ACCI SUBMISSION
TO THE
THE PRODUCTIVITY COMMISSION

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

AUGUST 2004

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Background

The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.

ACCI is Australia's largest and most representative business organisation. Through our membership, ACCI represents over 350,000 businesses nationwide, including: Australia's top 100 companies; over 55,000 medium sized enterprises employing 20 to 100 people; and, over 280,000 smaller enterprises employing less than 20 people.

Some 20 per cent of these firms – or some 70,000 enterprises – are actively engaged in the 'trade chain', either as exporters or importers, or in providing goods and services to them

Businesses within the ACCI member network employ over 4 million working Australians.

ACCI members are 33 employer organisations in all States and Territories and all major sectors of Australian Industry.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.

Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plan-united action. Through this process, business policies are developed and strategies for change are implemented.

ACCI members actively participate in developing national policy on a collective and individual basis.

As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.

Executive Summary

The services provided by the liner cargo-shipping industry is an integral part of Australia's international trade relationship, carrying a high proportion of our lower value/higher volume manufactured exports.

At the same time, a substantial proportion of this sector is accounted for by cartel-like arrangements amongst sea carriers, and allied service providers, known by a number of nomenclatures, most notably conferences.

By one estimate, these conferences account for around three-quarters of Australia's international sea transport services, by volume of manufactures carried.

These conferences, and the like, currently enjoy special treatment under Australian competition laws, most notably their exemption by virtue of Part X of the Trade Practices Act (1974) for anti-competitive conduct and practices which would otherwise be in breach of certain elements of Part IV of that Act.

The Australian Chamber of Commerce and Industry, for the reasons outlined in this submission, believes the current blanket exemptions and immunities afforded to the liner cargo shipping industry should be terminated.

In this regard, the Australian Chamber of Commerce and Industry recommends:

- Part X of the Trade Practices Act be repealed; and,
- any requests by the liner shipping industry for exemption or special treatment for conduct otherwise likely to breach Part IV of the Trade Practices Act be dealt with under Part VII of the Act.

Commerce and industry accepts some transitional arrangements and period may be required to allow the liner shipping industry, both service providers and users, time to adjust.

In this regard, we further recommend a three-year transitional period:

- under which the register of agreements et al for the purposes of Part X be closed immediately upon enacted of the necessary legislative changes; and,
- existing agreements et al currently registered under Part X be required to seek appropriate authorisations under Part VII.

At the end of the three-year period, any agreements, conduct et al not covered by Part VII shall be subject to enforcement action by the appropriate regulatory agencies under Part IV of the Act.

International Sea Transport

Sea transport is a major service industry to the international trading community, whether for manufactures (using containerised, liner shipping) or commodities (using bulk transport).

The competitiveness and the efficiency, and any regulatory interventions in the operations, of the sea transport sector have vital implications for users of such services. This is especially the case for exporters, importers and downstream users of lower value/higher volume products for whom sea transport is often the only logistically and financially viable option.

The sea transport industry is ostensibly structured along two lines: liner cargo services; and, bulk cargo services.

In broad terms, liner cargo services operate regular and scheduled services from defined ports along specified routes, known as 'liner trades'. They generally operate on a 'common carrier' basis (without discrimination between the goods of those prepared to pay the requisite price), with cargos aggregated for several shippers[1] at the same time.

The liner shipping industry is subject to numerous commercial and regulatory interventions, especially concerning safety[2]. Amongst the most prominent of the economic regulatory interventions are conditional exemptions from the application of competition (also known as anti-trust) laws in many countries.

[1] In the lexicon of sea transport, a 'shipper' is the party whose goods are consigned for transportation, for example the exporter or the importer. A shipping line or owner is called a 'carrier'.

[2] Such matters are beyond the scope of this submission.

The existence, and the nature and extent, of these exemptions continues to generate considerable (often heated) debate within the sea transport industry, in particular between carriers on one side, and shippers and up- and down-stream players on the other.

The bulk cargo market, by comparison, is based on two key sub-sectors: liquid cargoes, such as chemicals, oils and compressed natural gas, which are carried by specialist tankers; and, non-liquid cargoes, such as agricultural and mineral commodities (eg grains and iron ore, respectively). Carriers in the bulk trades generally do not operate on scheduled services, but rather specific, contracted voyages of fulfilment where the entire bulk cargo being moved belongs to one owner.

The broad regulatory framework applying to bulk transport is markedly different to that for liner shipping. First, safety regulations are more demanding and more rigorously enforced (reflecting the nature of the cargoes, for example chemicals and petroleum), and second (and more importantly for the terms of reference of this inquiry) operate in a free market without the competition law exemptions afforded to liner shipping[3].

[3] The industry and organisational structure, and the performance of the bulk trades are outside the terms of reference for the current inquiry, and will not be discussed further here. However, for a good general overview, see OECD (2001) at 20 - 25

Liner Shipping – Industry Structure

The international liner-shipping sector is not homogeneous in its industry structure, with several different types of vessels engaged in the liner trades.

These vessel types include: general cargo ships; container carriers (carrying containers holding manufactures); 'reefers' (refrigerated cargoes, such as processed meats and other cold foods); 'ro-ro' (roll-on/roll-off, for the transport of motor vehicles and trucks etc); and, multipurpose ships, which can perform several or all of the above tasks.

By the end of the 1990s, container traffic accounted for more than 75 per cent of liner trades by volume for many developed countries[4].

This outcome was driven by a number of factors including: greater economies of scale in container transport; rising per capita incomes in the major industrialised nations, leading to increased demand for imports of goods suitable for container transport; and, the globalisation of economics and trade, especially in Asia, as sources of products suitable for containerised transport.

The international liner shipping industry is also becoming more capital intensive, and more concentrated, than in the past, with each characteristic (capital intensity and concentration) driving the other in a circular pattern.

[4] OECD (2001) at 14

In simple terms, economic and trade growth and development has driven increased demand for containerised shipping, which in turn has stimulated the construction of increasingly larger vessels to maximise economies of scale.

This movement to larger vessels has, in turn, has lead to the consolidation of shipping companies into larger entities, with cargo movements by larger vessels focusing on fewer, major 'hub' ports, which can include consolidation and transhipment of containers from smaller ports/'thin trades' (ie routes with lower cargo volumes).

In quantitative terms, vessels capable of carrying between 2000 and 4000 TEUs[5] accounted for 40 per cent of total, global capacity at the end of the 1990s, with another almost one-quarter of capacity accounted for by vessels capable of carrying more than 4000 TEUs, and plans for ships able to move more than 10000 TEUs[6].

By the early 2000's, the top twenty container service operators accounted for more than 60 per cent of global container capacity[7].

Liner Shipping – Industry Organisation: The Conferences

A critical, and distinguishing, feature of the international liner shipping industry continues to be the capacity of carriers to develop and implement a range of market co-operative arrangements which, if practiced in other industry sectors, would likely be regarded breaching competition law.

[5] Twenty Foot Equivalent Units, the conventional measurement for containers in the liner shipping industry, reflecting the length of the 'container box'.
[6] OECD (2001) at 14
[7] OECD (2001) at 14

In short, these market sharing, price colluding/fixing arrangements would, absent various forms of government acquiescence, be illegal under the national competition laws of many developed countries.

Such anti-competitive arrangements, agreements, structures et al, are generally termed 'conferences'.

These cartel-like arrangements have, over time, persuaded numerous national governments (which have accepted such arguments with varying degrees of reluctance) that such collusive arrangements are necessary for certainty of supply of service and stability in pricing for the movement of freight by liner shipping.

More formally, the term 'liner conferences' can be defined as *"formal or informal private arrangements between carriers or between shipping lines to utilise common freight rates and to engage in other co-operative activities on a particular route or routes."*[8] Even at first glance, anti-competitive practices would appear to potentially include price fixing and market sharing.

According to the Organisation for Economic Co-operation and Development (OECD): there are more than 300 liner conferences in operation around the world, with membership ranging from 2 to 40 shipping lines; and, these conferences or the like account for around half global general liner shipping trade, a share which is declining in favour of non-conference carriers[9].

[8] OECD (2001) at 16
[9] OECD (2001) at 16

By one estimate, the liner shipping conferences accounted for just 60 per cent of the TEU capacity in the late 1990s, which can be largely attributable to the entry into the sea transport industry of a number of large, independent carriers able to offer comprehensive services, and smaller and lower cost carriers operating in niche markets, or those where the products being transported are of lower value/less time sensitivity[10].

The share of the Australian trades taken by the conferences has declined from around 74 per cent in 1984 to around 55 per cent in 1999, although if the capacity of the members of 'Discussion Agreements' is added back then the figure rises to around 70 per cent[11].

Although conceptually similar to conferences in a number of regards (especially in their anti-competitive nature), consortia, and 'discussion agreements' and capacity stabilisation arrangements have several distinguishing features.

Consortia are arrangements between liner shipping companies aimed primarily at supplying jointly organised services, largely by means of operational or technical activities. While similar to conferences in this regard, they differ in that consortia address the rationalisation of container shipping services, whereas conferences extend their co-operative arrangements to include uniform or common freight rates.

[10] OECD (2002) at 20
[11] OECD (2002) at 22

'Capacity Stabilisation' and, 'Discussion/Talking' Agreements have emerged in a number of countries and regions as mechanisms for co-operation between conferences and their members, and non-conference member liner shipping companies. The presence of such mechanisms generally reflects the weakened position of conferences in the relevant 'trades', which feel able, at best, to reach 'understandings' with non-conference carriers on selected issues, which are not binding.

Obtaining reliable price and cost information from carriers and shippers to evaluate the impact of the sea transport cartels is at best very difficult, and more realistically largely unavailable. This situation reflects the confidentiality of such arrangements between the parties, and the general absence of any reporting requirements for such information.

However, based on the experience of other sectors and industries where there have been monopolies, oligopolies or other forms of suppression of robust competition, and economic theory, it is likely such cartels result in costs and prices that are higher than would prevail in more competitive markets.

(By way of indication, economic deregulation in the air and road transport sectors in developed, industrialised nations has seen prices fall between 15 and 30 per cent for both sectors in countries such as Australia, Britain, France, Germany, Spain and the United States of America.[12])

[12] OECD (2002) at 8

According to the OECD[13], on what limited information is available: the overall pricing structure of the liner cargo trades is driven by demand and supply for services, which in turn reflect economic and trade growth rates in key trading nations; non-conference carriers are taking an increasing market share and placing greater competitive, including price, pressures on conference-based carriers; conferences are increasingly offering 'discounts' on official 'book rates'; and, in general terms, the freight rates for non-conference carriers tend to be around 10 per cent lower than conference members.

Taken as a whole, this suggests a diminishing capacity of conferences to set, and maintain, freight rates both per se and in competition with non-conference carriers, both of whom adjust their broader prices according to the economic and trade cycles.

However, in making such assessments, analysts and observers should bear in mind in sea transport there are always two legs (inbound and outbound) to any given trade, which may be subject to distinctly different demand/supply profiles that in turn result in differing pricing structures depending on the direction of the trade.

Not surprisingly, carriers are likely to be able to ask, and obtain, higher prices in the more buoyant, than in the softer, direction of trade. In some cases, cross-subsidies and round-tripping pricing may be charged, as will costs for moving 'empty boxes' between destinations where there are imbalances in movements.

[13] OECD (2001) at 44

Liner Shipping And Competition Policy

Liner shipping conferences, and the like, benefit from special treatment under national competition laws in most developed and industrialised countries; only the nature and extent of this 'special treatment' differs.

Proponents of these special treatment arrangements vigorously defend them on a number of grounds, the most prominent of which is they are seen (by them) as necessary to guarantee the reliability of supply of maritime freight transport services.

Other arguments put forward include: liner shipping is generally a common carrier service, where ships sail at set times regardless of the amount of cargo they have on board; carriers are often confronted with imbalanced trade flows, and the deployment of sufficient carrying capacity on the 'dominant trade' will often be well in excess of the amount on the return or 'deficient' trade; conference and similar arrangements help avoid destructive competition in a capital intensive industry, where entry costs are very high.

Opponents of such special treatment argue, usually with equal conviction, that these practices are at least anti-competitive, and at worst cartels which manage supply of maritime transport services to inflate prices.

Other criticisms include: these arrangements have resulted in abuses of power, and unjustifiably higher freight rates (prices), well above those which would prevail in a competitive market; pricing and service provision in such an anti-competitive framework gravitates towards that of the *least* efficient service provider (shipping line); the claimed benefits of reliability of supply are overstated, and not borne out by experience; and, the bulk transport sector is able to operate in a competitive environment, without special treatment under national competition laws.

The following Table, prepared by the OECD[14], provides a summary of the key points of agreement and disagreement between carriers and shippers/users of the international liner shipping industry.

[14] OECD (2002) at 29

Carrier And Shipper Views On Liner Shipping And Price-Fixing

	Carriers	Shippers
Features of Liner Shipping		
No regulatory barriers to entry	Agree	Agree
No economic barriers to entry	Agree	Mostly Agree
Wide array of service options	Agree	Reserved
Market-Driven competition	Agree	Disagree
Ample capacity	Agree	Agree
Efficient capacity	Agree	Disagree
Investment in innovation	Agree	Reserved
Efficient operation	Agree	Disagree
Unique challenges (eg lumpy costs, below average cost pricing, etc)	Agree	Disagree
Benefits of price-fixing in Liner Shipping		
Allows for competition and market rates to emerge	Agree	Disagree
High quality service	Agree	Reserved
Stable commercial development	Agree	Disagree
Stable service delivery	Agree	Agree
Allows to mitigate effects of excess capacity	Agree	Disagree
Justifications for price-fixing		
Counteracts destructive marginal cost pricing that would otherwise be below real costs	Justified	Not Justified
Prevents consolidation of industry into a few monopolistic actors	Justified	Not Justified
Exchange and discussion of market information is necessary to better develop future strategies	Justified	Not Justified
Commonly-set prices act as a benchmark for negotiated rates	Justified	Not Justified

The main messages emerging from this Table are the clear divisions in opinion between the carriers on one side, and the shippers/users on the other, with only a relatively few points of agreement.

However, the blanket exemption from national competition laws, which have been traditionally sought/defended by the liner shipping industry have been wound back in a number of countries (excluding Australia, at least for the time being)[15].

The European Union does not allow a block exemption for anti-competitive (market and price sharing) agreements between conference and non-conference lines, which are generally scrutinised with considerable attention to detail.

The United States, by comparison, through its Ocean Shipping and Reform Act of 1998 has undermined the power of the conferences by simplifying the negotiating arrangements between carriers and shippers/ users, allowing those active on the US trades to enter into confidential contracts.

A key result of these legislative and policy changes in the United States was a massive switch toward confidential contracting. Key results of this outcome has been a convergence of freight rates charged by conferences toward their real costs of operation, and a general undermining of the market power of the liner shipping conferences on key trades. For example, the conferences now account for a very small share (less than 10 per cent) of the important Europe – United States trade[16].

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[15] OECD (2002) at 51 for a longer discussion of the arguments for and against such special treatment
[16] OECD (2002) at 22

In a major review of the special treatment of the liner shipping industry under various national competition laws, the OECD found[17]:

"… freight rates have generally declined from high levels achieved in the late 1970s and early 1980s where conferences were better able to dictate rates. It is perhaps significant that some of the steepest declines in rates have occurred in the past few years following on the heels of regulatory changes allowing more flexible pricing mechanisms and the arrival of strong independent carriers."

They concluded[18]:

"… this review has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offer more benefits than costs to shippers and consumers, and recommends that limited anti-trust exemptions not be allowed to cover price-fixing and rate discussions. It also finds that capacity agreements should be carefully scrutinised to ensure that they do not distort the markets in which they are present."

This outcome largely reflects the general lack of available information to allow economists and others to rigorously analysis the arguments for and against the preservation of the special treatment generally afforded to the liner shipping industry.

[17] OECD (2002) at 40
[18] OECD (2002) at 5

This information vacuum covers critical measures of market performance such as actual negotiated freight rates, the terms and conditions of service agreements, relationships between operating costs and freight rates, and the nature of arrangements between carriers.

Nevertheless, the OECD expected[19] the removal of the existing anti-competitive exemptions in the international liner shipping industry would be likely to result in some distinctive changes in industry structures and operations.

These changes would likely include: additional pressures on carriers to enhance the range of services, and the coverage of those services, offered to shippers; major carriers would continue to evolve towards operating between major hubs seaports; new operators and subsidiaries of existing carriers would improve their offerings to niche markets, which to date have suffered from relatively poor service; and, a continued expansion in multi-modal, door-to-door services.

The Trade Practices Act: Part X – Exemption

Part X of the Australian Trade Practices Act provides exemptions for the international liner cargo shipping industry from key anti-competitive provisions of Part IV the Act, which deal with restrictive trade practices.

Most notable of these exemptions are those dealing with anti-competitive agreements (Section 45[20]), and exclusive dealing (Section 47[21])[22]. Absent these exemptions, international liner cargo carriers involved in cartels (generally called conferences) would be liable under the Act.

[19] OECD (2002) at 72
[20] TPA, Section 10.17 and 10.17A
[21] TPA, Section 10.18 and 10.18A
[22] See also TPA, Section 10.24 and 10.24 A

Part X was enacted by the Parliament with several objectives, most notably: "*to ensure Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive*[23]*; and, to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories...*[24]"

The Courts have distilled the purpose of Part X in the following manner: *"... the provisions of Part X were intended by the Parliament to constitute an exhaustive code controlling and regulating, in so far as restrictive trade practices are concerned, outward cargo shipping.*[25]*"*

The main components of the Part X system for regulating the international cargo liner shipping sector are: the registration of conference agreements; the regulation of non-conference ocean carriers with substantial market power; the regulation of unfair pricing practices; and, the registration of agents of ocean carriers[26].

Part X provides some limits on the restrictive trade practices which may be dealt with in conference agreements, and hence exemption from liability under Sections 45 and/or 47 of Part IV of the Act.

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[23] TPA, Section 10.01 (1)(a)
[24] TPA, Section 10.01 (1)(b)
[25] *Refrigerated Express Lines A/Asia Pty Ltd vs Australian Meat and Livestock Corporation* (1980) 44 FLR 455 at 461
[26] TPA, Section 10.01A

These matters include: the fixing or other regulation of freight rates; the pooling or apportionment of earnings, losses or traffic; the restriction or other regulation of the quantity or the kind of cargo to be carried by parties to a conference agreement; or the restriction or other regulation of the entry of new parties to the agreement[27]. (In essence, the first element concerns price fixing, while the latter three involve market sharing.)

Part X limits the exemption to only certain activities within registered[28] conference agreements dealing with inward and/or outward liner cargo shipping services: the transport of cargo by sea; stevedoring services; and, activities that take place outside of Australia[29].

It also includes: the fixing of charges for an inter-terminal transport service where this is part of a inward or outward liner cargo shipping service[30]; and, the determination of common terms and conditions for bills of lading, again where this is part of a inward or outward liner cargo shipping service[31]. However, such exemptions do not extend to dealings between parties to a conference and the supplier(s) of ancillary services on behalf of the provider of a scheduled cargo shipping service[32].

Part X does impose some constraints on the capacity of the parties to a conference agreement to engage in unfair pricing practices[33].

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[27] TPA, Section 10.08(1)(c)
[28] TPA, Section 10.16; and Division 6, "Registration of Conference Agreements"
[29] TPA, Section 10.14 (1)
[30] TPA, Section 10.14 (2)
[31] TPA, Section 10.14 (3)
[32] TPA, Section 10.14 (4)
[33] TPA, Section 10.61

In particular, the Minister under the Act can order a carrier not to engage in a pricing practice that, inter alia, is of such magnitude or recurring nature that it prevents or hinders (or threatens to do so) the supply of liner cargo shipping services on the trade route that are efficient and economical, and provided at the capacity and frequency to meet the needs of shipping users[34].

The Minister can also issue an order for a carrier not to engage in a pricing practice where the practice is *"contrary to the national interest"*[35].

Part X imposes both sectoral benefit and national interests tests. Conference agreements may include certain restrictive trade practices (those otherwise in breaches of Sections 45 and/or 47), where there is an *"overall benefit"* to Australian exporters (in the case of outward conference agreements) or Australian importers (in the case of inwards conference agreements)[36].

Determination of the *"national interest"* is guided by several elements: whether the past and likely future effect of the practice on continued access by Australian exporters to outward liner cargo shipping services delivers at adequate frequency, reliability and freight rates that are internationally competitive; and, offers stable access to export markets for exporters in all States and Territories[37].

[34] TPA, Section 10.62 (a)
[35] TPA, Section 10.62 (a) (iv)
[36] TPA, Section 10.08 (1)(d)
[37] TPA, Section 10.67 (1) (a)

Other elements in determining *"national interest"* include: the extent to which the competitors of Australian exporters enjoy advantages arising from such practices; and, the effect denial of any advantages provided by such practices would have on the competitiveness of Australian industries[38].

Part X imposes obligations upon carriers in relation to registered conference agreements[39]. Prominent amongst these obligations are requirements for parties to conference agreements to: participate in negotiations with relevant designated shipper bodies in relation to negotiable shipping arrangements; and, to provide reasonable information to shipping users to facilitate those negotiations[40].

The Trade Practices Act: Part Vii – Authorisation And Notification

Part VII of the Trade Practices Act offers a viable alternative approach for dealing with the anti-competitive effects of the international cargo liner shipping industry, by allowing for the authorisation or notification of certain forms of behaviour that would otherwise be in breach of the Act.

Behaviour that can be subject to authorisation under Part VII of the Act covers:

. contracts, arrangements or understandings that would have the effect of substantially lessening competition within the meaning of Section 45 of the Act (for which authorisation can be granted under Section 88 of the Act);

[38] TPA, Section 10.67 (1) (b) and (c)
[39] TPA, Division 7
[40] TPA, Section 10.41

- resale price maintenance (otherwise in contravention of Section 48 of the Act, and open to authorisation under Section 88 8(A);

- mergers that may adversely effect competition in a market in Australia (otherwise in breach of Section 50, and open to authorisation under Section 88 of the Act); and,

- exclusive dealing that would have the effect of substantially lessening competition within the meaning of Section 47 of the Act (for which notification may be accepted under Section 93 of the Act).

While an authorisation remains in force, parties to behaviour subject to that authorisation (ie engaged in the relevant otherwise anti-competitive conduct) are, in effect, granted immunity from the relevant provisions of Part IV of the Act.

The power to make determinations, and issue, authorisations resides with the Australian Competition and Consumer Commission[41], which shall be guided by three core principles in this regard.

First, the parties seeking the authorisation need to satisfy the regulator there is likely to be a public benefit, and it will be sufficient to outweigh the anti-competitive detriment; second, the regulator shall consider the likely shape of the future, both with and without the conduct in question; and, finally, the regulator shall form a view of the functioning of the relevant markets with and without the conduct for which the authorisation is being sought[42].

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[41] TPA, Section 88
[42] *Re John Dee (Export) Pty Ltd* (1989) 87 ALR 321

Importantly, Part VII imposes a number of requirements, which provide considerable transparency in the authorisation process (and hence, greater public awareness of the nature and extent of anti-competitive behaviour which is being granted immunity on their behalf).

Such transparency comes from the procedures involved for making applications, and their consideration by the regulator – for example: in the making public of applications[43], in the maintenance by the ACCC of a register of applications and authorisations granted[44] (although certain forms of confidential information are protected[45]); and, in the requirement for the regulator to convene a conference of interested parties (broadly defined) before a final decision is made[46].

Part VII of the Act confers fairly broad discretion upon the regulator as to the nature of the authorisation granted: *"The Commission shall … make a determination in writing granting such authorisation as it considers appropriate."*[47] The regulator also has the discretion to reject an application for authorisation[48].

In making a determination, as noted earlier, the regulator is required to consider the 'future with and without' outcomes of granting or not granting the authorisation[49], and whether the likely result thereof would have or likely have a public benefit and that benefit would outweigh the detriment to the public arising from the resulting continuity of anti-competitive behaviour[50].

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[43] TPA, Section 89
[44] TPA, Section 89
[45] TPA, Section 89 (5A)
[46] TPA, Section 90 (5)
[47] TPA, Section 90 (1)(a)
[48] TPA, Section 90 (1)(b)
[49] *Re John Dee (Export) Pty Ltd (1989)* 87 ALR 321
[50] Inter alia, TPA, Section 90 (6) and (7)

The Commission is also required to take a broad, rather than a narrow, view of the functions performed by those seeking the authorisation, of the industry in which the applicant operates, and of the market likely to be impacted by the conduct for which authorisation is being sought[51].

Regrettably, the Act does not provide express guidance to the ACCC on the critical concept of 'public benefit'[52], leaving the matter largely to the Courts to define.

In an important decision[53], the Courts have set a very broad boundary on matters which could be considered to be, but are not exhaustive of, public benefit.

These include, amongst others: economic development; the encourage of research and business capital investment; the promotion of business efficiency and international competitiveness; industrial rationalisation; the expansion of employment or prevention of unemployment in efficient industries; industrial harmony; assistance to efficient small business; the expansion of consumer choice; improved market information to consumers and producers; the generation of export markets; and, protection of the natural environment.

However, where claims of public benefit are made, general statements are to be given little weight, with a clear preference for factual material[54]. Furthermore, in making such assessments of public benefit, the regulator will do so in the context of the 'future with and without' test[55].

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[51] *Re Concrete Carters Association (Vic)* (1977) 31 FLR 193
[52] beyond Section 90 (9A) dealing with public benefit in applications for authorisation of mergers
[53] *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50 - 108
[54] *Re Rural Traders Co-operative (WA) Pty Ltd* (1979) 37 FLR 244
[55] *Re Media Council of Australia (No 2)* (1987) 88 FLR 1; 82 ALR 115

While the Act provides the regulator with broad discretion as to the decision to grant, or not, an authorisation, and any terms and conditions to be attached thereto, the duration of authorisations are not open ended – with a period of five years being considered appropriate recognising the constantly changing nature of markets[56].

As has been noted, the potential anti-competitive behaviour of the international liner cargo shipping industry is currently exempt from elements of the Part IV of the Act, by virtue of Part X of the Act.

However, a number of aspects of such behaviour, albeit in other industries, has been subject to authorisations. Such conduct has included[57]: capacity allocation; co-operative buying; infrastructure; joint ventures; industry rationalisation; standard documentation; third line forcing; and, uniform pricing.

There have also been a number of relevant judicial determinations in relation to the transport industry (both aviation and road passenger)[58]. Several of these authorisations, particularly those in the international aviation industry, have resonance for the application of Part VII to the international liner cargo shipping industry, given common features of potentially anti-competitive behaviour.

[56] *Re Australasian Performing Rights Association* (1999) ATPR 41 - 701
[57] For a general discussion, and citation of judicial authorities, see Miller (2004) at 909 - 919
[58] See Miller (2004) at 917

They include authorisation for: the co-ordination of international air services through an alliance[59]; scheduling, capacity and pricing co-ordination arrangements[60]; common booking services[61]; fare setting[62] and price fixing[63]; agreements on the scheduling of international air transport services[64]; capacity leasing and sharing arrangements[65].

Clearly, if the international air transport sector, and its major players, have been able to operate under the authorisation process, where there are numerous examples of similar potentially anti-competitive conduct, it is (even more) difficult to understand why the international liner cargo shipping industry cannot.

Summary And Conclusion

The liner cargo shipping industry is an integral part of Australia's international trade chain, and plays an important role in determining the international competitiveness of key manufactured export industries.

There are clear and strong divisions of opinion between carriers and users as to the economic implications of the cartel-like arrangements – known variously, but generally as conferences - which have traditionally dominated the liner shipping industry.

[59] *Re Ansett Australia Ltd* (1998) ATPR (Com) 50 - 265
[60] *Re Qantas Airways Ltd* (1995) ATPR (Com) 50 - 184
[61] *Re Travel Industries Automated Systems Pty Ltd* (1993) ATPR (Com) 50 -131
[62] *Re Qantas Airways Ltd* (1992) ATPR (Com) 50 - 120
[63] *Re Qantas Airways Ltd* (1987) ATPR (Com) 50 -056
[64] *Re International Air Transport Association* (1986) ATPR (Com) 50 - 101
[65] *Re Qantas Airways Ltd* (1985) ATPR (Com) 50 - 090

There is little disagreement, however, on a key issue concerning these arrangements – they are anti-competitive – although whether they deliver net benefits which outweigh those anti-competitive effects has been subject to considerable disagreement between service providers and users.

The Chamber movement shares the view of the OECD on the role and function of competition law and policy in the fostering and operation of competitive markets:

"A well-functioning competitive market environment allows buyers to decide and communicate what products and services they desire, and allows sellers to respond to this demand as creatively and inexpensively as the market will permit."

"These goals can be thwarted by inefficient government regulation or by collusion among sellers to artificially restrict output, set prices above what they might otherwise be and/or unfairly eliminate competitors."[66]

And further[67]: *"Given the effectiveness of competitive markets in most sectors, and the net negative impact of most anti-competitive practices, these (government intervention in the operation of markets) are the exception rather than the rule."*

[66] OECD (2002) at 7
[67] OECD (2002) at 9

"The common practice is to put the onus of proof for implementing or continuing such practices on the proponents of such measures. Furthermore, governments engaging in regulatory reviews of competition policy have a responsibility to ensure that the special circumstances that gave rise to restrictions on competition still exist and/or warrant exemptions to the general pro-competition policies."

The Australian Chamber of Commerce and Industry believes the existing preferential treatment for the liner shipping industry should be terminated. The international aviation industry has shown, in similar market circumstances, an authorisation process for otherwise anti-competitive arrangements and conduct is applicable and workable.

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