ACCC submission to the Productivity Commission's 2004 review of Part X

Summary

In this submission, the Australian Competition and Consumer Commission (the ACCC) recommends that Part X of the *Trade Practices Act 1974* (the Act) be reformed. The ACCC submits that Australia would be better served by abolishing Part X and allowing the provisions of the Act to be applied to liner shipping on the same basis that they are applied to all other industries. In recognition of the long-established arrangements in place in the industry, this submission also proposes that some transitional arrangements are appropriate.

Part X—background

(Section 2)

Part X provides conditional exemptions to Part IV of the Act for shipping lines. Part IV prohibits businesses engaging in certain types of anti-competitive conduct. The exemption allows shipping lines to collaborate through arrangements such as discussion, conference and consortia agreements. The shipping lines are obligated under the terms and conditions of these agreements to negotiate with Australian export and import shipping bodies about minimum levels of service.

ACCC experience of Part X arrangements

(Section 2)

Part X is administered by the Department of Transport and Regional Services (DTRS). The ACCC investigates potential breaches of the Part X arrangements and reports to the Minister for Transport and Regional Services.

The ACCC has conducted five Part X investigations over the last 15 years. This experience has suggested there are several constraints on the effectiveness of this investigation function including:

- movements in actual market freight rates are not easily observable
- the existence of contracts between lines and shippers and their effect on average prices cannot be observed
- there is little incentive for shipping lines to provide information, especially as it pertains to potential public benefits of particular liner agreements

- establishing proof of the anti-competitive detriment resulting, or likely to result from the conduct of parties to registered agreements is problematic—in particular, distinguishing anti-competitive detriment from the effects of other forces in the market raises evidentiary problems

- similarly, measuring public benefits that are integral to particular liner agreements is problematic.

In carrying out its investigation function, the ACCC has also observed that:

- many shippers have little understanding of Part X and the rights that Part X grants them

- shippers appear to exercise only limited countervailing power, particularly on the import trades and where broad-based discussion agreements are involved.

Economic models of liner shipping markets

(Section 3)

A wide range of economic models have been developed to advance understanding of the operation of liner shipping markets and their performance.

Unfortunately, there is no single coherent economic model of liner shipping markets that is sufficiently powerful and empirically supportable to adequately address key questions. However, some working hypotheses that may guide the Productivity Commission's (PC) considerations are suggested:

- a competitive equilibrium of some form is likely to exist

- liner shipping markets are likely to be substantially contestable

- relatively few liner shipping companies can be expected to operate over the relevant route network markets as Australia's trades tend to be relatively long and thin

- on balance, it is likely that the extent of the potential forms of market failure would be at most modest.

Shipping agreements

(Section 4)

There are a range of registered anti-competitive agreements among carriers operating on Australia's liner trades.

Generally, there are three categories of registered agreements among liner shipping companies operating on Australian trades—discussion agreements, conference agreements and consortia agreements.

Currently, all of these types can be registered to obtain partial anti-trust immunity pursuant to Part X. This submission's objective is to describe the different types of liner agreements in more detail based on the ACCC's enforcement experience and to suggest avenues of investigation for the PC.

International regulatory arrangements

(Section 5)

This submission notes the increasing scepticism in international attitudes towards the automatic anti-trust immunity granted by competition regulators to anti-competitive agreements amongst liner companies involving collective discussion and setting of freight rates.

An issue for the PC to consider is whether Australia should follow the example of the European Commission in repealing automatic anti-trust immunity for collective rate setting agreements.

Significantly, the European Commission found that:

- the liner shipping industry does not possess unique characteristics that warrant the need for block exemption provisions
- there is insufficient evidence of price stability to establish whether liner conference agreements provided public benefits to shippers
- liner conferences did not directly provide shippers with cost and qualitative efficiencies since conference agreements as organised bodies are not responsible directly for liner supply
- liner conferences are not indispensable—increased use of individual service contracts between shippers and carriers operating on some European liner trades, as well as the increase in the market share of independent lines on some European trade lanes has not led to a fall in reliability of services
- there is no clear cut evidence that conference agreements result in public benefits that would outweigh or at least neutralise the effect of restrictions on competition.

This submission also notes the 2002 OECD report on Competition Policy in Liner Shipping, which recommended that all member countries should consider removing anti-trust exemptions for price fixing and rate discussions. The exemption for other operational type agreements could be retained if it did not result in excessive market power.

The PC will need to form a view on the potential impact of the removal of anti-trust immunity (in particular for those agreements involving price fixing) on the incentives of individual carriers to invest in regular scheduled services to and from Australia, employing relatively small vessels on long trade routes.

The ACCC notes that not all of Australia's principal liner trades are long and thin.

The Regulatory alternative—authorisation

(Section 6)

Authorisation

The authorisation process allows the ACCC to grant immunity on public benefit grounds for conduct that might otherwise breach the competition provisions of Part IV of the Act (except s. 46 - misuse of market power).

The authorisation process

In order to grant immunity from the competition provisions of the Act the ACCC must be satisfied that the public benefit from the conduct would be likely to outweigh any public detriment resulting from any lessening of competition.

The authorisation process is designed to establish whether or not this is the case. It is necessarily a thorough and rigorous one, the onus being on the applicant to demonstrate that immunity is justified (as is required under the Act). Given the different circumstances of each authorisation application, the ACCC considers applications on a case by case basis, assessing each one on its merits.

The process is very public, transparent and consultative. It effectively balances the differing needs for a process that is flexible and responsive, broadly accessible, fair to all parties, efficient and timely, provides certainty to business and has an appropriate framework for accountability.

The process the ACCC must follow before it can grant authorisation is set out in the Act. The main steps are:

1) an application for authorisation is lodged with the ACCC

2) the ACCC seeks comments and submissions from interested parties

3) the ACCC publishes a draft determination on the application

4) the applicant or any interested party can call a pre-decision conference to discuss the ACCC's draft determination

5) the ACCC issues a final determination.

The applicant or any interested party can apply to the Australian Competition Tribunal (the 'Tribunal') to review ACCC authorisation decisions on their merits.

Public benefit

The assessment of public benefit is a key factor in any authorisation application. Conduct generates a public benefit if it improves economic efficiency—that is, productive efficiency, allocative efficiency or dynamic efficiency. In addition, conduct may also generate public benefits unrelated to improving economic efficiency.

Interim authorisation

The Act gives the ACCC power to grant interim authorisation in relation to authorisation applications. The ACCC aims to issue its decision on interim authorisation within 30 days of lodgement of an application.

Flexibility

The ACCC recognises that certain conduct may necessarily change over the life of an authorisation, for example when it relates to a program which is amended and updated on a regular basis. The authorisation process is flexible enough to deal with this situation.

The authorisation provisions provide for minor changes to be made to an authorisation through the process of minor variation application.

The authorisation process also provides flexibility with regard to the parties to the arrangement. Authorisation can apply to current and future parties to an arrangement, meaning that the addition of new parties would not necessarily result in a loss of immunity for the arrangement.

ACCC guidance to applicants

The ACCC is committed to providing guidance and information to the community on its operations, activities and processes, including the authorisation process. As part of that commitment, the ACCC is currently updating and improving its *Guide to authorisation and notification.* To complement this general guide, the ACCC is proposing to focus one of the summary guides on international liner cargo shipping in order to assist in the transition process should Part X be abolished.

ACCC's view of how the authorisation would operate

(Section 6)

Existing liner agreements

Recognising that the abolition of Part X and a move to a Part VII regime represents a departure from some long established practices, the ACCC believes it is appropriate to implement some transitional arrangements. To this end, agreements that are registered under Part X would be deemed to be authorised under Part VII. That is, these agreements would continue to be partly exempted from the provisions of Part IV until reviewed by the ACCC. The outcome of an ACCC review could be that the exemption be allowed to continue, that the exemption be revoked, or that the exemption continue in a modified form. In those reviews, in effect the onus would be on those seeking to retain the immunity of an authorisation to satisfy the ACCC it is in the net public benefit to do so.

New liner agreements

The ACCC proposes that, following the abolition of Part X, bodies wishing to gain exemption from Part IV would need to submit an application to the ACCC under Part VII consistent with authorisation applicants in other industries.

Authorisation of shipper bodies

Organisations seeking protection to aggregate the collective bargaining power of shippers or industry groups can seek protection from competition law under Part VII of the Act. Under the proposed transition arrangements, shipper bodies that are currently recognised by Part X would be deemed to be authorised and would maintain their existing rights, including the right to collectively negotiate with the lines.

No further Part X investigations

The ACCC believes removing the Part X investigation function from Australia's liner shipping markets will represent a reduction in the cost of the industry's regulation.

Compliance with Part IV

(Section 6)

Under the options for future regulation proposed in this submission, the ACCC will no longer carry out investigation and enforcement functions pursuant to Part X. This will allow the ACCC to direct its focus towards enforcing the provisions of Part IV in those cases where the conduct of liner groups is not protected by Part VII authorisation.

Working through organisations such as the International Competition Network (ICN) and the OECD, the ACCC will continue to develop the necessary relationships with regulators in foreign jurisdictions in order to ensure that anti-competitive activity affecting Australian markets can be investigated and prosecuted.

Recommendation

(Section 7)

From a public policy perspective, the ACCC views the existence of Part X as an ongoing risk to the welfare of Australians. The absence of any analysis of the likely anti-competitive effect of liner shipping agreements *prior* to them being granted anti-trust immunity represents a gamble that, overwhelmingly, such agreements deliver net public benefits to Australia. This contrasts with the approach taken to other Australian industries where, consistent with National Competition Policy, the onus of proving the net public benefit of an anti-competitive arrangement rests with the proponents of that proposed agreement.

The ACCC recommends the abolition of Part X. It would remain open to all liner agreements and shipper bodies to retain authorisation from the prohibitions on anti-competitive conduct contained in Part IV following the transitional arrangements.

1 Introduction

1.1 Objectives of Part X

Part X of the *Trade Practices Act 1974* provides conditional exemptions to Part IV of the Act for shipping lines. Part IV prohibits businesses engaging in certain types of anti-competitive conduct. The exemption allows shipping lines to collaborate through arrangements such as discussion, conference and consortia agreements. The shipping lines are obligated under the terms and conditions of these agreements to negotiate with Australian export and import shipping bodies regarding minimum levels of service.

Failure by the lines to comply with Part X provisions, to provide efficient and economic services, or where lines implement an 'unreasonable' increase in freight rates or decrease in capacity can result in an investigation by the ACCC. Investigations can be initiated by complaints to the ACCC by shippers, the ACCC can initiate an investigation or one can begin via a ministerial directive from the Minister for Transport and Regional Services. The ACCC concludes its investigation with a recommendation to the minister as to whether or not to deregister a particular shipping agreement. The minister has ultimate discretion over what action should be taken. Registration of agreements and the general administration of Part X is the responsibility of the DTRS.

1.2 Scope of ACCC submission

The ACCC's submission will focus on facets of the Part X arrangements where the ACCC:

- has enforcement experience
- can suggest areas of particular exploration by the PC
- is well placed to suggest potential regulatory alternatives to Part X.

The PC's *Issues Paper* raises numerous questions. The approach that the ACCC takes in this submission is to provide an analysis of the ACCC's observations during its role as administrator of Part X's investigation criteria and to provide some regulatory alternatives to Part X. The conclusion provides a summary that directly references many of the questions posed by the *Issues Paper.* Appendix A provides page number references to the ACCC's discussion of particular *Issues Paper* questions in the text of the submission.

Section 2 elaborates on the ACCC's enforcement experience. This appraisal will include perceived information asymmetry and data collection issues, a brief overview of the ACCC's investigation history, and the shippers understanding of the Part X provisions.

Section 3 summarises economic literature that has been used to justify the case for block exemptions and assesses whether there is support for exemptions to be provided to liner cargo shipping on Australian trades. In addition, it proposes areas of additional exploration for the PC with the objective of achieving as thorough a critique of the

economic argument for anti-trust immunity for shipping lines on Australian trades as possible.

Section 4 critiques the observed and potential levels of public benefits and anti-competitive detriments associated with discussion, conference and consortia agreements.

Section 5 provides an overview of regulatory arrangements and developments in other jurisdictions. Particular emphasis is placed on developments in the United States (US) and European Union (EU), whilst the implications of the Organisation for Economic Co-operation and Development's (OECD) 2002 report on Australian trades are also given attention.

Section 6 encapsulates the ACCC's recommendations for future regulatory development to international liner cargo shipping on Australian trades. It outlines the ACCC's preferred regulatory tool and justification for that recommendation. The section also includes a recommendation for a transitional regulatory mechanism to operate for an interim period while the industry, regulatory bodies and other relevant government bodies adjust to the ACCC's proposed regulatory arrangements.

Section 7 concludes the ACCC submission's observations and findings on its enforcement experience and recommends suggested changes to current competition law governing international liner cargo shipping on Australian trades.

1.3 ACCC's qualifications

Under Part X, the ACCC is responsible for conducting investigations into alleged breaches of Part X provisions by shipping agreements registered under Part X. Therefore, the ACCC is well qualified to assess and comment on the workability of the Part X investigation criteria. Moreover, the ACCC contends its enforcement experience enables it to highlight some functional difficulties with the current arrangements and some economic arguments associated with the justification of liner shipping agreements. Finally, the ACCC considers its regulatory involvement in the industry enables it to form valuable insights as to how the present regulatory arrangements can be amended to provide more efficient, effective and welfare enhancing outcomes for Australia.

2 Enforcement experience

2.1 History of ACCC Part X investigations

Table 2.1: TPC/ACCC Part X Investigations since 1992

	Part X investigation of complaint by APSA against North American conferences regarding terminal handling charges (1992)	**Part X investigation of complaint by APSA against AUSCLA alleged currency adjustment factors cost allocation (1994)**	**Part X investigation of complaint by APSA against AUSDA AGT outwards shipping services (1997)**	**Part X investigations complaint against SEATFA (TFA) (2000)**	**Part X investigations complaint against AADA (2003–-4)**
Complaint details	NACON had not satisfied the obligation to negotiate terminal handling charges (THCS). THCS had clawed back previous freight rate falls in a competitive market.	AUSCLA had not satisfied the obligation to negotiate currency adjustment factors (CAFS). Items such as THCS, cargo handling costs and depreciation charges were incorporated in CAFS.	AUSDA had not had due regard for its services to be economic and efficient. Monopolisation of the Australia –US reefer trade by AUSDA, very limited competition	Rapid and significant increases in freight rates and application of other surcharges	Rapid and significant increases in freight rates and application of peak season surcharges
Major reason for recommendation	Collusive nature of trade rather than NACON is the major factor behind shippers complaint on THCS Deregistration of NACON would not solve problems No indication that the levels of benefits afforded by AUSDA offset the level of competitive detriment The uniform introduction of THCS caused shippers confusion and disarray.	No recommendation made	No report written Investigation discontinued.	Actual freight rates began falling in 2000. The SEATFA did not implement further freight rate increases planned in 2000.	It was likely that the AADA did not expand capacity due to a dearth of vessel supply internationally Recent new entry into the liner trade would likely temper future freight rate increases
Recommendation by TPC/ACCC	Not to deregister NACON, Deregister AUSDA	N/A	N/A	Not to deregister SEATFA	Not to deregister AADA
Decision by Minister	Undertaking made by AUSDA to	Undertaking made by AUSCLA to Minister	N/A	None	Pending

for Transport	Minister under section 10.49 no further action taken	under section 10.49 no further action taken			

2.2 Data gathering

2.2.1 Accurately identifying freight rate movements

The price of containers transported on international liner cargo shipping vessels is formulated either on a spot market or through contractual negotiations between shippers and shipping lines. Through its market inquiries during the recent Asia-Australia Discussion Agreement (AADA) investigation, the ACCC understands that between 80-90 per cent of containers on the southbound North East Asia—Australia trade are transported under contract, with the remaining 10–20 per cent subject to freight rates determined by the spot market. Contracts between shippers and the lines typically cover three, six or twelve month timeframes.

The contract market is not observable. Contractual arrangements will differ depending on supply and demand conditions at the time of negotiations (which vary regularly courtesy of dynamic and fluid market conditions) and the extent of the shippers' volume requirements. The spot market appears more readily observable to shippers and the ACCC during investigations. Despite the absence of posted freight rates, the spot market freight rates can be obtained by contacting individual lines. However, given its size relative to the contract market, spot market freight rates appear to be an inadequate proxy for the average freight rates.

Consequently, it is difficult for the ACCC to accurately gauge movements of average freight rates prior to or during an investigation. Moreover, it is also difficult for shippers and freight forwarders to assess the level of freight rates in the contract market. Apart from Australia–US trades, it seems likely that lines are aware of established benchmark contract rates that are set by other lines operating on a particular trade. This obvious information asymmetry would appear to disadvantage the shippers and freight forwarders during their negotiations with the lines.

2.2.2 Benefits and effects of medium-term contracts

As identified above, up to 80–90 per cent of the Australia–North East Asia trade was met by contracts between shippers and carriers. The significance and role of contracts on liner trades would be clearer with a more complete understanding of the following points:

- the average spread of contract lengths between shippers and carriers operating on Australian liner trades
- whether this average term spread has been increasing in recent years

- the potential impact of increased use of long term contracting on the potential lessening of the mandating power of liner conferences to oblige carriers to adhere to conference set rates[1]

- whether the increase in take up of the individual confidential contracts between shippers and carriers operating on Australia–US liner trades has weakened the ability of the parties to the relevant conference agreements (AUSCLA/ACCLA) to influence market freight rates and

- what is the potential impact of these market changes on the competitive detriment posed by the existence of liner conferences?

2.2.3 Monitoring data of limited value

The 2000 reforms allowed for the ACCC to initiate an investigation. Therefore, the ACCC needed a mechanism to determine when it would be appropriate to exercise this initiative. As a consequence, the ACCC commenced its monitoring of freight rates in conjunction with Shipping Australia.

Shipping Australia voluntarily supplied monitoring data to the ACCC regarding blue water freight rates across a number of Australian trades. For some trades this supply of information from Shipping Australia ceased after the December quarter of 2003. Consequently, the ACCC's monitoring of freight rate data for international liner cargo shipping for some trades does not extend beyond the September quarter 2003.

The intention of the monitoring program was to provide average quarterly blue water freight rates (exclusive of port, stevedoring and other applicable charges) on Australia's major trade lanes for reefers and dry box containers. The freight rate data provided by Shipping Australia averaged the freight rates of containers transported on both spot and contract markets. The data was not delineated to specifically identify spot and contract freight rates.

The nature of the monitoring data meant that market trends were difficult to discern. For instance, a quarterly average gives little indication of the direction of the rates during a quarter until the subsequent quarter's data was received.

The ACCC observed that the monitoring data tended to relate to cargo shipped from the less expensive foreign ports to Australian east coast ports. These ports include the large regional ports of Hong Kong, Shanghai and Rotterdam where it has traditionally been less expensive to transport cargo. In this respect the average prices reported tended to underestimate the actual freight rates reported by Australian shippers.

---

[1] European Commission (2004), *Review 4056/86 Discussion paper* pp. 20-21

2.2.4 Publishing freight rate data may improve informational flows

Regulatory regimes in the US and South Korea force registered shipping lines to publish spot market freight rates on the internet. Obtaining immediate access to a range of spot market freight rates without detailed market research could allow shippers and freight forwarders to be better informed when searching for the most competitive freight rates on the spot market. While the ACCC recognises that such arrangements can assist in reducing the information asymmetry between shippers and the shipping lines, it is also mindful of a potential for competing shipping lines to use published prices to facilitate collusion. Indeed, through its investigation of the activities of the Asia Australia Discussion Agreement, the ACCC understands that signalling of intentions regarding prices and capacity forms an important element of attempts to cooperate in shipping markets. Therefore, should the PC be considering the appropriateness of any obligation on registered lines to regularly publish their spot market freight rates, consideration should also be given to the potential effect on competition between the lines.

2.2.5 Incentives for lines to provide information

The ACCC has formed the view that, due to the current structure of Part X, there is little incentive for the lines to provide evidence to the ACCC during investigations to demonstrate that liner agreements provide public benefits to Australia. Indeed, prior to the amendment of Part X in 2000, shipping lines were not required by the legislation to even address the issue of public benefit during a Part X investigation. Furthermore, shipping lines are not required to demonstrate *ex-ante* evidence of public benefits prior to gaining Part X registration. A *prima facie* assessment of the ACCC's investigation history indicates that it is difficult to recommend deregistering a liner agreement. For example, the ACCC was unable to recommend deregistration of the AADA despite concluding that the public benefits claimed by the AADA had not been substantiated. Therefore, the ACCC believes there is little incentive for shipping lines to provide evidence of public benefits under the current Part X arrangements, either prior to registration or during investigations.

The EU is currently reviewing its shipping legislation with regard to international liner cargo shipping and has challenged the lines to prove liner agreements provide net additions to public benefits or else risk losing anti-trust immunity. The PC has outlined a similar challenge to the lines serving Australian trades. The ACCC endorses this approach. The lines are the only party within the international shipping framework with the information that could demonstrate that serving 'long, thin' trades with liner agreements is more cost effective and efficient than would otherwise be the case. The lines may also be able to provide time series data that could be tested empirically to demonstrate a causational relationship between liner agreements and the stability, regularity and the scheduled services they claim to provide.

2.3 Shippers' understanding of Part X

2.3.1 Experience from AADA investigation

It became clear during the initial stages of the AADA investigation that many shippers contacting the ACCC with complaints regarding the AADA's conduct held little

understanding of the functional elements of Part X or its objectives. In response to these complaints significant ACCC resources were dedicated to explaining the nuances, complexities and the ACCC's role under the Part X legislation to the shippers.

Without fully understanding their rights under Part X, shippers may be sacrificing some potential benefits Part X is designed to provide. (For example, Part X provides designated shipper bodies with a right of negotiation. Prior to contacting the ACCC, many individual shippers are unaware of this.) The ACCC therefore recommends that if the PC recommends the retention of Part X then effective education programs for Australian importers and exporters should be explored as a mechanism to improve shippers' understanding of Part X.

2.4 Effectiveness of Part X negotiation provisions

2.4.1 Countervailing power of shippers

The countervailing power of large and small shippers (collectively) is fundamental to the desired outcomes of Part X. Immunity from s. 45 enables liner agreements to form and aggregate market participants on a trade to the extent where lines party to the agreement may have the ability to leverage market power under favourable market circumstances. Apart from the threat of an ACCC investigation and possible deregistration, the primary factors preventing the liner agreements leveraging their market power are the shippers' countervailing power and the threat of market entry in the event of excessive rates of return.

Essentially, the level of vessel capacity relative to aggregate cargo demand on a trade along with the degree of concentration of lines will determine whether the lines or the shippers hold the stronger bargaining position at any given time. When supply exceeds demand, freight rates are driven lower by shippers' position of bargaining strength. Upward pressure is placed on rates if demand extends beyond supply.

The shipping lines have achieved significant gains in technical efficiency over the past two decades. The extent of countervailing power shippers can command over a period of time will dictate the level of cost savings the shipping lines will be forced to pass through to shippers. Providing an appropriate forum for Australian shippers to share some of the producer surplus gains through lower freight rates is not only in their interests but also in Australia's national interests.

2.4.2 Instances of 'meaningful' negotiations

The likelihood of welfare maximising outcomes extending from Part X appear to be closely correlated with the incidences of *meaningful* negotiations between shipping lines and shippers. If meaningful negotiations are not taking place it may be taken as a sign of shippers' low countervailing power and relative bargaining strength.

Productive negotiations may allow the lines to explain to shippers any difficulties they encounter in servicing the long, thin and imbalanced Australian trades and the subsequent precarious financial outcomes of doing so. Meaningful negotiations may also enable shippers to arrange satisfactory minimum service levels and favourable or

commercially viable freight rates. Furthermore, a common understanding of the opposing sides' requirements and operational challenges may stimulate an increase in the availability of long-term contracts. Long-term contracts should assist in enhancing business and investment certainty and overcome potentially deleterious effects of rate and supply instability.

During the ACCC's investigation of the AADA, the Importers Association of Australia (IAA) claimed that the instances of *meaningful* negotiations between designated shipper bodies registered under Part X and liner agreements have been extremely rare. APSA and secondary export shipper bodies appear to have engaged in more frequent and successful shipping negotiations.

Therefore the ACCC is of the view that Part X has produced sub-optimal outcomes because of insufficient use of Part X negotiation provisions. While the ACCC does not attribute blame for such an outcome to either the shippers or shipping lines, it encourages the PC to consider how these arrangements could be used to provide more effective market outcomes if it recommends the continuation of Part X.

2.5 Establishing proof of anti-competitive detriment

Pursuant to the Part X amendments enacted in 2000, the ACCC used the investigation criteria in s. 10.45(3) for the first time during the recent AADA investigation. Prior to the implementation of s. 10.45(3), there were no provisions pursuant to Part X that enabled the ACCC to assess the level of anti-competitive detriment imposed on shippers by liner agreements registered under Part X. The insertion of s. 10.45(3)(c) enabled the ACCC to assess anti-competitive detriment associated with the conduct of a liner agreement for the first time. Therefore the analysis in this section will be based solely on the AADA investigation.

2.5.1 Did the AADA restrict competition?

The ACCC formed the view that the AADA was likely to have lessened competition.

It formed the view that discussion agreement members are afforded market power when the members of the agreement make up the majority of the trade and aggregate cargo demand exceeds vessel supply. Those circumstances were judged to have prevailed in the latter half of 2003 (the *reference period*) when the contestability of the trade was affected by high charter rates for appropriately-sized vessels and low threat of entry by lines not party to the AADA. The apparent vessel scarcity and subsequent escalation in the cost of providing additional tonnage substantially increased the cost to potential entrants considering entry into the North East Asia–Australia trade.

The AADA may have influenced the strategic responses of the member consortia/carriers to strong demand growth. If so the AADA would have distorted market outcomes. In particular, the AADA may have distorted its members' incentives to invest in additional capacity to service the burgeoning cargo demand growth. Extra vessel capacity would have reduced the instances of shipment delays and slowed the escalation of freight rates.

The ACCC concluded that the AADA agreement, in providing for potential competitors to discuss and reach a consensus on pricing, was likely to have the effect of lessening competition when the members to the AADA held a degree of market power. Given that the AADA members held a significant share of the trade, the ACCC considered that the AADA (and any other agreement for that matter) served to limit rivalry between its members.

The AADA's provisions demonstrated that despite being a non-binding, consensus driven vehicle, it appeared to enable its members to form and sustain a consensus on various matters, including pricing. The ACCC contended that should the parties to the agreement recognise that complying with a consensus on pricing is in their own best interests then the provisions of the agreement will facilitate that understanding.[2]

2.5.2 Accurately identifying the counterfactual scenario

The ACCC assessed whether capacity and freight rate expansion during the *reference period* would have been more likely in the absence of the AADA. The *factual* scenario was modelled on the actual behaviour and outcomes of the AADA—one discussion agreement covering 93 per cent of the North East Asia–Australia trade. In contrast, its counterfactual scenario comprised of four separate consortia/carrier groups. If four separate consortia/carrier groups each sought to maximise revenue and achieve optimal rates of return they would have been competing on both capacity and freight rate mediums. In an industry that is in general regarded as competitive, it is likely that some of the four separate consortia/carrier groups would have responded to increased cargo demand by expanding capacity.[3]

The likelihood of at least one of the consortia/carriers increasing capacity, and thereby seizing the first mover advantage by servicing some or all of the excess demand, appeared to be more probable in a market where the AADA did not exist. In a forum such as the AADA, the ACCC considered it likely that each of the consortia/carriers can recognise their mutual interdependence and, at least, be better informed (if not assured) about their fellow members' likely conduct. With the ability to discuss supply (individual and market) and demand conditions, and in the absence of immediate competitive threats, the AADA members would have less incentive to move away from those capacity levels that formed the basis of their program to increase rates.

In the absence of the AADA, the ACCC contended that each of the consortia/carriers' decisions to invest in additional or larger vessels was likely to focus on the benefits that could be captured by that consortia/carrier. In such a case the absence of the capacity-related consensus from the AADA discussion forum may have led to a consortia/carrier choosing to expand capacity when under the AADA, they would not. As possible support for this contention, the ACCC observed that new entrants, rather than existing

---

2 During periods of excess capacity it is generally acknowledged that shipping lines party to discussion agreements have been unwilling to maintain price compliance. Without punishment mechanisms, the incentive of discussion agreement members to cheat in terms of freight rate reductions (which are designed to stimulate higher load factors and capacity utilisation rates) is stronger.

3 Competing on capacity and increasing market share is a well-established characteristic of carriers, especially in expanding markets.

AADA members, were first to put significant additional liner capacity into the North East Asia–Australia trade in 2004. This provides at least circumstantial evidence that the AADA members may have had a lower incentive to expand capacity to service the demand because of the AADA.

Financial modelling undertaken by the ACCC (based on information provided by the AADA lines and using conservative assumptions) indicated that the marginal addition of an extra vessel or the replacement of smaller vessels with larger vessels would have been profitable.[4] Under such conditions, the ACCC would have generally expected to observe the consortia/carriers introducing additional capacity in an attempt to increase market share, revenues and ultimately, profits. Cost information provided to the ACCC by the lines indicated that capacity expansion on the trade would have been profitable, notwithstanding the escalating cost of chartering vessels.

Although not conclusive, the ACCC considered it likely that, in a world without the AADA, capacity would have been increased at a rate faster than that observed over the *reference period*. If this scenario proved correct, rates may have remained lower in the counterfactual than the factual, as higher capacity typically drives rates lower (unless surplus demand absorbs all of the additional capacity). Moreover, subsequent to the *reference period*, it appears the profitability of the lines providing additional capacity to the trade in 2004 has been established.

Having taken account of the relevant market factors and broader supply and demand conditions, the ACCC considered there was a significant likelihood that the capacity supplied to the trade in the absence of the AADA would have been higher than that observed during the *reference period*. The logical implication is that the presence of the AADA constrained capacity during the *reference period*.

2.6 Distinguishing anti-competitive detriment from the effect of market forces

Notwithstanding the finding that the AADA lessened competition, the ACCC was unable to establish the amount by which freight rates were higher as a consequence of the AADA's presence constraining capacity during the *reference period*. Despite circumstantial evidence and logical reasoning, the ACCC could not categorically separate the direct implications of the market forces from the conduct of the AADA members during the *reference period*. Finding out how the counterfactual state of the market would have evolved is extremely difficult to predict with *absolute* certainty.[5]

It was incumbent on the ACCC to extend its analysis to unambiguously identify the extent of (if any) anti-competitive detriment flowing from the AADA's market conduct.

---

[4] The ACCC's calculations were based on a round trip, which includes the revenues and costs associated with both the north and southbound trades. Its assessment of revenue was conservative, with lower post-entry prices forecast than the December quarter rates show. The costs include the average roundtrip costs supplied confidentially by the AADA and factor in Clarkson's charter rates of $US30 000 per day.

[5] In fact unless it can establish evidence that will stand up to the rigor of an appeal in the Australian Competition Tribunal, the ACCC is unlikely to recommend deregistration of liner agreements.

Distinguishing the outcomes flowing from underlying market forces from those caused by the presence of the AADA was fundamental to forming an unequivocal assessment on whether the AADA's conduct had inflicted an anti-competitive detriment on Australian importers.

The ACCC noted in its decision that over the period under investigation three important market developments evolved: increasing costs of chartering vessels of a size suitable for the North East Asia–Australia trade, strong growth in Australian demand for goods from North East Asia and strong growth in global demand for goods from North East Asia.

The decision by lines to invest in additional capacity will be influenced by its cost and profitability. The extent of the global boom in aggregate demand for cargo from China appeared to have caught the world's major shipping lines somewhat by surprise. Consequently, the construction and delivery of new ships lagged behind the level of demand for those ships. The profitability of market entry or incumbent expansion on the North East Asia to Australia trade from other trades would have been affected as the cost to lines of obtaining additional vessels increased.[6] Thus, the ACCC notes that, even in the absence of the AADA, there was *some* chance that the consortia/carriers may have opted not to increase supply (because of actual and opportunity costs) to meet surging cargo demand. This recognition was crucial to the ACCC's final recommendation not to deregister the AADA.

On balance, the ACCC reached the view that it could not establish with certainty that the anti-competitive detriment that resulted from (or was likely to result from) the *conduct* outweighed a benefit to the public that may have arisen, or may have arisen going forward, or alternatively, may have arisen indirectly from that *conduct*.

Should the PC contemplate the ACCC continuing its investigation role under Part X, consideration should be given to the difficulties of distinguishing underlying market forces from anti-competitive conduct, as experienced in the AADA investigation. Maintaining the current section 10.45 provisions is likely to produce similar outcomes in future investigations. In particular, the PC should consider the problematic task of proving the causational link between the market conduct and any ensuing anti-competitive detriment and the significant evidential burden the ACCC is required to satisfy despite a dearth of publicly available market data and information.

The ACCC believes the criteria pursuant to the Part X investigation provisions (section 10.45) prescribe an usually high level of evidential proof before a confident and unambiguous recommendation can be delivered on the conduct of lines subject to a Part X investigation. In its consideration of regulatory options for the future, the PC should consider a regime under which, as a minimum, the most potentially detrimental agreements place the onus of establishing an overwhelming public benefit on those lines entering into that agreement.

---

[6] Clarkson's charter rate index shows that charter rates for vessels of a size suitable for the North East Asia to Australia trade doubled during 2003.

2.7 Establishing proof of public benefits

2.7.1 Public benefits

Following the 1999 PC Part X review, subsection 10.45(3) was inserted into the amended Part X investigation criteria in 2000. Consequently, in the 2004 AADA investigation, two public benefit tests were assessed in relation to a liner agreement's services for the first time.

Prior to the 2000 Part X amendments, the ACCC was required to assess whether members party to a liner agreement (those under investigation) provided '*economic* and *efficient*' services. This compelled the ACCC to assess the shipping lines' revenues and costs in order to determine trade specific liner profitability and therefore whether the liners' services were *economic*. The ACCC also analysed the lines' vessel acquisition programs (dynamic efficiency), capacity utilisation (allocative efficiency) and the level and movement of costs levels relative to output (technical efficiency). Depending on the degree of shippers' countervailing power and the strength of competitive forces on shipping lines, proportions of the lines' efficiency improvements would pass through to Australian shippers over the medium-term. Thus, the measurement of the lines' efficiency gains could be described as an implicit public benefit test prior to the 2000 amendments.

If the ACCC conducts a Part X investigation pursuant to the revised provisions, it is required to consider two tests of public benefit. The first test—as set out in s.10.45(3)(c)—relates to a benefit to the *public* associated with the conduct that has flowed from the agreement. The second test, which arises in the context of the criteria of 'exceptional circumstances', refers to the public benefits associated with the operation of the agreement that flows to shippers. In considering public benefits and anti-competitive detriment, the ACCC adopted a broad consideration of possible public benefits.

The introduction of two public benefit tests raised uncertainty during the investigation with respect to the applicability, length of assessment and relative weightings of both tests. The public benefit test inserted in the '*exceptional circumstances*' provision [1.45(3)(d)] indicated the length of assessment should be analysed over the duration the exceptional circumstances were judged to have existed. An assessment of this duration could be problematic if it is difficult to definitively determine the exact timeframe over which the exceptional circumstances persisted.

The first test set out in s. 10.45(3)(c) gives little or no indication of over what time period the test should be applied. A possible option is the period over the length of the agreement. Constraining it to the exceptional circumstances period is another option. A third option is selecting an arbitrary time period. These three scenarios could produce differing levels of public benefits attributable to the conduct of liner shipping services, depending on the market's circumstances over the period being assessed. For instance, public benefits may have been deemed to exist if regular, scheduled services still operated even when freight rates were depressed and liners' rates of return were inadequate.

2.7.2 AADA investigation

Some empirical literature suggests that permitting shipping lines to collectively discuss and set freight and capacity will enhance the service quality offered to shippers and realise efficiency gains and cost effectiveness through the joint provision of shipping services. The guarantee of regular, scheduled shipping services is posited to stem from the stability and sustainability proffered by liner agreements and may be compared with the inherent market instability thought to exist on international liner cargo trades and in declining cost industries. Moreover, the provision and coordination of joint liner shipping services are considered to provide economies of scale and scope advantages that result in more efficient and cost effective shipping services, especially on long, thin trades.[7] If this theory applies, liner agreements may deliver high levels of service quality at low and affordable prices to Australian shippers.

In its submission to the ACCC Issues Paper, the AADA members claimed that a number of public benefits can be attributed to the AADA. They include an enhanced ability for member lines to provide stable and adequate services and a reduction in the likelihood that importers' requirements would be underestimated. Regarding the coordination of freight rates, the AADA submission states that the AADA '…has served to synchronise rate variations, which allows the trade a degree of stability relative to the (volatility) of freighting arrangements that would otherwise not exist'.[8]

The ACCC took the view that the first order effect of coordinated freight rate increases over the medium-term is likely to transfer income to carriers that would have otherwise remained as shipper (or consumer) surpluses under more competitive conditions (i.e. without any liner agreements). Discussion agreements, such as the AADA, were also assessed to facilitate a flow of surpluses from shippers to carriers that would have been unlikely without the AADA. It appears shippers may be prepared to pay the increased rates to guarantee reliable, scheduled shipping services. However if discussion agreements fail to deliver public benefits (the ACCC's conclusion at the end of the AADA investigation), shippers appear to have paid a premium to the AADA members without receiving any tangible improvements to the quality of shipping services.

The ACCC concluded that the causal link between stable scheduled services and the AADA members' conduct in coordinating significant freight rates increases during the *reference period* of the investigation was not obvious. It would be reasonable to assume that in a period of strong and sustained demand growth that a discussion agreement forum would not be necessary to ensure adequacy of supply. Moreover the shippers do not get any immediate benefit for their increased cost burden in terms of improved services and reliability. In fact the opposite occurred with more complaints from shippers about increased congestion and delays. Thus, during the *reference period,* the above public benefits that the AADA associated with the market conduct of the AADA members did not materialise.

---

7 There is a strong argument and ample evidence that suggests that independent lines are also able to deliver liner services with economies of scale and scope.

8 AADA, *Submission to ACCC Issues Paper*.

The ACCC found that there were no significant public benefits that could be attributed to the conduct of the AADA's members in discussing and collectively setting prices during the *reference period*. Especially during periods of excess demand, the ACCC considers it is unlikely that discussion agreements provide public benefits to shippers. As independents, consortia and conference agreements are clearly capable of providing regular, scheduled services that deliver economies of scale and scope, the ACCC had little alternative other than to not attribute any public benefits to the existence of the AADA.

2.7.3 Public benefits and liner profitability

The objects clause of Part X makes no specific mention of liner profitability as a public benefit. Technically, liner profitability is a private benefit accruing to shareholders of shipping lines. Without an Australian firm owning an international liner cargo shipping operator, this definition is especially pertinent. However, liner profitability is an indirect consideration for public benefits accruing to shippers. In order for liner shipping services to be provided they must expect to be financially sustainable over the long term. This implies that lines should make sufficient rates of return in order to have incentives to invest and continue provision of regular services. Without sufficient profitability carriers would not be willing to provide adequate, reliable and stable services.

In its AADA decision the ACCC noted that despite increasing profitability during the reference period there was no significant investment in new tonnage by the AADA-member lines.[9] Thus, during the *reference period,* the public benefits that the AADA associated with the market conduct of the AADA members did not materialise. However the ACCC recognises that substantial increases in charter rates and vessel scarcity may have prevented AADA-member lines from supplying additional vessels to the trade.

---

[9] Apart from the replacement by China Shipping Company of two smaller vessels with two larger vessels.

3 Economic models of liner shipping markets

3.1 Overview

This section briefly outlines some of the ways in which liner shipping has been subject to economic analysis and shows some of the outstanding issues that may require deeper analysis and empirical study.

A wide range of economic models have been developed to advance understanding of the operation of liner shipping markets and their performance. An important use of these models is to structure sound assessment of the appropriateness and effectiveness of policies applied to liner markets, especially the sanctioning of liner agreements, and in so doing guide policy reform.

In particular it is expected that economic models of liner shipping markets could be used to shed light on five key questions:

- Are liner shipping markets likely to result in a competitive equilibrium?
- Are liner shipping markets vulnerable to excessive instability?
- Are liner shipping markets prone to significant market failure, specifically with respect to price/quality of service outcomes?
- Are liner shipping markets 'unique' in a way that warrants their singling-out for special exemption from anti-competitive practices?
- What is likely to be the most efficient policy approach to liner shipping market?

These questions are posed in this way because the status quo of liner shipping markets *worldwide* is some form of conference institutional arrangement.[10]

So the point of departure for policy assessment is attempting to predict the most likely market outcomes if some or all of the various areas of collusion among carriers were not exempt from competition law.

Unfortunately there is no single coherent economic model of liner shipping markets that is sufficiently powerful and empirically supportable to adequately address these key questions. Existing theory is partial and static and severe data restrictions have limited the normal penetrating role of empirical studies. Thus a combination of theoretical approaches supported by some ad hoc observations and empirical findings offers the best current

---

[10] This raises the central question as to what should at present be the 'default' status of liner conferences: should the onus be on carriers to demonstrate the net public benefit from authorising certain areas of collusion/co-ordination/discussion agreements (especially given the large asymmetry in information) or should special and singular exemption be continued. Judgment of the benefits and costs of these two positions depends on the perceived balance of existing economic arguments and evidence, the consequences of 'Type 1' and 'Type 2' errors arising from each position, and the relative policy/regulatory resources likely to be incurred. Of course this judgement question could be posed for many similar industries. The ex-ante judgement made for all other industries is that the anti-competitive costs exceed any potential benefits.

approach. Plainly this limits the extent to which alternative policies can be rigorously assessed *ex-ante*. This is reinforced by the fact that worldwide there is very little variation in government policy toward liner shipping.

In essence all major trading countries[11] have sanctioned the conference form of institutional arrangement for their liner shipping over many decades—although with different requirements, especially on disclosure of contract rates and whether the conference is open or closed to new membership. Without a solid theoretical model supported by empirical evidence, and without the benefit of observing the outcomes of prominent and different policy experiments, the answers to the key questions posed above are necessarily somewhat speculative.[12] However by judicious use of existing models and careful application of basic economic principles and analysis, some working hypotheses can be advanced. In addition the answers derived from this can be judged against the conclusions of several recent comprehensive reviews of liner shipping policy around the world.

Accordingly, this section provides an overview of what are generally considered the most useful economic models of liner shipping markets. Some of the predictions suggested by these models have been drawn upon to advance support for liner agreements. This is critically assessed. The emphasis here is on the insights that these models can contribute to grappling with the above five key questions.

3.2 The models

There are three economic models of liner shipping markets most commonly draw upon:

- Neoclassical Oligopoly—Orthodox Open Cartel Theory
- Contestable Markets—Sustainability
- Game Theory—Concept of an Empty Core

These three theoretical 'model elements' are set out in Appendix B. The table is not intended to be definitive. Rather it is designed to summarise the most salient aspects of these theories in terms of their main assumptions, predictions, empirical support and possible contributions in guiding policy assessment. But before elaborating briefly on the table and the use of these elements, it is helpful to reiterate briefly (that is without detailed discussion which is available in numerous publications, including previous reports on liner shipping by the PC and the ACCC) some of the main characteristics of liner shipping. Also some of the claims made about liner shipping that are relevant to this discussion are noted.

---

[11] Among others, OECD, 2002.

[12] A recent OECD report on competition policy in liner shipping (OECD, 2002) noted that its earlier background paper was criticized for being '... more grounded in ideology than in complete and detailed analysis ….(and for) the leap ..perceived between ..data and .. the strong findings against anti-trust immunity for liner operators'.

3.3 What are some of the key economic characteristics of liner shipping?

The production of liner shipping services is generally agreed to be associated with economies of scale in vessel size or decreasing long run unit capacity cost (through at least about 5000 TEU). For a particular vessel size, capacity is ultimately fixed by a physical design limit. There are limited economies of scale and scope for an individual carrier, although network economies appear increasingly important in many trades and in part account for the changing organisational landscape with degrees of cooperation: consortia, alliances, and mergers.

Carriers face high fixed (but usually avoidable) costs associated with vessel operations although asset recovery values are shaped by the worldwide state of the used and new vessel markets. By route and voyage these costs are heavily joint. For example, a voyage from China to Australia will be jointly provided with a return voyage from Australia to China. Sunk costs are regarded as modest—not high—and stem from route development (corporate infrastructure, marketing) and any owned on-shore facilities. Service capacity cannot be stored, in the sense that, once the vessel departs, if space on a vessel is not used then it is no longer available.

In the short-run with a fixed vessel fleet, short-run marginal costs of service rise sharply as vessels approach full utilisation. But marginal increases in capacity may be secured by slot-chartering, vessel leasing, adjustments in voyage itinerary and so on. The marginal cost of these sources clearly hinges on the state of the worldwide market and, among other factors, available vessel size and how quickly additional capacity is wanted. Where there is underutilised vessel capacity, short-run marginal costs are relatively low and less than average cost.

Supply includes not just transportation but also quality of service: schedule (dates and time), frequency, reliability, voyage duration, port calls, security, safety and so on. These attributes are valued by shippers—some more than others, largely depending on the cargo. An aspect of liner shipping that receives much attention and debate is the more certain provision of regular scheduled services, coupled with adequate frequency. These attributes affect total transit time from production site to customer and shape total logistics costs and hence supply chain management.

Two aspects warrant noting here. First, as a rule, *there is diminishing marginal value to increases in schedules and frequency.* That is, the most valuable additions to schedules and frequency occur when frequency is low. For example, if one service per week is added to a trade that currently offers only a weekly service, the overall quality of service is significantly increased. However the addition of one service per week to a trade that currently has a daily service represents a less significant gain. Second, when individual carriers add an extra service frequency this increases the quality of service (frequency and schedule) for the overall market. An individual carrier's decision to schedule a departure 'spills-over' to improve the total service offering in the market. There is a gain to all potential shippers and, to the extent that demand is sensitive to quality of service, a potential gain to other carriers. This externality is likely to be important in markets that exhibit low density or low frequency. Relevantly, it bears upon the service quality arguments often advanced for the co-coordinating role offered by liner agreements and is part of their justification.

Demand for liner shipping cargoes—which are extensively containerised—is highly divisible (many shippers use a single vessel's capacity) and typically comprises 'medium'-valued manufactured goods. The ACCC notes that this contrasts strikingly with bulk cargoes (primary products—grain, minerals, liquids, etc) for which a single shipper typically uses an entire vessel. Demand is typically seasonal, substantially different by direction, uncertain, cyclical, and so fluctuates considerably. Demand can be stored (by being shifted in time) but at a cost that increases with the value of the cargo, the cost of storage, and the impact on downstream use of the cargo.

For Australia (including the East Asian trades), outbound export goods tend to be dominated by bulk cargoes, while inbound imports are dominated by liner cargoes. In both cases the goods are subject to world markets. Generally Australia faces elastic demand for, and relatively inelastic supply of, its exports and the opposite for its imports. As a consequence, *Australian nationals (the producers of exports and buyers of imports) bear the greater part of the burden of transport costs and would benefit most from their reduction.*[13]

3.4 What are the main consequences of these characteristics for how liner shipping markets are likely to operate?

The consequences of the fundamental supply and demand characteristics of liner shipping markets, taking into account the institutional environment, need to be analysed with the aid of some form of economic model. Some of the main results are derived by applying the three model elements set out in Appendix B. However a couple of the main consequences expected are highlighted here.

Consequences hinge on the market structure that prevails. However in general, in the short-run, fluctuations in demand will result in price movements. That is, from a reasonably balanced condition, a fast or unanticipated rise in demand will cause the market price to rise; a slump in demand will cause the price to fall. These movements will be more or less efficient as price rations scarce capacity to those shippers that value it the most or, during slumps, price falls to the avoidable cost at which liners are willing to supply. The latter case is the point of departure for long-held arguments that the consequences can be 'destructive' or 'cutthroat' competition. The argument is that price will fall to marginal cost as carriers maximise profits, but at that price losses are incurred.[14] Faced with financial losses, some carriers will exit. When demand rises, price rises above average cost and some carriers (re)enter and earn profits, but the cycle would continue when demand falls relative to supply.

The changing fortunes of carriers, and fluctuating freight rates, has often led to lobbying for some form of price smoothing or stabilisation to reduce the alleged string of losses to carriers and freight rate uncertainty to shippers. Granting carriers immunity from collusion is one approach. However while attempting to hold a fixed price in the face of a drop in

---

[13] The overall incidence of liner freight rates to and from Australia has been estimated using partial equilibrium analysis to be of the order of 65 per cent for exports and 59 per cent for imports. (BTCE, 1986)

[14] since with high fixed costs marginal cost is below average total cost.

demand is most likely to (temporarily) restrain some exit it will actually exacerbate losses. Instability in prices may be unfortunate but in these circumstances it will generally minimise short run losses of the lines and serve to efficiently allocate capacity available. Shippers concerned about coping with rate uncertainty may be able to insure against this by seeking forward contracts with carriers. Moreover there is nothing unique to the liner shipping industry about fluctuations in prices and constrained available capacity.

Many industries face lumpy capacity that cannot be quickly changed and sharply rising marginal costs near capacity, a large fraction of costs that are fixed (in the short run) and fluctuating demand. These include transport: rail, airlines and road haulage and other sectors such as hotel accommodation, oil refining, aluminium smelting, automobile manufacturing and power generation. Some of these industries tend to be oligopolistic and yet can experience substantial price fluctuations. But rarely is this deemed 'instability'—as it is in liner shipping.[15] Some, like liner shipping, involve relatively low sunk costs. For others sunk costs are much higher than for liner shipping.

Transport markets in particular, typically involve a quality of service externality (see below) that can distinguish them. Air services and liner shipping are examples: the level of output of each carrier affects the level of quality of service, such as frequency, in the market. But the significance of this feature of transport markets decreases quickly for cargo as frequency surpasses a modest threshold level. The importance of this externality is greatest on very low frequency service routes. These routes are often thin (low density) and long. Of course, it is intrinsic to long, thin markets that frequency will be low. But a problem may arise if competition drives departure schedules in such markets to an inefficient pattern –such as bunching. This is discussed further below.

3.5 Why should liner shipping markets be singled out for 'special exemption' under competition policy?

At one level this question covers the whole matter of liner shipping and competition policy (Part X). Here comment is confined to outlining and assessing the three main arguments commonly put forward to support sanctioning and even fostering collusion in liner shipping. Each involves a judgment that the balance of costs and benefits favours the sanctioning of liner agreements. Implicit, if not explicit, is the view that three modes of market failure prevail and that a net improvement will be achieved by an intervention involving exemption from competition law. No attempt is made here to weigh-up the sides of the benefit-cost equations.

3.6 Market characteristics

3.6.1 Destructive competition & instability

It has been claimed that a characteristic of international liner shipping is a tendency to 'destructive competition' and 'instability' in prices and capacity. As noted above, the

[15] Plant indivisibility tends to dwarf demand units (although in the case of road haulage supply and demand units are fairly close.

argument is in essence based upon two claims. First, uncertain demand fluctuations, combined with the fixed capacity and non-storable nature of liner services, cause social costs. These social costs arise from the costs incurred by suppliers and customers in adjusting to unanticipated demand fluctuations. These costs, the argument goes, exceed the benefits of a freely-operating market-based supply response to changes in demand. Second, it is claimed that a sanctioned liner conference will reduce these social costs significantly. As discussed above, the evidence for the latter claim is generally weak or lacking.

3.6.2 Frequency and regular, scheduled services

Liner shipping services have the characteristic externalities associated generally with frequency or regular scheduled services. The role of individual and market level quality of service in the supply of liner services was outlined above. It is argued that a competitive market would result in an inefficient price-quality of service combination. Support for liner agreements to address this issue is that they have the ability to ensure joint coordination of members' capacity to allow the more *efficient scheduling* of total market capacity. This may include collective agreements on covering less profitable departure times and some smaller vessel sizes that allow increases in frequency and regularity of schedules—even if it is at the expense of higher unit costs.[16]

Where necessary, transfers among liner agreement members ('pooling arrangements') would balance any additional costs incurred by those members who agree to adjust to ensure the overall 'optimal' quality of service. The benefit-cost equation here includes the benefit of reduced transit time via reduced delay of cargos while costs are higher rates (if schedules are adjusted and smaller vessel sizes are used) and impairment of service quality innovations from lower service competition.

Under this argument, the greater the capacity share per trade held by a liner agreement, the greater the benefit of coordination but, on the cost side, the greater the anti-competitive detriment. A difficulty in assessment of the *net* benefit here is that a liner agreement's capacity shares per trade tend to be higher in relatively long thin markets where the benefits of frequency and schedules are relatively more important to shippers.

This matter also raises the question of whether forward contract markets will develop and what their effectiveness is in determining efficient price-schedule combinations. Surprisingly there appears to have been inadequate attention given to the role of such markets. Such markets may be vulnerable to depth and existence problems for liner cargoes.

3.6.3 Game Theory and the 'empty core'

Is there a susceptibility of liner shipping to an 'empty core' and resultant 'instability'?

The theory of the core predicts that for markets where demand is finely divisible relative to units of supply a stable competitive market equilibrium is unlikely to exist. Arguably, these fundamental conditions arise in liner shipping where units of demand from many individual shippers (containers) are small relative to the unit of supply (vessel size): supply has

---

[16] The ACCC notes that in the Australian outbound liner trades average vessel size is of the order of 2000 TEU, i.e. at a size at which economies of vessel scale still yield decreasing unit capacity costs.

indivisibilities from 'lumpy' discrete units (vessels), costs are discontinuous; and, therefore a market equilibrium may not emerge. Rather, the predicted market outcome is one of instability[17], with continual changes in supply of liner shipping capacity in attempts to form allocations of total capacity but with no price level that supports any allocation that is viable.[18]

However the conditions for an empty core are quite stringent and of questionable realism: in liner shipping markets options exist at the margin for carriers to add or contract their capacity. Such options include slot-chartering, cross-leasing of vessels, adjustments to schedules, changing vessel sizes and voyage itineraries. Thus the significance of this potential market failure depends on strict cost indivisibilities *and* the costs of any disequilibrium. In addition, where a market may be susceptible to an empty core, there are typically several institutional interventions that may be used to resolve the instability, including the use of adjudication or customary practice.

There is also the question of whether a forward contracts market for liner cargo shipments can resolve any persistent empty core problem in the liner shipping market. Spot and long-term contracts exist for bulk markets (albeit where demand conditions do not foster an empty core).[19]

Appendix B summarises the application of three economic model elements to liner shipping markets. The table also indicates the manner in which the forms of alleged market failure described briefly above may arise.

A number of working hypotheses may be drawn from this Appendix. These are discussed next.

3.7 What can be concluded from current economic analysis of liner shipping?

As indicated earlier the current state of economic theoretical and empirical analysis falls short of providing a robust scientific understanding of liner shipping markets with and without a sanctioned conference institutional dimension. This aside, conclusions based on an assessment of the economic models of liner agreements, together with the application of sound economic principles would suggest the following as working hypotheses for predicting broadly what is most likely to happen if Part X is withdrawn.

---

[17] This form of instability is different from the variation in market-clearing prices arising from demand fluctuations noted under above.

[18] In this respect, a viable allocation would result in no losses to suppliers and no gains available for any shippers. Such an allocation could be regarded as efficient.

[19] These contracts are used especially when shippers require a regular flow of the cargo, often from a few suppliers, interruptions are costly and inventories are expensive to hold. Examples in the bulk trades are coking coal, iron ore, and with many suppliers, grain, for which voyage contracts are often used. Here such contracts are not a response to 'instability' but rather a coordinating device to ensure steady flow at low transactions costs.

These working hypotheses are aimed at addressing the key questions posed at the beginning of this section:

(1) ***a competitive equilibrium of some form is likely to exist*** as a state toward which market outcomes will gravitate, unless perturbed. The non-existence of such an equilibrium as predicted as a real possibility by the theory of the empty core hinges on supply (vessels) being indivisible and considerably greater (on average) than divisible units of demand (containers). There is a question as to whether the assumption of absolutely rigid capacity applies in actual liner shipping markets. Indeed, adjustments in vessel capacity are possible through chartering, vessel size changes etc. Such an assumption appears questionable and problematic. However the methods available, the extent to which they could be used in Australia's trades, given Australia's location vis-a-vis world shipping networks, and some *evidence* and market intelligence of these methods on the NE Asia trades, is needed to give this issue greater perspective.

(2) L***iner shipping markets are likely to be 'substantially contestable'.*** In general the majority of a carrier's costs are in vessels and are largely avoidable. Some sunk costs (such as shipping corporate infrastructure, route establishment, marketing and possibly some terminal facilities) can be expected to be incurred but these are not usually high relative to total costs. Therefore *competition in and for the market is likely to be 'reasonably workable' but may be susceptible* to attempts at tacit and possibly clandestine collusion, unless threat of prosecution on anti-competitive conduct is highly credible and the penalties under the Act are significant compared to gains from collusion.

(3) R***elatively few liner shipping companies can be expected to operate*** over the relevant route network markets as Australia's trades tend to be relatively long and thin (low density). The market structure across these trades may be effectively competitive *if* the relevant broad market proves to be *sufficiently contestable, especially for shipping companies that wish to vigorously and independently compete* on these trades. But if not, they are susceptible to some form of *oligopoly* behaviour or inter-firm cooperative arrangements (from consortia to alliances to discussion agreements). Given Australia's *open* liner agreements circumstances, the impact of removal of the Part X mechanism ***may not yield substantial real rate falls in the short term***.

While liner agreement-announced rates provided competitors with a useful benchmark or signal, the extent to which competitors moved away from that rate in various contracts is not known. The ACCC considers it likely that, when market demand conditions are weakened, departures from a liner agreement's announced rate are likely to have been significant.[20] Further, with a major withdrawal of exemption under Part X there is likely to exist an entrenched legacy of learned collusive behaviour. This mind set may prevail for some time, largely depending on the balance of companies' expectations of being able to circumvent the Act. Therefore on economic grounds *a*

---

[20] When demand conditions strengthen, in the short term with capacity quite fixed, individual shipping companies may also rationally choose to set individual rates above the conference agreed rate, which may lag behind the market. In these circumstances companies' higher market place rates are not likely to be much different than if there was no conference.

relatively short lead time (6 months or less) to reasonably accommodate the costs of adjustment to a major policy change would be justified. This may involve some transition provisions such as discussed in Section 6 below. **But *complete withdrawal of exemption immediately afterwards* would appear the most efficient way to implement such a change.**

The low costs of joining and not following the rules of a liner agreement while still benefiting from collectively shared information, may go some way towards explaining the lack of a significant presence of independent lines that chose to stay outside the liner agreements. This in turn may indicate considerable scope for competition if no liner arrangements were available.[21]

(4) ***On balance, it is likely that the extent of the potential forms of market failure noted above would be at most modest***. In relation to the proposition that liner shipping is vulnerable to market failure through the costs of instability from 'destructive competition', there does not appear to be any empirical support for the argument that allowing market prices to ration fixed capacity to demand is inefficient. Moreover an implicit corollary of this proposition is that, if true, the most efficient way to address it is through fostering collusion among carriers so as to bring greater price stability to the market. Interventions such as price stabilisation schemes have at best a mixed record of serving their objectives, including efficiency.[22]

For liner shipping, there does not appear to be any evidence that demonstrates the proposition or the relative efficacy of liner agreements in dealing with rate fluctuations. Other industries that have high fixed costs manage profitable utilisation by closely adjusting their prices to deal with fluctuating demand (for example, peak/off-peak rates). Customers also benefit provided that in periods of tight capacity market prices are as low as possible consistent with rationing scarce capacity. The best way to ensure constrained prices and avoid any leveraging of market power is through effective competition in the market.

The degree to which a competitive market process may fail to bring about an efficient combination of freight rates and quality of shipping service would appear to be at most modest, even in the relatively thin Australian trades. For example, present day market sizes have yielded what would appear to be a satisfactory level of frequency and spread of ship departure schedules. It is unlikely that there would be much drop in shipping frequency without liner agreements, although some bunching of departure schedules may occur. Thus the potential losses that might emerge in the absence of liner agreements would appear to be small and likely to be exceeded by the benefits of removing collusion and opening the way for full rate competition.

The magnitudes of both the benefits of service quality and the costs of collusion attributable to liner agreements are not readily quantified. Accordingly, given this is universally advanced as a key dimension justifying special treatment for liner agreements, it warrants attention for some careful quantitative investigation by the PC. This should include developing estimates of the value to shippers of various levels of

---

[21] A recent study of a hypothesized break-up of carrier agreements in US liner trades estimates that the average reduction in freight rates would be 25 percent. World Bank (2002).

[22] For example, agricultural market price stabilization schemes, although these involve storable supply.

service, especially expected and unexpected increases in wait time and total door-to-door transit time from increased schedule delay deemed attributable to loss of liner agreement co-ordination, as far as possible across routes of different density and frequency.

(5) In attempting to predict what form of market competition is likely to emerge, three ***interrelated aspects, among others, need to be kept in mind***:

(i) Changes in Australia's liner shipping policy (specifically removal of the exemption of liner agreements for price and capacity collusion) is most readily applied on its *outbound* (export) trades. Competition policy on the largely parallel inbound (import) trades is primarily in the hands of Australia's partner national governments at the other end of the shipping route(s).

(ii) Shipping routes and networks involve substantial '*jointness' in operations and voyage costs.* Hence the likely positive consequences of changing liner agreement entry on Australia's outbound routes and exposing them to real competition is likely to be tempered somewhat by the characteristics of network operations and 'jointness' in route direction. That is, the cost to a shipping line of servicing a route comprises both inbound and outbound legs. This is an aspect that has tended to be overlooked and it warrants some assessment.

(iii) Finally, a unilateral move by Australia would *alter the 'rules of the game'* initially in the Australian trades. Although these trades are relatively small, they may have real spill-over effects to other shipping markets. First, by removing the overwhelming anti-competitive influence of the liner agreements, the Australian outbound trades are rendered potentially more attractive. This may encourage new entry seeking short-term profit opportunities and precipitate some re-allocation of shipping resources to Australian markets. Second, an initiative by Australia may provide some modest but positive '*demonstration effect'* to other countries to treat liner shipping on an equal footing in their competition policy.

For a summary overview of the key assumptions, predictions, empirical support and assessment of the three economic models discussed above, see Appendix B.

3.8 Summary

In most respects the economic characteristics of international liner shipping do not differ from those of many other industries that continue to be sustainable without blanket exemptions from competition law. While a theoretical case may be made that, in markets with low volumes, quality of service (in terms of the provision of scheduled services) may be lower under conditions of greater competition, there is a question as to whether such a case can be made for all Australian trades. In any event, the cost of addressing such perceived 'market failure' through allowing collusion between competitors carries with it the likelihood that prices for shipping services are higher than they otherwise would be.

4 Shipping agreements

4.1 Overview

There are a range of registered anti-competitive agreements among carriers operating on Australia's liner trades. There does not appear to be one Australian trade in which there is not some form of registered anti-competitive agreement between carriers. The ACCC has also investigated several trades[23] in recent years (see 2.1) that appear to contain multi-layered structures to the liner agreements.

While there are some independent lines that do operate outside the agreement structures on several liner trades, they are few in number.[24]

Generally, there are three categories of registered agreements among liner shipping companies operating on Australian trades. These are discussion agreements, conference agreements and consortia agreements. The first two can involve discussion, setting and benchmarking of rates. The latter generally does not involve any form of rate making. There are further differences. Discussion agreements represent a 'loose' voluntary arrangement among members whereby they are not obliged to follow collective decisions. Conference agreements are more formal arrangements with mandated adherence to collective decisions.

All of these types of agreements can be registered to obtain partial anti-trust immunity pursuant to Part X. The granting of partial anti-trust immunity is virtually automatic upon presentation of the agreement to the Liner Registrar. However all of these agreements can be made subject to authorisation procedures pursuant to Part VII of the Act. This would allow for some public accountability and testing before they are granted anti-trust immunity. Under Part X, these three types of agreements are registered in perpetuity, whereas authorisation under Part VII is usually only for a set period and is open to future review in the event of changed market circumstances. These alternative regulatory options are further discussed in section 6.

The objective of the following subsections is to describe the different types of liner agreements in more detail based on the ACCC's enforcement experience and to suggest certain avenues of investigation for the PC. Discussion agreements are the subject of 4.2, conference agreements are discussed in 4.3 and 4.4 provides an outline of consortia agreements.

---

[23] For instance on Australia–South East Asia export liner trades there is one discussion agreement (SEATFA) and four consortia agreements. For the Australia-US export liner trades there is one discussion agreement (AUSDA), one conference agreement (AUSCLA) and several consortia agreements.

[24] Mediterranean Shipping Company (MSC) are an independent carrier on the Australia Europe liner trades and prior to 2001 China Shipping Company were an independent carrier on the Australia–North East Asia trade lanes.

4.2 Discussion agreements

Discussion agreements have been the focus of the last three ACCC Part X investigations in the period 1996–2004.

There are registered discussion agreements operating on most major Australian trades and among lines operating on several of Australia's smaller trades.[25] There are no discussion agreements among carriers participating on the Australia–Europe trades due to an EU ban on discussion agreements for all European trades.

This subsection will describe a typical discussion agreement (drawing on the example of the AADA) that exists amongst carriers operating on Australian trades. This includes an examination of the type of information that is exchanged between parties to discussion agreements, as gleaned from ACCC market inquiries and information provided on a collective basis by the AADA to the ACCC.

It will then look at the potential anti-competitive detriment associated with discussion agreements. These include the potential to monopolise a trade, potential for making it difficult for new entry onto a trade, and finally the potential to limit price competition between its members in periods of excess demand.

The ACCC recommends that the PC investigate whether there are any further anti-competitive detriments associated with discussion agreements over and above those associated with conference and consortia agreements.

Potential public benefits are also discussed. These include the ability to stabilise freight rates and service levels associated with the ongoing provision of reliable, scheduled services. Further, there may be public benefits provided by discussion agreements over and above those provided by conference and consortia agreements. The ACCC suggests the PC direct its research effort to investigating whether there are public benefits of discussion agreements that may be above and beyond those provided by conference and consortia agreements. In particular, there is the question of whether the rate making powers of discussion agreements in some way facilitate the workability and efficiency of underlying consortia agreements.

4.2.1 An example of a discussion agreement—the AADA

The AADA among liner companies operating on the North East Asia–Australia liner import trades, is an example of a typical discussion agreement.

Article 4 of the AADA indicates the rules of the agreement. The parties are permitted to discuss rates, service items and rules of the trade and reach a consensus on those in a non-binding manner. The parties to the AADA are permitted to consider, discuss and exchange information and reach consensus on all service and transportation aspects of the liner trade.

---

[25] Examples of discussion agreements on minor trade lanes are Australia–NZ Discussion Agreement, AADA, Australia–Fiji Discussion Agreement.

The AADA, like all discussion agreements, is a non-binding agreement and its members are not obligated to follow its collective decisions.

Article 6 of the AADA stipulates that membership is open to all carriers that regularly operate within the geographic scope of the agreement as outlined in Article 3.[26] Carrier members of the AADA can leave the agreement by giving 30 days written notice to the other parties under article 8 of the AADA.

Part X of the Act places certain obligations upon the AADA in return for its right to be granted partial immunity from Part IV. This includes the obligation for the members of the AADA to negotiate tariff levels[27] as well as the minimum levels of service, with the relevant peak industry body (the Importers Association of Australia). The minimum levels of service are outlined within the appendix of the AADA. These provide details of the minimum annual capacity and refrigerated capacity to be provided from North East Asia to Australia's major east (Sydney, Melbourne and Brisbane) and west (Fremantle) coast ports as well as the number of regular sailings between the two regions.

While the ACCC is not privy to the meetings of parties to discussion agreements, some of the types of confidential information that are exchanged between members can be gleaned from the collective information provided to the ACCC by the AADA during the recent investigation.[28]

Confidential information that is exchanged appears to include:

- individual company information concerning freight rates including contract freight rates[29]
- individual consortia/company information concerning surcharges
- individual company information concerning vessel utilisation rates.

According to the AADA, the parties discuss vessel capacity, cargo demand, vessel utilisation, an indicative level of freight rate increases and the pattern of services schedules. The AADA contends that joint provision, joint scheduling and joint management of services are not discussed by the AADA members. However, these issues are discussed in the underlying conference (ANZESC) and consortia agreements. More importantly, it appears that discussion regarding new investment or withdrawal of vessel capacity is carried out within the consortia or by the individual carrier.[30]

---

[26] That is, membership is open to all carriers that operate on the liner import trades from PRC, Hong Kong, South Korea, Taiwan, Japan and the Philippines to Australia.

[27] The AADA is a little unusual in this respect as it has not yet negotiated a tariff level. The other discussion agreements set tariff levels for their respective liner trades.

[28] As well as from the AADA responses in their submission to the Commission and questionnaire.

[29] According to the European Liner Association confidential information concerning contract freight rates is not exchanged by liner conferences (see European Liner Association (2003), *Response to the European Commission Consultation Paper on the review of Council regulation (EEC) 4056/86* p. 67). However, the PC should question how discussion agreement parties seek to benchmark contract freight rates without knowing details of their respective levels.

[30] AADA (2003) *Submission to ACCC* p. 10 AADA (2003) *Questionnaire Response*.

The purpose of the meetings within discussion agreements appears to be to consolidate confidential market information. Information sharing is designed to improve forecasts of demand and supply conditions in order to facilitate investment planning and management decisions by the consortia parties and to benchmark contract and non-contract freight rates. The latter benchmarking allegedly provides a stabilising influence on freight rates as set by the individual parties to the agreement.

The enhanced ability to forecast supply and demand trends through swapping confidential market information, such as individual lines' vessel utilisation rates, allegedly contributes to supply stability which, with the greater rate stability, underpins the provision of adequate and reliable services.[31] In a theoretical context, the existence of discussion/conference agreements allegedly facilitates the provision of adequate service levels which a competitive market cannot provide.[32] The potential benefits of discussion agreements are further considered below.

4.2.2 Potential competitive detriment of discussion agreements

The apparent ease of entry into discussion agreements as well as the ability of parties to discuss and swap confidential market information has serious potential anti-competitive consequences. These include:

- potential monopolisation of the liner trade
- potential to hinder new entry by carriers into the liner trade and
- during periods of excess demand parties have every incentive not to 'cheat' on agreed freight rates. The agreement serves as a signalling device about each party's intentions to increase rates and surcharges, thereby limiting price competition.

All of the discussion agreements subject to ACCC investigations in the past eight years had significant market/capacity shares on their respective trades as shown in Table 4.1. The parties to the agreements also faced limited competition and shippers had limited choice of alternative liner supply.

---

31 European Liner Association (2003) op cit pp 20-33.

32 Haralambides (2003), Final *Report prepared for European Commission* p. 81.

Table 4.1: Estimated market share and competitive influences on discussion agreements subject to the last three Commission investigations 1996- 2004

Australia – US Liner Trade (Northbound) (1996)			**Australia – South East Asia Liner Trade (Northbound) (2000)**			**North East Asia – Australia (Southbound) (2003)**		
Discussion Agreement	**No of members**	**Market Share (%)**	**Discussion Agreement**	**No of members**	**Market Share (%)**	**Discussion Agreement**	**No of members**	**Market Share (%)**
AUSDA	6	92	SEATFA	15	72	AADA	15	86
Independents								
FESCO			AAL /PAS			PAS		
			Wallenius Wilhelmsen			Evergreen Marine		
			PIL/MISC					
Transhipment								
NA			PONL/NYK PONL/Contship ANL/CMA-CGM/Contship/ Marfret			APL/PIL/ RCL/Hapag Lloyd/MISC		

The table also shows the different levels of competition faced by the parties to the various discussion agreements. In the case of AUSDA and the AADA, the discussion agreements faced competition from only one effective competitor in their respective direct liner trades.[33] In the North East Asia–Australia import liner trades, AADA members also faced competition from several shipping lines which transhipped cargoes via Singapore. These latter services are slower (up to a week) and involve potential delays and double handling at the Port of Singapore.

For the case of the northbound discussion agreement SEATFA among carriers operating on the Australia–South East Asia export trade, there is greater potential competition provided by the carriers operating on the Australia–Europe trades. Most of these lines sail to Europe via Singapore and have varying capacities (space allocations) to ship cargoes to South East Asia from Australia.

The easy entry and lack of major investment commitment associated with discussion agreements, combined with the ability to talk legally about pricing, demand and supply conditions makes discussion agreements an attractive proposition for carriers. Thus, it has been observed over a period of time that the market shares of discussion agreements

[33] Evergreen Marine in the case of the AADA and FESCO in the case of the AUSDA

has been observed over a period of time that the market shares of discussion agreements have grown. This situation evolved within the AADA, where its major competitor, China Shipping Company joined in mid 2001[34]. Given the factors above, discussion agreements could lead to monopolisation of trades.

According to shippers the presence of discussion agreements among carriers with large market shares could potentially hinder liner entry.[35] It is feasible that the parties to a discussion agreement could increase vessel capacity supplied within a trade lane in order to lower rates of return (post entry) for new entrants, although it is open to question whether this strategy is profitable on some of Australia's trades. Secondly, decisions concerning vessel investment and vessel withdrawal[36] from trades appear ultimately to be the responsibility of the parties to the consortia agreements and not the discussion agreements.

In the past two Part X investigations, the ACCC has observed that the parties to discussion agreements are accorded market power when cargo demand increases significantly relative to supply.

On both occasions in 1999–2000 and in 2003, parties to the SEATFA and the AADA instituted a series of rapid freight rate increases, taking advantage of significant increases in cargo volumes on the respective trades.[37] Shippers lost their bargaining power in negotiations enabling carriers to announce large rate hikes in concert. The increased freight rates appeared to hold in the market, resulting in shipper complaints to the Minister of Transport and Regional Services and the ACCC.

In periods of significant demand growth, parties to discussion agreements cease price competition between each other, discounts to all but the largest shippers are withdrawn and contract terms tend to shorten as they expire. In a growing market, carriers have no incentive to cheat on each other by offering discounts in the short term as they are already experiencing high load factors.

Given that discussion agreements tend to have large market shares, this behaviour in a tight market means that often shippers are forced to absorb freight rate hikes or switch to inferior shipping alternatives such as transhipment[38] with slower transit times and

---

[34] Two lines quit the AADA, but both quit the Australia–North East Asia trade as well. AUSDA increased its market share in 1995 with the entry of Cool Carriers and Scaldis into AUSDA, providing the impetus for the ACCC Part X investigation into AUSDA.

[35] Importers Association of Australia, evidence to Commission, Fusillo M (2003), *Excess Capacity and Entry Deterrence: The case of Ocean Liner Shipping Markets*, Maritime Economics and Logistics 5 pp. 100-115

[36] In 1999, ANSCON, a liner conference among carriers operating on the outbound Australia–North East Asia liner trades, attempted to defend its market share in the face of determined new entry by several lines into the Australia–North East Asia liner trades, by establishing a new service loop. The new service loop was withdrawn five months later as the market share of the parties to ANSCON shrank. More recently, the parties to the AADA did not invest in significant additional tonnage to hinder the market entry of several new carriers to the Australia–North East Asia liner trade in mid 2004.

[37] In 1998–99 there was also significant reduction of capacity supplied to the Australia–South East Asia liner trades - see ACCC (2000), *Part X Complaint Trade Facilitation Agreement for Australian Northbound Liner Trades to South East Asia Final Report* ,October 2000 p. 18.

[38] In case of the SEATFA, exporters did have the option of switching to lines operating in the Australia –Europe liner trades via Singapore.

greater possibilities of delay through double handling. Also, given the ability of discussion agreement members to exchange confidential market data and to signal to each their pricing intentions, the speed of rate increases following an increase in cargo demand may be more rapid than that in a competitive market.

4.2.3 Potential public benefits of discussion agreements

The potential public benefits of discussion agreements are as follows:

- stabilises freight rates and service levels
- provides a basis for the provision of adequate reliable, scheduled liner services especially in periods of excess capacity
- encourages future investment into trades by reducing risk.

The ACCC suggests the PC examine these potential public benefits and investigate any causal links between the discussion agreement members' conduct on Australian trades and consequential level of freight rate and service level stability. The ACCC failed to find any such causal link in the particular case of the AADA.[39] Moreover, even if such a link is substantiated, are the market arrangements particular to discussion agreements indispensable for the provision of reliable scheduled shipping?[40] Is this especially pertinent for long, thin trades?[41] This is further discussed in section 5.3.

The ACCC found (on the basis of limited data) that liner freight rates for the North East Asia–Australia trade were relatively stable, albeit low, between 2000–03, before a significant freight rate increase during the latter stages of 2003. The levels of service provided by the AADA member lines were stable over the entire period, despite significant changes to membership of the associated consortia agreements. Similarly, it is acknowledged that freight rates and vessel utilisation rates for the northbound export liner trade to North East Asia were declining in 2003. Annual average rate of return levels were negative for liner operations on the North East Asia–Australia for the four years prior to 2003.

Any contribution to stability that may be made by discussion agreements during times of excess capacity has not been examined by the ACCC. In part this is because the ACCC typically investigates during periods of excess demand when rates are rising quickly and carriers' profit levels for the trade have been restored. Furthermore, a question remains as to whether there is a significant efficiency cost to the carriers (and

---

[39] The ACCC did not have access to quarterly freight rate data that went back far enough in time. However the AADA only commenced in 1999. Haralambides et al (2003) found that conferences had a stabilising influence on freight rates and could not exert market power generally by raising rates. However this study also stated that tacit collusion between independents and parties to conferences could raise freight rates.

[40] This can be confounded by lack of any counterfactual examples of genuine independents that do not price off benchmark rates set by discussion agreements. Also, what is the impact of long term contracting on service and rate stability independent of that of discussion agreements and of the move towards yield management by carriers independent of discussion agreements?

[41] European Liner Association (2003) op cit p. 21.

ultimately to Australian shippers) maintaining capacity at levels where excess supply and sub-optimal capacity utilisation rates prevail.

4.3 Conference agreements

Liner conference agreements are in many ways similar to discussion agreements. They involve:

- discussion and setting of common freight rates
- discussing operational service matters
- negotiating minimum service levels with relevant designated shipper bodies
- making provision for pooling or apportionment of cargoes
- entering into loyalty agreements with shippers.[42] [43]

All conference agreements operating on Australian liner trades have closed membership with the exception of the conferences operating on the Australia–US trades. However member carriers of even closed conferences cannot reasonably refuse membership to lines seeking to join and indeed such refusal can be subject to investigation by the ACCC pursuant to s.10.45(1)(a)(ix).

Carriers are required to give a stipulated notice time for withdrawal from conference agreements. Under the Australia Europe Liner Association, this period is three months. This appears to be only a little more onerous than the one month notice of intention to leave a discussion agreement.

Conference agreements contain clauses which dictate that the parties follow the terms and conditions laid down in the agreements' rate and tariff schedules. While member lines are also allowed to set rates independently, they are obligated to notify the other parties of the rates and commodities involved. Member lines are also permitted to enter into individual confidential contracts with shippers, with the details of such contracts not permitted to be disclosed to other lines.

The principal conferences are shown in Table 4.2. The table shows there are conference agreements among carriers on three of Australia's principal trades.

---

[42] Taken from the current constitution of the Australia–Europe Liner Association amongst carriers operating on the Australia–Europe northbound liner trades (September 2003) p. 3.

[43] It is understood by the ACCC that the latter two activities are not currently pursued by parties to liner conferences.

Table 4.2: Conference agreements among carriers operating on Australia's principal liner trades

Australia-North East Asia	Australia–South East Asia	Australia–Europe	Australia–US
ANZESC (southbound)	NA	AELA (northbound)	AUSCLA (northbound to US)
ANSCON (northbound) *		TEANZC (southbound)	ACCLA (northbound to Canada)

** collapsed in 2002.*

4.3.1 Potential competitive detriment of liner conferences

The potential anti-competitive detriment associated with liner conference agreements among carriers operating on Australian trades is the same as that associated with discussion agreements (see 4.1) with a few caveats.

Generally, conference agreements have lower market shares than discussion agreements on Australian trades. This can be partly attributed to lower costs of entry to and exit from and the lower degree of commitment associated with discussion agreements. This makes discussion agreements potentially more attractive to join for carriers. The ACCC found that the market share of ANZESC on the southbound North East Asia–Australia trade was about 40 per cent, compared to that of the AADA at 86 per cent.[44]

Like discussion agreements, it appears that conference agreements may have little control over any inherent propensity of lines to oversupply trades. Vessel investment and withdrawal decisions are alleged to be devised within the auspices of consortia agreements.

Like discussion agreements, the parties to conference agreements have a lower incentive to set rates below those of their fellow members in the circumstances of significant cargo demand growth. This leads to a greater likelihood of the collective efforts of parties to conference agreements succeeding in raising market freight rates, through common announcements of rate rises.[45] As with discussion agreements, intra-conference freight rate competition slows, offered contract terms become shorter and rate discounting disappears. The only difference to the case of the discussion agreement is that the liner conference has generally a lower market share and therefore faces greater competition from outside the conference. Consequently the associated competitive

---

[44] In 1995–96, the market share of AUSCLA, the northbound liner conference agreement among carriers operating on the Australia–US liner trades was found to be 70 per cent, while that for the associated discussion agreement AUSDA was 92 per cent.

[45] While the AADA was announcing rate rises in late 2003, the parties to the ANZESC conference were also announcing freight rate increases for both contract and non-contract cargoes imported from Japan/ South Korea.

detriment of the actions of the parties to a conference agreement may be less than that associated with the parties to a discussion agreement which has greater market coverage.

There may be discernable differences in the ability of conference agreements and discussion agreements[46] to mandate and police adherence to agreed common freight rates. However in periods of excess capacity with greater possible competition from outsiders, it is not obvious that conference agreements are better equipped than discussion agreements to halt the reduction of freight rates, or succeed in raising rates collectively.

4.3.2 Potential public benefits of conference agreements

The potential public benefits associated with the operation of liner conference agreements are similar to those for discussion agreements. That is, they *may* provide stable freight rates and stable liner services, which underpin the provision of an adequate reliable scheduled service. As with discussion agreements, the ACCC raises the same questions about whether liner conference agreements are necessary for the provision of reliable adequate scheduled services for Australian liner trades. These questions should be examined carefully with due regard to whether Australian liner trades are long and thin and the alleged sensitivity of freight rates to minor adjustments to vessel numbers operating on long, thin trades.

Whether agreements between liner shipping suppliers can, in general, address any market failure problems is discussed elsewhere in this submission. The limited econometric evidence available suggests that liner conferences stabilise freight rates and service levels and diminish competition. It can also be surmised that the market share of conferences does not appear to enhance a conference's ability to raise freight rates. However in liner trades, where there has been competition from independents and intra-conference competition due to the influence of individual service contracts freight rates and service levels have been on average less stable and the rates lower.[47] Significantly, the European Commission recently concluded that reliability and adequacy of liner services were not compromised on European liner trades (see 5.2).

4.4 Consortia agreements

There are many different types of consortia agreements involving technical cooperation between carriers that operate on Australian liner trades. These include joint service agreements, vessel sharing agreements, slot share and slot charter agreements. They all involve varying degrees of cooperation between each of the members. However the common denominator among them is that, unlike discussion agreements or conference agreements, they do not involve rate fixing or benchmarking.

---

[46] Discussion agreements are non-binding voluntary agreements.

[47] Haralambides et al (2003) op cit, Clyde and Reitzes, (1995), *The Effectiveness of Collusion under Anti-trust immunity: The Case of Liner Shipping Conferences*, FTC Staff Report.

In this section, potential competitive detriments and public benefits of consortia agreements are discussed. The ACCC suggests that the PC examine these independently of those stemming from conference and discussion agreements.

There are several consortia agreements on many Australian trades. Table 4.3 shows examples of the principal consortia agreements among carriers that operate on the Australia's principal liner trades.

TABLE 4.3: Examples of consortia agreements among carriers operating on Australia's principal liner trades

Australia-North East Asia	**Australia–South East Asia**	**Australia–Europe**	**Australia–US**
North East Asia Express Agreement	Australia Asia Express Service Agreement	Contship/P&O-NL – Hapag Lloyd vessel sharing agreement	Contship/P&O-NL - Hapag Lloyd Vessel Sharing Agreement
East Australia/Asia Agreement	Australia Asia Alliance	Contship/P&O-NL - HSDG vessel sharing agreement	US Pacific Coast–Oceania [48]Agreement (US West Coast Only)
West Australia/Asia Agreement	ASA Consortium slot exchange agreement	Contship/P&O-NL - CMA CGM/ Marfret vessel sharing agreement	Contship/P&O-NL – Hapag Lloyd vessel sharing agreement
NAX Slot Charter Exchange Agreement	West Australia/Asia agreement	Contship/P&O-NL vessel sharing agreement	Contship/P&O-NL - CMA CGM/ Marfret vessel sharing agreement
NEAX and COSCON joint services agreement	APL & MSL slot charter agreement	P&O-NL/Wallenius Wilhemsen operating agreement	Contship/P&O-NL vessel sharing agreement
Master Slot Charter Agreement between CSCL and OOCL	NZAX Consortium operating agreement		Columbus/P&O-NL Space charter and sailing agreement
Asia / Australia Services slot exchange agreement			
Australia–North East Asia	**Australia–South East Asia**	**Australia–Europe**	**Australia–US**

[48] Consists of P&O Nedlloyd, HSDG, FESCO, ANZDL, Lykes Line, and MSL.

The types of technical agreements between carriers that operate on Australian liner trades differ in terms of the degree of cooperation between the members. They can range from loose arrangements of simply buying or exchanging allocated container (slot) space on each others' vessels to jointly agreeing to operate to the same schedule and jointly chartering and managing vessels.

Consortia agreements among carriers on Australian trades exhibit significantly differing degrees of stability. The membership of the agreements that are prevalent among carriers on the North East Asia–Australia liner trades has changed a number of times in the past five years. Many lines have moved between different agreements on several occasions on this liner trade. This relative instability in membership may be attributable to isolated disagreements between lines who nevertheless still wish to obtain the benefits of consortia agreements.[49] It could also be due to demand instability and directional trade imbalances observed on Australian trade in recent years. However, there are also examples of stability in consortia memberships. After experiencing some instability in the late 1990s, the three consortia among carriers participating in the Australia–South East Asia liner trades have not changed memberships in the past three years.[50]

4.4.1 Potential anti-competitive detriment of consortia agreements

The potential anti-competitive detriment of consortia agreements is generally not regarded as pernicious as those agreements involving some form of rate fixing. As shown in section 5.2, the European Commission exempts consortia type agreements but also subjects them to a market share threshold test. Usually the market share of the parties to consortia agreements is relatively small.[51] However market shares of consortia agreements can be significant. The vessel sharing agreement's large market share (VSA) on the Australia–US (West Coast) trade in 2000 demonstrates this point.[52] Thus the tendency for monopolisation of a liner trade by parties to a consortia agreement appears to be less than that for a discussion agreement.

The basic competitive unit in terms of service provision for both ACCC Part X investigations in 2000 and 2003 was taken to be the consortium agreement and where possible, the individual carrier. Thus the added competitive detriment of forestalling competition between rival carriers that would otherwise operate individual services in the absence of consortia agreements was not investigated by the ACCC. This potential competitive detriment has to be balanced by the likelihood that the cost of providing an entire liner service with five vessels by one carrier would be prohibitive. Thus, there may be limited net competitive detriment of a consortium with respect to service

---

49 Midori R et al (2000), *A critical evaluation of strategic alliances in liner shipping*, Maritime Policy Management Vol 27 No 1 p 37. Although these arguments relate to alliances they could be pertinent to consortia agreements.

50 Neil Byron and Lisa Wall (2002), *International Liner Shipping: An Assessment of Part X of the Act and its application to the Australia – South East Asia Trade*, Economic Papers Vol 21 No 4 December 2002 p. 35.

51 Consortia agreements operating on the Australian trades to North East and South East Asia trades hold relatively small market shares.

52 This VSA had almost achieved close to 100 per cent coverage of the Australia–US (West Coast) liner trade, before MSL entered the trade in 2001.

provision. In terms of marketing/sales and freight rate setting, it appears that consortia bodies do not impede upon their individual liner parties' decision making. Absent discussion and conference agreements, the basic competitive medium with respect to freight rate setting appears to be the carriers themselves.

Another possible source of competitive detriment accorded to the consortia agreements relates to prohibitions placed on parties to charter to third party lines. However, the overall competitive impact of this depends on the prevalence of this practice and the amount of capacity involved (typically about 10 per cent of a given vessel) in a liner trade.[53]

4.4.2 Potential public benefits of consortia agreements

The potential public benefits of consortia agreements are:

- offering operating efficiencies and reduce costs
- optimising capital investment and reduce risk
- making it easier for carriers to enter new trades and markets
- offering expanded network efficiencies and more choice of port rotation and routes for shippers.[54]

Prima facie, most of the benefits claimed to flow from the various forms of liner agreements appear attributable to consortia agreements.

Consortia agreements allow for liner companies to minimise their vessel investment and scale of involvement on a particular trade but still partake in providing a liner service that may require up to five vessels.[55]

It could also enable the selection of the optimal choice of vessel size to realise inherent economies of scale by spreading the risk of chartering or investing in vessels. Consortia agreements facilitate carriers' initial entry into a trade by significantly reducing the required scale and cost of entry. There are numerous examples of liner companies entering Australian trades with minimal investment and then gradually expanding their market presence.[56] When significant excess capacity and poor returns persist, lines may decide to enter into a consortium with other lines to reduce their market exposure and costs.

---

53 For instance, Evergreen Marine was not inhibited by its membership of the NAX consortium to slot charter to Hapag Lloyd, before Hapag Lloyd's official entry into the consortium in May 2004.

54 World Shippers Council (2001), *Submission to the OECD Inquiry into Competition in Liner Shipping* pp. 21-22

55 To cover the round the world ANZ Eastabout and Westabout services the number of vessels required is ten and twelve respectively.

56 This is how Evergreen Marine entered the Australia–South East Asia liner trade by slot sharing with Lloyd Triestino.

Consortia agreements also allow lines to enter into complementary markets and expand their market reach with minimal investment.[57] This may increase the network density efficiencies generated by the shipping lines regional or global networks (to the extent that lines that are party to consortia also belong to the same global alliance groupings).[58]

Finally, the use of slot share arrangements may use up spare reserve capacity,[59] thus improving overall vessel utilisation and possibly leading to greater competition between carriers and greater brand proliferation and choice for shippers.

Both the potential benefits and competitive detriments associated with consortia agreements require further investigation. One particular point of interest that the PC may examine is the potential impact of the rate making ability of umbrella discussion agreements upon the workability and efficiency of underlying consortia agreements. This was a point of contention by the European Liner Association that was rejected recently by the European Commission (see 5.2). These potential effects do not appear to have been extensively researched.[60]

---

[57] An example of this was the slot share agreement between NEAX and COSCON which permitted the former to swap cargo slots carried on services between Australia and Japan/Korea with those carried on services between Australia and China. This effectively increased the market reach of both NEAX and COSCON into these respective Australian liner trades.

[58] Berganto A and Veenstra A (2002) *Interconnection and Co-ordination: An application of Network Theory to Liner Shipping, International Journal of Maritime Economics* 2002 4 pp. 231-248

[59] Only to the extent that the vessel provider could not sell the space itself.

[60] Reitzes J (1993) *Ocean shipping economics: comment*, Contemporary Policy Issues v 11 N 3 p. 82.

5 International regulatory arrangements

5.1 Overview

Since the 1999 review into Part X of the Act, there has been increasing scepticism internationally about the automatic anti-trust immunity granted to anti-competitive agreements among liner companies involving collective discussion and setting of freight rates. This is illustrated by the recent decision of the European Commission to repeal Council Regulation 4056/86, governing block exemptions for liner conferences as well as the call by the OECD for all member countries to outlaw discussion and liner conference agreements, specifically on the basis of their 'price fixing provisions'.

Similarly, although the 1999 amendments to the US Shipping Act 1984 still maintain general exemptions from US competition law for anti-competitive agreements among liner companies, it did introduce several pro-competitive measures. According to the US Federal Maritime Commission, these amendments appear to have lessened the influence of the parties to anti-competitive agreements over trends in market rates and have also resulted in a fall in the number of liner conference agreements among carriers participating in US liner trades.

The issue that the PC needs to consider is whether Australia should follow the example of the European Commission in repealing automatic anti-trust immunity for collective rate setting agreements. Are the arguments put forward by the European Commission and the OECD to justify their conclusions about these types of anti-competitive agreements applicable to Australia?

In particular, do the Australian liner trades possess particular characteristics that increase the risks of a decision to revoke the almost automatic anti-trust immunity for collective rate setting and discussion agreements pursuant to Part X of the Act?

Alternatively, would a regulatory regime modelled on Ocean Shipping Reform Act (OSRA) be workable for Australian liner trades?

This section of the submission will briefly explore these issues and will suggest possible areas for further research for the current inquiry into Part X.

Section 5.2 contains a brief description of the European regulatory regime governing exemptions for anti-competitive agreements among liner companies operating on trade lanes connecting Europe to overseas markets. This is followed by a summary of the reasoning behind the recent proposals by the European Commission for repeal of Council regulation 4056/86. An outline of the 1999 OSRA amendments to the US Shipping Act *1984* and its ramifications for the structure of agreements among carriers on US liner trades and the market conduct of carriers operating on US liner trades is provided in section 5.3. The following section (5.4) outlines the arguments and findings of the two year study by the OECD into liner shipping that was completed in 2002.

Section 5.5 discusses the issue of applicability to Australian liner trades of the revocation of automatic exemptions granted to agreements involving collective discussion and setting of freight rates and surcharges. It suggests that the PC focus its

attention towards a study of long thin characteristics of the Australian liner trades and their bearing on the risks of repeal of the automatic exemption of these types of anti-competitive agreements. Several avenues of research are also suggested. Second, the section suggests that the PC examines the recent market experience of the Australia–US liner trades to discover any potential impact of the enactment of OSRA. This experience may point to a greater understanding by policy makers of the potential impact and risks associated with the adoption of an OSRA style regulatory regime for all Australian liner trades.

5.2 Current European regulatory arrangements and proposed changes

Enacted by the European Commission in 1986, Council Regulation No. 4056/86 has provisions for a general block exemption regime for collective discussion and setting of freight rates as well as other conditions of liner service provision. There are no provisions attaching conditions to the exemptions regarding the collective market share of parties to anti-competitive agreements on European liner trades. Additionally, there is no expiry date for Regulation 4056/86.

Article 3 of the Council Regulation No. 4056/86 (1) permits agreements between carriers which provide scheduled maritime services, with general block exemptions from the application of Article 81(1) of the Treaty of Rome. Article 81(1) contains the legal provisions governing prohibition of anti-competitive agreements.

Article 3 permits anti-competitive agreements between liners, which have the aim of fixing rates and conditions of carriage as well as one or more of several other objectives.[61] For example, regulation of carrying capacity offered by individual members, allocation of cargo or revenue between members, and determination of sailing frequency. Additionally there are block exemptions for agreements between transport users and conferences concerning the use of scheduled maritime services (Article 6). Article 5 imposes obligations attached to the block exemptions on both shippers and the shipping lines.[62]

On 26 April 2000, the Commission Regulation No. 823/2000 was promulgated, providing for a block exemption regime for technical agreements (consortia) between carriers operating scheduled maritime services. The regulation also exempts agreements between transport users and consortia concerning the use of scheduled maritime services.

This regulation remains in force for a period of five years. It exempts anti-competitive agreements which cover one or more of several activities, including temporary capacity adjustments, participation in cargo, revenue or net revenue pools, joint operation or use of port terminals and joint marketing structures.

---

[61] These objectives are listed from a) to e) of Article 3.

[62] Council Regulation (EEC) No 4056/86 (1) of 22 December 2986 available at http://europa.eu.int/comm/competition/antitrust/legislation/405686_en.html

There are conditions attached to the block exemptions for technical agreements between liner companies. The conditions are that there should be effective price and service competition between parties to a conference agreement within which a consortium operates. Additionally, the consortium members must be subject to effective actual or potential competition from lines not party to the consortium. The market share conditions that apply to the block exemption regime for technical agreements are that the combined market share of consortium parties must be less than 35 per cent if it operates outside a conference and 30 per cent when it operates within a conference. A consortium agreement whose members possess a combined market share between 30 per cent (35 per cent if outside a conference) and 50 per cent is obligated to notify the European Commission, which can oppose the block exemption for the consortium agreement within a period of six months.[63]

The European Commission does not permit the formation of discussion agreements among carriers on European liner trades because of concerns about the elimination of competition between conferences and independent lines. Furthermore, the European Commission has not been persuaded of the public benefits of discussion agreements.

In June 2004, the European Commission completed the first stage of its review of Council Regulation 4056/86 as part of a general and on going overhaul of competition rules.[64] The European Commission's finding that continuing block exemptions for anti-competitive agreements involving price setting was not justified may inform the PC in its current review.

The European Commission review experienced several difficulties related to inadequate data, definitional and methodological problems and establishing connections between stated actions and objectives of conference agreements and public benefit outcomes. The ACCC shared some of these experiences in its recent investigation into the Asia-Australia Discussion Agreement as noted in section 2 (above). In section 5.4, the applicability for Australian liner markets of the conclusions and arguments of the European Commission with regard to the removal of exemptions for anti-competitive agreements involving collective price setting is discussed.

In arriving at the conclusion that the block exemptions provided under Regulation 4056/86 are no longer justified, the European Commission made findings related to:

- the uniqueness of liner shipping
- rate stability
- cost and technical efficiencies
- indispensability of liner conferences, and
- benefits to Shippers.

---

63 Commission Regulation (EC) No 823/2000 of 19 April 2000 in Official Journal of European Communities 20.4.2000.

64 European Commission (2004) Review 4056/86—discussion paper.

5.2.1 Uniqueness of liner shipping

- The European Commission dismissed the argument that the liner shipping industry possesses unique characteristics that warrant the need for block exemption provisions. This included refuting the economic theories employed to justify the need for anti-competitive agreements in liner shipping (for example, destructive competition, the empty core, and theory of contestable markets). According to Directorate General Competition, these theories do not provide for a satisfactory theoretical framework to analyse the market.

5.2.2 Rate stability

- The EC stated that the evidence of price stability was insufficient to establish whether liner conference agreements provided public benefits to shippers. To that end it must be demonstrated that rate stability leads to reliable shipping services.
- Freight rate data that was submitted to the EC was not of sufficient quality to conclude that liner conference benchmark mechanisms achieved rate stability.

5.2.3 Cost and technical efficiencies

- Liner conferences did not directly provide shippers with cost and qualitative efficiencies since conference agreements as organised bodies are not responsible directly for liner supply.
- The EC rejected the argument that carriers are encouraged to invest due to the ability to set rates collectively. In fact competition restrictions impede investment by reducing competitive advantages.
- The workability of consortia agreements is not impeded by the removal of block exemptions from conference agreements of which consortia parties are also members.

5.2.4 Indispensability of liner conferences

- The increased use of individual service contracts between shippers and carriers operating on some European liner trades, as well as the increase in the market share of independent lines on some European trade lanes has not led to a fall in reliability of services.

- The significance of long-term contracting has increased on several European liner trades. Long-term contracts contribute to price stability, assure shippers of reliability and remove uncertainty. Moreover, there are no grounds to suggest that long-term contracting is less restrictive of competition than liner conference agreements.

5.2.5 Benefits to shippers

- Observed freight rates trends have fallen in those liner trades where there has been greater use of individual service contracts and greater competition from

independent carriers. This supports the assertion that price fixing between competitors leads to prices above competitive levels, which serves to protect the less efficient members of a conference.

- There is no clear cut evidence that conference agreements result in public benefits that would outweigh or at least neutralise the effect of restrictions on competition.

5.3 Ocean Shipping Reform Act 1998

The *Ocean Shipping Reform Act 1998* provided several pro-competitive amendments to the US Shipping Act 1984. These measures provided that[65]:

- carriers were no longer obligated to file their tariff structures with the Federal Maritime Commission (FMC), but they are required to publish their tariffs on the internet
- service contracts between shippers and parties to anti-competitive agreements apart from conferences were now permitted
- service contracts can now contain confidential provisions relating to strategic aspects of rates and services, while other 'certain essential provisions' are still filed with the FMC
- abolition of the 'me too' right which dictated that the essential terms of service contacts be made available to similarly placed shippers
- the parties to the anti-competitive agreements may no longer prohibit members from negotiating service contracts with shippers. The parties could no longer require disclosure of the process of negotiations or confidential terms or conditions within a service contract. Further, the parties could not establish rules affecting the rights of individual members to negotiate and enter into service contracts. However, the parties to anti-competitive agreements can adopt voluntary guidelines that deal with processes and terms contained in individual members' service contacts. OSRA requires that the carriers file these guidelines confidentially with the FMC.
- Non-Vessel Operating Common Carriers (NVOCCs) and freight forwarders are defined by OSRA to be ocean intermediaries. As such they are not permitted to enter into service contracts with other shippers but as a common carrier they are required to publish their tariffs.

In 2001, the US FMC released a report[66] concerning the impact of OSRA on the US liner trades. It found that the more market-oriented regulation reflected in OSRA had impacted upon the dynamic structural changes occurring within the US liner industry and that OSRA was generally achieving its objective of increasing market responsiveness. The FMC found that in the two years since enactment of OSRA, there had been a significant increase in the use of confidentially negotiated shipper contracts

---

65 Gardner B, Marlow P and Nair R, *The Economic Regulation of Liner Shipping: The Impact of US and EU Regulation in US Trades* in *Handbook of Maritime Economics and Business* (2002) ed Costas Grammenos et al.

66 Federal Maritime Commission (2001) *The Impact of the Ocean Shipping Reform Act of 1998*, September 2001.

between individual shippers and individual carriers. According to the FMC in 2001, about 80 per cent of all cargoes on US liner trades were carried under individual service contracts. By 2003, that proportion of cargoes carried under individual service contracts had increased to 90 per cent.

These trends had led to a marked weakening of the binding influence on the level of market freight rates of the parties to liner conference agreements and in turn to a rapid fall in the number of conference agreements between carriers operating in US liner trades. The liner conference agreement has been replaced by the discussion agreement as the major form of anti-competitive agreement involving rate fixing among carriers operating on US liner trades.

On the transatlantic trades, the Trans Atlantic Conference Agreement (TACA) has maintained the form of a conference since discussion agreements are prohibited by the EU. The decisions made by the EU in the TACA case of September 1998 brought the EU regulatory regime into line with OSRA. The decision ruled that exemptions from EC competition law were not necessary in order to allow for the introduction of individual service contracts. The EU also found that joint service contracts (between a group of carriers) and shippers required individual exemptions from the EU. Furthermore, the EU ruled that liner conferences which entered into joint service contracts could not influence the contents of individual service contracts, prohibit individual service contracts or prohibit individual action by carriers on joint service contracts.

Consistent with other US liner trades, there has been a significant increase in the number of individual service contracts employed and proportion of cargo carried under individual service contracts by carriers on the Transatlantic trade. This has led to markedly less influence by TACA on market freight rates, departure of members and lower market share.

5.4 OECD report

In April 2002, the OECD released its report on Competition Policy in Liner Shipping.[67] This report represented the completion of a study that arose from an OECD Secretariat workshop held two years before. Both the workshop and the review were part of an ongoing reform initiative by the OECD to investigate the state of and the need for regulatory reform of various economic sectors.

The premise of the review was to adequately assess on the basis of sound evidence and data the following:

- the positive and negative effects of common pricing under anti-competitive agreements on both shippers and carriers
- the impact of various types of agreements on both carriers and shippers
- the potential effects of the removal of anti-trust immunity for liner shipping.

---

[67] OECD Directorate for Science, Technology and Industry Division of Transport, *Competition Policy in Liner Shipping Final Report*.

The OECD noted the poor quality of the econometric evidence and the data provided by interested parties in their respective submissions. The data was not disaggregated enough to identify the market experiences of individual lines and the quality of the data provided was not suited to the detailed analysis which the study proposed to undertake. This reflects the ACCC's experience. With respect to the level of data disaggregation, the ACCC in its past two investigations has not been able to source freight rate or rate of return data for particular lines operating on particular Australian trade lanes. Consequently, the ACCC could not measure the spread of rate of return (spread of efficiency) amongst the member lines in a discussion agreement under investigation. The OECD study used many third party data sources and older studies (in particular of the US trades) in its analysis and assessment.

The OECD study found that:

- liner shipping is not unique (from other transport industries) in terms of its cost structure, and seasonal and directional trade imbalances justifying continued anti-trust immunity
- no consensus exists as to the liner shipping industry's alleged propensity to destructive competition
- the long-term falls in freight rates in the last few decades have been due to greater competition. The steepest declines in rates have been observed in the trade lanes with the greatest competition
- trade instability has not emerged in trade lanes where there has been increased competition—carriers have developed other efficiency enhancing measures (such as slot sharing agreements) as conference power has weakened
- in the US and Canadian trade lanes there is greater emphasis on carrier-shipper negotiations post-OSRA
- price fixing keeps rates from aligning with the costs of the most efficient carrier
- in non-US trades, which do not have mandated confidential contracting, independents have incentives to price off the discussion agreement benchmark rate.

The OECD recommended that all member countries should consider removing anti-trust exemptions for price fixing and rate discussions. The exemption for other operational type agreements could be retained if it did not result in excessive market power.

5.5 Applicability to Australian liner trades

The purpose of this section is to discuss whether arguments put forward by both the European Commission and the OECD for the removal of automatic exemptions for anti-competitive agreements (in particular those involving price fixing) between carriers, apply to the Australian case. It also suggests several avenues of research for the PC.

The PC can also consider the impact upon Australian economic welfare of the potential adoption of an OSRA style regime, while maintaining the Part X exemptions.

An argument that may be advanced by proponents of retention of the Part X regime is that the Australian economy is highly dependent upon mercantile trades and Australian liner trades are very small in relation to the overall global liner trade. These facets tend to make the Australian economy especially vulnerable to any declines in the reliability of shipping services, the numbers of scheduled liner services and port rotations within Australia. It is these aspects of quality of service that Part X aims to protect. Moreover, Australian liner trades are argued to be 'long and thin', meaning that steaming distances are long (with consequential higher operational costs) and the scale of vessels employed on Australian liner trades is relatively small (at between 2000 to 3000 TEU). (Refer to Section 3, above, for a discussion of the significance of low density trades to analysis of the Australian liner shipping industry.)

The argument proceeds that, since Europe represents a significant proportion of world mercantile trade, the European Commission can afford the risk of removing block exemptions allowed liner conferences from its competition laws. The carriers will continue to carry cargoes to and from Europe in the advent of a European Commission ban on conference agreements.

In analysing such an argument, the PC will need to form a view on the potential impact of the removal of anti-trust immunity (in particular for those agreements involving price fixing) on the incentives of individual carriers to invest in regular scheduled services to and from Australia, employing relatively small vessels on long trade routes. The PC's view will then form the basis of its decision as to whether the general arguments advanced and conclusions reached in both the OECD and EC inquiries apply to the Australian case.

While no Australian liner trade is entirely free of carriers that belong to some form of anti-competitive agreement, the PC could examine the incentives of independent carriers to invest in reliable scheduled shipping services for some of the longest Australian liner trades.

The ACCC's view is that not all of Australia's principal liner trades are long and thin. Indeed several Australian trades are sufficiently 'thick' enough to support frequent sailings by several groups and independent lines. The Australia–South East Asia trade is such an example. There are also alternative routes via Singapore to the direct routes between Europe and Australia (the longest Australian liner trade route). Since Singapore does not represent a significant diversion (in distance) for carriers, it is not significantly slower to ship goods via Singapore to Europe rather than directly.[68] The relative volumes that are carried by carriers on either the direct or indirect route between Australia and Europe depend on the relative freight rates earned by carriers operating on each route. In the late 1990's the freight rates for shipping boxes via Singapore was less

---

[68] Trace K (2001), *For "Tyranny of Distance" Read "Tyranny of Scale": Australia and Global Container Market The Great Circle* 23 p. 38.

than that for direct carriage. However in the past few years direct shipping has become cheaper than transhipment via Singapore.[69]

[69] Trace K (2002), *Globalisation of Container Shipping: Implications for the North-South Shipping Trades* Economic Papers Vol 21 No. 4 Dec 2002 pp. 16-17.

6 ACCC's regulatory alternative

6.1 Overview

To assist the PC in its consideration of regulatory alternatives that may produce market outcomes that should enhance the welfare of Australian shippers and other relevant market participants, and improve the effectiveness and efficiency of regulatory arrangements governing liner shipping market on Australian trades, the ACCC has outlined an authorisation process (including a transition mechanism). The authorisation proposal is explained within a functional framework and includes analytical justification for its implementation. The explanation of the transitional arrangements has been kept concise to provide an overview of the main features. The ACCC is confident the transitional arrangements proposed below provide a workable solution to the perceived inadequacies of the current regulatory structure under Part X.

The ACCC considers Part X to be inconsistent with the National Competition Policy (NCP) framework and the broad principles governing Australian competition law. However, if the PC opts to retain Part X, in part or in full, the ACCC would welcome an opportunity to comment further on alternative regulatory arrangements that should provide superior welfare outcomes to those Part X currently provides.

6.2 Authorisation

The authorisation process allows the ACCC to grant immunity on public benefit grounds for conduct that might otherwise breach most of the competition provisions of Part IV of the Act.

6.2.1 The authorisation process

In order to grant immunity from the competition provisions of the Act the ACCC must be satisfied that the public benefit from the conduct would be likely to outweigh any public detriment resulting from any lessening of competition.

.

The authorisation process is designed to establish whether or not this is the case. It is necessarily a thorough and rigorous one, the onus being on the applicant to demonstrate that immunity is justified (as is required under the Act). Given the different circumstances of each authorisation application, the ACCC considers applications on a case by case basis, assessing each one on its merits.

The authorisation process is very public, transparent and consultative. It effectively balances the need for a process that is flexible and responsive, broadly accessible, fair to all parties, efficient and timely, provides certainty to business and has an appropriate framework for accountability.

The process the ACCC must follow before it can grant authorisation is set out in the Act. The main steps are:

1. an application for authorisation is lodged with the ACCC
2. the ACCC seeks comments and submissions from interested parties
3. the ACCC publishes a draft determination on the application
4. the applicant or any interested party can call a pre-decision conference to discuss the ACCC's draft determination
5. the ACCC issues a final determination.

In order to obtain guidance on the authorisation process, prospective applicants are encouraged to hold informal discussions with the ACCC prior to lodging an application.

After receiving an application for authorisation the ACCC invites interested parties to make submissions in response to the application.

The organisations or people consulted by the ACCC depend on the nature of the conduct for which authorisation is sought and the type of people likely to be affected. Typically, interested parties can include competitors, customers, suppliers and other people affected by the conduct. Relevant government bodies, industry associations and other representative organisations and industry experts may also be interested parties. The ACCC also undertakes its own market enquiries and research.

Unless the ACCC accepts a claim for confidentiality, submissions and other relevant documents are placed on the ACCC's public register and become publicly available. Applicants are given the opportunity to respond to issues raised throughout the public consultation process.

Before issuing a final decision the ACCC is required to issue a draft determination stating whether or not it proposes to grant authorisation and setting out reasons for its proposed decision. The ACCC then invites the applicant and interested parties to call a pre-decision conference. This gives the applicant and interested parties an opportunity to discuss the ACCC's draft determination and put their views directly to an ACCC Commissioner. An opportunity to provide further submissions in response to the ACCC's draft determination is also offered.

The ACCC then takes into account issues raised at the conference and any related submissions, and issues a final determination. The ACCC's final determination sets out its decision on whether to:

- grant authorisation unconditionally
- grant authorisation subject to conditions or
- deny authorisation.

It also states the reasons for its determination.

Under ss. 91B and 91C of the Act there are processes whereby authorisations previously granted can be reviewed and renewed, changed or revoked. Authorisations can also be

varied in a minor way under s. 91A. The process followed by the ACCC under these provisions is similar to that outlined above.

Authorisation decisions made by the ACCC are reviewable on their merits by the Australian Competition Tribunal (the Tribunal) at the application of the applicant or any interested party. The Tribunal conducts a re-hearing of the matter and makes its decision completely independent of the ACCC's determination. The ACCC's decision making processes are also subject to review under the *Administrative Decisions (Judicial Review) Act 1977*.

The recommendations of the (recently concluded) Dawson Review and the probable enactment of legislation appear likely to require the ACCC to release final determinations of its consideration of authorisation reviews within a six month timeframe.

6.2.2 Examples of authorisation applications in the transport sector

In the aviation sector, the ACCC has granted authorisation to some airline alliances and denied authorisation to others.

Qantas—Air New Zealand

Qantas and Air New Zealand lodged applications seeking authorisation for Qantas to acquire up to 22.5% of the equity in Air New Zealand and for the formation of a strategic alliance between Qantas and Air New Zealand. The strategic alliance would involve price, capacity and schedule coordination on nominated routes including the trans-Tasman, North America and New Zealand domestic markets.

The ACCC issued a final determination denying authorisation to the proposed arrangements. The ACCC formed the view that the arrangements would be highly anti-competitive and would lead to increases in fares and decreases in capacity and quality of services on routes which involve Australia and where both airlines have a presence. The ACCC also formed the view that any public benefit arising from the arrangements would be unlikely to outweigh the significant level of anti-competitive detriment.

Qantas and Air New Zealand lodged an application to review the ACCC's determination with the Australian Competition Tribunal. The Tribunal reserved its judgement and has not yet handed down a decision.

Qantas—British Airways

On 23 August 2004, the ACCC issued a Draft Determination proposing to re-authorise the Joint Service Agreement (JSA) between Qantas and British Airways for a period of 5 years. The JSA provides for the coordination of scheduling, marketing, sales, freight, pricing and customer service activities between Qantas and British Airways primarily on services between Australia and Europe, including services between Australia/Europe and intermediate points. The ACCC considered that overall there would be a small net public benefit associated with the JSA.

This essentially would enable an authorisation previously granted for 8 years (5 years followed by another 3 years) to be renewed for another 5 years, with the ACCC having been able to review and consult upon the net public benefit.

Port Waratah Coal Services

In July 2004 the ACCC issued its final determination on the Port Waratah Coal Services Ltd applications, granting authorisation until 31 December 2004 to a proposed Capacity Distribution System which aimed to reduce the vessel queue sitting off the Port of Newcastle. The queue formed primarily because coal vessels were arriving at a faster rate than coal could be transported from mines in the Hunter Valley to the port. The system aims to match the rate of ship arrivals with the capacity of the rail and port systems to transport coal from mine to ship.

The ACCC was satisfied that the system was likely to result in a net public benefit in 2004. In particular, the ACCC concluded that the key public benefit generated by the system is an improvement in economic efficiency due to demurrage cost savings. The ACCC considered that the system would result in some public detriment from any reduction in aggregate exports due to under use of allocation. The ACCC also considered that a public detriment would result from any efficiency losses caused by increasing the amount of coal exported by higher cost producers at the expense of more efficient lower-cost producers.

6.2.3 Public benefit

The assessment of public benefit is a key factor in any authorisation application. Public benefit is not defined in the Act. However, the Tribunal has stated that it includes:

> *anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.*[70]

Consequently, conduct generates a public benefit if it improves economic efficiency—that is, productive efficiency, allocative efficiency or dynamic efficiency. In addition, conduct may also generate public benefits unrelated to improving economic efficiency.

It should be noted that with respect to merger authorisations, s. 90(9A) of the Act requires the ACCC to consider export enhancement and import replacement as public benefits and to take account of the international competitiveness of any Australian industry. The ACCC applies the same principles in its consideration of any other authorisation.

6.2.4 Interim authorisation

The Act gives the ACCC power to grant interim authorisation in relation to authorisation applications. Interim authorisation allows an applicant to engage in the

---

[70] *Queensland Co-operative Milling Association Ltd.* (1976), ATPR 40-012, at 17,242.

conduct for which authorisation is sought while the ACCC considers the merits of the authorisation application.

Generally, decisions about whether to grant interim authorisations are based on a variety of different factors including:

- whether the arrangements are likely to be highly anti-competitive (if this is the case, the ACCC is unlikely to grant interim authorisation unless compelling reasons are provided)
- whether the application is urgent and/or necessary
- the level of harm likely to result to the applicant or to other parties (such as customers or competitors) should interim authorisation be granted or denied
- the ability of the market to return to its pre-interim authorisation state should final authorisation be denied
- the length of time that is likely to elapse between the granting of interim authorisation and the anticipated date of final authorisation
- where possible, a preliminary assessment of public benefit and anti-competitive detriment.

The ACCC aims to issue its decision on interim authorisation within 30 days of an application being lodged, unless extensive consultations are required or the application raises validity issues which need to be resolved prior to interim authorisation being considered.

For example, interim authorisation was granted (in around one month) for an application by the Royal Australasian College of Surgeons (RACS) for authorisation of its selection and training processes and assessment of overseas trained specialists. RACS processes had been in place in various forms for many years prior to RACS lodging the application. The granting of interim authorisation by the ACCC allowed RACS to continue to engage in the conduct while the ACCC was assessing the application, with full certainty that they were protected from legal action under the Act. The ACCC ultimately granted conditional authorisation.

In the case of the applications for re-authorisation of the JSA lodged by Qantas and British Airways, the ACCC also granted interim authorisation around one month after the applications were lodged to enable the arrangements to proceed with immunity while the ACCC considered and consulted on the merits of the applications.

More recently, the ACCC granted interim authorisation (in one month) to Port Waratah Coal Services for its proposed Capacity Distribution System to reduce the queue of vessels waiting to load coal at the Port of Newcastle. Granting interim authorisation allowed Port Waratah Coal Services to implement the plan immediately. The ACCC recognised that the situation was urgent as there was a significant queue (around 40 vessels) sitting off the port which resulted in a substantial cost to the industry. By the

time the ACCC granted its final determination authorising the conduct the vessel queue had dropped substantially due to the operation of the interim authorised system.

6.2.5 Flexibility

The ACCC recognises that certain conduct may necessarily change over the life of an authorisation, for example when it relates to a program which is amended and updated on a regular basis. The authorisation process is flexible enough to deal with this situation.

For example, in November 2002 the ACCC authorised the International Air Transport Association (IATA) Passenger Agency Program (IPAP) which provides a system for the sale and distribution of air transport through travel agencies. The IPAP is embodied mainly in resolutions passed by IATA member airlines at IATA Passenger Agency Conferences. The ACCC authorised resolutions of the IPAP which it considered as having minimal anti-competitive risk for eight years, with the authorisation permitting amendments to be made to those resolutions by IATA and its members. Other resolutions where the ACCC considered there to be higher anti-competitive risk were authorised for four years, with the authorisation not permitting amendments or substitutions to be made to those resolutions without the ACCC's consideration.

The authorisation provisions provide for minor changes to be made to an authorisation through the process of minor variation application outlined in s. 91A of the Act. A minor variation is defined as a variation that does not involve a material change in the effect of the authorisation. When the minor variation sought is truly minor and non-contentious, the process is an expeditious one.

The ACCC is dealing in this way with changes made to IPAP resolutions since authorisation was granted to IATA and for which the consideration of the ACCC is required. For example, IATA applied on 24 December 2002 for minor variations to IPAP. Interim authorisation was granted on 16 January 2003. The ACCC's determination granting authorisation for the minor variations was issued on 5 March 2003. IATA has since lodged a second and third application for minor variation to the IPAP.

The authorisation process also provides flexibility with regard to parties to the arrangement. Section 88(10) of the Act allows an authorisation to apply to parties who become involved at a later stage in the conduct for which authorisation is granted—that is, authorisation can apply to current and future parties to an arrangement. This means the addition of new parties would not result in a loss of immunity for the arrangement. For example, the application for authorisation lodged by RACS applied to 'the College, its officers, employees, current and future Fellows, the current and future members of the College's affiliated specialist societies and associations'.

6.2.6 Period of authorisation

The Act allows authorisation to be granted for a specific period of time. The ACCC makes use of this provision to provide it with an opportunity to review authorisations. It does this because circumstances may change by the time the term of the authorisation

expires so that subsequent authorisation under the same terms may no longer be appropriate or necessary.

The term of an authorisation depends on the specific circumstances of each case, and where the applicant seeks longer-term authorisation the ACCC's assessment is based on the merits of the arguments put before it.

It should also be noted that many time limited authorisations are ultimately rolled over by the ACCC on further review. Generally speaking, when applications for re-authorisation are lodged these are able to be dealt with by the ACCC far more expeditiously than initial applications, particularly when the conduct and market conditions have not changed significantly.

6.2.7 Assessment time frames

The ACCC would generally aim to issue a draft determination within four months of receiving an application and final determination within six months. The time the ACCC takes to review authorisations largely depends on information provided by the applicant and sought from interested parties.

The process is necessarily thorough, rigorous and public, given that what is being contemplated is immunity from the law. This means that the applicant's public benefit claims are tested and those who may be adversely affected by the granting of an authorisation are given an opportunity to put their views to the ACCC.

The *Trade Practices Legislation Amendment Bill 2004* (Dawson Bill), introduced in Parliament on 24 June 2004, is proposed to impose set timeframes for the ACCC's consideration of new applications for authorisation. Once enacted, this legislation will require the ACCC to make a decision on authorisation applications within six months from the date of lodgement or authorisation will be taken to have been granted by the ACCC. The six-month timeframe will only be extended for up to a further six months if the ACCC has issued a draft determination, the ACCC determines that the period has been extended **and** the applicant agrees to the extension. At the time of writing, the Bill is being considered by the Senate.

6.2.8 Costs

The fees for lodging an authorisation application with the ACCC are specified in the Trade Practices Regulations. For non-merger authorisation applications, the fee is $7500. A concession fee of $1500 is payable for any additional application related to conduct in the same market or a closely related market and lodged within 14 days of the first application.

It is worth noting that a decision by the applicant to use professional advisers such as legal advisers can add to the cost to business of accessing the authorisation process. It is entirely a matter of choice whether a business uses the services of professional advisers to assist them through the authorisation process.

It may not be necessary for applicants to employ professional advisers to prepare authorisation applications and supporting submissions. The ACCC can meet with potential applicants to help them understand the process and identify the type of information the ACCC is likely to want to examine in its assessment.

6.2.9 ACCC guidance to applicants

The ACCC is committed to provide guidance and information to the community on its operations, activities and processes, including the authorisation process. As part of that commitment the ACCC is currently updating and improving its *Guide to authorisation and notification*, last revised in 1995. The revised guide aims to explain the steps in the authorisation process in a more user-friendly way, with a particular focus on helping potential applicants to prepare and lodge applications and supporting submissions, and to participate (along with interested parties) in the authorisation process as it unfolds.

To complement this guide, the ACCC expects to publish a series of summary guides targeting particular industries. The ACCC is particularly sensitive to the information needs of industries or sectors in transition. Therefore, the ACCC would propose to focus one of the summary guides on international liner cargo shipping in order to assist in the transition process should Part X be abolished.

The ACCC is always prepared to provide further information and education through speeches and presentations and through direct communication with parties contemplating applying for authorisation. As indicated above, the ACCC is always prepared to discuss proposed application with prospective applicants prior to an application being lodged.

6.3 Transition arrangements

6.3.1 The transition from Part X to the authorisation process

Recognising that the abolition of Part X and a move to a Part VII regime represents a departure from some long established practices, the ACCC considers it appropriate to institute some transitional arrangements. Minimising the potential service disruptions and business uncertainty of the liner shipping companies' and Australian shippers' operating environment is an important element in achieving a successful regulatory transition from Part X to Part VII. Maintaining scheduled, reliable services for shippers and offering shipping lines some certainty that their operating arrangements will not change in the short-term, if at all, are objectives the ACCC intends to avail to market participants.

In order to facilitate these transitional arrangements, the ACCC envisages that:

- liner agreements registered under Part X would be *deemed* to be authorised pursuant to an Amending Act

- deemed authorisation would continue to protect each liner agreement until that liner agreement was reviewed by the ACCC and the ACCC determined that the deemed authorisation should either be replaced by an actual authorisation in identical terms; be replaced by an actual authorisation in different terms; or be revoked entirely (under a revocation or a revocation and substitution process)

- d*eemed authorisation* would give the same immunity as if the liner agreements were authorised by the ACCC under Part VII.

The ACCC envisages that the review process for each liner agreement would proceed as follows:

- The process would start with the issue of a Notice to revoke or revoke and substitute, similar to the current process under ss. 91B (revocation) and 91C (revocation and substitution) of the Act. The Amending Act would need to allow the ACCC to initiate the process set out in ss. 91B and 91C at its discretion, as the three conditions currently allowing the ACCC to commence a review process in ss. 91B and 91C would not be relevant for the proposed transitional arrangements.

- The Notice would indicate that the ACCC is considering revocation or revocation and substitution of a particular liner agreement (*in the latter case giving an indication of the nature of the proposed substitute authorisation*) and invite submissions from interested parties (including members of the liner agreement).

- In order for the ACCC to grant a substitute authorisation to a liner agreement, a similar public benefit test as currently applies under ss. 91B and 91C would have to be met. That is, the ACCC would have to be satisfied that in all the circumstances the benefit to the public from the agreement would outweigh the detriment to the public constituted by any lessening of competition resulting from the agreement. In effect, it would be incumbent on the parties wishing to retain immunity to satisfy the ACCC it is in the public interest to do so.

The Amending Act would also repeal Part X. Groups providing the joint provision of services or collective negotiation rights within liner shipping markets would be able to seek authorisation for their conduct under Part VII. However, the ACCC envisages that, as part of the transitional arrangements, registered shipper bodies under Part X would also be granted deemed authorisation pursuant to the Amending Act to continue to engage in the conduct previously covered by Part X immunity until such a time when the ACCC has reviewed these arrangements.

The ACCC considers that the granting of deemed authorisation pursuant to an Amending Act to all liner agreements and shipper bodies registered under Part X would be the most effective and transparent way of achieving the aforementioned objectives. The automatic transferral to the status of *deemed authorisation* should enable liner agreements and shipper bodies to continue their operations unaffected by the amended

regulatory structure. The same Amending Act would enable the ACCC to initiate s. 91B or 91C reviews by which a proponent for continuing immunity would need to satisfy the ACCC, through an appropriate transparent process, that it is in the net public benefit.

6.3.2 Conditions of deemed authorisation

The ACCC proposes that conditions be attached to deemed authorisation requiring liner agreements:

- to continue to abide by the obligations imposed under the terms of the registered liner agreements; and

- to abide by the obligations that are currently imposed by virtue of registration under Part X.

This will essentially mean shipping lines can continue to operate *as if* liner agreements were still registered under Part X. The relevant conditions could be set out in an Amending Act, and would include the requirements to provide the agreed minimum level of services and negotiate with shipper bodies.

The ACCC envisages that non-compliance with a condition of deemed authorisation by parties to a liner agreement would trigger a revocation process by the ACCC similar to the revocation process set out in s. 91B(3)(b) or 91C(3)(b). This should ensure the liner agreements continue to deliver benefits to shippers and consumers in the transition period.

In order to assess whether the shipping lines abide by the conditions of deemed authorisation, the ACCC would require access to documentation of registered liner agreements. The ACCC notes the Registrar currently holds copies of all of these agreements. Alternatively, the liners could be required to provide copies to the ACCC as a condition of deemed authorisation. Failure to provide a copy of the relevant agreement may constitute a trigger for priority review of that immunity by the ACCC. Alternatively, the Amending Act could prescribe that deemed authorisation would not come into effect until the relevant agreement is provided to the ACCC.

6.3.3 The schedule of review of deemed authorisations

The ACCC envisages that a higher priority would be placed on reviewing those arrangements that have the higher likelihood of imposing anti-competitive detriment on shippers relative to other liner agreements. In this sense, agreements that contain price setting provisions, comprise high proportions of competitors per trade, and/or a large capacity or cargo share per trade, are likely to be the first to be reviewed. A lower priority for review would be those liner agreements that comprise non-price, operational arrangements and whose members transport relatively moderate proportions of cargo per trade.

That is, some liner agreements would retain the benefit of deemed authorisation for as long as the ACCC decides not to initiate a review process (if it does, immunity would

continue to be retained unless the ACCC decides, after a consultative process, to amend or revoke that immunity).

Evidently, all liner agreements feature distinguishing characteristics in terms of:

- the proportion of cargo share per trade
- the number of liner agreement members
- the liner agreement's functional capacity
- the size of the relevant trade the liner agreement operates in.

The ACCC would aim to provide and publicise a schedule of proposed reviews of deemed authorisations in order to increase the predictability of the review process to the industry.

6.4 Agreements and Part VII following reform of Part X

The ACCC proposes that, subsequent to the enactment of reforms to Part X, liner agreements or shipper bodies wishing to gain exemption from Part IV would need to submit an application to the ACCC under Part VII consistent with authorisation applicants in other industries.[71] Such an application would be assessed following the process described in section 6.2 above.

6.4.1 A material change in circumstances

Sections 91B and 91C of the Act provide for the ACCC to initiate a revocation or revocation and substitution process on the basis of a material change in circumstances. These provisions provide relevant markets with a safeguard against the outcomes from authorised anti-competitive behaviour being contrary to the public interest should the underlying market conditions that liner agreements operate in change significantly. For example, a significant increase in capacity or cargo share of the relevant trade by an authorised liner agreement (either deemed or otherwise) may amount to a material change in circumstance. A significant increase in capacity increases the probability that a liner agreement could successfully leverage its market power to the detriment of shippers.

Liner agreements would also be subject to the Part IV provisions if the conduct of an authorised liner agreement differs from the terms and conditions pursuant to an agreement that has been authorised. For example, shipping lines found jointly setting freight rates after obtaining authorisation without freight rate-fixing powers would be exposed to enforcement action under Part IV of the Act for that aspect of their conduct not covered by the authorisation.

---

[71] New liner agreements are defined as those which apply for authorisation and did not previously obtain registration status pursuant to Part X.

6.4.2 Lines seeking to join an authorised liner agreement

The addition of new shipping lines to previously authorised agreements may require the reconfigured liner agreement to reapply and gain approval for authorisation before operating with immunity from the Act.

The ACCC envisages that applications from lines to join authorised liner agreements will be comprised of circumstances with varying competitive implications. Each alternation or amendment of an authorised liner agreement that is the subject of an application for authorisation or variation would need to be considered on case by case basis

6.4.3 Authorisation of shipper bodies, including collective bargaining

Organisations designed to aggregate the collective bargaining power of shippers or industry groups are required under the Act to be assessed *ex-ante*, in the same context as liner agreements seeking authorisation. Assessing the potential ramifications in terms of public benefits and anti-competitive detriment of collective bargaining agreements ensure that only those generating net public benefits will be implemented.

In their current functional roles, primary and secondary designated shipper bodies, both inward and outward, may wish to apply for authorisation to obtain Part IV immunity in order to enable collective bargaining, should they be at risk of breaching the Act, on behalf of Australian shippers.

The ACCC has authorised a number of collective arrangements in recent years. For example, ACCC authorisation has enabled collective bargaining by chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers, TAB agents, hotels, newsagents and small private hospitals amongst others.

It should be noted that the *Trade Practices Legislation Amendment Bill 2004*, upon enactment, is proposed to provide for a speedier and simpler 'notification' process for small businesses to seek immunity from the TPA to collectively bargain. The process is proposed to be available for businesses negotiating contracts up to three million dollars per participating business each year. Immunity would commence 14 days after lodging the notice and would apply for three years from lodging. The ACCC will be able to seek to prevent immunity commencing (within the 14 days) or seek to remove immunity (following the 14 days), where it is satisfied that the proposed arrangements are not in the public interest. The proposed notification process will be available for collective bargaining and associated collective boycott arrangements.

The ACCC has observed that Australian exporter and importer bodies value the negotiation rights available to them under Part X. It appears that the obligations on liner agreements to negotiate various terms and conditions of carriage with Australian shippers enable the balance of countervailing power to move towards shippers. In general, proportionate levels of negotiating power may enable the attainment of greater efficiency in liner shipping markets and an appropriate sharing of those gains with users of liner shipping services.

The ACCC, in administering the Part VII authorisation procedure, will take account of all areas of perceived public benefit when reviewing liner agreements and shipper bodies' deemed authorisations. The ACCC experience has been that shippers take advantage of rights granted to them by Part X to varying degrees. Notwithstanding this, most shipper bodies regard these rights as important and valuable. The ACCC notes the PC's view (as stated in the 1999 Part X Report) that *the interests of Australian shippers reflect Australia's national interests*. The ACCC will be mindful of an extension of shippers' negotiation rights when reviewing deemed authorisations. The ACCC would also anticipate that negotiation obligations are likely to be fundamental to any subsequent liner agreement related application for Part VII authorisation.

6.4.4 Authorisation for lines' negotiations with stevedores

Liner agreements wishing to collectively negotiate the terms and conditions of service with Australian stevedoring operators may need to apply for authorisation to obtain Part IV immunity should those arrangements potentially breach provisions of that part of the Act. The ACCC recognises there are various potentially arguable public benefits in enabling the shipping lines to continue to collectively negotiate the terms and conditions of stevedoring services with Australian-based stevedores.

6.4.5 No further Part X investigations

The ACCC considers the removal of the Part X investigation function from Australia's liner shipping markets would be a significant benefit. The protracted and resource intensive process experienced over the last five investigations has not appeared to have been successful. Given the inherent difficulty in proving or satisfying Part X's investigation criteria with inadequate market data, the discontinuance of the investigation function is likely to enable resources to be saved, whilst achieving similar market outcomes.

Moreover, it is important to note that authorisation provides liner agreements certainty that they are protected from enforcement actions by the ACCC or private parties over the period of the authorisation for the authorised conduct. In contrast, liner agreements registered under Part X currently face uncertainty in terms of the ACCC potentially launching an investigation into allegations that liner agreements' conduct imposed detriment on shippers.

6.4.6 Costs and benefits of the authorisation process compared to Part X

A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in *price*, *quality* and *service*. The Act, however, recognises that the public interest may sometimes be best served by conduct which is potentially in breach of the restrictive trade practice provisions of the Act. The authorisation process addresses this eventuality by allowing the ACCC to grant immunity from the application of most of the restrictive trade practices provisions of the Act if it is satisfied the conduct is likely to result in a benefit to the public which outweighs any anti-competitive detriment.

Part X does not have the flexibility to individually assess which liner agreements are likely to provide public benefits that outweigh anti-competitive detriments. Part X is

based on the premise that all liner agreements, regardless of cargo share per trade or functional capacity, will produce public benefits that outweigh the anti-competitive detriments of collusive behaviour. As recognised by the ACCC in its recent investigation, some liner agreements appear to not provide demonstrable public benefits that may counter the anti-competitive effects of collusion. Consequently, Part X may enable certain liner agreements to operate which produce outcomes that are detrimental to Australia.

The authorisation process gives the ACCC (and the wider industry) the opportunity to comment and assess the potential ramifications of certain types of liner agreements *prior* to them being protected from the provisions of Part IV. As all liner agreements present slightly different characteristics and operate in varying market conditions, dependent on the structure and competitive characteristics of each trade, the ACCC considers it important to have a regulatory regime that is capable of accounting for the particular circumstances of each liner agreement. For this reason, the ACCC considers the authorisation process is likely to enhance the market outcomes currently by only continuing exemption from Part IV in those circumstances where it can be justified.

As outlined in section 6.3, a move to the authorisation process for liner shipping markets is not intended to result in the dismantling of liner agreements. However, members of liner agreements and shipper bodies would be required to demonstrate in a public and transparent manner to an independent body the public benefits that offset the anti-competitive costs if the arrangements were to remain. This process is consistent with that applying to all other industries wishing to enter into anti-competitive arrangements.

Moreover, further arguments exist regarding the industry-wide consistency and the aforementioned advantages of authorisation as a regulatory process overseeing liner shipping markets. They appear to be:

- closer public scrutiny of the justification for anti-competitive practices to be offset by public benefits on a case-by-case basis
- the alignment of liner shipping markets with all other industries under Part VII
- the enhanced regulatory uniformity under the Act which can be achieved without substantive changes to the Act
- removing the industry-specific provisions for which the need has not been substantiated.

An overriding benefit of the authorisation approach over Part X is that it enables an *ex-ante* assessment of liner agreements on a case-by-case basis and provides economy-wide uniformity of the application of competition law to industries operating in Australia. Rigorous *ex-ante* analysis and public consultation of liner agreements should enable a thorough assessment of the costs and benefits of anti-competitive agreements in line with other industries.

The ACCC considers that the authorisation process has regularly produced welfare enhancing outcomes across many Australian industries. Acknowledging efficiency and cost effective benefits of the joint provision of operations that outweigh the anti-

competitive detriment of providing such operations during the authorisation process has facilitated these outcomes. The ACCC contends the authorisation process will yield similar benefits if applied to liner shipping markets on Australian trades.

Part VII offers greater certainty to liner agreements than Part X. The ACCC's obligation to investigate instances of 'unreasonable' increases in freight rates, regardless of market circumstances, gives rise to operating uncertainty for shipping lines. In contrast, liner agreements and shipper bodies would be given confidence that Part IV exemption is more certain over the term of authorisation.

Another advantage of the authorisation process is that independent lines that, under the existing Part X regime, are deemed to hold market power on a trade do *not* have to seek authorisation. Under Part X, such independent lines with market power are currently obligated to register. Furthermore, liner agreements and shipper bodies who consider that their conduct is unlikely to represent a breach of Part IV can opt not to seek authorisation.

6.5 Compliance with Part IV

The ACCC will not be required to carry out the Part X investigation and enforcement functions under Part VII. This will allow the ACCC to direct its focus towards enforcing the provisions of Part IV in those cases where the conduct of liner groups is not protected by Part VII authorisation or an amended Part X.

Working through organisations such as the International Competition Network (ICN) and the OECD, the ACCC will continue to develop the necessary relationships with regulators in foreign jurisdictions in order ensure that anticompetitive activity affecting Australian markets can be investigated and prosecuted.

The international nature of the liner shipping industry gives rise to a potential for jurisdictional conflict in its regulation. However, this problem is not unique to liner shipping and did not prevent the ACCC successfully prosecuting an international cartel of foreign firms that supplied vitamins to Australia.

7 Recommendation

From a public policy perspective, the ACCC views the existence of Part X as an ongoing risk to the welfare of Australians. The absence of any analysis of the likely anti-competitive effect of liner shipping agreements *prior* to them being granted anti-trust immunity represents a gamble that, overwhelmingly, such agreements deliver net public benefits to Australia. This contrasts with the approach taken to other Australian industries where, consistent with National Competition Policy, the onus of proving the net public benefit of an anti-competitive arrangement rests with the proponents of that proposed agreement.

The ACCC recommends that the PC recommend the abolition of Part X. It would remain open to all liner agreements to seek authorisation under Part VII to retain Part IV immunity, following the proposed transitional arrangements.

Appendix A

References to ACCC responses to PC's Issues Paper questions

Should Part X be retained?

Is the rationale presented by carriers appropriate?

Sections 2.1.5 and 2.6.3

What are the market characteristics of liner shipping markets that may justify exemption from competition regulation?

Sections 3.3–3.7

Is the traditional rationale for trade practices exemptions for liner cargo shipping still relevant in light of recent developments in international liner cargo shipping?

Sections 2.7.2, 2.7.3, 4.2.2, 4.3.2 and 4.4.2

Does Part X restrict competition and, if so, is this restriction necessary?

Sections 2.5.1, 2.5.2, 4.2.1, 4.3.1 and 4.4.1

What are key developments in the international liner cargo market?

Section 5.1

What are the implications for conferences and for Part X exemptions?

Sections 4.1–4.4

What are the alternatives if Part X is abolished?

What would be the preferred set of alternative arrangements were Part X to be abolished?

Sections 6.1–6.3

What would be the advantages and disadvantages in using Part VII of the Act as an alternative to Part X?

Sections 6.1–6.3

What types of coordination arrangements are likely to be permissible under Part VII as currently structured?

Sections 6.2.2, 6.3.1, 6.3.3, 6.3.6 and 6.3.7.

What changes could be made to Part VII to improve its operation with particular reference to liner cargo shipping?

Section 6.3.2

What market-based responses are likely to appear if the exemptions from aspects of trade practices legislation for conferences are removed on Australian trades?

Section 3.7

What would happen to the level of service provided to Australian shippers if conferences were not allowed to operate?

Sections 3.7 and 5.5

If Australia repealed Part X, what conflicts, if any, would arise with regulation of cargo liner services in other jurisdictions?

Section 5, particularly 5.5

If Part X is retained, how could it be improved?

What problems have been experienced with Part X?

Section 2

Have the Minister's powers to enforce Part X been effective?

Sections 2.1, 2.5 and 2.6

What are the advantages and disadvantages of providing such a broad range of exemptions from the Act to ocean carriers?

Sections 2.6, 2.7, 3.3–3.6 and 4.1–4.4

Are there unique features of Australian trades which would justify a different regulatory regime from those of its trading partners?

Sections 3.7 and 5.5

How prevalent is the use of discussion agreements on Australian trade routes?

Section 4.2

In practice, how do these agreements differ from traditional conferences?

Section 4.2

What are their strengths and weaknesses relative to traditional conferences?

Section 4.2

Do discussion agreements, as used under Part X, result in a substantial lessening of competition in any Australian trade route?

Sections 2.5, 2.6 and 4.2.1

How is international liner cargo shipping regulated by Australia's major trading partners and what changes have been made, or are proposed, to it recently?

Section 5

Appendix B—Overview of economic models of liner shipping conferences

Table B1 Neoclassical oligopoly

Model	Key assumptions & structure	Predications and main insights	Empirical support	Assessment

1. Neoclassical oligopoly
 	
(Orthodox Open cartel theory)
	• entry unrestricted but consortia and alliances form
	• high fixed avoidable costs sharply rising short run marginal cost near vessel capacity
	• modest sunk costs
	• variable demand
	• competition from independents (low in Australian trades)
	• many behavioural variants of collusive price setting
	  • monopoly/dominant firm
	  • price leadership
	  • capacity quotes
	  • defection under excess capacity and destructive breakdown
	• shipper countervailing power possible
		• prone to bouts of 'cutthroat' competition
		• periods of excess capacity may absorb excess profits
		• profits drive down to low/normal levels
		• prices discrimination possible despite threat of entry
		• periods of 'excess' capacity caters for variable demand, but price at SR marginal cost is below LR average cost
		• non-price service competition benefits hinge on price set
		• exit and entry cycles in capacity and price; adaptable to quasi–dynamic setting
		• survival with entry suggests low X-efficiency
		• incentive for carriers to merge /collude/tie customers
		• numerous relatively small shippers bargaining constrained
			• Untestable since conferences pervasive
			• Consistent with observed low returns
			• Stability reinforced via negotiated contracts (overseas)
			• Exemption from price-fixing less relevant with contracts ; conference markets share insignificant overseas (higher share held by independents)
			• Concentration increasing / modest impact up on rates
			• Shippers' associations influence limited consolidators strengthening
				• myopic behaviour of carriers unrealistic; so too is independent restraint with demand slump
				• generally unrestricted competition fosters rapid adjust and reduces instability
				• can operational cooperation take place without indirect broad collusion?
				• question of market failure via price–scheduled service reliability 'externality' unclear
				• without conference would shippers buy rate stability through forward contracts?
				• alternative independent carriers add choice and effective competition

Table B2 Contestable markets

Model	Key assumptions & structure	Predications & main insights	Empirical support	Assessment
2. Contestable markets	• no (low) sunk costs (e.g. lease) • easy and reversible entry • incumbents and entrants similar ('symmetrical') • accommodates high vessel fixed costs and limited market size; some economies of scale	• effective threat of entry disciplines pricing • vulnerability to 'hit and run' entry • prices limited to near long run marginal costs • market shares unrelated to market power • compatible with empty core; under decreasing unit costs no sustainable competitive price	• modest: vessels highly mobile across routes but routes may have certain sunk costs in some facilities (terminals) and establishment • leasing/spot–chartering increases degree of contestability • consistent with (limited) observation of price discrimination • availability of direct evidence of high contestability limited: frequency of entry and exit only partial; potential (threat of) entry not observable per se; evidence that many individual conferences have been short-lived	• suggestive that unrestricted entry and market operation may be effectively competitive • entrant (with some sunk costs) does run higher risk of loss

Table B3 Empty core (game theory)

Model	Key assumptions & structure	Predications & main insights	Empirical support	Assessment
3. Empty core (game theory)	• supply: indivisibilities in carriers' vessel capacities • marginal costs discontinuous • demand: highly divisible	• an efficient allocation (of capacities) supported by competitive market price that covers costs may not exist • inelastic demand and supply sufficient but not necessary for empty core • incentive for market participants to devise restrictions that reduce competition enough to allow a stable equilibrium • collusion may be an efficient response to competitive market failure and instability - but may be insufficient to eliminate an empty core • excess/idle capacity often is efficient overall—indicating need for 'side payments' (e.g. pooling)	• fixed capacities excessively rigid as carriers can adjust TEU capacity at margin through slot charters, leasing, voyage changes etc. • indirect support relative to cartels via higher output and less legal restrictions • contrast with bulk cargo markets where competition flourishes • persistence of conferences consistent with core theory despite low entry barriers • endless cycles of instability unrealistic but untestable; longer term strategic behaviour likely—alliances, consortia	• awareness of forces (in addition to short run marginal costs) that can also be destabilizing • may aid historical understanding of contrast between liner and bulk markets • if an empty core arises, even temporarily, how costly is it? • scheduled service may be vulnerable to opportunistic carriers setting a "just earlier" departure to "steal" cargo – but cargo management systems should be able to circumvent • similar disequilibria do arise in unrestricted bus markets; a 'solution' there has been the use of competitively tendered route franchises (bids on lowest price for a service level) • incentive for shipper groups to seek long term contracts and options with carriers that offer stability

8 References

AADA (2003) Response to ACCC Questionnaire

AADA (2003) Submission to ACCC Issues Paper

ACCC (2000), Part X Complaint Trade Facilitation Agreement for Australian Northbound Liner Trades to South East Asia. Final Report October 2000

Brooks M (2000) Sea change in Liner Shipping: Regulation and Managerial Decision Making in a Global Industry, Elsevier, New York

Byron N and Wall W (2002), International Liner Shipping: An Assessment of Part X of the Act and its application to the Australia–South East Asia Trade, Economic Papers Vol 21 No 4 December 2002 pp. 23–44

Butz D (1993) Ocean Shipping economics: free trade and anti-trust implications, Contemporary Policy Issues v11 no 3 pp. 69–81

Clyde and Reitzes, (1995), The Effectiveness of Collusion under Anti-trust immunity: The Case of Liner Shipping Conferences, Bureau of Economics Federal Trade Commission Staff Paper

Commission Regulation (EC) No 823/2000 of 19 April 2000 in Official Journal of European Communities 20.4.2000

European Commission (2004), Review 4056/86 Discussion paper

European Liner Association (2003), Response to the European Commission Consultation Paper on the review of Council regulation (EEC) 4056/8

Federal Maritime Commission (2001) The Impact of the Ocean Shipping Reform Act of 1998, September 2001

Fusillo M (2003), Excess Capacity and Entry Deterrence: The case of Ocean Liner Shipping Markets, Maritime Economics and Logistics Vol 5 No 2 pp. 100–115

Gardner B, Marlow P and Nair R, The Economic Regulation of Liner Shipping: The Impact of US and EU Regulation in US Trades in Handbook of Maritime Economics and Business (2002) (ed) Costas Grammenos et al pp. 326–343

Haralambides et al (2003), Final Report prepared for European Commission

Midori R et al (2000), A critical evaluation of strategic alliances in liner shipping, Maritime Policy Management Vol 27 No 1 pp. 31–40

Neel R and Gooding Carl (1997) Service contracts, rate discounting, and the future of shipping conferences, IAER Vol 3 Bo 4

OECD (2002) Directorate for Science, Technology and Industry Division of Transport, Competition Policy in Liner Shipping Final Report

Pirrong S (1992), An application of core theory to the analysis of ocean shipping markets, Journal of Law and Economics pp 89-131

Trace K (2001), For “Tyranny of Distance” Read “Tyranny of Scale”: Australia and Global Container Market – The Great Circle 23 pp 21-46

Trace K (2002), Globalisation of Container Shipping: Implications for the North-South Shipping Trades Economic Papers Vol 21 No 4 Dec 2002 p 1-22

World Bank (2002).″Trade in International Maritime Services: How Much Does Policy Matter?", *World Bank Economic Review*, Vol. 16, No. 1, January, 2002.(Authors: Fink, C., Mattoo, A., and Neagu, I. C.) Washington, D.C.

World Shippers Council (2001), Submission to the OECD Inquiry into Competition in Liner Shipping