used in its recent investigation of the Asia-Australia Discussion Agreement (AADA). Another new ground relates to unreasonable exclusion from a conference agreement.

It was hoped that "exceptional circumstances" ground would prove, in cases where it applied, to be more practicable than the previously used test (that the agreement has been applied without due regard to the need for liner services to be efficient and economical, and provided at a level that meets the needs of shippers). If in future this proves to be the

case, then the amendment providing for more effective enforcement of undertakings could receive its first test.

The third significant amendment provided for the ACCC to initiate an investigation on its own initiative without the need for a person affected by the operation of a conference agreement having applied to the Commission for an investigation. Although this provision also relates to the "exceptional circumstances" ground for deregistration referred to in the previous paragraph, it was not invoked in the AADA investigation, as there had been complaints from a number of importers regarding the rapidity of freight rate rises during 2003. However, this provision could be a powerful weapon for dealing with conferences in the future.

The Department has received no information or complaints from industry regarding the effectiveness or otherwise of the other amendments made in 2000.

Shippers' call to bring forward the scheduled 2005 review of Part X

On 4 June 2003, the Australian Peak Shippers Association (APSA) wrote to the Minister for Transport and Regional Services, the Hon John Anderson MP, requesting the scheduled 2005 review of Part X be brought forward. That letter, which sets out APSA's issues of concern, and the subsequent reply, is at Appendix 2.

As a result of this correspondence, consultations were held in Melbourne on 19 November 2003 between shippers and officials from the Departments of Transport and Regional Services and the Treasury and from the Australian Competition and Consumer Commission (ACCC). Consultations were next held with Shipping Australia Ltd, the ocean carriers' peak body. Shipping Australia Ltd did not believe that the scheduled 2005 review of Part X needed to be brought forward.

At those consultations shippers, on both the export and import sides, expressed strong concerns, particularly concerning the adverse impacts of the operation of discussion agreements on liner shipping markets. The need to strengthen shippers' negotiating powers under Part X in the current liner market environment was also a major concern. Shippers also vented longstanding opposition to surcharges that were exacerbated by the operation of discussion agreements, and horticultural exporters voiced concerns about the imposition of freight rates denominated in US dollars.

5: LINER SHIPPING REGIMES OF AUSTRALIA'S MAJOR TRADING PARTNERS

Conditional exemptions from competition rules similar broadly to Part X are provided by a number of major trading economies including the USA, European Union, Japan, Korea, Canada and New Zealand. A number of other economies do not regulate the commercial operations of liner shipping conferences. Some of the major regimes are outlined below, noting recent developments.

While there has been extensive debate in the OECD, the European Union (EU) 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 collaboration plays an important role in providing efficient and reliable scheduled services for the carriage of international trade, particularly valued-added goods. 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 arrangements can change their shape and operations and the legal jurisdictions under which they operate.

The most significant recent changes to the specialist liner regimes have been to the US regime (Canada has followed suit), and have been in the general direction of increased flexibility (more details are given below). The Department has noted that there also have been renewed calls for removal or reduction of liner exemptions from, for example, the European Shippers Council, the EC Competition Directorate, and the OECD.

The EU is reviewing its block exemption for liner conferences and its regulation for consortia, although decisions have not yet been taken about the form of changes that may be made. The OECD[30] has noted that those "*countries that have recently reviewed their policies have generally chosen to retain some form of anti-trust immunity for rate-fixing and/or have extended this immunity for rate discussions and capacity agreements among competitors in return for the implementation of more shipper friendly measures.*"

While Australia should monitor developments in overseas regimes, it needs to reach an independent view of what form of regulation is in its own national interest, bearing in mind the differences in the geographical situation and liner market circumstances between Australia and the other economies concerned. Australia needs a regime that best suits its circumstances.

Australia's Part X is a flexible regime, and unlike the EU block exemption, exemptions are conditional and may be withdrawn for breach of those conditions. Part X provides countervailing power to shippers acting through designated shipper bodies, and it has been supported by shippers generally at previous reviews.

It would be risky for Australia to be in advance of its major trading partners in the application of mainstream competition regulation to the liner industry. If Australia were to abolish conference exemptions for international liner cargo shipping, then conferences are likely to continue to operate from overseas jurisdictions.

Australian shippers would lose their countervailing power provided by Part X, and could suffer in terms of both service quality and freight costs as our shippers lost the ability to call the conferences to account and to negotiate. Part IV of the TPA could face some interesting tests if the ACCC tried to retrieve the situation by mounting challenges to the conferences in foreign jurisdictions.

USA[31]

In the USA, the liner regime is provided by the *Merchant Shipping Act of 1984*, as amended by the *Ocean Shipping Reform Act 1998* (OSRA). The OSRA was approved by Congress after more than three years of debate, and came into effect on 1 May 1999. 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 US exports. The US legislation continues to regulate both outward and inward conferences.

The new Act retains existing anti-trust immunities applying to shipping conferences (including discussion agreements), and its key features are:

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[30] OECD 2002, *Competition Policy in Liner Shipping – Final Report* DSTI/DOT(2002)2, p74.

31 Australia's liner trade with North & Central America comprised about 10% by tonnage and 14% by value of our total liner trades in 2002-2003.

- The Federal Maritime Commission (FMC) continues to regulate liner shipping and to enforce carriers' published tariffs.
- Ocean carriers are able to negotiate service contracts, individually or as a conference or alliance, with shippers individually, as a group or as a shippers' association.
- Reduction in required notice from 10 business days to 5 calendar days before a carrier can deviate from conference tariffs or conference service contracts.
- Key provisions of service contracts (which must be filed with the FMC) can be kept confidential (rates, service commitments, intermodal origin/destination points, damages for non-performance). Commodity, volume, port ranges and contract duration of service contracts must be made public.
- Shippers are no longer able to demand that carriers match service contract terms given to other, similarly situated, shippers. Individual carriers have more freedom than conferences in refusing to grant service contracts.
- Tariffs no longer to be filed with the FMC, but must be publicly available via carrier's internet sites or private tariff services in FMC-approved formats.
- Unfair pricing practices by foreign carriers are prohibited.
- Groups of ocean carriers are able to negotiate jointly with inland carriers, subject to anti-trust laws.
- Conferences are prohibited from interfering with a member's negotiation of service contracts, and cannot require disclosure of confidential contract terms. Conferences may issue voluntary guidelines for members' negotiation of service contracts.

Canada has a liner regime similar to that of the USA.

European Union[32]

The EC at present retains 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 other features broadly parallelling those of Part X (eg. in relation to pooling, consultation with shippers, discrimination, and misuse of market power). The block exemption was granted so that carriers would not be forced into destructive competition. Discussion agreements are not eligible for the block exemption[33], but the EC has accepted that discussion agreements could be exempted in special circumstances.

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 covered conditions for automatic exemptions (or anti-trust immunities) for joint service agreements that exclude price fixing (known as "consortia"). It was revised in 2000 as Regulation 823/2000.

The 1995 EC regime for "consortia" restricts the availability of block exemptions. Consortia having a market share of less than 30% receive a blanket exemption. Consortia with market shares between this limit and 50% must be notified to the Commission, but

32 Australia's liner trade with Europe comprised about 16% by tonnage and 21% by value of our total liner trades in 2002-2003.

33 Under Regulation 4056, liner conferences must have "uniform or common freight rates".

will receive exemption unless the Commission decides within 6 months of notification to oppose such exemption. Regulation 870/95 was renewed in 2000 as Regulation 823/2000.

In March 2003 the EC commenced a review of regulation 4056/86, with submissions by interested parties by June 2003. Few new arguments were advanced regarding the case for the exemption. The EC Competition Commissioner in an interview appeared to rule out allowing discussion agreements to enjoy a block exemption similar to conferences[34].

Regarding the conference block exemption, the EC Competition Directorate has reached preliminary conclusion that "the conditions for an exemption under Article 81(3) of the EC Treaty would appear, in the current market circumstances, to be no longer fulfilled."[35] The Competition Directorate stressed, however, this was a preliminary conclusion, and the EC had not yet taken a formal position on the matter. It advised that a Commission White Paper, containing concrete proposals, is due to be adopted in the autumn. [36]

The EC has also recently commenced a review of its consortium regulation 823/2000. A consultation document issued by the Competition Directorate concludes "that most likely the Commission will renew Regulation 823/2000, possibly subject to some technical modifications…."

Japan[37]: Marine Transportation Law

Japanese legislation under the Maintenance of Fair Trade Law No. 54 of 1947 governs the application of competition policy. Subsequently, the Marine Transportation Law provides an exemption for conferences under certain conditions. The Ministry of Land Infrastructure and Transport noted in July 1999[38] that it is "*considered that conferences setting common rates, charges, routes, ship deployment and other transport conditions are indispensable for the stable supply of international service. The industry's structural tendency toward excessive supply would cause destructive competition, unless shipping agreements are granted immunity from the Anti-Monopoly Law*."

Conference agreements have to be filed in advance with the Ministry of Transport, which must notify the Fair Trade Commission of the filed agreements. The Ministry may issue orders to revise or abolish individual agreements that unduly impair users' interest, that involve undue discrimination, that unduly restrict participation or withdrawal, or that do not meet minimum criteria dependent on the purpose of the agreement.

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

[34] Davias, Philip, , EC: Carriers bear burden of proof, *American Shipper*, August 2003, p29
[35] European Commission Competition Directorate *pers. comm.*, 19 July 2004.
[36] *Ibid*.
[37] Australia's liner trade with Japan & North Asia comprised about 17% by tonnage and 20% by value of our total liner trades in 2002-2003.
[38] Ministry of Land Infrastructure and Transport, *The Amendment of the Marine Transportation Law by the Law for the Adjustment of the Immunity System for the Anti-Monopoly Law*, July 1999.

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 no longer required.

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.)

Parallel to 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.

OECD

The OECD in 2002, after extensive discussion, published its *Competition Policy in Liner Shipping – Final Report*[39]. The report made the following recommendation:

> *"Based on the analysis in this report, it is recommended that Member countries, when reviewing the application of competition policy in the liner shipping sector, should seriously consider removing anti-trust exemptions for price fixing and rate discussions. Exemptions for other operational arrangements may be retained so long as these do not result in excessive market power."*

The OECD report also enunciated three principles:

> *"Principle 1: Freedom to negotiate – Shippers and carriers should always have the option of freely negotiating rates, surcharges and other terms of carriage on an individual and confidential basis.*
>
> *Principle 2: Freedom to protect Contracts – Carriers and shippers should always be able to contractually protect key terms of negotiated service contracts,*

[39] OECD DSTI/DOT(2002)2, 16 April 2002.

> *including information regarding rates, and this confidentiality should be given maximum protection.*
>
> *Principle 3: Freedom to co-ordinate operations – Carriers should be able to pursue operational and/or capacity agreements with other carriers as long as these do not confer undue market power to the parties involved."*

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

Regarding the OECD recommendation, it is the view of the Department that Australia should not be in advance of its major trading partners in removing conference exemptions for price fixing, as there would be a danger that Australian shippers, particularly exporters, would lose the countervailing power they exercise under Part X, especially if outwards conferences now managed in Australia were to be run entirely from overseas.

Concerning OECD Principle 1, the Commission should seriously consider an amendment to Part X that mandated a right of individual conference members to do deals with individual shippers or shipper bodies. It is understood that this does occur within conferences now under Part X, especially when there is excess capacity, but mandating this may be of some benefit to Australian shippers and shipper bodies.

Part X does not require filing of freight rates or of loyalty agreements or other forms of contract between shippers and carriers, these (other than publicly available tariff freight rates) being commercial-in-confidence to the parties concerned, so Part X would appear to comply with Principle 2. Part X allows the registration of operational agreements (including slot charter, slot exchange, space sharing and joint services agreements) so it would appear to comply with OECD Principle 3.

COMPATIBILITY OF REGIMES

Compatibility of regimes for international liner cargo shipping is an important consideration if conflicts of jurisdiction are to be avoided[40]. In a 1999 commentary on proposed action by China to impose unilateral controls on liner shipping, US maritime administrator Clyde Hart Jr. said:

> *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.*

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

[40] The EC in its *Review 4056.86 – discussion paper*, p37 takes the view that a conflict of laws does not arise unless one regime requires what another regime prohibits. However, if one regime prohibits what another regime allows, then it would seem there is potential for jurisdictional conflict if the prohibiting regime takes action against conferences for conduct engaged in within the other jurisdiction that allows that conduct.

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 that 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, also 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 or bloc 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.

Compatibility of regimes - OECD Maritime Transport Committee

The OECD's Common Principles of Shipping Policy for Member Countries[41], 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 international liner conference agreements some form of predictable, but conditional, exemption from national competition legislation. This allows the conferences to exist and operate in international trade subject to meeting various conditions (and, under Part X, obligations towards exporters and importers).

Recognising the fundamental importance of compatibility of liner regimes to international trade, the OECD through its Maritime Transport Committee (MTC) 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.

[41] Organisation for Economic Cooperation and Development 1987, *Recommendation of the Council concerning Common Principles of Shipping Policy for Member Countries*, Maritime Transport Committee.

- 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 compatibility and 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.

Again, as an OECD member, Australia should keep these principles in mind in deciding which type of liner shipping regime best serves Australia's interests.

6: OPTIONS FOR REGULATING LINER CARGO SHIPPING

There are many options possible for regulating of international liner shipping. The *status quo* is not considered to be desirable because of the issues discussed in section 8. Other options include:

1) Retain Part X with improvements to various provisions to solve particular problems;
2) Retain Part X, with reversal of burden of proof of public benefit after complaint;
3) Retain Part X, mandating the right of individual conference members to negotiate service contracts with shippers;
4) Retain Part X and exclude price fixing and rate discussions from the matters that registered conference agreements may deal with;
5) Retain Part X with improvements, but also transfer to the ACCC the Minister's powers to de-register a conference agreement;
6) Retain Part X with the scope of exemptions dependant on the collective market share of the parties to the agreement;

and three alternatives to Part X;

7) Repeal Part X and make international liner shipping and exporter groups subject to the **Authorisation** procedures of Part VII of the TPA;
8) Repeal Part X and make international liner shipping and exporter groups subject to the existing **Notification** procedures of Part VII of the TPA; or
9) Repeal Part X and replace with an **industry code**.

The options involving retaining Part X are discussed in sections 7 and 8.

ALTERNATIVES TO PART X

The alternatives to Part X, with their advantages and disadvantages, appear to be as follows:

Authorisation under Part VII of the TPA

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. Shippers 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 would replace commercial negotiations (as in Part X in which shippers are given countervailing powers to deal with conferences) with a Government-run process. The direct cost of applications for authorisation would be higher than the cost of registrations under Part X, in terms of both fees and the cost of preparation of cases supporting grants of 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 3.

Most of the conduct involved in typical conference arrangements (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.

If the ACCC would not authorise arrangements involving price fixing, then under this option only technical cooperation agreements such as non-price-fixing consortia agreements, slot exchange agreements and, perhaps, slot charter agreements would be authorised by the ACCC.

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. Authorisation may also reduce the ability of shipping lines to adjust existing services or to introduce new ones to meet changes in market conditions.

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 international liner cargo 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.

If Part X were repealed as a result of the review, there is no certainty that liner shipping companies would seek authorizations under Part VII. If the Commission were to conclude that the benefits of Part X do not outweigh the costs (the key condition for obtaining an authorization), then the lines would consider the question of whether ACCC was likely to come to a different conclusion and grant authorisation. As liner shipping companies operating under conference agreements in Australia also operate in the countries of our major trading partners, if it became illegal for such companies to collaborate in Australia, consideration needs to be given to whether the issues of freight rates and levels of service could not be dealt with overseas, and to whether the extended application of Part IV of the TPA (s. 5) could deal adequately with such a situation.

Block authorisation
Block authorisation was examined by the Commission as an option in 1999, and its report cited the EU's Regulation 4056/86 (a block exemption for conferences) as a potential model. However, the Commission did not favour this option, noting "broad ranging implications for many sectors of the economy"[42] from such an extension of the authorisation process.

Notification under Part VII of the TPA
This option would provide automatic exemption arrangements for shipping conferences and shipper 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. 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.

With one important exception, it is not entirely clear what advantages notification would have over the existing Part X registration process for conference agreements. Since the 2000 amendments, the ACCC can recommend to the Minister to cancel the registration of a registered conference agreement on public benefit grounds. This Part X mechanism provides the flexibility of allowing the Minister to seek undertakings from the parties to such an agreement that would make cancellation unnecessary, such undertakings being enforceable in the courts.

The important exception referred to above concerns the burden of proof. Under notification, it is the conference which would have to demonstrate a net benefit from the operation of the agreement. Under Part X at present the burden is on the ACCC to demonstrate that a ground for deregistration (listed in s10.45) exists.

[42] *Ibid* p143

Extending the current application of the notification procedures to liner shipping conferences might create pressures from other industries to be given similar treatment.

Industry Code

In the 1999 review, the Productivity Commission examined the option of an industry code of practice agreed between conference members and shipper bodies in place of Part X, such a code being subject to authorisation by the ACCC.

However, the Commission noted that the ACCC had never authorised any code resembling the Part X regime, and that legal advice suggested that there appeared to be little chances of authorisation for a code encompassing core conference practices[43].

An industry code covering conduct of shipper/conference negotiations could be a useful adjunct to Part X. Some years ago, after shippers had expressed dissatisfaction with the course of some negotiations held under Part X, the Department developed some informal guidelines (*Negotiations Under Part X: Voluntary Guidelines*), in an attempt to facilitate the conduct of such negotiations, which are to be found at Appendix 4. These guidelines were (informally) supported by the heads of the peak conference and exporter bodies, but it would appear that they have not been adopted to any extent. However, an ACCC-sanctioned code for negotiations under Part X might be a way to increase the effectiveness of shippers' negotiating powers under Part X.

Assessment of specific alternatives to Part X

In the report of the 1999 review, the Productivity Commission stated (p XXXIX):

> *Repeal of Part X and its replacement by the general provisions in Part VII of the TPA is unlikely to produce outcomes as good or better than Part X, or do so more efficiently. While the PC accepts that, in principle, Part X-type approach could be applied within the general provision of the TPA, this may require industry specific legislation (a notification procedure) or possibly general amendment of the TPA (block authorisation). However, inevitably uncertainty would remain as to whether these options would be implemented in the manner of the regulation which the PC assesses as appropriate, as embodied in Part X.*

The Department considers this assessment of the specific alternatives to Part X remains valid.

GENERAL IMPLICATIONS OF REPEALING PART X

The question of possible conflicts with other jurisdictions if Part X were to be repealed was considered in section 5 (after outlining the characteristics of the major overseas liner regimes). A number of other issues and possible effects should be taken into account in considering the future of liner shipping regulatory arrangements.

Extent of regulation

Subjecting the liner cargo 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

[43] Productivity Commission 1999, *op* cit, p138.

submissions to a government regulator (the ACCC), with the outcome determined by the government regulator. A similar situation would apply to shippers 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 cargo shipping industry and its customers could be justified on public interest grounds, is of course a major issue for the review.

Loss of predictability of outcome

Interests that 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 shippers. 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 on service levels, the nature and magnitude of which is almost impossible to predict. This 'risk' would be worth taking only if it were demonstrated that the current arrangement is too costly and inefficient in competition policy terms.

Possible reaction of shipping conferences

Some industry parties have indicated that if Part X were to be repealed, shipping conferences may handle their conference arrangements offshore. If this were to happen, shippers (particularly exporters) would lose the 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.

Possible effects on industry structure

Over much of the past 10 years or so, the option of increasing freight rates as a means of improving reported low rates of return in liner shipping was limited and spasmodic. In light of this situation liner shipping companies were pressured into finding ways to improve returns. Alliances and mergers have been ways of cutting costs for liner operators seeking economies of scale and rationalisation of services.

Many existing carriers are also seeking economies of scale by ordering ever-larger containerships. The current order book for containerships is reported to be at record levels, with *Lloyd's List DCN*[44] reporting an estimate of orders for over 133 ships of 7,500 teu or above.

However, it may well be that mergers and takeovers will yield the greatest cost reductions through rationalisation of management, administration, financing and agency costs, as well as economies of scale and scope. Cost reductions are a major consideration in an environment of low rates of return in the industry. The outcome could be a relative

[44] 4 March 2004, p12

handful of very large carriers. The major mergers and takeovers that have occurred in the liner shipping industry in recent years (chiefly in the 1990s) include:

- P&O merged its containership assets with those of Nedlloyd to form P&O Nedlloyd, which has recently come under the control of Nedlloyd;
- P&O Nedlloyd purchased Blue Star Line's liner services, and Tasman Express Line;
- Evergreen purchased Lloyd Triestino;
- CMA merged with CGM, and then purchased ANL's liner business;
- CP (Canadian Pacific) Ships purchased Canmar, Cast, ANZDL, Contship, Lykes Lines, Ivaran Lines and TMM;
- NYK Lines took over Nippon Liner System;
- Neptune Orient Line purchased American President Lines; and
- Maersk purchased Safmarine, and the liner assets of CSX to form Maersk Sealand.

Nevertheless, the industry currently remains one with a relatively low level of concentration of ownership, although collaboration between lines is increasingly widespread with the evolution of discussion agreements that most lines are willing to join.

It is a matter for consideration whether too stringent a competition policy approach by major trading nations to the liner industry could encourage another round of mergers, which would have greater anti-competitive effects than looser forms of alliance.

Australian flag shipping

Section 10.45(1)(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, to an extent that is reasonable, considering the national interest and the interests of Australian shippers, in the provision of outwards liner shipping services. This is essentially a fair trading clause and does not restrict competition. Although Australian flag involvement in international liner cargo shipping is at present minimal, if Part X were to be repealed, consideration should be given to whether this clause should be retained in another part of the Trade Practices Act.

Need for transitional arrangements if Part X were to be repealed

In order to avoid undue disruption to shipping arrangements, any decision to adopt an alternative approach to liner regulation should be accompanied by transitional arrangements. Such arrangements could include provisions that allowed all current exemptions under Part X to continue for a sufficient time to allow conferences adjust to new requirements, for example to apply for authorisation (it is not certain that they would chose to do so), and for the ACCC to make decisions on those applications.

GENERAL CONCLUSION REGARDING ALTERNATIVES TO PART X

In its report of the 1999 review, the Productivity Commission stated (pXVII):

> *Repeal of Part X in favour of a potentially more interventionist approach under the general (authorisation) provisions in Part VII of the TPA, is unlikely to deliver greater net national benefits. Scope for successful intervention appears limited and, moreover, the general provisions of the TPA are likely to involve greater administrative and compliance costs than Part X.*

The Department considers this assessment remains valid. 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 and importers. 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 adoption of an alternative model of liner regulation would lead to any increase in public benefits over and above those achieved with the present arrangements.

7: PREFERRED OPTION FOR REGULATION

The Department is not aware of any fundamental problems in the longstanding current arrangements applying to Australia's liner trades that would warrant repeal of Part X. However, the problems reported by shippers in dealing with discussion agreements suggest that changes are desirable to the scope of the Part X exemptions and/or to shippers' countervailing powers under Part X. Also, the outcome of the ACCC investigation into the AADA may suggest that the grounds for deregistration of conference agreements under Part X need to be re-examined, including in regard to the burden of proof. The views of the ACCC should be sought on this matter.

A regime that allows exemptions for conferences to operate may well be more important a factor in Australia receiving good quality liner cargo shipping services than it is for economies lying on the major east-west trade routes between North America, Europe and Asia. Australia's liner trades are commonly characterised as "long and thin". Other features are a substantial imbalance between import and export container flows[45], a large refrigerated component, a large proportion of 20 foot containers (rather than the 40 footers used extensively in mainline trades) due to the relatively high density of many of our containerised exports, and the relatively long distances separating Australia's main container ports leading to a geographically extended port call pattern for many services.

These characteristics of the Australian liner trades, taken together, would appear to militate against efficient and economical liner services by lines operating independently. Collaboration between lines allows an effective combination of high regular service frequency and/or the service of a wider range of ports[46] with the use of relatively large and economical[47] vessels.

Without the ability to collaborate in joint services, liner shipping companies may not find it possible or economic to offer the level of service Australian shippers require and, by and large, are accustomed to receiving. Service frequency and capacity offered, port ranges offered for loading and discharge of cargo, and the availability of special

[45] The Bureau of Transport and Regional Economics *Waterline 36* reports 1.8m teu of full containers inwards and 1.3m teu outwards, together with 0.2m teu of empty containers inwards [reefer containers are often returned empty to Australia] and 0.7m teu outwards, in 2003. The carriage of 3.1m full containers represents 4.7% of world container traffic of 66m teu in 2003.

[46] With space sharing between a number of lines, economic container exchanges can be generated at a wider range of ports than would otherwise be viable.

[47] Meyrick and Associates 1992, *The Economics of Liner Conferences*, p8, suggests that a 10% increase in vessel size reduces unit costs by 3% to 4%.

equipment (especially refrigerated containers) could all be affected by an application of mainstream competition policy to the liner industry[48].

Further, if Australia moved in advance of its major trading partners, it is likely that conferences would continue to be run from jurisdictions that still permitted their operation, and that Australian shippers would lose the countervailing power they currently enjoy under Part X.

On this basis, as discussed earlier, it may be risky for Australia to be in advance of its major trading partners in the application of mainstream competition regulation to the liner industry. Rather, it would be a better option for Australia to work within the OECD to achieve common objectives for appropriate international liner cargo shipping regulation.

Options (not mutually exclusive) involving retaining Part X are discussed below.

Retain Part X with improvements to address particular problems

The Department's preferred option is to retain part X with improvements to various provisions to address particular problems (**option 1** in section 6). However, the Department also believes that, in the interests of Australia's international trading performance, and given the alignment between the national interest and the interests of Australian shippers, the preferred option for regulating liner cargo shipping should be the one that is in the best interests of Australian shippers. So while there are important issues of international compatibility which must be considered, careful consideration should be given to shippers' views (particularly those of exporters) concerning the benefits and costs of the Part X regime.

Shippers at the Melbourne meeting of 19 November 2003, that was held to discuss the call by shippers to bring forward the 2005 review of Part X, generally wanted Part X retained. The views of Australian shippers, especially export shippers, on this issue should be sought out by the Commission, and need to be carefully considered[49].

However, a number of problems have been reported by shippers and/or shipper bodies in recent times that strongly suggest various improvements to the Part X arrangements are required, particularly in respect of discussion agreements and strengthening the rights of shippers (these are discussed in section 8 below).

Retain Part X, with reversal of burden of proof of public benefit after complaint

The ACCC said in its media statement[50] on the report on its investigation into the Asia-Australia Discussion Agreement, that demonstrating a public detriment constituted a "remarkably high threshold". O**ption 2** in section 6, would be to put on the conferences, in cases where the "exceptional circumstances" test of s10.45(3) applies, the burden of demonstrating a public benefit, after complaints by shippers.

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[48] COAG, *op cit*, p5, has as one of its principles of good regulation that Regulations should not restrict international trade, and states "*Regulations should not be applied in a way that creates unnecessary obstacles to international trade.*"

[49] The EC (*Review 5056/86 – discussion paper* 2004) has stated (p30): "Any impact assessment of a situation without a Block Exemption would therefore be largely hypothetical (like the assessment of the OECD report). But, most importantly, the transport users themselves have stressed they are willing 'to take the risk' of a competitive world."

[50] Australian Comptition and Consumer Commission, *News Release – ACCC questions benefit of shipping exemptions*, 19 July 2004.

This option, if adopted should operate only in the case of shipper complaints referred to the ACCC by the Minister. The outcome, in cases where the exceptional circumstances test applied, would be something like the notification process, but with the specialised structures of Part X countervailing powers retained for the benefit of Australian shippers. It is an option that may be effective in dealing with discussion agreements that give rise to substantial shipper dissatisfaction to the extent that the Minister feels that referral to the ACCC for investigation and report is justified. This option might be considered in conjunction with measures discussed in section 8 to enhance shippers' negotiating powers.

Retain Part X, mandating the right of individual conference members to negotiate service contracts with shippers

O**ption 3** in section 6, mandating in Part X the right of individual conference members to enter into service contracts with shippers[51] (a feature of the 1998 US amendments) is seemingly an attractive option to be considered for Part X. This was one of the changes to the US liner regime that were aimed "at promoting a more market-driven, efficient liner shipping industry" [52], and the US Federal Maritime Commission in 2001 reported[53] "…the apparent widespread general satisfaction with the current US regulatory framework for ocean shipping…".

However, Australian shippers are differently situated compared to US shippers, who are served primarily by the mainline east-west trades and are thus much more assured of adequate liner services no matter what the form of liner regulation is adopted. Also, this amendment to the US liner regime appears to have contributed to the reported replacement of conference agreements in various US trades by discussion agreements[54].

Discussion agreements are strongly opposed by Australian shippers. Therefore this option would need careful consideration.

Retain Part X but remove pricing exemptions

With respect to **option 4** in section 6, Australia should not be in advance of its major trading partners in removing conference exemptions for price fixing, as there would be a danger that Australian shippers, particularly exporters, would lose the countervailing power they exercise under Part X, if outwards conferences now managed in Australia were to be run entirely from overseas.

However, if Australia's trading partners removed pricing exemptions, then it may well be in Australia's interests to follow suit, by amending Part X to reduce the range of matters with which conference agreements may deal[55]. This option, which would retain the basic structure of Part X including provisions giving countervailing power to shippers, should be seriously considered at the next review of Part X. The next review of Part X should be in three to five years' time, depending on whether and how quickly our trading partners move to adopt this approach.

[51] It is understood that this happens under Part X.
[52] *The Impact of the Ocean Shipping Reform Act of 1998,* Federal Maritime Commission, September 2001, p2.
[53] *Ibid*, p7
[54] *Ibid, p3*
[55] Section 10.08 of Part X sets out the range of matters with which restrictive or exclusionary provisions can deal. The allowable matters now include s10.08(1)(c)(i) "the fixing or other regulation of freight rates;"

Based on processes in the OECD, some of Australia's major trading partners may be reluctant to follow the possible lead of the EU[56] in this direction. As the EU comprised only about 16% by tonnage and 21% by value of our international liner cargo trades in 2002-2003, a differentiated approach might then be needed for the various liner trades.

Transfer to the ACCC of Minister's powers to deregister a conference agreement

Option 5 in section 6 would bring shipping conference conduct further within the ambit of the competition policy regulator and keep the Minister at arm's length from the enforcement of Part X conditions and sanctions. It would have similar effects to the notification option, but without the need to expand the mainstream notification procedures especially for the liner cargo shipping sector. Under this option the ACCC would have the power to enforce remedial action, subject to appeal to the Competition Tribunal.

The ACCC may undertake an investigation of a conference agreement where a person affected by the operation of a registered conference agreement has complained to it about the conduct of a particular conference, and it must undertake an investigation if a complaint is referred to it by the Minister. Also, in limited circumstances, the ACCC itself can initiate a review, and such a review would require the parties to the conference agreement to demonstrate a net public benefit if they wished to retain the exemption.

If the Productivity Commission decided to recommend that Part X should be retained, then a strategic modification to the Part X regime that might be considered would be to transfer 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.

Under the approach, the ACCC also could be given the role of first seeking undertakings that would make deregistration unnecessary, that now sits with the Department, before an agreement is deregistered.

Retain Part X with the scope of exemptions dependant on the collective market share of the parties to the agreement

This is **Option 6** in section 6. The Department would not favour such an approach, as trade (or even capacity) shares would be difficult to monitor given the dynamic nature of the industry and the variability of cargo flows. It would prefer to retain the current general approach underlying Part X, that agreements should be registered and receive the exemptions until such time as an agreement can be demonstrated by the ACCC to have given the Minister grounds for its deregistration, and thereupon being deregistered unless the parties to the agreement give satisfactory undertakings regard future conduct.

We note that while the European Union provides an automatic exemption for consortium agreements up to a 30% market share, no maximum trade share applies to its current block exemption for conference agreements.

[56] At this stage, the EC has not taken any formal position, and proposals for reform remain only preliminary conclusions of the Competition Directorate.

PREFERRED APPROACH

All the options above have some merit, and should be considered by the Commission in the context of other submissions. On the basis that shippers generally wish to see Part X retained but amended, the Department's preferred option is Option 1: Retain Part X with improvements discussed below in section 8.

If and when our major trading partners remove pricing exemptions for conferences, again review Part X to consider further amendments to maintain compatibility of regimes.

8: RECENT MAJOR ISSUES CONCERNING PART X

Attendance by authorised officers of the Department at shipper/conference negotiations (when requested to do so by the shippers), has made it evident that four major issues have presented Australian exporters and importers using liner cargo shipping with problems in recent years:

- Discussion agreements;
- Shippers' negotiating powers under Part X;
- Surcharges (as against "all-in" freight rates); and for some shippers; and
- Freight rates denominated in US dollars.

Amendments to Part X are desirable to address these problems, effective solutions to which would significantly enhance the efficiency of the Part X regime for Australian shippers. Issues and options for improving the efficiency of Part X are discussed below in the context of these four major problems, and also the question of support for shipper bodies.

DISCUSSION AGREEMENTS

A discussion agreement is a non-binding form of liner agreement that typically has most or almost all carriers in a trade as members. Other forms of conference agreement are binding on the parties to the agreement. As noted above, the EU provides exemptions for traditional conference agreements, but not in general for discussion agreements, whereas the USA does provide exemptions for discussion agreements.

Since the 1999 review of Part X, the increasing prominence of discussion agreements has blurred, if not entirely wiped out, the distinction between conference and non-conference carriers that has been a major consideration in past reviews. It appears that relatively few carriers servicing Australia would not be part of one or more discussion agreements in the Australian trades.

The members of a discussion agreement typically will include ocean carriers that are part of one or more joint enterprises to provide liner cargo shipping services, and other ocean carriers that are not part of those joint endeavours. That is, discussion agreements are not directed to the provision of particular liner cargo shipping services by all the members acting together, but are over-arching agreements directed to allowing the members to discuss freight rate charges (and other matters) on a trade-wide basis. Discussion

agreements typically encompass conference carriers and other lines that would otherwise provide competition for the conference as independents or as rival consortia.

Although the objects of Part X are largely directed to ensuring the provision of liner services to Australian shippers, the present definition of "conference" in Part X allows the registration of discussion agreements as conferences, as those are defined very broadly in Part X.

Shippers at the Melbourne meeting held in November 2003 to discuss the call by shippers to bring forward the 2005 review of Part X, made it clear they would like discussion agreements to be ineligible for registration as conference agreements under Part X.

Issue: Should the definitions of "conference" and/or "conference agreement" in section 10.02 of Part X preclude the registration of discussion agreements?

In Part X, "conference" and "conference agreement" have the following meanings:

> **10.02 Interpretation**
> …….
>
> ***conference*** means an unincorporated association of 2 or more ocean carriers carrying on 2 or more businesses each of which includes, or is proposed to include, the provision of outwards liner cargo shipping services or inwards liner cargo shipping services.
>
> ***conference agreement*** means:
>
> (a) an outwards conference agreement; or
>
> (b) an inwards conference agreement.

Although many shipper groups may well favour the sweeping approach of excluding discussion agreements from registration under Part X, a major problem with that approach is that discussion agreements exist in many overseas liner trades, and indeed have reportedly supplanted traditional conferences in some major trades. To exclude discussion agreements from registration could create major problems of compatibility with the liner cargo shipping regimes of most of our major trading partners. A further issue for consideration is whether excluding discussion agreements from registration under Part X would have the effect of inducing shipping lines that have collaborated in non-binding discussion agreements to instead join some form of binding conference.

Nevertheless, if the Commission wished to consider that approach, the following issues would need to be addressed.

Issues: How would the definition of "conference" and/or "conference agreement" in section 10.02 of Part X need to be changed to achieve that outcome? What is a workable definition of a "discussion agreement"?

Part X adopts what is virtually an all-encompassing definition of "conference". It allows a very wide range of types of agreement to be registered.

The following definitions of "conference", "discussion agreement" and "registrable conference agreement" are offered for consideration. They attempt to restrict registration under Part X to those kinds of agreements that involve all the parties actually engaging together in the provision of liner shipping services. The definitions attempt to exclude

registration of agreements in which all the parties are not involved in producing the same set of joint liner services, but merely operate in the same trades.

> ***Conference*** *means an unincorporated association of 2 or more ocean carriers, all the members of which are engaged together, or propose to engage together, in jointly providing outwards or inwards liner cargo shipping services, whether as vessel operators or space charterers.*
>
> ***Conference agreement*** *means:*
>
> *(a) an agreement between members of a conference, and may be either;*
>
> *(b) an outwards conference agreement; or*
>
> *(c) an inwards conference agreement; but*
>
> *(d) not a discussion agreement.*
>
> ***Discussion agreement*** *means an agreement between ocean carriers, where all members of the agreement are not jointly engaged in the provision of outwards or inwards liner cargo shipping services, and where the principal purpose is to allow those ocean carriers to discuss the terms and conditions of ocean carriage, including freight rate charges, on a non-binding basis.*
>
> ***Registrable conference agreement*** *means an agreement between members of a conference which relates to joint outwards or inwards liner cargo shipping services provided by the members of that agreement, where the joint service may be:*
>
> 1. *provided by the members of the agreement as an association only; or*
> 2. *[to allow for registration of consortia or space sharing agreements within a conference] in conjunction with other ocean carriers, provided that the members of the conference and those other ocean carriers are all members of another registerable conference agreement [ie the overall conference agreement];*
> 3. *To remove doubt, non-binding agreements, commonly referred to as discussion agreements, are not registerable conference agreements unless they relate to liner cargo shipping services provided jointly by each and every member of the agreement, whether as vessel operators or space charterers.*

The views of industry should be sought as to workable definitions of “conference”, “discussion agreement” and “registrable conference agreement” if this approach is to be followed.

An intermediate position may be that foreshadowed by the ACCC in its interim 2004 report on shipper complaints regarding the Asia-Australia Discussion Agreement: to remove discussion of freight rate charges (ie. ocean freight rates and surcharges) from the scope of the exemptions allowed under Part X from s45 and s47 of the TPA. The implications of this approach for international compatibility of Part X with the regimes of our international trading partners would need to be carefully considered.

Preferred approach

A better approach (mainly for reasons of international compatibility and avoiding jurisdictional conflicts with our trading partners) than excluding discussion agreements, wholly or in part, from registration under Part X may well be to enhance shippers’ negotiating powers under Part X, with particular reference given to the obligations placed on parties to discussion agreements in their dealings with shippers.

SHIPPERS' NEGOTIATING POWERS UNDER PART X

The rise to prominence of discussion agreements in most Australian and many overseas liner trades, and the market power they can wield because of their wide membership, has also raised questions as to the adequacy of negotiating powers of shippers under Part X.

Issue: Do the negotiating arrangements under Part X provide Australian shippers with a satisfactory means of negotiating with liner conferences, including discussion agreements, in the current environment in liner shipping?

In Part X, the obligations of ocean carriers towards shippers are set out as follows:

Division 7—Obligations of ocean carriers in relation to registered conference agreements

10.41 Parties to registered conference agreement to negotiate with certain designated shipper bodies etc.

(1) The parties to a registered conference agreement shall:

(a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements (including any provisions of the agreement that affect those arrangements) whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body;

(b) if the shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) The parties to the agreement shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3) In this section:

eligible Australian contract means:

(a) a contract entered into in Australia; or

(b) a contract where questions arising under the contract are to be determined in accordance with Australian law.

freight rates includes base freight rates, surcharges, rebates and allowances.

negotiable shipping arrangements:

(a) in relation to an outwards conference agreement—means the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call); or

(b) in relation to an inwards conference agreement—means:

(i) the arrangements for, or the terms and conditions applicable to, inwards liner cargo shipping services provided, or proposed to be provided,

under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call), where those arrangements or those terms and conditions, as the case may be, are embodied in an eligible Australian contract; or

(ii) the arrangements for, or the terms and conditions applicable to, the parts of the inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement that consist of activities that take place on land in Australia (including, for example, terminal handling charges and charges for inter-terminal transport services).

relevant designated shipper body:

(a) in relation to an outwards conference agreement—means:

(i) a designated outwards peak shipper body; or

(ii) a designated outwards secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section; or

(b) in relation to an inwards conference agreement—means:

(i) a designated inwards peak shipper body; or

(ii) a designated inwards secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section.

Issues: Should the powers of shippers under Part X be strengthened by changes to the obligations of ocean carriers in Part X, and if so, how? Should an industry code of conduct govern shipper/conference negotiations? Should Part X require that offers voluntarily made to shippers on behalf of the members of a discussion agreement, by authorised representatives of that agreement during negotiations with shippers, are, if accepted by those shippers, binding on the members of that discussion agreement in relation to those shippers?

Shipper dissatisfaction with the negotiating powers provided to designated shipper bodies under Part X is particularly focussed on their dealings with discussion agreements. The ability of parties to discussion agreements to regard offers, voluntarily made to shippers and accepted by the shippers, as having been made on a non-binding basis, makes some shippers consider the process of negotiating with the parties to discussion agreements to be one of dubious value. Indeed, some shippers appear to regard such negotiations as worthless - but no doubt shippers will give their views on that to the Commission.

An amendment is desirable to clearly distinguish between any non-binding consensus reached between the parties to a discussion agreement, and any outcomes of negotiations with shippers, which should be binding obligations on the parties to a discussion agreement to the extent that those parties have reached an agreement with shippers.

Such an amendment would need to prevent the binding nature of obligations to shippers from any crossing over to agreements purely between the parties to the agreement, which need to remain clearly non-binding in agreements with such typically wide membership.

It would seem that the current powers have been adequate, more or less, in respect of dealings with binding forms of conference agreement, but this is a matter on which the views of shippers needs to be sought by the Commission.

One area of apparent ongoing irritation for shippers has been obtaining information from carriers that supports or justifies an increase in freight rate charges or other negotiable

shipping arrangements. Part X should be amended to require the parties to registered conference agreements to provide designated shipper bodies with adequate justification, including relevant quantitative data, for proposed increases in freight rate charges, as a separate obligation to the mutual obligation to exchange information under s10.41(1)(b)[57]. Such an obligation should be subject to a test of reasonableness.

Another area of concern to shippers appears to be the frequency and short notice given by liner operators for changes in negotiable shipping arrangements, particularly freight rates and surcharges. Section 10.45(2) provides that parties to registered conference agreements must give relevant designated shipper bodies 30 days notice of changes in negotiable shipping arrangements. The Commission should seek the views of shippers as to whether the period of notice could usefully be increased to 60 days or even 90 days.

Changes in negotiable shipping arrangements appear often to be notified by an advert-isement in the trade press. The Commission might seek the views of shipper bodies as to whether Part X should explicitly require parties to conference agreements to notify each designated shipper body directly (including by electronic message) of such changes, to ensure that shipper bodies have the opportunity to call for negotiations where appropriate.

Preferred approach
Amend Part X to require conference parties to provide shippers with quantitative information to justify changes in negotiable shipping arrangements that are sought by conferences. Amend Part X to bind parties to discussion agreements to offers made by them to shippers. Consider other amendments proposed by shippers to strengthen their negotiating position with conferences.

SURCHARGES v "ALL-IN" FREIGHT RATES

Shippers in Australia and elsewhere have long opposed the widespread use of surcharges to the ocean freight rate in liner shipping, preferring instead an "all-in" freight rate.

Carriers have argued that the use of surcharges makes for greater transparency. Shippers believe surcharges render only the ocean freight component readily negotiable, leaving a significant proportion of freight costs non-negotiable when making shipping arrangements, as they are set by formulae negotiated separately with shipper bodies.

An all-in freight rate can be a fully negotiable market rate. Surcharges are either set by formula negotiated periodically with shippers, or else imposed by the shipping lines, and only the ocean freight rate component may be fully negotiable in the market. Shippers have argued that, while the carriers can segment their charges on invoices, the total freight cost must be negotiable at the time of arranging transport, and the use of surcharges prevents this.

Shippers have said that the widespread use of surcharges in liner shipping effectively transfers financial risk from the liner operator to the shipper. Shippers who have contracted to sell or buy overseas for a period on the basis of a certain level of freight rate charges may find the profitability of these transactions eroded or eliminated by increases in surcharges during the period of their sales contracts.

[57] Such a change would help address the "information asymmetry"as between carriers and shippers that was noted in the 1993 Brazil report, *op cit*, p23.

Shippers would prefer an all-in rate negotiated with the carriers for an agreed period either as a tariff rate or as contract rates for the various liner cargo commodities. Shippers have said, however, that they would be prepared to consider adjustments to freight rates in genuine emergencies, for example to cover war risk insurance or spikes in fuel costs.

The frequency with which surcharges and freight rates for different commodities can vary means that it is not a trivial task for shippers to keep track of such changes. This is a minor, but not negligible, argument for a simpler liner shipping freight structure without a plethora of surcharges.

Issues: Should the exemptions provided by Part X be conditional on an all-in freight rate being available to Australian shippers, at the option of shippers? Should Part X be changed to achieve "all-in" freight rates, and if so, how? Should it be just the ocean freight rate that is on an all-in basis (ie no separate CAFs, BAFs or documentation fees etc.) or should all-in rates be available on a terminal-to-terminal basis (ie no separate THCs), or on some other basis?

Part X restricts what restrictive trade practices may be in a registered conference agreement, as shown below:

10.08 Conference agreements may include only certain restrictive trade practice provisions

(1) If a conference agreement includes a provision:

(a) that is an exclusionary provision; or

(b) that has the purpose, or has or is likely to have the effect, of substantially lessening competition (within the meaning of section 45);

the provision, so far as it is an exclusionary provision or has or is likely to have that effect, must either:

(c) deal only with the following matters:

(i) the fixing or other regulation of freight rates;

…….

Part X provides exemptions in relation to freight rate agreements made by the members of a registered conference agreement, where freight rate charges are defined to include surcharges.

10.02 Interpretation

…….

freight rate charges:

(a) in relation to an outwards conference agreement—means those parts of the conference agreement that specify freight rates (including base freight rates, surcharges, rebates and allowances) for outwards liner cargo shipping services; and

(b) in relation to an inwards conference agreement—means those parts of the conference agreement that specify freight rates (including base freight rates, surcharges, rebates and allowances) for inwards liner cargo shipping services.

10.17A Exemptions from section 45 for freight rate agreements

(1) Section 45 does not apply to the making of freight rate charges in a freight rate agreement if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner

cargo shipping services provided under a single registered outwards conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(2) Section 45 does not apply to the making of freight rate charges in a freight rate agreement if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

(3) Section 45 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner cargo shipping services provided under a single registered outwards conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(4) Section 45 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

……

10.18A Exemptions from section 47 for freight rate agreements

(1) Section 47 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for outwards liner cargo shipping services provided under a single registered outwards

conference agreement after the end of 30 days after the last-mentioned agreement is finally registered; and

(b) the parties to the freight rate agreement are the same as the parties to the registered outwards conference agreement.

(2) Section 47 does not apply to conduct engaged in by a party to a freight rate agreement, so far as the conduct gives effect to freight rate charges in the freight rate agreement, if:

(a) the freight rates (including base freight rates, surcharges, rebates and allowances) specified in the freight rate agreement are for inwards liner cargo shipping services provided under a single registered inwards conference agreement after whichever is the later of the following times:

(i) the end of 30 days after the last-mentioned agreement is finally registered;

(ii) the commencement of Part 2 of Schedule 1 to the *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000*; and

(b) the parties to the freight rate agreement are the same as the parties to the registered inwards conference agreement.

(3) The exemptions provided by subsections (1) and (2) do not apply in relation to subsections 47(6) and (7).

The Commission should give serious consideration to whether Australian shippers should have the option of an "all-in" freight rate in all freight contracts negotiated with parties to registered conference agreements that apply to the trade route concerned, whether or not the particular surcharges are set independently of that conference agreement. It would not appear that prescribing such an option in Part X would raise any significant compatibility problems with overseas regimes if it were to be restricted to shipping arrangements that were contracted in Australia (that is, for most exports and some imports). The all-in rate option should be limited to those shipments to which the definition of "negotiable shipping arrangements" in s10.41 relates.

Preferred approach

Amend section 10.41 to include an obligation for parties to registered conference agreements to offer Australian shippers the option of an "all-in" freight rate without surcharges. It appears that there should be no significant compatibility problems with overseas regimes if this option was to be limited to shipping arrangements that were contracted in Australia.

AUSTRALIAN DOLLAR FREIGHT RATES

The question of whether Australian shippers should be able, at their option, to obtain freight costs fixed in Australian dollars at the time of booking cargo, should also be examined. Freight rates denominated in US$ were introduced relatively recently by ocean carriers in the Australian liner trades, with the agreement of most, but not all, Australian exporters. For example, the Australian Horticultural Exporters Association did not agree to this change, as, to a large extent, its members make their overseas sales in Australian dollar terms. It appears that some countries mandate that freight rates must be denominated in the local currency.

Issues: Should freight rates denominated in Australian dollars be an option mandatorily available to Australian shippers, at the discretion of the shipper? Should Part X changed to achieve this end, and if so, how?

Freight rates in contracts or loyalty agreements could presumably be set in Australian dollars for the term of the contract or loyalty agreement. For casual shippers, freight rates could presumably be fixed in Australian dollars at the time of booking the cargo.

Preferred approach
Amend section 10.41 to include an obligation for parties to registered conference agreements to offer to fix freight rate charges in Australian dollars at the time of making the contract for carrying the cargo or at the time of booking the cargo. The views of shippers would be instructive in determining the form of mechanism for this. It appears that there should be no significant compatibility problems with overseas regimes if this option was to be limited to shipping arrangements contracted in Australia.

SUPPORT FOR DESIGNATED SHIPPER BODIES

Effective shipper representative bodies are central to the effective operation of Part X. The issue of shipper support for the various designated shipper bodies for both exports and imports has come to the fore since the last review. As noted in section 1 above, shippers benefit from the work of these bodies whether or not they support these bodies financially by taking out membership. This is a result of the way that Part X is constructed (see s10.03 and s10.41). Not unnaturally, this has given rise to a "free rider" problem that constrains the resources available to the shipper bodies, particularly the peak bodies.

In the case of the Australian Peak Shippers Association (APSA), the designated peak body for exporters, the "free rider" problem is severely impacting on APSA's financial viability and threatens its continuing existence. In the case of the Importers Association of Australia (IAA), the designated peak body for importers, the problem constrains its ability to move beyond operating as an internet-based association with no membership fees.

The Productivity Commission in its 1999 review report recommended (recommendation 8.7, p XLII) that funding "for APSA should come from the beneficiaries of its activities, namely Australian shippers". However, there is no existing mechanism to ensure that the beneficiaries do contribute. This has the potential to impact on the effectiveness of the Part X regime or alternative arrangements, and we would ask that the Productivity Commission address the question of a mechanism for ensuring that adequate resources are available to ensure the ongoing viability and effectiveness of the peak shippers bodies.

9: PARTICULAR QUESTIONS POSED BY THE COMMISSION

In its Issues Paper, the Productivity Commission asked a number of questions, and the Department's responses are as follows:

Is the rationale for Part X exemptions presented by carriers appropriate? That is a valid question to be answered by the Commission, but it must be remembered that the fundamental rationale for Part X is based on the interests of Australian shippers. So the rationale for Part X must be examined from the shippers' perspective also.

What are the market characteristics of liner shipping markets that may justify exemption from competition regulation? The question is rather what justifies special treatment of liner shipping, separate from the mainstream competition policy regimes that are operated by the various developed economies that do provide such special treatment.

Is the traditional rationale for trade practices exemptions for liner cargo shipping still relevant in light of recent developments in international liner cargo shipping and of developments in methods of conducting business in risky markets? On aspect of this question is that liner shipping operators and conferences have long used surcharges (such as Bunker Adjustment Factors, Currency Adjustment Factors, Port Service Charges including Terminal Handling Charges, documentation charges etc) to transfer risk from the business operator to the customer. Shippers generally oppose that approach.

Does Part X restrict competition and, if so, is this restriction necessary? Undoubtedly Part X does restrict competition to a substantial degree[58], although it does not eliminate it. This restriction may be argued to be "necessary" in the Australian liner trades in the sense that it results in a superior level of liner services, in terms of stability, frequency, port range, equipment availability etc., through collaboration between shipping lines that yield technical efficiencies allowing freight rates to be internationally competitive, that could not be achieved by other means in the Australian liner trades.

The case to justify the special treatment is one that the shipping lines and conferences are best placed to make. However, the usual argument is that unless collaboration is permitted there is a real risk of destructive or "cut-throat competition" developing in a dynamic industry, where trade flows can change rapidly with currency fluctuations (among other reasons) and one that operates with highly mobile assets. Particular trades might be left without services, or with drastically reduced services, as the operators drive each other from those markets. This is often referred to as the "empty core" problem.

Does Part X impede the development of other market-based forms of coordination between carriers? Part X allows the registration of all forms of cooperative agreements between ocean carriers. Traditional conference agreements; consortium agreements with and without price-fixing; slot charter, slot exchange or other forms of space sharing or joint service agreements; and more latterly, discussion agreements have all been registered under Part X. This flexibility allows ocean carriers a wide range of choices in the form of collaboration, some of which may be regarded as the maritime counterparts of arrangements such as alliances, code sharing etc that may be observed in other industries. Allowing collaboration in the provision of services reduces pressures for mergers and takeovers in the industry, which still remains one of relatively low concentration.

What are key developments in the international liner cargo shipping market? What are the implications for shipping services to Australian shippers? What are the implications for conferences and for Part X exemptions. Undoubtedly the key development in liner shipping since the last review of Part X has been the rise to prominence of discussion agreements (except in the European trades) and consortium-type agreements (especially in the European trades) at the expense of traditional, highly structured, liner conferences. The rise of non-binding discussion agreements has had a considerable impact on Australian shippers and their ability to negotiate effectively under Part X. This

[58] The EC, *Review 4056/86* (2004) stated (p27):"However, given the increasing number of links between carriers, determining the extent to which a particular conference is subject to competititon can be a very complex exercise. In any event, such an assessment would necessarily have to be made on a trade by trade basis."

development raises the question of whether the Part X exemptions should apply to discussion agreements, and also whether the obligations placed on conference agreements under Part X should be modified in respect of discussion agreements. These issues were explored in section 8.

The increasing prominence of discussion agreements in recent years has blurred, if not entirely wiped out, the distinction between conference and non-conference carriers and their market shares that has been a major consideration in past reviews. Accordingly, the Department does not any longer have data on the cargo split between conference and non-conference carriers. However, it appears that very few carriers servicing Australia would not be part of one or more discussion agreements in the Australian trades.

Have market developments, technological and regulatory changes in other developed countries affected the arguments for and against the need for Part X exemptions? If so, how? The most significant market development since the 1999 review of Part X has involved discussion agreements. At the level of technology, there has been the introduction of ever-larger container ships, as operators pursue economies of scale, especially in the east-west mainline trades. Neither of these developments overturns the traditional rationale for specialist treatment for liner shipping. The former suggests that modifications may be desirable for the various liner regimes around the world that permit discussion agreements. The latter suggests that shippers in the smaller liner markets may need the sort of countervailing powers offered under Part X to make sure that the carriers' economies of scale are not achieved at the undue expense of service frequency. While market and technological developments have not affected the fundamental arguments for and against the need for Part X exemptions, the rise of discussion agreements suggests changes are desirable to the form of, and/or the conditions placed upon, the exemptions provided under Part X.

Given the emerging international trend to limit antitrust exemptions for conferences and consortia, what are the reasons for retaining Part X in Australia? Some other developed economies have modified their liner regimes, often to provide more flexible arrangements, or are reviewing their regimes with a view to considering whether changes are desirable. However, Australia has its own geographical and market situation, and should not necessarily follow in the footsteps of other countries, especially those that are serviced by the mainline east-west liner trades.

[What]*… practical alternatives to Part X that should be considered?* The practical alternatives to Part X were outlined in section 6.

What would be the preferred set of alternative arrangements were Part X to be abolished? If Part X were to be abolished, the preferred arrangements would involve a form of notification together with an industry code preserving the countervailing powers shippers now enjoy under Part X.

Given the current state of affairs, how relevant is the analysis and conclusions made at that time [ie 1999]*?* In the view of the Department, there have been no developments since the 1999 review that would upset the fundamental conclusions reached by the Productivity Commission at that time, although the problems experienced by Australian shippers in dealing with discussion agreements suggests that it is desirable to amend Part X in some respects.

What would be the advantages of using Part VII of the TPA as an alternative to Part X? What types of coordination arrangements are likely to be permissible under Part VII as

currently structured? What changes could be made to Part VII to improve its operation with particular reference to liner cargo shipping? These questions were addressed in section 6.

What market-based responses are likely to appear if the exemptions from aspects of trade practices legislation for conferences are removed on Australian routes? What would happen to the level of service provided to Australian shippers if conferences were not allowed to operate? What would happen if Part X were repealed? If Australia repealed Part X, what conflicts, if any, would arise with regulation of cargo liner services in other jurisdictions? These questions were addressed in section 6.

What problems have been experienced with the operation of Part X, in particular by shippers, and how should they be addressed? This question was addressed in section 8.

Can processes under Part X be streamlined, for example, the registration of a conference occurs in two stages – provisional and final? The processes under Part X are not considered to be an onerous task for industry – indeed Part X may be regarded as "regulation with a light hand", as Part X [s10.01(2)(b)] relies primarily "on private commercial and legal processes and a reduced level of government regulation of routine commercial matters;". With particular respect to the two-stage registration process, provisional registration allows the parties to a conference agreement to negotiate with the relevant peak shipper body regarding the minimum levels of service proposed to be provided under the agreement (although the exemptions for the operation of the agreement itself do not commence until after 30 days after final registration).

Have the Minister's powers to enforce Part X been effective? If not, how could they be improved? An assessment of the 2000 amendments was made in section 4 above. Following the 2000 amendments, it was felt that the Minister's powers in relation to enforcement would be adequate, although the first opportunity to test these powers (the ACCC investigation into the AADA) appears to suggest that a further strengthening of these powers needs to be considered. However, deregistration is a very blunt instrument, and in the interests of a reduced level of government intervention (in line with the Objects of Part X set out in s10.01), it is apparent that it is desirable to enhance the ability of shipper bodies to deal with conferences, especially discussion agreements.

How should the efficiency of shipping services be assessed? The "efficiency" of shipping services is a complex issue, encompassing multidimensional issues of service quality and price. Service quality takes in issues of capacity offered, frequency and whether service involves fixed-day sailings, schedule reliability, service stability, port ranges served (both in Australia and overseas), whether centralisation arrangements are offered and are satisfactory, whether services to particular ports are direct or by transhipment, whether special equipment (eg refrigerated containers, bolsters, tank containers) is readily available, the care taken of cargo, etcetera. Even the cost of liner services is not a simple issue, being complicated by tariff rates as against contract rates, a variety of surcharges, a multiplicity of different rates for different commodities etcetera. The issue might best be handled by the review as a qualitative problem, and addressed by considering the views of a variety of shippers, large and small, in the various States.

With the retention of Part X, what changes should be made to improve the efficiency of liner cargo shipping services? This question has been addressed in section 8.

Have these changes [extension of Part X to cover importers] *made any significant difference to the operation of conferences in relation to importers? What if any, are the*

key differences in either the market or regulatory environment facing importers compared with exporters? These questions have been addressed in section 3.

What are the advantages and disadvantages of providing such a broad range of exemptions from the TPA to ocean carriers? The limited exemptions provided under Part X from the mainstream competition provisions of the TPA are those that are required to permit traditional liner conferences to operate. The exemptions from s45 are those that are required to allow conferences to form and to act in collaboration. The exemptions from s47 facilitate the negotiation of loyalty agreements with shippers or shipper bodies.

Why does Australia need broader exemptions than, for example, the United States and Europe? In allowing exemptions for international liner cargo shipping, Australia follows the same broad overall approach as the EU and US, and it is not entirely clear that the Australian exemptions are significantly broader overall than those regimes. The Australian exemptions are limited and conditional, and the Part X regime also provides a structure of countervailing powers for shippers.

Should Part X exemptions be narrowed, and if so, in what way, for example by region or by route, or by particular regional or route characteristics? The current exemptions should not be altered in general, but their application might be constrained. For example, discussion agreements might be excluded from registration, as discussed above. A more wide-ranging change that might be considered would be to remove freight rate charges from the suite of matters that (under s10.08) can be covered by a conference agreement, allowing only those matters to be included that facilitate technical cooperation or consortium-type agreements, along the lines favoured by the OECD in the third principle (*Freedom to co-ordinate* operations) enunciated in its 2002 report[59]. The timing of such a change needs careful consideration.

Are there unique features of Australian trade which would justify a different regulatory regime from those of its trading partners? Australia's liner trades, unlike those of many other countries with specialist liner regimes, are north-south trades that are commonly characterised as "long and thin". It is likely that Australia would be far more reliant for an adequate level of good quality liner cargo shipping services on continued collaboration between shipping lines than would be economies lying on the major east-west trade routes between North America, Europe and Asia.

For example, should the exemptions to carriers be limited to ones that result in the combined market share of the carriers being less than a specified percentage (similar to the European block exemptions)? This question was addressed in section 7.

Is this requirement [that no carrier be "unreasonably" excluded from conference membership] sufficient to ensure the free entry and exit of conference members? Should Part X be amended so as to include a specific requirement for conferences to be open? If discussion agreements were to be excluded from registration under Part X, there might be a case for adopting the open conference system that is adopted in the US trades. Otherwise, the no-unreasonable-exclusion provision in Part X, together with the provision (s10.06) that any party to an outwards registered conference agreement must have the right to withdraw from an agreement upon reasonable notice without penalty, are sufficient to ensure reasonably free entry and exit from conference membership.

[59] *Competition Policy in Liner Shipping – Final Report*, OECD 16 April 2002, p80.

Does Part X require amendment to ensure the confidentiality of agreements entered into by individual carriers and shippers? Part X has never required the filing (or even the notification) of agreements between carriers and shippers, and presumably these remain commercial-in-confidence unless agreed otherwise. Part X (subdivision B of Division 5) facilitates the making of loyalty agreements between shippers and ocean carriers or conferences. Australian designated secondary shipper bodies set up under the auspices of Part X already have the right to negotiate special rates, terms and conditions for their members, that may be confidential to those members, different from those of the freight tariffs established by the conferences. However, if it were to be decided to override any constraints imposed by conference agreements on their members' rights to negotiate individual deals with a particular shipper or groups of shippers, then amendments would be required.

How prevalent is the use of discussion agreements on Australian trade routes? In practice, how do these agreements differ from traditional conferences? What are their strengths and weaknesses relative to traditional conferences? There are discussion agreements active in all the major Australian liner trades, with the exception of the Europe trade and its offshoot, the Middle East/Gulf trade. These discussion agreements include the:

- *Australia South East Asia Trade Facilitation Agreement* [northbound trade];
- *South East Asia and South Asia Australia/Trade Facilitation Agreement* [southbound trade];
- *Australia North and East Asia Trade Facilitation Agreement* [northbound trade];
- *Asia - Australia Discussion Agreement* [southbound trade];
- *Australia/United States Discussion Agreement* [northbound trade];
- *Australia/Canada Discussion Agreement* [northbound trade];
- *Australia/Mexico Discussion Agreement* [northbound trade]
- *United States/Australasia Discussion Agreement* [southbound trade];
- *Canada/Australia New Zealand Discussion Agreement* [southbound trade];
- *Australia/New Zealand Vessel Operators' Discussion Agreement* [outwards and inwards trades];
- *Australia to South Pacific Islands Ports Discussion Agreement* [outwards trade];
- *Australia/Fiji Discussion Agreement* [outwards trade]; and the
- *Australia-Caribbean Discussion Agreement* [outwards trade].

At the consultations with shippers that were held in Melbourne after shippers had asked the Minister for an early review of Part X, both exporters and importers made it very clear that Australian shippers were having great difficulties in dealing with discussion agreements registered as liner conferences under Part X. Information from shippers was that these difficulties appeared to arise from two causes: the large proportion of capacity typically operated by parties to the discussion agreements; and the non-binding nature of the agreements, which representatives of member lines have stated extend to agreements reached with shippers. Some shippers thought that the nature of the agreements made negotiating with the parties to discussion agreements a futile exercise.

Do discussion agreements, as used under Part X, result in a substantial lessening of competition in any Australian trade route? Shippers regard discussion agreements as resulting in a substantial lessening of competition in the trade routes on which they operate. Carrier interests on the other hand would dispute the degree of market power that can be exercised by a non-binding agreement, and have indicated that where offers by parties to discussion agreements had been stated to be on a non-binding basis, shippers had not tested whether the parties were prepared to stand by offers that had been accepted

by the shippers. The degree of market power exercised by discussion agreements probably will vary with the stage of the freight rate cycle – when there is an excess of capacity, discussion agreements are likely to be relatively ineffective in holding up rates as individual carriers chase the available cargo by offering reduced rates.

What would be the consequences if the exemption was no longer extended to discussion agreements? Precluding discussion agreements from registration under Part X could cause jurisdictional conflicts, particularly in the North American trades. The US and Canadian liner regimes permit discussion agreements, and regulate both inwards and outwards trades. Even partial deregistration (regarding the ability to discuss freight rate charges), as was at one time suggested in the ACCC investigation into the Asia-Australia Discussion Agreement, could have led to some interesting jurisdictional situations. Strengthening shippers' ability to deal with discussion agreements seems a better approach.

How is international liner cargo shipping regulated by Australia's major trading partners and what changes have been made, or are proposed to it recently? What could Australia learn from the regulation of international liner cargo shipping by other countries? The first question was addressed in section 5. Australia needs to decide which form of liner regulation best suits its geographical situation and liner market circumstances.

10: CONCLUSIONS

- Part X should be retained, provided that, on balance, shippers support its retention.

- Part X should be amended to address problems experienced by shippers in recent years, especially those relating to discussion agreements.
    - Part X should be amended to explicitly make offers made to shippers by the parties to a conference agreement, including a discussion agreement, in the course of negotiations conducted pursuant to s10.41, binding on those conference parties if accepted by the shippers, so long as the lines involved remain parties to the agreement.
    - Part X should be amended to require the parties to registered conference agreements to provide designated shipper bodies with adequate justification, including relevant quantitative data, for proposed increases in freight rate charges, as a separate obligation to the mutual obligation to exchange information under s10.41(1)(b).
    - Part X should be amended to require the parties to registered conference agreements to offer "all-in" freight rates (i.e. terminal-to-terminal without any surcharges) as an option for shippers to take up if they wish.
    - Part X should be amended to require the parties to registered conference agreements to offer freight rates fixed in Australian dollars as an option for shippers to take up if they wish, where the contract is an *eligible Australian contract* as defined in s10.41(3).

- Part X should be reviewed again in 3 to 5 years, and if our major trading partners have then removed exemptions for price fixing and price discussions, Australia then should remove exemptions for such conduct from the scope of Part X.

- Improved funding arrangements for APSA and the IAA need to be developed.

11: CONTACT DETAILS

If you have any questions about this Submission please contact Neil Kelso on (02) 6274 7084 or Neil.Kelso@dotars.gov.au .

APPENDIX 1

DESCRIPTION OF THE PART X PROCESS

Part X provides that the parties to a conference agreement in respect of outwards or inwards 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:

- a requirement that any provision that substantially lessens competition or is an exclusionary provision must either
  - deal only with certain matters (set out in s10.08); or
  - must be of overall benefit to Australian exporters or importers, and necessary for the effective operation of the agreement.
- application of Australian law to questions arising from outwards agreements; and
- provision for parties to outwards conference agreements to withdraw from the agreement on reasonable notice without penalty.

After applying for provisional registration (fee $360), the parties to the agreement must offer to negotiate minimum levels of shipping services with the relevant designated peak shipper body: either the Australian Peak Shippers Association (APSA) or the Importers Association of Australia (IAA). The shipper body may accept the levels proposed by the parties and decline the opportunity to negotiate.

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 applicant, APSA and the ACCC. A copy of the finally registered agreement is placed on a conference agreement file that is available for public scrutiny (except those parts which are commercial-in-confidence and where an application for confidentiality has been made and granted by the Registrar).

The ACCC receives a copy of the agreement at both the provisional registration stage, and the final registration stage, at which latter stage the agreement includes provisions specifying the minimum levels of service that have been agreed with shippers.

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.

Variations to registered conference agreements must also be registered; a not infrequent occurrence in an industry where trade flows can change quickly and 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, the Minister may direct the deregistration of the agreement, wholly or in part, after first having sought undertakings from the parties to the agreement that would make such a direction unnecessary.

De-registration removes the exemptions from Part IV of the TPA, and the authority for the shipping lines concerned to operate as a conference. Deregistration has so far not been found to be necessary. 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.

As at 30 June 2004, there were 129 conference agreements on the Register of Conference Agreements that is administered by the Registrar of Liner Shipping, an officer of the Department of Transport and Regional Services. These comprised 86 outwards conference agreements and 43 inwards conference agreements. A substantial number of these agreements, mostly older outwards agreements, are probably no longer in active operation but remain on the Register in the absence of advice from the parties to the agreements that they may safely be removed. Since 2000, many agreements are registered as both outwards and inwards conference agreements (sometimes with minor variations).

APPENDIX 2

SHIPPERS' CALL TO BRING FORWARD THE 2005 REVIEW OF PART X

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Minister for Transp
and Regional Servic

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AUSTRALIAN PEAK SHIPPERS ASSOCIATION INC.

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10 September 2003

The Hon John Anderson MP
Deputy Prime Minister
Federal Minister for Transport
Parliament House
CANBERRA ACT 2600

Dear Minister

PART X of the Australian Trade Practices Act 1974

I write to you on behalf of exporters seeking an urgent review of PART X of the Trade Practices Act (TPA).

The Australian Peak Shippers Association Inc. (APSA) is the Designated Peak Shippers Body under PART X of the TPA and represents shippers of Australia's containerised exports.

APSA's role is to represent Australian exporters on negotiable shipping arrangements with shipping conferences, consortia or alliances on matters such as freight rates, freight surcharges, frequency of sailings and ports of call, amongst others.

Australia is a nation of shippers and the interests of Australian shippers must be balanced against the interests of foreign-owned carriers.

As you would be aware the shipping conference system that dates back to the late 19th century is still enshrined in legislation and its relevance is being seriously questioned in today's international trading environment.

Until the mid 1980's there was general acceptance by exporters that the comprehensive service that a shipping conference provided greatly assisted Australia's export industry.

However since the 1980's the powers of shipping conferences is increasingly being called into question and whether conferences should continue to receive the exceptionally generous exemptions from sections of the TPA they currently enjoy.

RECEIVED PLS
18 Sep 2003

Exporters are questioning the need for collective price-fixing by conferences which includes not only the setting of ocean freight rates but also the imposition of freight surcharges.

One of the main concerns of exporters relates to the relatively recent practice of shipping lines forming discussion agreements. Although the issue of discussion agreements was canvassed in passing at the last review of PART X in 1999 (with exporters opposing them), the experience of exporters since then has strengthened exporters' opposition to this form of conference agreement.

Exporters believe that carriers which would previously have operated independently have been induced to join these discussion agreements so as to alter the structure of the liner freight markets in the various liner trades.

In the interests of liner service quality, liner cargo shipping conference agreements that are registered with your Department receive exemptions from parts of the TPA that allow shipping lines to collaborate to offer joint services with common freight rates.

A discussion agreement is a form of conference agreement that allows carriers to discuss market conditions, freight rates and surcharges without having to provide a joint service under the agreement. Exporters see no benefits from discussion agreements. On the contrary, because of the non-binding nature of discussion agreements, exporters find it almost impossible to have meaningful negotiations with the parties to these agreements on matters such as freight rates and surcharges.

PART X is scheduled to be reviewed again in 2005. APSA does not agree with the view that, due to liner market conditions, there is no pressure for the review to be held as scheduled. Discussion agreements will be a major issue raised by exporters at the next review.

As the discussion agreements are having a serious effect on the ability of exporters to negotiate satisfactory freight contracts APSA seeks to have the review of PART X brought forward to 2004.

I have taken the opportunity to also write to the Federal Treasurer Peter Costello on this matter.

Yours faithfully

Frank Beaufort
Executive President

Office of the Deputy Prime Minister
and Minister for Transport and Regional Services
Leader of The Nationals

Mr Frank Beaufort
Executive President
Australian Peak Shippers Association
PO Box 244
SOUTH MELBOURNE VIC 2003

Dear Mr Beaufort

Thank you for your letter of 10 September 2003 to the Deputy Prime Minister and Minister for Transport and Regional Services, the Hon John Anderson MP, concerning a review of Part X of the Trade Practices Act (TPA). Mr Anderson has asked me to reply on his behalf.

As you have stated, Part X is scheduled to be reviewed again in 2005. It has been envisaged that the Productivity Commission would undertake the review once more. While I see merit in an earlier review, the Productivity Commission has a heavy schedule and we will need good evidence and strong arguments to support bringing forward the review to 2004.

To facilitate this process, I propose that consultations be held between representatives of shippers, exporters and importers, that use liner shipping and officers of the Department of Transport and Regional Services, the Treasury, the Australian Competition and Consumer Commission (ACCC).

If you are agreeable, please contact the Registrar of Liner Shipping, Mr Neil Kelso, on (02) 6274 7084 to discuss the details of such consultations.

The results of the consultations would enable the Government to have a better assessment of the seriousness of the problem and the urgency of a review.

Thank you for bringing this matter to the attention of the Minister.

Yours sincerely

Peter Langhorne
Chief of Staff

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APPENDIX 3

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 obligations are met to register agreements, to provide shipper bodies with notice of changes in negotiable shipping arrangements, to negotiate with relevant exporter or importer shipper bodies, as appropriate, on levels and standards of service, and on freight rates and charges.	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 shippers countervailing powers to collectively negotiate commercial solutions that 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 shipper 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 (or to the Minister for referral to the ACCC if that is considered appropriate). 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.

PART X	**AUTHORISATION**
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 or importers.	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 obligations of parties to conference agreements concerning inwards liner services are more restricted than those relating to outwards liner services, being only in relation to contracts made in Australian or to which Australian law is to apply. Otherwise, such agreements are regarded as matters for regulation by the various exporting countries, in accordance with principles of international comity.	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."
CRITERIA In considering an application for (final) registration, the Registrar of Liner Shipping must be satisfied that the agreements meets certain minimum standards: (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 shippers; (ii) any party to an outwards 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 an outwards 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). The Registrar must also maintain files of conference agreements, which are publicly available. However, the Registrar may exclude commercially sensitive material from the publicly available files if requested by the applicant (who must supply a statement supporting the request).	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.

PART X	**AUTHORISATION**
ROLE OF SHIPPERS 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 (these are more limited for importers than for exporters), including freight rates and charges. Shippers 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 4

NEGOTIATIONS UNDER PART X: VOLUNTARY GUIDELINES

The Australian Competition and Consumer Commission (ACCC) has called for shippers' powers under Part X to be strengthened in regard to the negotiation, under section 10.41, of negotiable shipping arrangements. The ACCC would like to see a negotiation process that will ensure all possibilities are explored for reaching a compromise acceptable to both sides before a complaint is made to the ACCC (or to the Minister for possible reference to the ACCC) for investigation and report. In the absence of amendments to the legislation, but in line with that approach, negotiating under Part X should involve the following:

1. Genuine negotiations in good faith will be held under the existing provisions of Part X, with the attendance of an Authorised Officer if requested by either side, until either an acceptable compromise or a deadlock has been reached.

- negotiations often may concern changes in shipping arrangements that already have been implemented following expiry of the notice period under s.10.41 (2) of 30 days (or lesser period if agreed by both sides); but
- genuine negotiations requires that both sides are prepared to move, if necessary, from their initial positions in order to move towards a compromise;
- genuine negotiations requires that the representatives of both sides have the authority to commit their principals to a negotiated outcome; and
- good faith implies each side has a genuine wish to achieve a negotiated settlement of the outstanding issues;
- each side will use its best endeavours to provide, in a timely fashion, the information requested by the other side that is reasonably necessary for the negotiations;
- negotiations may be face-to-face, telephone or video conference, or fax;
- the Authorised Officer may suggest that the parties hold further negotiations;
- in general terms, each side will use its best endeavours to reach a **commercial resolution**.

2. If **complete** deadlock is reached in negotiations between shippers and the parties to a conference agreement, before a complaint is made to the Minister or directly to the ACCC:

a) Either side (or both) may request the Authorised Officer, having considered the issues, to develop a strategy for further progressing matters. This may involve the Authorised Officer requesting further information from either side or from both sides.

b) The Authorised Officer, having received any information requested of either side, will consider the issues in the context of the objects of Part X, and use his or her best endeavours to a develop a strategy for further progressing matters for both sides to consider.

c) Both sides will consider the Authorised Officer's suggested approach, and should conduct at least one further round of genuine negotiations in good faith.

d) If deadlock is again reached, each side should provide the Authorised Officer with a Statement of Reasons outlining why it is not prepared to move further towards a compromise position. The Statements of Reasons may later be given to the ACCC.

e) The Authorised Officer and the opposing parties will consider the Statements of Reasons, and consider whether there is the possibility of further movement.

f) If there is no such possibility, then both sides and the Authorised Officer will formally consider the question of whether all avenues for a compromise settlement have been exhausted, covering issues of amounts, timing, scope of application, offsets etc.

g) If all avenues have been exhausted, the Authorised Officer will formally advise both sides of the options (including a complaint to the Minister or directly to the ACCC), and may also give an assessment of the likely response of the Minister or the ACCC;

h) There will then be a "cooling off" period of 14 days before such a complaint is made.