2004 Review of Part X of the *Trade Practices Act 1974*: International Liner Cargo Shipping.

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INTRODUCTION

1.1 Historic Reason for the implementation of Part X

The enactment of Part X *Trade Practices Act* (Cth) resulted from a view that there was a need for regulation of the liner cargo shipping industry, primarily because provision of these services, if left to be driven by market forces, could not guarantee the levels and standards of service required by Australian exporters.

The characteristics hindering the provision of such services has stemmed from Australia's remote geographical location in respect to the destinations of it exports and origins of its imports, as well as the historic oligopolistic nature of the Australian carrier industry. With few players it was deemed that there was a need for carriers to be able to coordinate their infrastructure so that efficient routes covering all Australian ports would result and cost effective methods of sea transport could be sustained.

There was and presently still remains a wide consensus that an Australian international liner industry operating solely on market forces would result in 'destructive competition' in which supply of services would not adequately meet short term fluctuations in demand, which consequently may incubate increased volatility in freight prices, reduced level of service within the industry and a reduction in the number of port being serviced.

1.2 Principal Objectives of Part X

The principal objects of Part X include ensuring that Australian exporters have access to outward liner cargo shipping services with adequate frequency and reliability at internationally competitive freight rates and promoting conditions in international cargo liner shipping that encourage stable access to export markets. This legislation also aims as far as practicable, to extend to Australian importers in each state and territory the protection given by this part of the Act to Australian exporters.

The legislation aims to achieve these objectives by balancing the competing interests of the shipper and carrier via permitting conference meetings and agreements while enhancing the competitive environment for outwards liner cargo shipping services through safeguards against the abuse of conference power.

Part X regulations cover the conduct of a number of limited activities, including;

1. The provision of minimum levels of service, including the collective maintenance by conference members of an agreed capacity of general and refrigerated containers to service the trade to which the agreement applies;
2. The number and regularity of passages per year and the ports of loading and discharge to be serviced on each passage;
3. Slot sharing arrangements and the rights of members of an arrangement to a specified amount of cargo to be transported by each member;
4. The fixing and charging of uniform freight rates amongst conference members;
5. The discussion of freight rate levels and agreement on the range of freight rates and minimum rates;
6. Entry into loyalty agreements with exporters;
7. Arrangements of amalgamating and sharing costs;
8. Conditions for the entry and extraction of carriers from conference agreements.

1.3 Is Part X still relevant for the same reasons? Why else is it relevant now?

Due to Australia's geographic isolation, high traffic ocean trading routes as well as Australia's growing dependency on the export of manufactured goods by way of liner shipping as a major source of foreign revenue, the need for reliable liner shipping services to and from Australia is growing. Liner shipping to and from Australia makes up between 2-3 % of world liner shipping trade, which although comparatively small in volume is still of great importance to the economic development and prosperity of the Australian economy.

The competitiveness of Australia's exports in international markets depends to a large extent on the price, high-quality reliable service and predictable timetables of carriers. Quality of

service, frequency, timeliness, standards of cargo care and access to refrigerated containers is integral if Australian exporters are going to successfully compete in global markets.

This has historically been the case, is presently the case and will continue to influence the international competitiveness of Australian exporters in the future.

The relevance of a liner shipping conference arrangement scheme in Australia is becoming more enhanced with the continuing decline in the level of Australian registered shipping. The use of conference agreements allows for an increased level of transparency concerning shipping services to and from Australia (s.10.10 TPA) via the establishment of a public register of Australian conference agreements. Application can be made to make agreements confidential (s.10.37 TPA) for a number of statutory reasons but must not disadvantage other importers or exporters in doing so. Such conference agreements also provide a forum allowing for the exposure of agreed service levels in an industry which in which Australian shippers no longer play a significant role.

Without such a scheme Australian shippers would be less privy to the industry and individual carrier standards and levels of service resulting in less information on which to choose their carrier of choice and by which to benchmark carriers levels of service and standards of care in the delivery of cargo.

Australia is a nation of shippers and thus a regulatory scheme maintaining the interest of Australian shippers must be used to balance the market dominance of global carriers. This is of greater importance with a trend towards increased concentration of shipping in the hands of fewer organisations and increased global alliances within the carrier shipping industry.

1.4 What are the market characteristics of International Liner Shipping and how do these characteristics support the continuation of competition exemptions?

Liner shipping at a domestic and international level has a number of important market characteristics, which require consideration when reviewing the influence competition policy will have on liner shipping associated with Australian trade.

In assessing the market characteristics of the International liner industry we must continually remind ourselves of the characteristics unique to Australia which will influence the willingness of carriers to service Australian ports. Namely, our remoteness from major trading routes and our position at the southern end of Asia's north/south shipping corridor.

The international liner shipping market is inherently unstable and volatile due to a combination of the following market characteristics[1]:

- High fixed costs to operate a regularly scheduled service.
- Relatively inelastic demand for service.
- Significant mismatches in demand arising from chronic trade imbalances (import and export volumes often differ widely) and significant fluctuations in demand. This is particularly apparent in Australia where containerised merchandise imports significantly outweigh containerised merchandise exports.
- Inelastic supply.
- "Lumpy supply" (capacity must be added or withdrawn in large units eg whole ships, unlike trains where cars can be added or subtracted with variation in demand for service.)
- No barriers to new entry or capacity expansion.
- Distortive government subsidisation of shipping and ship building.
- Australia's demand for high cost Reefer containers (refrigerated containers).

[1] *International Liner Shipping Regulation: Its rationale and its benefits*. World Shipping Council Report, March 2002; www.worldshipping,org/Int_liner_ship_reg.PDF

The conclusion this paper proposes is that the benefits of Part x TPA significantly outweigh the disadvantages and thus Part X should be retained in the same or a similar fashion to its present existence.

2. DO THE PART X ARRANGEMENTS RESTRICT COMPETITION?

A note on the Australian liner trade

It should firstly be noted that Australia is not located on a hub or major East-West liner-shipping route. This basic fact is the premise of much of the discussion in this submission.

Restriction on Trade

The object of the TPA is set out in s2 of that Act such as to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." Part X of this same Act is designed to essentially "give concessions to providers of liner shipping services to behave in ways that would not otherwise be permissible under the TPA" (Fels, 2001). By deductive logic it can then be concluded that a number of provisions included in Part X result in the restriction of competition by creating exemptions to those sections of the TPA that are aimed at the promotion of competition, fair trading and consumer protection.

In the past, Courts have examined the market structure in determining whether a company or business has acted anti-competitively. The indicia found in *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings* (1976) 25 FLR 169 are helpful in analysing the provisions of Part X with relation to the liner industry as those provisions relate to market structure:

> "(1) The number and size distribution of independent sellers, especially the degree of market concentration; (2) The height of barriers to entry, that is the ease with which new firms may enter and secure a viable market; (3) The extent to which the products of the industry are characterized by extreme product differentiation and sales promotion; (4) The

character of ‘vertical relationships’ with customers and with suppliers and the extent of vertical integration; and, (5) The nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.”

The Court in this case clarified that “the most important is (2), the condition of entry”. With a large majority of its freight being containerised and containerised freight being rigid logistically and high cost, barriers to entry of new liner shipping competitors are high. The combination of required frequency and of heavy expenditure for asset replacement, due to the advent of container ships, is the main reason for the emergence of liner conferences which have made their mark on post-containerization liner shipping.

Common Carrier

It must first be noted, that liner trade conferences and carriers in Australia are generally common carriers, as per the *Common Carriers Act* 1902 (Cth) and do not have the right to refuse passage of goods except under extreme circumstances. Combined with the factors discussed below this makes it extremely difficult for liner conferences to dictate commerce on terms that could be considered excluding to shipper bodies.

Barriers to Entry: Containerisation & Regularity of Services

The two characteristics that maintain the height of any barriers to entry and continuing running costs are (i) Containerisation of freight and (ii) Regularity of services.

The majority of the Australia’s liner trade is containerised. Containerisation began in the late 1960’s early 1970’s but began slowly due to the high costs of converting to the new cargo system and the subsequently low versatility of usage that was available to bulk carriers. The high costs and low versatility of container ships means a higher barrier to entry for new competitors and difficulties for current liner companies who cannot guarantee full container slots on each run.

This is a major rationale behind allowing liner conferences. High demand and the resultant tight schedules of liner shipping mean that ships will often leave with empty containers or empty container slots. The more empty containers or container slots the less money the carrier is making on a particular run. This loss can only be made up by an increase in prices.

Figures of Port Botany's import and export container volumes (see appendix courtesy of Graeme Sargent, Acting President of the New South Wales Sea Freight Council) describe a situation representative of Australia as a whole, where the number of imports and exports is unbalanced. What this in turn means, is that not all the containers or container slots filled when goods are imported into Australia are filled on liners carrying exports, making it less economically viable to continue regular liner services. Thus the high costs of containerisation compared to bulk cargo and the inability of Australian exporters to maintain a comparable volume with importers can affect transport regularity.

> "Regularity of transport is the essence of liner services themselves and disruptions in the service due to financial pressures signify essentially the end of operations of the liner carrier, hence the early appearance of forms of co-operation, such as route based conferences, to preserve stability in the level of freight rates agreed among their members."
>
> D. K. Ryoo and H. A. Thanopoulou "Liner alliances in the globalization era: a strategic tool for Asian container carriers" (1999) 26(4) *Maritime Policy and Management* 349 at 353.

There appear to be three obvious ways of remedying this problem:

(i) Increase the price for importers/exporters of shipping their freight to cover the eventuality of having sold insufficient container slots on a given run. This is precisely what Part X aims to manage/prevent;

(ii) Subsidise liner shipping through government funding or tax cuts for liners or shippers to balance any losses, though this solution does not solve the problem of logistics including co-ordinating equipment and runs; and,

(iii) Allowing liners to co-ordinate freight rates and/or services through either conferences or the European consortia to achieve an efficient and reliable service with minimum price disadvantages.

The alternative Part X offers is represented by the last of these indicia. It implies a recognition that whilst containerisation of exports from Australia is increasing for a number of reasons, including the advantage of being able to control product quality and condition, the ability to deliver small volumes direct to the point of demand, and the low blue-water container rates (Crisp 2000a), they are still unable make it economical for outward liner services who must necessarily carry a relatively high number of empty containers or container slots. These empty containers or container slots represent a loss of money and when saddled with liners' duties as common carriers to bear goods upon request.

Liner shipping then is faced with:

(a) Initial barriers to entry into the market including ship conversion costs, regularity of services and co-ordination of those services; and,
(b) A continuingly high running costs through regularity of services, co-ordination of those services and an imbalance in import and export freight ;

Unlike the air transport industry that was deregulated in the 1980's shipping is a much higher cost, more rigid transport area where the potential for loss is greater.

In effect then, it appears that Part X actually encourages competition by allowing smaller liner companies to remain in a market they would not otherwise be able to as an individual liner company by allowing them to co-ordinate services and fix prices with fellow companies so as to minimise obvious losses from the number of these empty container slots. This in turn allows them to compete with the large liner companies that are able to bear any losses associated with empty containers or container slots of Australia's export market for the profits associated with the import market.

What are the motives for forming conferences?

Due to the fact that certain provisions of the TPA express the intention to restrict or reduce competition in the Australian marketplace, the question as to whether conferences under Part X are anti-competitive in nature is, relevant to a consideration of whether Part X should be abolished.

As explained above, logic dictates that an exception to an Act whose aim is to promote competition must of necessity be anti-competitive. If this is the aim of the inclusion of Part X in the *TPA* it does not necessarily mean that it is the practical outcome.

The symbiotic relationship then between financial pressures (containerisation) and logistics (regularity of transport), as explored above, is the essence of liner shipping and this is reflected in liner conference motives. A survey of liner shipping companies made by the author of the article sited below identifies the motives behind the forming of consortiums and alliances. Similar if not the same motives can be rationalised to exist with regards to Australian liner conferences.

Table 4. Advantages of alliances: survey results.

Alliance Consortium				
Co-operation motives	**Mean***	**SD****	**Mean**	**SD**
Maximize operational synergy	2.89	0.33	2.31	0.75
Rationalize service routes	2.78	0.44	2.23	0.73
Increase market share	2.78	0.44	2.46	0.78
Increase the utilization of container boxes	2.67	0.50	2.31	0.85
Reduce firm' s financial burden on equipment investment	2.33	0.71	2.15	0.69
Reduce capital cost of purchasing or supplying ships	2.33	0.71	2.54	0.52
Link into partner's established marketing network	2.33	0.50	1.54	0.52
Extend service coverage	2.22	0.67	2.23	0.73
Maximize financial synergy	2.11	0.78	2.15	0.69
Stabilize freight rates	2.11	0.78	1.38	0.77

Develop a liner service for specific market niches	2.11	0.60	1.92	0.76
Limit external competition	1.89	0.60	2.08	0.76
Share the risks of providing new liner services	1.89	0.78	2.38	0.65
Provide total container logistics service	1.78	0.44	1.38	0.65
Provide intermodal service	1.78	0.67	1.46	0.52
Provide more frequent sailings	1.78	0.83	2.15	0.69
Faster entry to new trade routes	1.78	0.67	1.92	0.64
Gain access to general management skills	1.22	0.44	1.23	0.44
Conform to shipping policy of foreign government	1.00	0.00	1.23	0.60
Conform to shipping policy of national government	1.00	0.00	1.00	0.00

*Respondents ranked motives from 1 (not important at all) to 3 (very important).

** SD= Standard Deviation.

Source: Questionnaire survey 1998, by D. K. Ryoo.

D. K. Ryoo and H. A. Thanopoulou "Liner alliances in the globalization era: a strategic tool for Asian container carriers" (1999) 26(4) *Maritime Policy and Management* 349 at 359.

Whilst many of these motives may be similar to most other businesses, liner shipping is made different by the barriers to entry, continuing high running costs, international character and necessity of services (discussed above).

Do The Part X Arrangements Restrict Competition?

Part X, whilst designed to be an exception to competition policy, may actually have the effect of increasing competition in a market that has the continuing potential to be hijacked and monopolised by a handful of major liner companies. It is argued further below that the benefits of retaining Part X outweigh the costs/disadvantages, so that even if the Part is found to restrict competition, its retention is justified nonetheless.

Regulation of Liner Trades Around the World

Many critics of Part X will no doubt point to systems in place in other countries throughout the world and suggest adoption of one single system for regulating the liner trade, deregulation of the liner trade or suggest a hybridisation of approaches. Examined below are

some of the systems that are currently in place or have been place previously and reasons for either adopting or rejecting the approaches in these countries.

Korea

As the fastest growing nation of ship-owners the Republic of Korea is an example of continuing regulation whilst remaining initially apart from the conferences that dominated the world in the 1970 and 80's. However, in modern times even Korean ship-owners have become part of the alliances that encompass much of the world's liner trade. It is interesting to note that even in a nation of ship-owners such as Korea, where regularity of transport it is assumed would not be an issue as a result of a large national flag fleet, the government still regulates and validates alliances between ship-owners.

The transparency of the Korean system should also be considered in reviewing Part X. Currently conference agreements are made available over the internet such that dealings are open and transparent. It is suggested that the following amendments be undertaken in line with the Korean model.

Part X

Section 10.01 (*addition to current provisions*)

(1) (e) To achieve transparency in normal commercial dealings between conferences and shipping bodies.

Section 10.10 (*replacing the current provision*)

(2) (a) All registered conference agreements are to be made publicly available and over the internet at no cost.

(b) Any person is entitled to a copy of a registered conference agreement kept by the registry or an entry in a register kept under this Part. Payment of the prescribed fee, to obtain a physical copy of the whole or any part of may be required.

Caution should be taken in following the Korean approach to regulation in any wholesale way as, to be general, the Republic of Korea is a nation of *shipowners* whilst Australia is a nation of *shippers*. The distinction is significant as Korea has a large national flag fleet that is government subsidised and is close to the trading hub that is Japan.

United States

The United States, like Australia, uses a system of 'cabotage' in an attempt to encourage liner services whilst protecting its shippers. The major difference between the US and Australia is the size of the economies and the location of the US on major East-West shipping routes. However, figures from the Journal of Commerce available at http://www.tdctrade.com/shippers/vol26_2/vol26_2_ports02.htm show a similar situation to that in Australia.

In 2002, for the ports of New York and New Jersey, 1,859,476 containers were inbound whilst only 751,910 were outbound. This echoes the situation in Australia with regards to liner services however, the magnitude of these figures for only a few ports when compared to Australia as a whole are evident and emphasise the fact that the US is an international trading hub. Australia is not so fortunate and as such cannot rely on a steady flow of liner 'through' traffic to maintain services in spite of any imbalance.

It is suggested that Australia not adopt the US approach of allowing conference agreements by encouraging private contracting. It is submitted that transparency is the key to maintaining consumer confidence in any system of liner regulation and the US approach does not encourage this.

Europe

Since 2003 there has been an ongoing review of the laws dealing with liner shipping. In Europe 'Consortia' are seen as a less damaging alternative to liner conferences. These consortia are able to agree upon liner logistics from sailings to share out capacities but are not allowed to agree on rates or fix prices. The Bundeskartellamt in response to the European Competition Commission's call for submissions last year responded that although price

fixing may be seen as a low cost means of ensuring that services and the trade remains sustainable, consortium agreements are an option without the need to restrict competition to the same extent.

Europe has a steady export market of luxury and manufactured goods, the majority being containerised such that the liner trade in Europe is constant, straddling a major East-West shipping route. The trade in Australia is not comparable and wholesale adoption of any changes following the European model should not be made. Adoption of the consortia concept with liner shipping able to register agreements on most matters with the exception of price is an option but this may encourage private contracting such as that in the US and discourage the transparency suggested above following the Korean model. It is part of this submission that transparency is a key element to the maintenance of acceptable liner prices. The European model does suggest forward thinking and perhaps a different way of approaching the problem though and should be considered with all seriousness.

3. BENEFITS OF PART X

3.1 Shipper Benefits

Part X[2] provides protection for shippers from the realities of an unregulated market where an oligopoly of carriers has the potential to control shipping costs through acting unilaterally and fixing costs. Benefits to Shippers from Part X outweigh economic rationalist argument which opposes conference agreements between shippers and carriers. If shippers are not jointly organised smaller, shippers would be adversely disadvantaged to varying degrees due to their market share. Additionally, ports of low usage would not be frequented as these ports would be commercially unattractive to carriers as the low tonnage shipper could not afford the tariff to make the carriers visit viable.

[2] Trade Practices Act 1974 (Cth)

Achieving Part X objects:

The principles of Part X are achieved through joint agreements (conference agreements) between different shipper bodies and carriers. The formation of a designated peak shipper body, Australian Peak Shippers Association (APSA) and the ability of individual shippers to form secondary groups under Part X provide shippers with a single negotiating voice in respect to conference between themselves and carriers. This objective is achieved under Part 10.01;

(2) (a) by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power.[3]

The collective power of shipper bodies gives the smallest of shippers the same bargaining power as the largest when dealing with large carrier bodies. The result of this collective bargaining power in respect to conference agreements is that stable carrier costs and thus prices are maintained.

Conference Agreements

Prices are maintained at an agreed rate through the fact that part 10.41 forces registered liner carriers to negotiate with designated shipper bodies. Under this part the parties to a registered conference agreement shall:

(1)(a) Take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements (including any provisions of the agreement that affect those arrangements) whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body.[4]

[3] s.10.01
[4] s.10.41

(b) Provides for the provision of information to be shared between the parties for the purposes of the negotiations placing all the bargaining parties on an equal footing.[5]

Additionally Part X provides protection to shippers under 10.61 to stop carriers engaging in pricing practices that may disadvantage the shipper. The Minister in relation to these pricing practices has the power;

(1) To order the ocean carrier not to engage in a pricing practice.[6]

While prices have been maintained through conference agreements at an agreed rate it appears these rates are competitive as the number of non-conference liners have not gained a substantial market share. The share of conference shipping in the total liner capacity serving Australian trade routes had declined from 74 per cent in 1984 to 70 per cent in 1999 with non-conference operators servicing the remainder of the market.

Protection under Australian Law

Under 10.06 shippers are provided with protection under Australian law in respect to outwards conference agreements, however this part also allows for the withdrawal from agreements as;

(1) An outwards conference agreement must expressly provide for a question arising under the agreement in relation to an outwards liner cargo shipping service provided, or proposed to be provided, under the agreement to be determined in Australia in accordance with Australian law unless the parties and the Minister agree, in writing, to the particular question being otherwise determined.[7]

[5] s.10.41
[6] 10.61
[7] s.10.06

Certainty of shipping services

Under 10.07 conference agreements provide minimum levels of shipping services therefore, providing a degree of certainty enabling shippers to organise their day-to-day commercial activities. This occurs as:

> (1) An outwards conference agreement must contain provisions specifying the minimum level of outwards liner cargo shipping services to be provided under the agreement.[8]
>
> (2) An inwards conference agreement must contain provisions specifying the minimum level of inwards liner cargo shipping services to be provided under the agreement.[9]

The significance of minimum levels of shipping services is highlighted by the fact that Australia's total merchant fleet decreased in size from 90 ships in 1994 to 77 ships in 2002. In line with these years deadweight decreased from 3,499,527 tonnes to 2,028,637 tonnes and gross tonnage decreased from 2,414,844 to 1,587,743.

Against this background of reducing fleet size and reduced gross tonnage the total export and import tonnage carried by International Liner traders between 2001-2002 was 41,656,574. The difference between these figures represents the gap between Australia's total capacity to ship and actual reliance on International Liners. In this respect it is in Australia's best interest, as a country of commodity owners, to give certainty to shippers through Part X so Australia's reliance is not taken advantage of by an oligopoly of ship owners.[10]

Resulting Shipper Benefits from Part X

The benefits for shippers resulting from conference agreements are;

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[8] s.10.07
[9] s.10.07
[10] Department of Transport and Regional Services Bureau of Transport and Regional Economics Information Paper 50 Australian Sea Freight 2001-2002 p.32

- Stability in costs and that these costs are competitive given Australia's geographical position.
- Non-conference carriers with substantial market power not being able to hijack the market.

Under Part 10.52 non-conference ocean carriers with substantial market power shall,

(1)(a) Take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body.[11]

The cost benefits to shippers created through Part X outweighs any theoretical Laissez Faire market argument as in reality the conditions for Laissez Faire market reform in international shipping do not exist.

Part X provides for shippers through conference agreements:

- Access to negotiation with carriers.
- Shipper bargaining power in respect to agreements.
- Protection against carrier control of costs through shipper input.
- Transparency of shipper/carrier agreements.
- Protection from market power of non-conference carriers.
- Jurisdiction consistent with International law.
- Certainty of carrier costs- Commission review of costs- Tribunal review.
- Certainty of carrier commitment- reliability- frequency- access to small ports.

Some of the rolling benefits for shippers from conference agreements providing certainty are:

- Ship standards are maintained.
- Access to export markets.
- Bargaining power in respect to exports.

[11] s.10.52

- Small port usage maintained therefore;
- An ability for shippers to deal with ports close to manufacturing centres resulting in;
- Cost savings in cartage and;
- More control over the export process.

3.2 What are the Carrier Benefits provided by Part X?

Part X provides a mechanism by which carriers are able to register conference agreements and thereby enjoy a statutory exemption from breaches of sections 45 and 47 of the *Trade Practices Act* 1974 (Cth) (TPA).

We submit that while Part X of the TPA does provide carriers with significant benefits, these benefits are sufficiently tempered with a range of statutory obligations and over sight provisions in addition to providing significant public benefit.

This tempering is achieved by providing the Minister with extensive powers to ensure that carriers do not misuse substantial market power. Furthermore, the statute provides shippers with the opportunity to negotiate contractual terms. The primary benefits of Part X to carriers are outlined in section 10.08 of the TPA.

Section 10.08

Section 10.08 provides that a conference agreement can in certain circumstances; include either an exclusionary provision or a provision that has likely to have the effect, of substantially lessening competition without infringing the TPA.

Provisions of an exclusionary nature

Section 4(1) defines exclusive dealing as the practice of dealing referred to in sections 47(2) – (9). This involves market behaviour which includes either the supply of goods and services subject to restrictions or alternatively, the refusal to supply because of a failure of the other party to accept certain restrictions.

Section 10.08 (2) provides that where an agreement results in exclusive dealing that agreement will only be allowed where it is necessary for the effective operation of the agreement and is of over all benefit to:

i. In the case of an outwards conference agreement—Australian exporters; or
ii. In the case of an inwards conference agreement—Australian importers.

Provisions which substantially lessen competition

Section 45(2) prohibits the making of a contract, arrangement or understanding that has the purpose, or would be likely to have the effect of substantially lessening competition.

Section 10.08 (1)(c) provides that such provisions are acceptable so long as they concern:

i. The fixing or other regulation of freight rates;
ii. The pooling or proportionment of earnings, losses or traffic;
iii. The restriction or other regulation of the quantity or kind of cargo to be carried by parties to the agreement;
iv. The restriction or other regulation of the entry of new parties to the agreement;

Furthermore, section 10.08 (d) provides that the provision will also be legal so long as it is necessary for the effective operation of the agreement and of overall benefit to:

i. In the case of an outwards conference agreement—Australian exporters; or
ii. In the case of an inwards conference agreement—Australian importers.

Implications of provisions

Pursuant to section 10.14 the exemptions outlined above only apply to the following activities:

i. Transport of the cargo by sea.
ii. Stevedoring services.
iii. Activities that take place outside of Australia.

The implications of Part X are best demonstrated by some common examples:

1. Conference agreements

Conference agreements are defined in section 10.02 to be an association between 2 or more ocean liners which purports to provide outwards or inwards cargo shipping services. Pursuant to sections 10.17 and 10.18, sections 45 and 47 of the TPA do not apply to these kinds of agreements so long as the parties apply for provisional registration within 30 days after making the agreement.

2. Loyalty agreements

Loyalty agreements are defined in section 10.02 to be an agreement between an ocean carrier and a shipper in relation to the provision of either inwards or outwards cargo services. Pursuant to sections 10.19 and 10.20, sections 45 and 47 of the TPA do not apply to these kinds of agreements.

3. Specified negotiations

Involve the determination of the terms and conditions of loyalty agreements. Pursuant to section 10.24 such negotiations are also exempt from sections 45 and 47 of the TPA.

4. Contracts with stevedores

These arrangements are defined in section 10.02 as a contract between an ocean carrier and a stevedoring operator wherein a stevedoring operator arranges for the provision of stevedoring services to the ocean carrier. Pursuant to section 10.24A the preparation and the carrying out of such agreements is also exempt from sections 45 and 47 of the TPA.

Responsibilities of carriers

Under section 10.29 parties to a provisionally registered inward or outward conference agreement must take part in negotiations with the designated shipper bodies in relation to the minimum level of shipping services to be provided.

Powers of the Minister

Where the Minister considers that a carrier has a substantial degree of market power he may direct that the Registrar, register the ocean carrier as a non-conference ocean carrier. Under section 10.54 the Minister then has the authority to order the carrier to comply with any of the ocean carrier's obligations.

Benefits of retaining Part X in its present form

The current regime seeks to balance the interests of carriers, with the interests of shippers and the consumer. As outlined above Part X provides for the protection of carriers by allowing them to enter conference agreements. Part X also protects the interests of the shippers by facilitating negotiations between the parties.

If Part X was to be altered we would risk damaging this important dichotomy. At present conference agreements assist carriers in capital investment planning, the review of vessel capacities as well as assist in ensuring that supply equates with market demand. Should carriers be unable to communicate on the issues outlined in section 10.17 and 10.18 it is be expected that there would be greater market instability as well higher corresponding freight rates.

3.3 Community Benefits

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices"

A Smith,
The Wealth of Nations, Chapter X, Part II, 1776

Part X of the *Trade Practices Act* 1974 (Cth) seems at odds with the underlying principle of Competition Law. This section allows Liner Shipping companies to engage in certain anti-

competitive behaviour, through limited exemptions from Trade Practices law[12]. The anomaly with Part X of the *Trade Practices Act* 1974 (Cth) is that while the hard work of enacting the legislature and ensuring compliance was done here in Australia the direct benefits are conferred on importers and foreign communities, rather than the Australian consumer. However, it is clear that this section can also be for the benefit of Australian exporters[13].

Is it in the Australian public's interest for Part X of the *Trade Practices Act* 1974 (Cth) to be retained as part of the Commonwealth legislation?

Part X is of benefit to the nation as a whole. The removal of this section would have a destabilising potential on the Australian economy. The issue of certainty of prices for the Australian exporter involved in International Liner Cargo Shipping, which is largely due to price regulation, would effectively be removed from Australian law. This would make our Exporters susceptible to price fluctuations due to the fluctuating dollar and price increases brought about by the reality of free trade. It would also leave Exporters at risk of a shortage of reliable shipping services[14].

Market contestability will not necessary translate to efficient prices, decreased freight rates or increased quality by the Carriers. Controlling prices guarantees a fixed price as the Carriers are bound by the conference agreements[15]. Without this control mechanism prices are likely to increase due to the emergence of large global shipping operators and their considerable power in this narrow market. While conference agreements can be varied, they must be registered in order to be valid[16]. Liner conferences are not "price setting cartels". They are a low cost way to ensure that the liner market is sustainable and they have been shown to reduce freight rate volatility[17].

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[12] A Fels, *Australian Liner Shipping Regulation*, Speech to the Australian Shipper Conference, Melbourne, 19th March 2001.
[13] J Levingston, *Shipper and Carrier Negotiations Part X of the Trade Practices Act 1974: A Model Law*, Asean Shippers' Council, Sydney, 18th October, 1995.
[14] Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, s9B: Economic Issues, Canberra, 1999.
[15] S10.41 *Trade Practices Act* 1974 (Cth) states the obligations on conference carriers.
[16] S10.16 *Trade Practices Act* 1974 (Cth).
[17] World Shipping Council, *European Commission Review of International Liner Shipping Competition and Regulation*, 26 November, 2003, http://www.worldshipping.org/final_report_erasmus.pdf.

Australia is not on a major shipping route, and it is only due to Part X of the *Trade Practices Act* 1974 (Cth) that Carriers are currently coming to our shores on our negotiated terms, and not on their own terms. The balance of trade in Australia is unequal, with the significant proportion of International Liner Shipping being from Imported goods. Despite this discrepancy, it is imperative for Australia to have the ability to both export and import goods. For this we are reliant on the availability of adequate and efficient foreign liner shipping services, as well as 'Australian flag' carriers[18]. This is not only in the best interests of the Australian Shippers, but coincides with the national community-wide interests[19]. The responsible minister has the power to cancel the registration of a conference agreement, if it is no longer in the national interest[20].

Due to Part X a minimum level of shipping service must be specified in the conference agreements[21], without market regulation shipping service of a suitable standard would not be guaranteed. Abolition of Part X would be likely to result in fewer direct services, fluctuating freight rates and reduced choices of services and operators[22]. Under Part X the quantity and quality of liner services has been perfectly acceptable[23]. The security within the shipping industry, which is in part due to the Carriers ability to collude under Part X, ensures Carriers come to Australia and that we have the ability to efficiently export goods overseas.

Australian Shippers use the conferences as an opportunity to obtain high quality shipping services at the best possible prices. This results in the reciprocal benefit of reduced distribution and transportation costs for the Australian consumer of imports and Australian exporters[24]. In relation to shipping service requirements, section 10.41 of the *Trade Practices Act* 1974 (Cth) allows Australian Exporters to dictate the required quality of service in

[18] ANLCL is an 'Australian flag' carrier, and is protected under the Part X provisions.
[19] Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, Canberra, 1999.
[20] S10.45(2)(a) *Trade Practices Act* 1974 (Cth).
[21] S10.07 *Trade Practices Act* 1974 (Cth).
[22] Australian Chamber of Commerce and Industry, Review of Part X, October 1999, http://www.acci.asn.au/text_files/issues_papers/Trade/TDE15.pdf.
[23] Keith Trace, *Australian Shipping and Stevedoring*, Ch 6, Conference of the H.R. Nicholls Society at Newcastle,19th-21st February,1988.
[24] Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, s9B: Economic Issues, Canberra, 1999.

Australia. This is done through negotiable shipping arrangements. This is important to the Australian Exporter, as a major proportion of our goods to be exported are time-sensitive commodities, such as grapes, oranges and apples. These commodities need to be shipped quickly, often in refrigerated containers[25], with a lot of care taken, to ensure they reach their destination in optimal condition.

The USA, Canada, Asia, New Zealand and the European Union have all had arrangements broadly similar to Part X for regulating international liner shipping and for protection of their domestic community[26]. There is a significant variant between foreign markets and our own. In 2003 only 47.4% of Australia's total dollar exports transported by sea use the industry in question, which is Liner Shipping. When considered by weight liner shipping services only account 3.5% of total exports by sea, stressing Australia's ongoing high dependency on commodity exports[27]. Australia's geographic isolation, and our comparatively small demand for liner shipping services in proportion to that of the global heavyweights, results in Australia having only a marginal position in the global maritime services market[28].

The importance to Australia of the retention of the Part X safeguards, in the *Trade Practices Act* 1974 (Cth), for modern International Maritime and Trade Law reiterates the high value the Australian community has placed on the protection of our domestic economy and our national interests. The flow on effect from resultant stability in effectively accessing international market promotes domestic employment, improves our balance on merchandise trade and safeguards our rights as consumers. The public benefits of Part X, which include improved efficiency, scheduling and certainty of services and greater stability of freight rates, when taken together far outweigh any anti-competitive impact of the arrangements[29].

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[25] In the Australasian region, conference agreements with International Liner Shipping companies, such as P & O Nedlloyd, ensures Reefers are readily available for exporting time- sensitive commodities.
[26] Russell McVeagh, *Liner Conferences – Trade Practices* [Shipping Update], Shipping and International Trade Law, August 2000.
[27] Bureau of Transport and Regional Economics, unpublished Sea Freight Data, http://www.bte.gov.au.
[28] Australian Chamber of Commerce and Industry, Review of Part X, October 1999, http://www.acci.asn.au/text_files/issues_papers/Trade/TDE15.pdf.
[29] Greg Outzen, *The Regulators: Their Influence on Our Industry*, Address to the Australian Federation of International Forwarders, Gold Coast, 20 May 2004.

4. CONTROLLING THE ANTI COMPETITIVE NATURE OF PART X

The Trade Practices Act's toleration of Anti-Competitive trading practice through Part X, is not without management. In order for the objects of the Part to be met, controls over such behaviour are imposed. Indeed, without these controls, there would be little justification for the Part's existence at all.

Carriers are bound by requirements in Part X, which control the (Conferencing) procedure. Liner Cargo Shipping agreements also remain subject to various other provisions of the *Trade Practices Act* 1974. These are outlined below:

- ***Specified Situations***

  Part X applies only to Carriers [10.14(4)] and to ocean transport of cargo under a Liner Cargo Shipping service [10.14(1)(a)]. Its exemptions apply only to the fixing of charges for an inter-terminal transport service for the import or export transport of goods [10.14(2)] and to the determination of common terms and conditions for Bills of Lading [10.14(3)].

- ***Compulsory Negotiation***

  Under Division 3, Liner Conferences are must participate in negotiation of services with respect to Outward Conferences (That is, conferences that transport cargo to other countries). The negotiations are conducted with an exporter's "Designated Shipper Body". These negotiations must provide for:

- ***Minimum standards of service*** *[10.07]*

  The agreement must determine the minimum level of service to be provided

- ***Disclosure of information as to costs*** *[10.10]*

  Conference Agreements are open to the public

- ***Australian Law to govern the agreement*** *[10.06]*

  Concurrence that any questions arising under the agreement are to be determined in Australia, according to Australian Law.

- ***Limitation upon Anti Competitive trade practices*** *[10.08]*
  Exclusionary provisions, or those which have the effect of substantially lessening competition may only deal with specified matters

The imposition of these conditions upon Liner Conferences ensures a level of control over the potentially anti-competitive behaviour permitted under the Part, so that Australian shippers are able to benefit from the Conferencing practice and the practice of Anti-Competitive behaviour is restricted to particular circumstances.

These provisions currently apply to Outward Conferences only and therefore Importers do not receive the benefit of the provisions. Obligations were not extended to Inward Conferences because of predicted:

a) Jurisdictional Difficulties
b) Practical Difficulties
c) Additional costs to Carriers and therefore ultimately Shippers

It is important to note that in both Europe and America, provisions similar to those in Part X encompass both outward and Inward Conferences. However there are significant differences between the shipping-transport industries in these countries and Australia, hence this does not necessarily give rise to argument that obligations should be extended to Inward Conferences with Australian Importers.

Discrimination

Carriers are not able to discriminate between shippers who require similar services, if this discrimination will have the effect of substantially lessening competition in a marketplace [s10.05] Discrimination is also prevented through the operation of s47(6) *Trade Practices Act* 1976, discussed below.

Registration

Agreements must be registered with the Registrar of Liner-Shipping in the Department of Workplace Relations and Small Business.
Without such registration, the Part X exemptions do not apply.

Ministerial Powers and the ACCC

The *Australian Competition and Consumer Commission* may be asked to investigate possible contraventions of Part X by either the Minister [s10.47] or a person affected by the operation of a Conference Agreement [10.48].

Agreements found to be in breach of the Part may be de-registered, either wholly or partially, upon the direction of the Minister. The effect of de-registration is that the Carrier is liable to the s45 and 47 provisions.

Australian Flag Operators protected

An agreement may be de-registered if the Minister believes that it will hinder an Australian Flag Operator from providing services. The standard is that of reasonableness [10.45(1)(v)]. Non-Conference Carriers may also be subject to this prohibition.

Other Trade Practices Act restrictions

Liner Shipping Conference Agreements are exempt only from the *Trade Practices Act* 'Anti Competitive Behaviour' provisions. They remain subject to the Act's provisions regarding:

- The prohibition of Third Line Forcing: s47(6),
- Mergers and Acquisitions: s50 *("Acquisitions that would result in a substantial lessening of competition"*)
- Misuse of Market Power: s46

4.1 Have the Part X's Controls Mechanisms provisions been effective?

It has been argued that Ship Owners are exploiting the Part X legislation by relying on the imposition of surcharges, (which are not the subject of Part X provisions in Conference Agreements) rather than negotiating "Blue Water Rates" as is the intention of the legislation. However, Liner-Shipping arrangements are exempt from the *Trade Practices Act* Anti-Competitive behaviour prohibitions only to the extent that they do not misuse market power. Carriers remain subject to the provisions under s46.

We submit that the current increases in rates and surcharges may be beyond those behaviours exempt from prohibition under Part X and therefore such Carriers are exposed to legal consequences for breach of the Trade Practices Act. At the very least, the concerns for the

recent price increases are able to be examined by virtue of Division 11: *Unfair Pricing Practices*.

Some Australian Shippers have also expressed concern that the Part X provisions do not fulfil the Part's objective of providing 'reliable' standards of Liner Shipping Service, at rates that are 'internationally competitive'. A significant number of complaints of this nature however, derive from Importer Organisations. While the Act does acknowledge the protection of Australian importers 'as far as practicable', the focus of the Act, as demonstrated by 10.01(1)(a) is the protection of exporters. It should also be noted, that under Section 10.01(1)(a), the Liner Cargo services envisaged by the Act are those which are 'adequate'. If the present service is 'adequate', there seems no legislative reason to abolish Part X and require Shippers to pay for a higher level of

Whatever the case may be, the abolition of Part X does not present as a solution to the problem. Presently, Part X requires Liner Cargo Carriers to observe the procedures outlined above, in order for the exemptions from legal recourse under the Trade Practices Act to apply. The abolition of Part X would expose International Liner Shipping to Part IV of the Trade Practices Act and would be unlikely to create a more stable Liner Cargo Shipping service to Australia.

At least now, Australian Shippers possess a degree of bargaining power with respect to Liner Cargo Shipping service conditions. Were Part X to be removed, there would be even less – or none at all. It may be a case of 'Better the devil you know'.

While liner shipping cargo arrangements are exempt from the TPA for anti-competitive behaviour, this exemption does not extend to misuse of market power. They remain subject to the s.46 prohibition on misuse of market power.

If anything, Part X applies regulatory constraints on the market power of shipping conferences. (ACCI)

Part X ensures that liner conferences:

- Participate in negotiations with exporters;
- Provide cost information to exporters;
- And are thus not able to disregard the interest of exporters.

As a result, shipping rates are generally competitive and exporters have reasonable access to overseas markets. (ACCI)

Importantly, there are no economic barriers to existing players (in the conferencing) exiting and new players entering the Australian international trades, as some have done in recent years. (ACCI)

Australia is not alone in the industrialised world in providing special competition and regulatory arrangements for the liner shipping conferences. Most countries permit liner shipping conferences, but subject their behaviour to regulation with the objective of promoting the interests of their exporters and shipping users. (ACCI)

Part X operates in a largely 'hands-off' manner, allowing market forces to regulate the liner-shipping conferences, so that it;

- Delivers reasonably predictable outcomes for Australian shipping users;
- Has low compliance costs for business and administrative costs for government; and
- Appears generally comparable with overseas regimes (ACCI)

Greater competition and contestability could be introduced into the liner-shipping industry through meaningful progress within maritime sector negotiations under the General Agreement on the Trade in Services (GATS) – one of the pillars of the World Trade Organisation. (ACCI)

The *Food and Beverage Importers Association* (AFBIA) feel that the Asia-Australia Discussion Agreements (AADA) do not benefit importers by improving supply chain performance and enhancing business efficacy. They believe adequate liner services are not

being provided and importers are suffering the negative impact of price arrangements under the AADA, without receiving the alleged benefits of such arrangements.

They believe the anti-competitive detriment of the AADA currently outweighs the public interest benefits it is supposed to deliver.
They ask for revocation of the provisions in the AADA allowing price discussions and setting and that the lines should be restricted to discussions about capacity, demand for services and service standard standards.

An outcome of Part X does seem to directly benefit exporters as well as cargo shipping liner companies.

After a 9 month investigation, the ACCC chairman Graeme Samuel said there was a 'remarkably high threshold' required for evidence to overturn the exemption, asking whether existing Trade Practices law served the interests of Australian exporters and importers. The ACCC investigation found that demand for Asian manufactured goods in Australia rose 25% in 2003 but the AADA discussion agreement affected shipping lines' willingness to offer extra capacity and introduce new ships on the route to ease demand.

The ACCC could not de-register the AADA because it could not separate broader market effects from the impact of the anti-competitive agreement.

The Government and Productivity Commission did not extend obligations to inward conferences because they predicted:

a) Jurisdictional conflicts
b) Practical Difficulties
c) Additional costs imposed on carriers and ultimately shippers.

It should be noted however, that in Europe and America, both outward and inward conferences are covered under their anti competitive and anti trust legislative frameworks.

Conference participants remain subject to the prohibitions on third line forcing in s.47(6) TPA. An example of third line forcing is where a person supplies goods and services at a particular price on the condition that the purchaser acquire or agrees to acquire other goods and services from another person or the same seller. Thus carriers cannot force shippers to insure through a designated insurance body to which the carrier is affiliated.

They are also subject to the s.50 TPA mergers and acquisitions provisions, which substantially lessen competition.

In order to qualify for the exemptions, conference agreements must be registered with the Registrar of Liner-Shipping in the Department of Workplace Relations and Small Business.

Part X requires Outward Conferences to negotiate with exporter's 'Designed Shipper Bodies.' (Outward Conferences: Conferences that transport cargo to other countries) Here, agreements must provide for a minimum level of shipping services and must specify that any questions arising under the agreement must be determined in Australia, according to Australian Law.

5. CONCLUSION AND RECOMMENDATION

This paper proposes that the benefits of Part X *TPA* significantly outweigh the disadvantages and thus Part X should be retained in its present form.

Benefits of retaining Part X in its present form

The current regime seeks to and achieves a balance of carrier interests, with the interests of shippers and the consumer. As outlined above Part X provides for the protection of carriers by allowing them to enter conference agreements. Part X also protects the interests of the shippers by facilitating negotiations between the parties.

If Part X was to be altered we would risk damaging this important dichotomy. At present conference agreements assist carriers in capital investment planning, the review of vessel capacities as well as assist in ensuring that supply equates with market demand and a favourable level of service is supplied by carriers servicing Australian exporters. Should carriers be unable to communicate on the issues outlined in section 10.17 and 10.18 it is be expected that there would be greater market instability, poorer delivery of shipping services and higher corresponding freight rates.