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Dear Sir

SUBMISSION TO THE 2004 REVIEW OF PART X OF THE TRADE PRACTICES ACT 1974: INTERNATIONAL LINER CARGO SHIPPING

Please find attached our submission to the Inquiry.

Regards

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SUBMISSION

TO

PRODUCTIVITY COMMISSION

2004 REVIEW OF PART X

OF THE

TRADE PRACTICES ACT 1974

We shall in a very literal sense empty the baby out with the bath by abolishing an institution which needs nothing more than a little…rationalizing to make it…useful.

George Bernard Shaw, Marriage, 1911

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Introduction

This submission is based on the existing Australian Law regulating International Liner Cargo Shipping to and from Australia in Part X of the Trade Practices Act 1974 (Cth) (the Act) and is concerned with the provisions balancing the competing interests of Australian exporters and importers (Shippers) and ocean carriers in their various groupings and individually as defined in the Act (Carriers) in the globalization of international markets by providing a limited exemption from the prohibitions against restraint of trade in Part IV and enabling Shippers to act together for the purpose of negotiations with Carriers concerning 'negotiable shipping arrangements' defined in ss10.41 and 10.52 of the Act, Part X.

Part X of the Act provides an interesting model for the conduct of Shipper and Carrier negotiations as it contains unique provisions in ss10.41 and 10.52 which recognise and re-dress the material inequality of Shippers in their negotiations with Carriers for the supply of shipping services at Australian ports which are a small part of the much larger global markets serviced by Carriers.

The net effect of Part X is to promote the negotiability of shipping arrangements by ensuring that Carriers must negotiate with Shippers on a range of matters concerning carriage of goods by sea and ancillary matters, and does not allow Carriers to act unilaterally either collectively, or individually in some circumstances.

Part X recognizes that Carriers provide a global service with access to specialized and internationally based resources, contrasted with under-resourced Shippers with perhaps only local knowledge, and re-dresses that inequality by the protection it gives Shippers in the context of requiring Carriers to negotiate a broad range of shipping arrangements, whilst balancing the interests of the community with a need for efficient and economic shipping services for the carriage of goods be sea, both from and to Australia. This is perhaps more significant in the current trend towards globalization of markets which is apparently occurring at an ever increasing pace, and probably well beyond the expectation of those who originally drafted the earlier versions of Part X in the early 1970's, and of even 10 years ago.

These are problems which have historically troubled other jurisdictions, such as:

- European Community
  See the Treaty of Rome, Art 85 deals with conduct which may affect trade, and see ICI v EEC (1972) CMLR 557, and since then the 'maritime transport package' regulations 1986 and subsequent additions;

- United States
  See the Shipping Act 1984 which gave exemptions from antitrust laws to filed agreements and activities within the scope of the Act. See also United States v Hamburg - Amerikanische Packetfahrt - Aktiengesellschaft 200 Fed Rep 806 (1911), 239 US 466 (1916) in which the restrictive practices of a shipping

conference were caught by US jurisdiction because although the contract was formed overseas, part of the contract was to be performed in the US, and that part could not be separate. However, the US approaches the doctrines of extra-territorial application of domestic law differently to the approach adopted by the UK, Australia and NZ;

- New Zealand
  See Shipping Act 1987 (NZ) granted exemption for outwards shipping from Parts II (Restrictive Trade Practices) and IV (Price Control) of the Commerce Act 1986 (NZ).

The creation of a statutory obligation on Carriers to negotiate with Shippers in Part X ss10.41 and 10.52 balance the rights (exemptions from Part IV) and obligations of Carriers (to negotiate with Shippers) with policy objectives promoting competition with benefits for Australian Shippers and the interests of the Australian community.

The sections providing benefits and protection for Shippers from unilateral conduct by Carriers (equivalent to unconscionable conduct recognized elsewhere at law) have been successfully used on a number of occasions and indicate the importance of the provisions in balancing the rights and obligations of shippers and carriers. A number of examples are set out later in this submission.

There have been periodic, if not continuous, calls for the abolition of Part X, repeated formally from at least the time of submissions to the 1993 Brazil Review.

These calls have originated from those observers and commentators with the advantage of a clear understanding of the theory and ideals of competition objectives and policy, but the disadvantages of:

- lack of experience of the disparity between the comparative resources, access to information and negotiating strength of Carriers and Shippers;

- lack of practical knowledge of the operation of ss10.41 and 10.52 of Part X;

- lack of knowledge, experience or understanding of the global shipping industry, including the sophistication and complexities of international trade, of which shipping is but only one part but which is at the same time inextricably bound up with the other parts consisting of:

  - international sale of goods;

  - jurisdiction and enforcement (including forum issues);

  - carriage of goods by sea;

  - international payments;

  - marine insurance.

Following recommendations of the Brazil Review, in October 1994 the Minister for Transport issued a Press Release confirming that the Government would amend Part X by providing penalties and civil remedies, subjecting the shipping accords and discussion agreements to greater scrutiny, and providing for mediation and conciliation. Although amendments have been made to Part X since then, those recommendations have not been adopted.

Since then, disputes between Shippers and Carriers continue to show that the conduct of some Carriers has clearly rebutted the argument that Part X is unnecessary and the industry should be self-regulated.

Shipper bodies throughout the ASEAN Region have also expressed interest in Part X as a model law for balancing the interests of Shippers and Carriers, and there seems to be little, if any, justification of abandoning all aspects of Part X to achieve economic purity, or because the Part X model is unique.

Interestingly and perhaps as a testament to the effectiveness of Part X, there appear to be no Court decisions on Part X issues, other than a Federal Court decision concerning an earlier version of these provisions, since repealed.

1 Retention of Part X

1.1 Objectives of Part X and utility of sections promoting negotiations between Australian shippers and foreign carriers

Part X achieves an important role in enabling Australian Shippers to present a collective position in negotiations with Carriers, and other parties providing an ancillary service.

Objectives

The Act specifies four principal objectives for Part X which have been tested over the years:

The principal objects are set out in s10.01(1) and include:

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

The means of achieving these objects are set out in s10.01(2), which involves balancing the competing interests of Australian exporters and importers with those of conference and non-conference carriers by permitting conference operations which has the important effects of:

- bringing the activities of those carrier groups within the jurisdiction;

> *(2)(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:*
> *…*
>
> *(2)(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.

- providing Australian exporters and importers with real negotiating power;

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

- reducing the role of the Commonwealth Government:

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

Part X, s 10.01A also explains the objectives and means for achieving them in a simplified outline, including:

- bringing their activities within jurisdiction:

This Part sets up a system for regulating international liner cargo shipping services.

The main components of that system are as follows:

(a) registration of conference agreements;
…
(d) registration of agents of ocean carriers.

The parties to a conference agreement relating to international liner cargo shipping services may apply for the registration of the agreement.

- providing Australian exporters and importers with real negotiating power;

The parties to a registered conference agreement are required to negotiate with, and provide information to, representative shipper bodies.

The relevance and importance of Part X extends beyond the actual carriage of goods by sea, and includes the independent land based services defined in s10.02 as 'ancillary service':

'ancillary service', in relation to a scheduled cargo shipping service, means:

(a) an inter-terminal transport service; or

(b) a stevedoring service; or

(c) a service provided outside Australia;

that:

(d) relates to the cargo transported, or to be transported, on the scheduled cargo shipping service; and
(e) is provided by, or on behalf of, the provider of the scheduled cargo shipping service.

Utility of Part X

The utility of Part X is functional rather than merely theoretic, and provides valuable statutory negotiating rights for exporters and importers under ss10.41 and 10.52 of the Act.

The importance of s10.41 is that it requires the parties to a registered conference agreement (Carriers) to negotiate with certain designated shipper bodies and shipper bodies in respect of both exports and imports (Shippers). The key elements of s10.41 are:

1 Identifies the subject matter for negotiations between Carriers and Shippers. The subject matter is defined in a very broad way as 'negotiable shipping arrangements' in s10.41(3):

> *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, ss, 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).*

And 'freight rates' which is used in the terms 'negotiable shipping arrangements' is also broadly defined in s10.41(3):

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

and a 'freight rate agreement' is defined in s10.02 as:

> *freight rate agreement means a conference agreement that consists of or includes freight rate charges.*

with 'freight rate charges' also defined in s10.02:

(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.

Importantly, the definition of 'negotiable shipping arrangements' in ss10.41 and 10.52 consists of arrangements, terms and conditions of Carrier services both proposed and provided under the conference agreement, and includes:

…freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call

The definition is not limited and is indicative by application of the principles of statutory interpretation by use of the words

'… including, for example…'

However, there is a difference between the examples in s10.41(1)(a) applying to exporters, and the examples in s10.41(1)(b)(ii) which expands the examples relevant to importers to activities occurring on land in Australia to include:

terminal handling charges and charges for inter-terminal transport services

There are a number of issues arising from this section:

(a) The difference in the examples between exporters and importers, and s10.41(1)(b)(ii) referring to terminal handling charges (THCs), may cause confusion and potential lead a court to conclude from the different treatment, that terminal handling charges are applicable only to importers and not to exporters. The fact is that THCs were introduced by Conference and non-conference Carriers for export cargo at Australian ports in about 2000.

(b) Potential inconsistency with the definition of the limits of a port or wharf set out in the Carriage of Goods by Sea Act 1991 (Cth), s9A;

(c) Fails to recognise the use of a combined transport bill of lading in the export trade. In other words, export goods (as well as import goods) may include an Australian inland (road, rail and warehouse) sector;

(d) Lack of transparency in the imposition of THCs which are applicable for terminal services between ship's side and terminal gate. Interestingly, THCs are almost uniform across Australian ports, and yet it is unlikely that the cost of delivering terminal services is the same at every port as there are a number of variables, including: return on capital; interest charges; wages; rent paid by stevedores to port authority; cost of power and fuel and so on. It is impossible to ascertain the cost base for stevedores at

each port without transparency, and to form an opinion about whether a uniform THC at different ports charged by different Carriers (both conference and non-conference members) is more than a happy coincidence. Similarly for inter-terminal transport services. Consider the situation of Adelaide, where export and import goods are transported overland by rail or road and shipped through Victorian ports

2 Carriers must provide Shippers with 30 days notice of any proposed change involving the negotiable shipping arrangements, s10.41(2):

(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 Carriers must participate in negotiations with Shippers, s10.41(1)(a), including a statutory obligation to consider matters raised and representations made in the negotiations:

(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;

4 Carriers must make information available to Shippers, s10.41(1)(b):

(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

This requirement recognizes the imbalance in access to information arising for Shippers, and is somewhat unique in that it requires one party to negotiations (Carriers) to provide information useful to its opponent (Shippers) they need in negotiations.

There is no doubt that Carriers conduct their business on a world-wide basis, of which Australia is a (relatively minor) part at the extremity of a trade route. Consider a round the world service as provided by the former Belgium Carrier, ABC Container Line, which effectively circled the globe at the equator, but traveled south from Singapore to Australian ports before heading to Auckland and then north to the Panama Canal, providing a service for Australian Shipper cargo discharged and loaded at North American, UK and European ports.

Access to information is very important to Shippers, particularly as Shippers are under-resourced, and do not have the financial or personnel resources to meet the Carriers. The position in one of a significant imbalance in favour of Carriers, to the detriment of Shippers.

5 Carriers have four obligations to the Commonwealth (by its authorised officer, in the Department of Transport and Communications) by which the Carriers are required to provide information, give notice of a proposed negotiation meeting, permit him or her to attend the meeting, and consider suggestions, s10.41(1)(c):

> *(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.*

This section effectively gives statutory responsibility for supervision of the negotiations between Carriers and Shippers to the Commonwealth Department of Transport and Communications. Without wishing to be critical of that Department, its function and focus is on transport issues, and there is doubt that its officers have the relevant experience, expertise or focus to supervise matters which fall for supervision under the restraint of trade provisions (Part IV) of the Trade Practices Act 1974, and which are more appropriately the operational responsibility of the ACCC.

Conceptually and operationally, theoretically and practically, Part X is directly associated with Part IV as it provides a qualified exception from the prohibitions in the restraint of trade provisions.

The activities of Carriers and Shippers under Part X, or a reformed Part X should be supervised by the ACCC.

Section 10.41(3) contains further definitions relevant to understanding the section:

In respect of jurisdictional issues:

> *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.*

And in defining the Shippers:

> *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.

The requirements of s10.41 are mirrored in s10.52 which requires a non-conference ocean carrier (NCOC) with substantial market power to satisfy the same obligations.

The requirement of 'substantial market power' applies a test which is elusive and troublesome for Shippers.

For example, COSCO is a major NCOC for carriage between Australia and China, with the potential for expanding cargo traffic, especially if the proposed Australia/China Free Trade Agreement is concluded.

To understand the operation of Part X and ss10.41 and 10.52, it is necessary to identify the parties to Part X who are defined in ss10.02, 10.03, 10.41 and 10.52:

1 Government 'authorised officer';

2 Shippers;

3 Carriers;

4 Stevedores.

And the services to which Part X applies, including export and import shipping and ancillary services provided by conference and non-conference carriers and stevedores.

Issues for Shippers

The context of sea carriage and terminal operations is international trade, and the Australian operations of international Carriers and terminal operators are small when compared to the over-all and world-wide operations of those Carriers and terminal operators.

Further, the tonnage and value of Australian exports and imports is also relatively insignificant in the context of world-wide operations.

It is in this context that Shippers have to deal with Carriers.

To put it bluntly, Australian Shippers have no real commercial negotiating power for the range of shipping services which fall within the definition of 'negotiable shipping arrangements' in ss10.41 and 10.52, other than perhaps the negotiation of a lower

freight rate achieved by larger Shippers that the freight rates available generally in the market.

The negotiating power of Australian Shippers is not a commercial power, but a statutory power which arises under the Act, Part X, ss10.41 and 10.52. It has a legislative rather than a commercial or market basis.

It has been a consistent view, since at least the 1920's, that Australian Shippers (being in the antipodes) have little, if any, market or commercial power (in a remote market for the supply of shipping services) to negotiate with Carriers operating in a world-wide market.

In the following paragraphs, this submission identifies some of the issues affecting Australian Shippers.

Bills of lading

Bill of lading terms and conditions are within the definition of 'negotiable shipping arrangements' in ss10.41 and 10.51, and there have been two significant bill of lading negotiations between Australian exporters and carriers which illustrate the effectiveness of these sections:

1 Australia to Europe Shipping Conference Combined Transport Bill of Lading

During 1991, clauses on the AESC Bill of Lading were negotiated by APSA to more fairly spread the share of responsibility for carriage of goods by sea under a combined transport bill of lading. The negotiations commenced in February 1991 and were finalised in November 1991. Mr Frank Beaufort of the Australian Peak Shippers' Association (APSA) led the shipper delegation and Mr John Richardson from P&O in London, and a member of the London based Bills of Lading Committee led the carrier delegation.

This bill of lading involved combined transport, ie sea carriage with a land carriage component, and was developed by the Bills of Lading Committee, in the late 1980's for introduction as a standard form bill of lading for use in world-wide operations. Accordingly AESC wrote to the Australian Peak Shippers' Association (APSA) and gave notice that they intended to introduce the bill of lading to the Australian trade.

The proposed bill of lading notified to APSA was a compromise document in the sense that it attempted to cover all international trades and markets. However, it contained clauses which were unacceptable to some Australian commodity exporters which had specific needs.

APSA canvassed its members and advised AESC that negotiations were required for changes to the proposed bill before it or its members would agree to its introduction. AESC then adopted a position of declining to accept any changes, but was unable to introduce the bill into the Australian trade. There was an impasse for about 10

months. Eventually, AESC sent Mr JW Richardson from London to conduct negotiations with APSA and to break the impasse. Mr Richardson's opening comments at the negotiations included words to the effect:

> *We don't know what the problem is in Australia. Two weeks ago the New Zealanders accepted the bill without any changes. It has been adopted everywhere else in the world. We do not want to have a different bill used in the Australian trade.*
>
> (The author of this submission was present as an adviser to APSA)

The 'negotiations' then commenced, but during the first day were notable only for the intransigence of the carrier delegation, which refused to concede any point. The negotiations were not making any progress, and resulted in the authorised officer present under s10.41(1)(c) making a comment to those present by words to the effect:

> *I can't say that I can describe what has happened so far as negotiations.*

Nevertheless, on a later day AESC did make a number of concessions, and a negotiated bill was agreed by AESC and APSA.

The point is that without the rights and obligations under s10.41 Australian exporters would have had no choice but to submit to the unilateral introduction of the AESC combined transport bill of lading, as apparently occurred in the rest of the world, including NZ.

2 Columbus Line – Australia to North America

In 1992, a similar situation arose in respect of s10.52 with the Columbus Line Bill of Lading to North America. However, Columbus indicated a willingness to negotiate its bill from the outset, and a bill was subsequently adopted which achieved terms which considered issues relevant to Australian exporters.

Minimum Service Levels

The history of minimum service levels and APSA Part X negotiations with Conferences and Consortia has led to acceptable outcomes, and registration of a number of agreements, including:

- Hapag-Lloyd Slot Charter Agreement with JMG
- Variation to the Australia to Europe Liner Association
- Anscon/Australia New Zealand Eastern Shipping Conference Pooling Agreement

- Australia to South East Asia Shipping Forum
- Variation to Trans Tasman Agreement
- Variation to Anscon Inwards Agreement
- Southern Africa/Australia Agreement
- Variation to Anscon/Anzesc Pooling Agreement
- Australia Japan/Korea & East Asia Rationalisation Agreement
- Australia J/K & E/A Service/Yangming Slot Charter Agreement
- Australia to Europe Liner Association Northbound Trade Agreement
- Heads of Agreement between JMG & Hamburg SUD
- Variation to the Australia South East Asia Shipping Forum Constitution
- Heads of Agreement between JMG & Wilhelmsens
- Heads of Agreement between JMG & Lloyd Triestino
- ANRO/JMG Charter Agreement
- Amended Anscon Constitution
- OOCL/ZIM Service Agreement
- Anscon/Zim Agreement
- AELA Northbound Trade Participation Agreement

The anecdotal evidence is that prior to negotiations under Part X, some of the Conferences and Consortia offered unsatisfactory levels of service which would have resulted in fewer and therefore less frequent sailings and less space for shippers. As a consequence of negotiations, higher minimum service levels were achieved.

Terminal Handling Charges

The North American Conferences imposed Terminal Handling Charges relating to the use of North American ports to be paid by either exporters or importers effective from 1 January 1991. APSA used Part X to commence negotiations with the North

American Conferences who were asked to justify and substantiate their charges.

A satisfactory conclusion to negotiations could not be reached and APSA referred the complaint to the Minister for Transport who referred the complaint to the Trade Practices Commission for investigation. A satisfactory resolution to the complaint was subsequently achieved.

Part X negotiations were held with the Australia Northbound Shipping Conference to establish the bona fides of their THCs for Asian Ports.

Anscon was obliged to provide copies of invoices justifying THCs to ensure that the charges covered costs outside of the terminal to terminal freight rates. As a consequence the THC at Manila was significantly reduced.

Subsequently, THCs were unilaterally introduced by Carriers at Australian Ports on outwards cargoes which APSA referred to the ACCC, but which was not resolved and the matter left with Shippers to pursue through litigation, but no further action has been taken by either exporters or importers.

THCs on import cargo at Australian ports represents a significant impost at about $250 per TEU and adds a cost to goods sold to Australian consumers.

Freight Rate Negotiations

Historically, APSA has assisted in freight rate negotiations conducted by the secondary designated shipper bodies if negotiations between export Shippers and Carriers have reached an impasse. The ability of APSA to assist arises under Part X, and has yielded satisfactory results.

Bunker and Currency Surcharges

Bunker Adjustment Factors (BAFs) and Currency Adjustment Factors (CAFs) (together referred to as CABAFs) are a significant and often unpredictable impost on Shippers, based on complex formulas little understood by Shippers.

Historically, APSA has used Part X, s10.41 to negotiate an acceptable outcome for Shippers. For example, APSA negotiated an emergency arrangement with the European and South-East Asian Conferences which allowed for a combined movement of CAF and BAF of minimum 4% up or down before there is any adjustment to the combined surcharge. A further example of the utility of s10.41 was movement in the European trade of the combined CABAF to negative 4.66% on 18 March 1993.

Without s10.41 the Carriers had the ability to unilaterally impose BAFs and CAFs without consideration of the effect on Shippers, and without the need to negotiate

with Shippers.

Stevedores

It is important to note that at law, the stevedores are not the servants or agents of the carrier or the cargo owner, but are independent contractors who provide their services in the loading and discharge of cargo from ships and its handling and storage at the port terminal, between the terminal gate and the ship's side, which is recognised in the development of the Himalaya Clause: see Adler v Dickson The Himalaya [1955] 1 QB 158; [1954] 2 Lloyd's Rep 267; and the form of the clause is set out in The Eurymedon (NZ Shipping Co Ltd) v AM Satterthwaite & Co Ltd [1975] AC 154 at 165; [1974] 1 Lloyd's Rep 534.

The Himalaya clause appears in the bill of lading which is evidence of the contract of carriage, and usually appears together with a 'promise not to sue the stevedore' clause and a 'circular indemnity' clause by which any amount recovered is paid back. The effect of the clause is to give the stevedore the benefit of the bill of lading terms and conditions and particularly the exclusions from liability: See BHP v Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 572; Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 587; Godina v Patrick Operations [1984] 1 Lloyd's Rep 333.

It is generally accepted that the Commonwealth has power under the Constitution to make laws in respect of stevedores under the trade and commerce power of the Commonwealth Constitution, s51(i): see Quick & Garran The Annotated Constitution of the Australian Commonwealth, Legal Books, Sydney 1976 (reprint 1901 edition), pp515 – 548.

However, that power has been used for the benefit of stevedores and other third parties such as warehousemen and inland carriers (rail and road) who provide ancillary services to export and import cargo, to give them the benefit of a statutory exclusion from the implied warranties in s74(1) and (2) that services will be provided for due care and skill, enabling them to exclude all responsibility and liability for all loss or damage caused by breach of contract, negligence and wilful default. See s74(3)(a) of the Trade Practices Act:

The principle objection to this exclusion is that it is inconsistent with international conventions, for example the European CMR and CMI conventions which provide a package limitation for road and rail carriers, and the Hague Visby Rules (see the Carriage of Goods by Sea Act 1991 (Cth)) which provide a package limitation for ocean carriers where goods are lost or damaged. Similar provisions apply to air carriage under the Warsaw Convention.

This is also an anomaly which is contrary to the interests of Australian consumers as the cost of losses must be ultimately recovered from the community by increased cost of goods and or insurance premiums.

The converse, that if losses had to be borne by stevedores, inland carriers and warehousemen who are responsible for causing them, then those entities would be financially unviable and would go out of business, is in fact an application of competition objectives and the market. The result being that inefficient entities will be unable to compete and leave or be driven from the market by market forces.

Current concepts and practices of total quality management and risk management in business have now been well established Internationally (ISO9000) and in Australia for at least 10 years, and implemented by major entities to reduce the level of loss.

The relevance of s74(3)(a) to Part X, and ss10.41 and 10.52 is that the statutory protection from liability takes negotiations for services ancillary to the international carriage of goods outside the ambit of ss10.41 and 10.52, especially in the context of the combined transport bill of lading.

1.2 The commercial setting of Part X.

Carriers and Shippers are given limited exemptions from certain prohibitions on restraints of trade based on a competition test in Part IV of the Act.

It is not far fetched to suggest that international trade would be far less efficient without the collusive conduct of Carriers and Shippers permitted by the scheme in Part X. There is an efficiency brought to the market place by collective negotiations between Carriers to provide shipping services and by Shippers to collectively negotiate the 'negotiable shipping arrangements' referred to in ss10.41 and 10.52.

The alternative is unworkable fiction.

Unworkable, as an average container ship carries about 1200 containers. Assuming at one extreme, 1200 different exporters each wishing to individually negotiate the matters currently contained in the definition of 'negotiable shipping arrangements' in ss10.41 and 10.52, for each ship at an Australian port. Assuming at the same extreme, each Carrier giving no guarantee about ports of call for discharge, no schedule for services, no schedule for connecting services for transhipment etc or any of the other matters in ss10.41 and 10.52, but meanwhile charging freight rates set at a pure market price determined by supply and demand, resulting in, amongst other things, loss of reliability with ships being removed from Australian service to create demand and higher shipping rates.

Fiction, as Part X represents a compromise of competing interests between:

- Government

The recognition of Government that it is effectively unable to regulate the conduct of international Carriers, unless the Carriers agree to submit to jurisdiction (and they have no real legal based incentive to do so other than as a matter of convenience),

and ultimately any penalty for breach will probably be effectively unenforceable. These issues are discussed in more detail below;

- Carriers

Whose commercial objectives are financially driven. They have world-wide operations and can choose which ports they will service. Ships can be allocated to and withdrawn from any service at will. The capital item is easily moveable and can be allocated to a more favourable market as the need arises.

There is no real risk to Carriers of a large capital item (a ship) not being put to use as ships are usually owned by third parties and operated by carriers under voyage or time charterparties.

- Shippers

Who need access to reliable, timely, cheap shipping services to transport their exports and imports to and from international markets. The carriage of goods by sea is only one, but underpins all of the transactions consisting of four international contracts relevant to: international sale of goods; international carriage contract; international payment; marine insurance.

These are all interlocking international contracts of great importance to Shippers, and without which a Shipper: cannot complete a sale; cannot deliver to market; cannot get paid; cannot be compensated for the value of the goods if they are lost or damaged (the Carrier has the advantage of package limitations so that Shippers can only recover the value of their loss through marine insurance).

There are a number of key provisions which are important for the protection of Carrier and Shipper interests in an international environment where the market strategy of international Carriers may overlook the specific interests of a national group of Shippers.

These provisions are looked at in the following paragraphs.

1 Shipper benefits

The most important benefit to Shippers are the obligations on Carriers to negotiate the matters defined as negotiable shipping arrangements under ss10.41 and 10.52.

These provide a significant framework preventing carriers from acting unilaterally and without regard to the interests of Australian shippers.

An earlier proposed amendment announced by the Commonwealth (Department of Transport, Enhancements to Part X, Information Paper, undated) but never enacted was to allow a Shipper body which was refused information to obtain a determination from an authorised officer who will exercise a currently undefined discretionary

power to decide whether the information was reasonable necessary for the negotiation, with a right of Appeal to the Administrative Appeals Tribunal.

The reason why this proposal may not have enacted arises perhaps from the obvious problem arising from a decision to be made by an authorised officer who is also required to give reasons, as it may in some circumstances be invalid as amounting to the exercise of a judicial power. However, if the role of the authorised officer is to be limited to expressing a non-binding 'opinion' this objection may not have arisen. But what is the point of an 'opinion' if it has no force, as the shipper body and carrier will be put to the trouble and expense of presenting an argument to an authorised officer, when the whole matter is doomed to failure if one of the parties is intent on not accepting any opinion which is not in its favour. This is not a matter of bad faith; so much as it is commercial reality and the legitimate protection of commercial interests.

2 Carrier benefits

The principal benefit to carriers is that they are exempted from the restrictive trade practices provisions of the Act, though the concessions are subject to an important reservation in relation to a prohibition of the misuse of market power under s46.

For the purposes of testing misuse of market power, the Act adopts a highest common denominator approach under s10.04 by which the Carriers in a conference agreement are all deemed to have a substantial degree of market power if any single member has that market power.

Carriers enjoy certain exemptions from a number of restrictive trade practice prohibitions in relation to:

I. Conference agreements, s10.14;

II. Loyalty agreements, s10.19;

III. Specified negotiations, s10.24;

IV. Negotiations with stevedores;

V. Door to door operations.

Conference Agreements

The exemptions from restrictive trade practices for carriers are available for outwards and inwards conferences, with the exemptions for inwards conferences under ss10.22 and 10.23 mirroring the exemptions for outwards conferences: ss10.14 and 10.18A .

Conference agreements (including agreements relating only to freight rates under ss10.17A and 10.18A) are exempt from the prohibition against restrictive trade practices, specifically:

- contracts, arrangements or understandings that restrict dealings or affect competition, s.45

- Exclusive dealing, s47;

where there is an application for provisional registration within 30 days of the agreement: see ss10.17 and 10.18.

Loyalty Agreements

Similarly, a Loyalty Agreement is exempted: for example see ss10.19 to 10.24; from the prohibitions on contracts, arrangement or understandings that restrict dealings or affect competition: s45; and Exclusive Dealing: s47; but, the exemption is only available at the option of Shippers and they cease to apply where the Shipper gives written notice to the Trade Practices Commission and each of the carriers to the agreement.

Specified Negotiations

Certain negotiations between carriers, conference members and shipper bodies or designated shipper bodies are exempted from the prohibitions in ss.45 and 47: see s10.24; Loyalty agreements: s10.24(1); Minimum level of shipping services after provisional registration of an agreement: s10.29; negotiations in relation to negotiable shipping arrangements involving a registered conference: s10.41; negotiations in relation to negotiable shipping arrangements involving a non-conference carrier with substantial market power: s10.52.

However, no exemptions are available for subsections 47(6) relating to exclusive dealing where there is third line forcing, and subsection 47(7) relating to refusal to supply which is associated with forcing another person's goods or services.

These subsections are particularly important in the context of a recurrent threat over recent years by carriers that they will introduce 'insured bills of lading' during various negotiations with shippers. Insured bills of lading are understood by Australian shippers to mean that the carrier will also offer insurance to shippers, either as a compulsory part of the service, or as an optional but convenient add-on to be purchased when freight is pre-paid. This threat has posed important and adverse revenue ramifications for the Australian insurance market, which has been understandably sensitive to this threat which could see a significant reduction in premiums placed in the Australian insurance market. However such threats can not be carried through as such conduct is prohibited and is illegal: see subsections 47(6) and (7).

Door to door operations

In recent years the use of combined transport and through bills of lading has increased, and Carriers see commercial advantages to these documents in the form of 'one-stop shipping' services offered to shippers. Amendments were previously made to allow the Part X exemptions from Part IV to apply to operations involving freight consolidation and distribution depots outside the limits of a wharf.

3 Prohibited anti-competitive conduct

Conference agreements may include only certain restrictive trade practice provisions, otherwise they are illegal.

Discrimination between shippers can have a serious anticompetitive effect, and its use is prohibited: s10.05; for reasons which can not be commercially justified. Discrimination by ocean carriers is prohibited between shippers requiring similar outwards liner cargo shipping services on a particular trade route (whether the discrimination is in relation to freight rates, levels of shipping services, the provision of equipment and facilities or otherwise) if the discrimination is of such a magnitude or such a recurring or systematic character that it has, or is likely to have, the effect of substantially lessening competition in a market for goods or services, being a market in which the shippers supply goods or the ocean carrier supplies outwards liner cargo shipping services.

However, a carrier has a defence if it proves that the discrimination made or the carrier reasonably believed it only made reasonable allowance for:

- differences in the cost or likely cost of providing outwards liner cargo shipping services resulting from different ports, quantities of cargo or kinds of cargo carried;

- the capacity of the ocean carrier to carry cargo, different times at which the outwards liner cargo shipping services were required, during an act in good faith to meet freight rates, levels of service, equipment or facilities, or benefits offered by a competitor.

This prohibition applies to a wide class, including servants and agents of both shippers and carriers, and third parties such as freight forwarders, and prohibits (see s10.05(3)) a person from:

- knowingly inducing, or attempting to induce, a Carrier to discriminate between Shippers;

- entering into a transaction that, to the knowledge of the person, would result in the person receiving the benefit of a prohibited discrimination.

An exclusionary provision of an agreement that has or is likely to have the effect of substantially lessening competition (within the meaning of section 45 of the Act) must either deal only with the following matters (see s10.08):

- fixing or regulation of freight rates;
- pooling or apportionment of earnings, losses or traffic;
- restriction or regulation of the quantity or kind of cargo carried by parties to the agreement;
- restriction or regulation of the entry of new parties to the agreement;

or it must be necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

If a conference agreement includes a provision that permits or requires exclusive dealing under Part IV, s47, the provision must be necessary for the effective operation of the agreement and of overall benefit to Shippers.

The prohibitions in s10.08 do not apply to a loyalty agreement.

There are a number of consequences which flow from a breach of minimum standards which are contained in s10.28 (decision on application for provisional registration); s10.33 (decision on application for final registration); and s10.45 (circumstances in which the Minister may exercise his powers in relation to registered conference agreements). For the reasons set out in this submission, the exercise of Ministerial power should be repealed.

Carrier Agents

The appointment of a Carrier agent for the purposes of Part X is of considerable interest following the 1995 repeal of the Ship's Port Agent provision in the Sea Carriage of Goods Act 1940 (NZ), by the Maritime Transport Act 1994 (NZ).

In Australia, the requirement for appointment of a Carrier agent has had an incidental benefit in maritime law, enabling Shippers to use the information on the Register to obtain an order of the admiralty court for substituted service on the Carrier Agent to overcome difficulties with service on some Carriers at overseas addresses.

1.3 Material inequality in bargaining power between carriers and shippers

The evidence of material inequality arises from the unilateral conduct of Carriers in relation to the issues identified in this submission, their preference for unilateral action, and their reluctance to negotiate with Shippers in the absence of a statutory obligation to do so under ss10.41 and 10.52.

The anecdotal evidence is that without the negotiation requirement of Part X, ss10.41 and 10.52, Carriers operating in a world-wide market will have little regard to the requirements of Australian Shippers in a relatively small sector of their international market.

1.3.1 Carrier use of standard form international contracts for carriage, including issues of deeming and privity of contract

These are complex issues arising under the Carriage of Goods by Sea Act 1991 (Cth), the Sea Carriage Documents Act of each of the Australian jurisdictions, and the terms of the bill of lading used by the Carrier which is said to be evidence of the contract of carriage.

The issue is that the bill of lading is many things, including a contract of adhesion, a document of title, a negotiable instrument, and its terms bind third parties who are not an original party to the bill of lading, ie Shipper as defined in a bill of lading will include the consignor (seller or exporter), the consignee (buyer or importer) and the holder (who is entitled to take delivery of the goods).

The point is that unless the terms can be negotiated by Shipper bodies under ss10.41 and 10.52 as one of the ‘negotiable shipping arrangements’, as was the case with the AESC Combined Transport Bill of Lading to Europe and the Columbus Line Bill of Lading to North America (discussed below), Shippers are vulnerable to unacceptable and prejudicial terms and conditions, including such matters as are usually contained in liberty clauses, such as giving the Carrier the liberty to deviate from the scheduled route and times. These matters are currently negotiated by Shippers with Carriers under Part X to achieve reliable services. Assume, at an extreme, a time sensitive export of ripening fruit in a reefer container sent on a published route, but the Carrier decides to vary the route and time, so that the fruit arrives over-ripened and unsaleable. Part X provides arrangements enabling Shippers to negotiate with Carriers to overcome such problems.

1.3.2 Negotiations between Carriers and Shippers;

Part X, ss10.41 and 10.52 provides a statutory obligation on Carriers to enter into negotiations concerning negotiable shipping arrangements, absent which, there is no obligation on Carriers to negotiate, and little or no commercial incentive for them to consider the interests of Australian Shippers. The evidence for this is set out in this submission.

1.3.3 Reasonable practicability for shipper to negotiate for alteration of contracts;

There is no reasonable practicability for individual Shippers or designated shipper bodies to negotiate the matters defined in negotiable shipping arrangements, including the terms of the standard form bill of lading in the example in 1.3.1 above without the scheme in Part X, ss10.41 and 10.52. This includes the negotiation of sea-carriage contract terms, including the terms in standard form bills of lading and other sea carriage documents (as defined in the Sea-Carriage Documents Act 1997 (NSW) and the various Australian States and relevant to the carriage of Goods by Sea Act 1991 (Cth)). The relevant sea-carriage documents are contracts of adhesion, that is, the printed form documents contain non-negotiable terms.

1.3.4 Effect on legitimate interests of carriers, shippers and the Australian community

Part X, ss10.41 and 10.52 provide a balancing of the commercial interests of Shippers and Carriers, and promote the interests of the Australian community in two respects:

1 creating wealth within Australia arising from the provision of reliable outwards (export) shipping services facilitating the delivery of export commodities to foreign markets;

2 facilitating the efficient, timely and cheap delivery of imported goods to the Australian market from the supply of reliable inwards (import) shipping services.

1.3.5 Whether Australian Shippers are reasonably able to protect their interests

Shippers do not have the resources to be able to reasonably protect their interests without the benefit of ss10.41 and 10.52 which imposes a statutory obligation on Shippers to engage in negotiations for the matters defined as negotiable shipping arrangements. The evidence is set out in this submission.

1.3.6 Relative economic circumstances and resources of Carriers and Shippers.

Shippers (individual, secondary shipper bodies and the peak shipper body) are concerned with obtaining shipping services for the carriage of goods by sea (both exports and imports). They are a part of an international market competing for the supply of shipping services on suitable commercial terms sought by Carriers who operate on a world-wide basis and have a commercial interest in providing shipping services to profitable markets on their commercial terms.

Importantly, Carriers look at a world wide market for the supply of shipping services and Australian Shippers are only a part of that market.

There is an obvious tension between the commercial interests of Shippers and Carriers.

Part X, ss10.41 and 10.52 address the imbalance in the relative economic circumstances and resources available to Carriers and Shippers, by preventing Carriers from acting unilaterally and requiring them to negotiate the matters within negotiable shipping arrangements.

Part X, ss10.41 and 10.52 are an equaliser by requiring negotiations. It is the requirement for negotiations that creates the opportunity for a negotiated outcome that may be a compromise for both sides, but the scheme in ss10.41 and 10.52 provides a process which is capable of producing an outcome that is satisfactory to both sides.

The importance of the scheme is that it prevents unilateral conduct by Carriers.

In a way, the relative economic circumstances and resources of Carriers and Shippers become unimportant as the process in ss10.41 and 10.52 provide an equal starting point – the obligation to conduct negotiations; and equalise the relative strength of the negotiating parties by requiring the Carriers to provide information relevant to the negotiations that may otherwise not be available to Shippers.

It is the basis of this submission that the success of Shipper negotiations with Carriers as set out in the examples in this submission arise from the use of the statutory obligations in Part X, s10.41 by Shippers, and that there is no commercial reason for Carriers to negotiate any of these matters without that statutory obligation.

1.4 Benefits to the community outweigh any potential detriment

1.4.1 Effect on consumers

The beneficial effect of the negotiation of the matters defined as negotiable shipping arrangements in s10.41 concerning inwards shipping services ensure the delivery of imports in an efficient, timely and cost effective manner to consumers in the Australian market from the supply of reliable inwards (import) shipping services.

The negotiations under ss10.41 and 10.52 provide a negotiated outcome and it is in the interests of the Australian community that negotiations on the matters within the definition of negotiable shipping arrangements are conducted to ensure that negotiable shipping arrangements are achieved which are suitable to both Shippers and Carriers. The commercial tension between Shipper and Carrier interests ensures that the ss10.41 and 10.52 negotiations do not result in an anti-competitive collusion between Shippers and Carriers.

2 Possible non-legislative alternative to Part X.

It is difficult to envisage a purely non-legislative (ie statutory) alternative to Part X as there is no commercial incentive for Carriers to submit to negotiations (other than perhaps freight rates) with Shippers if they are able to make unilateral commercial decisions.

In any case, collective negotiations between groups of Shippers and groups of Carriers will (without the statutory exemptions from Part IV) contravene Part IV.

If Part X is repealed and not replaced, Shippers (both exporters and importers) will be placed in the detrimental position of being wholly within the Australian jurisdiction and wholly governed by Part IV, whilst Carriers will be only partially and temporarily within jurisdiction, if ever at all, as any collusive agreements will be made in foreign boardrooms.

Carriers may in fact not be the actual owners of the ships they operate, as many ships are owned by another company and operated under charterparty.

Identification of the owner of a ship is searched through Lloyd's Register of Shipping which will reveal the intrigues of disguised ownership and tax havens. Further, Carriers operate their Australian business through agencies and do not have business assets within the jurisdiction. Carriers are not, for the most part, present within the Australian jurisdiction at all, nor amenable to prosecution under Part IV of the Act, unless of-course they submit to the jurisdiction.

The requirement to appoint an agent under Part X does not bring Carrier assets within the jurisdiction so that any penalty imposed following prosecution for a contravention of Part IV of the Act may be un-enforceable.

Although a ship owned or operated by a Carrier comes within the Australian Admiralty jurisdiction, there is no provision of the Admiralty Act (see the categories giving a right of ship arrest in s4) which would provide any basis for the arrest of a ship arising from a breach of Part IV of the Act.

These matters have long been the dilemmas of governments frustrated by an inability to regulate the collusive conduct of Carriers other than under some form of co-operative scheme, such as Part X, where the Carriers effectively take the path of least resistance and consent to submit to the jurisdiction for that purpose.

An alternative to the present Part X exists under a combination of Part X, ss10.41 and 10.52 and the authorization procedure under the Act.

However, there is an obvious disadvantage for Shippers who are currently under-resourced, as the authorization procedure will involve further financial commitment, including professional services to obtain the evidence required to meet the criteria for authorization or notification under the Act, see Part VII.

3 Improving Part X

3.1 The curate's egg and the scheme in ss10.41 and 10.52

Like the curate's egg, Part X is good in parts, particularly the scheme of negotiable shipping arrangements in ss10.41 and 10.52.

The utility, functionality and benefits of s10.41 are established as identified in this submission.

The effectiveness of s10.52 is so far untested as no NCOC has to date been found to meet the prima facie requirement of 'substantial market power', and therefore no NCOC has been required to enter into negotiations with Shippers.

The procedural requirements in ss10.50 and 10.51 for inquiry into whether an NCOC has a substantial degree of market power in the provision of outwards liner cargo shipping services or inwards liner cargo shipping services on a trade route (otherwise than because the ocean carrier is a party to a conference agreement) are unwieldy.

The distinctions between:

- the requirement for Carriers to negotiate with Shippers under s10.42;
- the requirement for a Carrier with a substantial degree of market power to negotiate with Shippers under s10.52; and
- no requirement for a Carrier without a substantial degree of market power to enter into negotiations with Shippers;

concerning negotiable shipping arrangements do not seem to be required to provide a constitutional basis for the sections, and create unnecessary distinctions. The policy objectives of Part X are expressed to be concerned with international liner cargo shipping services, but in fact are wider than that and include a single Carrier with a substantial degree of market power, s10.52; and it is difficult to find any justification for the objective of Part X being limited to either liner services or single Carrier with substantial degree of market power.

This submission supports the re-defining of the principal objectives set out in s10.01(1) so that they apply to all import and export cargo shipping services.

There appears to be little, if any, justification for an NCOC to be prima facie excluded from the requirement to negotiate with Australian Shippers on the matters within the ambit of 'negotiable shipping arrangements' unless they have a substantial degree of market power.

If the distinctions in s10.01(1) are to be retained, an alternative solution is for an NCOC to be prima facie included within the negotiation requirements of s10.41, but to have the right to seek a periodic exemption of a period of two years from the obligation to negotiate with Shippers if it establishes (the onus of proof being on it as applicant) that it does or is likely to suffer from an inequality of negotiating power in the market.

Negotiations between Carriers and Shippers could be enhanced by an Industry Code, with mediation facilities to assist by facilitating negotiations under ss10.41 and 10.52, and resolving disputes.

An established model exists in the Franchising Industry Code and the Office of the Mediation Adviser.

The model of an Industry Ombudsman is not appropriate as it is directed to complaints resolution rather than facilitating negotiations.

However, a further issue relevant to facilitating negotiations and assisting Shippers and Carriers to resolve disputes concerns the financial resources of Shippers.

3.1.1 Ministerial Powers

There are extensive Ministerial powers for exercise under the Act. For example, the Minister is required under s10.45(b) to have or attempt consultations with parties to obtain an undertaking or action so that it is unnecessary for him to direct the Registrar to cancel a registered conference agreement, and either the Minister has taken an ACCC Report into account, or is satisfied that the special circumstances of the case make it desirable to give the direction before waiting for the Commission's Report.

However, there must be a real question about the suitability of providing such powers to a Minister as a member of the executive arm of Government as they are inconsistent with the doctrine of separation of powers, and the current arrangements leave open the possibility of decision making made purely on the basis of a preferred political outcome, or worse still, potential interference by Ministerial political advisers.

There has been at least one situation in Australia where the Minister has exercised his power in requesting a report from the Commission, which involved the issue of Terminal Handling Charges (THC's) introduced at US Ports on 1 January 1991: see Report of the Trade Practices Commission, Canberra.

Further, the Minister has power to order a carrier not to engage in an unfair pricing practice: s10.61. The relevant circumstances for the exercise of the power are set out in s.10.62, and the matter may be referred to the ACCC for inquiry: s10.63.

There is anecdotal evidence of London representatives of Carrier interests flying to

Canberra to raise an issue of concern with a previous Minister. The entertaining of such a meeting in the absence of Shipper interests has unsavory aspects and lacks transparency, leading to the suspicion of secret political deals done contrary to the interests of Shippers.

There does not seem to be any justification or place for a Ministerial role in Part X, and this submission recommends that the role should be removed and replaced with the following:

- Inquiry by the ACCC of a Part X issue or its own motion, or following a Shipper complaint;

- Shipper and Carriers right to pursue its commercial interests through a two tiered Alternative Dispute Resolution scheme consisting of:

    - Mediation under a Part X Code of Conduct (discussed elsewhere in this submission);

    - Arbitration; or

- Shipper and Carrier right to pursue its commercial interests through court proceedings.

3.1.2 Commission investigations and reports

The ACCC (as was the previous Trade Practices Commission) is required to conduct investigations and report to the Minister: s10.47 which should be repealed for the reasons set out above; or at the request of an affected person: s10.48; who is widely defined in s10.48(5).

There is some doubt that the ACCC has practical or depth of experience or knowledge to properly understand the export and import trades and the carriage of goods by sea, particularly the complexities of the many interlocking issues. This is not intended as a criticism of the ACCC staff who are involved in these issues from time to time, but rather an observation of the difficulty for the ACCC to deal with the issues without specialist resources with knowledge of issues.

The obvious outcome of an ACCC investigation is either prosecution for breach of an obligation in Part X or Part IV, or a Federal Court enforceable undertaking by a Shipper or Carrier.

Shippers have called on the Trade Practices Commission to investigate a number of matters, including:

- The implementation of THCs introduced at US Ports on 1 January 1991;

- Introduction of CAFs by Bridge Line Pty Ltd in June 1995;
- Introduction of THCs introduced at Australian ports in about 1999.

with mixed outcomes.

3.1.3 Dispute Resolution

Shippers and carriers have been concerned that their disputes should be the subject of 'commercial negotiations' rather than litigation in the Courts, and during the 1993 Brazil Inquiry submissions were made by a number of parties to this effect, resulting in a recommendation for arbitration or mediation in that Report: see Chapter 9, p157. An important consideration has been the potential high cost of litigation, but also the belief that adversarial conflict with high risk of damage to ongoing relationships between Carriers and Shippers should be avoided.

There are already 'consultation' procedures in the Act which are intended to lead to an undertaking by a conference carrier: s10.45(b); and a non-conference carrier, s10.55(b).

The Department of Transport previously recommended alternative, low cost dispute resolution processes to provide for commercial resolution of problems at industry level using mediation, conciliation or arbitration where the parties agree. In those earlier recommendations, the Department noted in relation to arbitration that where the parties have a written agreement to adopt the arbitrator’s decision, no government involvement in the arbitration process would be necessary: see Department of Transport, Enhancements to Part X, Information Paper, p6.

The law in Australia has already become highly developed for resolution of maritime disputes by mediation or arbitration: see John Levingston, The Development of Arbitration and Mediation as Alternative Dispute Resolution Procedures for Resolving Maritime Disputes in Australia (1995) 6 ADRJ 127. Since that paper was written, the Federal Court Rules have been amended to allow a judge to refer the disputing parties to compulsory mediation or arbitration.

3.1.4 Penalties and Civil Remedies

There are currently no direct financial penalties for breaches of Part X by a Carrier for failure to comply with their obligations under ss10.41 and 10.52 respectively. The current penalties relate to offences under Part IV which apply where the conduct of a Carrier does not get the benefit of the limited exemptions under Part X, and are a comprehensive deterrent.

It is in this respect that Shippers see Part X as currently having no teeth in relation to

enforcement of Carrier obligations. APSA and NSWSA made submissions to the 1993 Brazil Inquiry calling for the introduction of penalties and civil remedies for damages arising from the conduct of carriers.

These submissions were adopted by the Brazil Inquiry and are included in its recommendations (Brazil Report, discussion commencing p159, Findings and Recommendations p162), and resulted in the amendments in s10.49A, but does not impose a clear pecuniary penalty where a Carrier contravenes its undertaking under s.10.49, except by reference to a contravention of Part IV and s76.

3.1.5 Civil Remedies

The Federal Court of Australia has the power to grant injunctions under the Act: see Part VI - Enforcement and Remedies, s.80 Injunctions and s.82 Actions for Damages. These civil remedies should be clearly available for a breach of the negotiation obligations concerning the negotiable shipping arrangements under ss10.41 and 10.52.

3.2 Resourcing Shippers.

Australian Shippers are under-resourced to conduct negotiations with conference and non-conference Carriers.

Shippers should have access to a suitable fund to provide a secretariat, and to buy professional services in order to conduct commercial negotiations with Carriers.

There are a number of funding alternatives:

- Annual Commonwealth grant

This scheme was previously abandoned by the Commonwealth and is not supported as a model;

- Australian Peak Shippers' Association (APSA) funded by exporters

This is the current scheme which has been in operation for about 15 years, but suffers from an inequality amongst Shippers:

  - it is funded by the major commodity exporters bodies as designated shipper bodies (DSGs);

  - exporters who are not members of APSA and do not contribute to the funding of APSA receive the benefits of negotiations by APSA and DSGs with Carriers;

  - importers are not members of APSA or DSGs and do not contribute to funding of APSA, but receive the benefit of negotiated outcomes under Part X, s10.41;

and does not provide a level of funding for APSA which is a reputable organization of standing recognised by Part X, and has depended to a major extent on volunteers who have provided professional services without charge.

APSA does not have the financial resources to conduct industry surveys, prepare and conduct Part X negotiations, provide education services to its members or the wider exporting and importing community, outsource its professional service requirements as required from time to time, including research into better methods of ensuring delivery of exports to overseas markets and imports into the domestic market.

The current scheme is also deficient as it is unlikely to provide adequate resources for any of the alternative schemes being discussed for Part X, such as the authorization or notification procedure under the Act, Part VII.

The current scheme is unable to deliver a level of service to Shippers suitable for involvement in negotiable shipping arrangements with Carriers as equals.

- Trust Fund

A funding scheme was originally proposed to the Brazil Review in 1993 based on an industry levy to fund Shippers for the purposes of Part X.

The conclusion of the 1993 Brazil Review was that a levy was politically unacceptable to the Executive arm of Government, and for that reason it was not supported by the final report.

The proposal has since been put a number of times, and the most recent explanation for lack of support from the Department has been that it would be a tax, and therefore unconstitutional. The reasons for that conclusion have not been provided by the Department and so have not been available for scrutiny. However, there have been a number of other levies in various markets which do not appear to have been struck down either as taxes or as being unconstitutional.

This proposal has now been refined, and is put to this Review on different bases, the essence of which follows:

1 Create a Trust Fund for the use of Australian Shippers for the purposes of Part X;

2 The Fund to be administered by trustees appointed by the Trust Deed, for example the CCES would be well placed to constitute the trust and provide trustees;

3 Funds to be accumulated by a levy of $1 for every defined ‘unit’ of export and import cargo (excluding empty containers). For example, a unit could be defined as:

3.1 20 foot container or flat rack;

3.2 10 tonnes of bulk cargo;

3.3 10 cubic metre of other cargo (non-container/flat rack, non-bulk);

4 Levy to be collected (under commercially negotiated contract) by a suitable authority such as Australian Customs or other entity present at the point of export and import, or handling export or import documents such as Carriers, for a commercially negotiated collection fee. Again, CCES will be well placed to negotiate with Australian Customs for collection of the levy;

5 Shippers to apply to the Trust for allocation of funds for Part X purposes;

6 Trustees to review applications for funds and distribute in their discretion.

There is a current model for such a Trust which has been successfully in operation for many years, known as the Travel Compensation Fund (TCF) which is used to compensate traveling consumers who have been stranded or lost money due to the failure of a travel agent.

The TCF is created by an industry levy which is paid into a Trust Fund administered by a number of private individuals as Trustees (several being former staff of the Trade Practices Commission), and used for the purposes of the Trust.

There are a number of other levies which have been collected in more recent years in a number of industries and community benefit activities, including: health; education; employment; gun buy-back – to name a few.

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Submission Preparation

This submission was prepared by John Levingston who is an Adjunct Professor of Law at the University of Canberra, School of Law, and principal consultant to the Centre for Customs and Excise Studies. He is a practicing barrister at the Sydney Bar and a specialist international transport lawyer. He has been an adviser to Shippers in negotiations with Carriers under s10.41. He also advised Shippers on submissions to the 1993 Brazil Review of Part X, and the 1999 Productivity Commission Inquiry into International Cargo Shipping. He was a member of the Commonwealth Department of Transport Working Group on Marine Claims Liability, convened January 1995 which recommended amendments to the Carriage of Goods by Sea Act (Cth) 1991, implemented in the 1997 Amendment Act (No 123 of 1997). He is the author of papers and an occasional speaker at international conferences in the field.