Supplementary submission to the Productivity Commission regarding the draft report reviewing Part X of the Trade Practices Act 1974: International Liner Cargo Shipping

Prepared by Shipping Australia Limited, November 2004

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EXECUTIVE SUMMARY

- SAL rejects the preferred option of the Productivity Commission (PC) to repeal Part X and to rely on the authorisation provisions of Part VII of the TPA because this option is not supported by the majority of Australian liner exporters and appears to be based on unsupported assertion, misunderstanding of how Part X operates in practice and Australia's ability to force its will upon the world when accounting for less than 5% of the global international liner shipping volume.

- SAL supports modification of Part X to enhance its effectiveness including adoption of some of the recommendations/findings of the draft PC report such as the introduction of confidential Individual Service Contracts, new objectives and adoption of financial penalties for breaches of specified regulatory approaches. In addition SAL recommends amendments to streamline the registration process and introduce more effective investigations of any alleged failure of the public benefit test contained in Part X but retaining Ministerial discretion regarding withdrawal of the limited exemption from the restrictive business practices provisions (Part IV) of the Act as the ultimate penalty in extreme cases.

- A number of the recommendations/findings in the draft report are rejected;

  - Part X is not a more permissive regime compared to Europe and the USA.

  - Europe has been reconsidering the exemption for some years and even if it is eventually withdrawn, 80% of Australia's trade will remain with countries that have regulatory regimes compatible with Part X.

  - 80% of the submissions received by the PC supported the retention of Part X in one form or another including most exporter groups and some importers based on concerns about service reliability and price stability if Part X goes and this representative view should not be ignored.

  - Discussion Agreements are the modern form of Conference and are not new as they were extensively reviewed in 1999 by the PC and there is normally a significant level of competition applying to them.

  - The PC's conclusions in 1999 that Part X is a low cost regulatory regime that has delivered an efficient, stable and competitive international liner shipping service is as valid today as it was then.

A very important choice is facing us all;

a. Repeal Part X and put at risk Australia's $120 billion international liner trade when the benefits to Australian exporters and importers from increased regulation under Part VII has not been substantiated
   or
b. seek to improve an already effective regulatory regime favoured by those who use the services and pay for them, Australia's liner shippers.

The draft report does not challenge the competitiveness of the existing regime or the efficiency of the shipping services provided under it but rather proposes a higher level of Government regulation in the mistaken belief that such a generalised, one-size-fits-all approach will lower costs and improve services. Modifying the current regime in the manner recommended in this submission as the preferred option is a more productive direction of reform and will lead to the PC's cherished goal of enhancing the net public benefit.

INTRODUCTION

1. Shipping Australia Limited (SAL) notes that the draft report sets out various options for reform of the regulatory regime governing the international liner shipping industry serving the Australian trades. SAL accepts the recommendation in the report that, if Part X is retained, its principal objectives should be to:

   - Facilitate efficient coordination and joint provision of liner cargo shipping services within a pro-competition framework; and

   - assist Australian exporters and importers to have access to liner cargo shipping services of adequate frequency, geographical coverage and reliability at freight rates that are internationally competitive.

2. Our major concern is that the PC preferred option of repealing Part X and for the industry to rely on authorisation under Part VII of the TPA, would not fulfil these objectives.

3. It is important to focus on the outcomes of any regulatory regime that is put in place. Regulation is normally introduced to ameliorate the possible effects of market failure and/or achieve public policy objectives. Since 1916 under the Industries Preservation Act, the Australian Government has recognised that a unique regulatory regime is required for the international liner shipping industry which found expression in the detailed regime contained in the original Part X introduced in 1966. The Government presumably understood that the industry had a reasonably high degree of contestability and the need for some compatibility between Australia's many trading partners. Furthermore, the Government decided that the interests of Australian liner exporters would be promoted with a light-handed regulatory regime which encouraged commercial resolution of the disputes that inevitability arise.

4. These are undoubtedly the reasons why there is very strong liner exporter support in Australia for the retention of Part X in one form or another.

Majority of Submissions Favoured Retention of Part X

Submissions that support retention of Part X: (In one form or another)

Flinders Ports South Australia
Australian Shipowners Association
Department of Foreign Affairs and Trade
Australian Peak Shippers Association
International Chamber of Shipping
Australian Federation of International Forwarders
Department of Transport and Regional Services
Port of Brisbane Corporation
Japanese Shipowners Association
Tasmanian Freight Logistics Council
Australian Horticultural Exporters Association
Australian International Movers Association
Shipping Australia Limited
ACIL Tasman Pty Ltd/Thompson Clarke Shipping Pty Ltd
Bluescope Steel Limited
Centre for Customs and Excise Studies – University of Canberra
Australian Meat Industry Council
Maritime Law and International Trade Group – University of Newcastle

Other submissions

Dr Tony Fletcher – recommends promotion of Australian flag shipping

Submissions that did not support retention of Part X

Importers Association of Australia
WA Shippers Council/CCIWA
Australian Chamber of Commerce and Industry
Australian Competition and Consumer Commission
Bunbury Port Authority

5. In the Overview of the draft report there is comment that the inclusion of Part X in the TPA reflects a view that normal market forces and the general regulation of them under the TPA are inadequate for the efficient supply of liner cargo shipping services. This suggests that the TPA regulates normal market forces either in Part X or in Part IV of the Act. What the TPA seeks to do is promote competition as a means of enhancing efficiency, productivity and the welfare benefits that those market forces can deliver. In the case of Part X, the light-handed system of regulation seeks to achieve a similar result but it also recognises that the complexity of the industry requires special treatment. The end objectives are similar and over any reasonable period of time, observance of the results of the application of such regulation in this industry can only lead one to the view that a high level of competition prevails but there is a balance between meeting the requirements of Australian liner exporters and those providing the service. As the 2003 report of the eminent team of economists led by Professor Haralambides from Erasmus University of Rotterdam who were commissioned to do an economic analysis by DG IV of the EU Commission, concluded:

- "Liner shipping conferences are not price setting cartels"
- They play a complex role against a background of difficult competitive conditions inherent in liner shipping
- They function as a platform to discuss prices and related cost levels and
- They have virtually no ability to collectively raise rates, they may even foster more competitive pricing in the market as a whole and reduce freight rate volatility.

6. Whilst international liner shipping shares characteristics with other industries to a greater or lesser extent, there is no other industry which has the same combination of characteristics which delivers this result.

7. The report suggests that under Part X registration of agreements is almost automatic and that there is no public benefit test applied. Registration of agreements is a reasonably complex process with provisional registration during which the Registrar checks that the agreement conforms with the requirements of Part X eg. the scope of exemption is not broader than that set out in Sections 10.14, 10.17(a), and 10.18(a), that Australian law applies, there is a reasonable notice of withdrawal clause, that requests for confidentiality are valid and so on. Then the Parties to the Agreement give designated shipper bodies the opportunity to negotiate Minimum Service Levels which need to the attached to the Agreement. There is a 30 day notice period after final registration, unless a shorter period of notice is agreed with the designated shipper body concerned. Importantly there is no exemption from Section 46, (Abuse of Market Power), of the Act.

8. **The provisions of Part X do provide for an ongoing public interest test.** Section 10.45 (1)(a)(iv), for example, provides that parties to the Agreement need to have due regard to the need for outwards liner cargo shipping services or inwards liner shipping services provided under the Agreement to be:

    a. Efficient, economical and

    b. provided at the capacity and frequency reasonably required to meet the needs of shippers who use, and shippers who may reasonably be expected to need to use, the services.

9. This is an important test which is regularly monitored by not only the peak shipper bodies but the secondary designated shipper bodies and individual shipper groups/shippers.

10. On the other hand, the TPA does not provide a definition of a “public benefit”. The Australian Competition Tribunal described it in “7-Eleven Stores Pty Ltd” as “anything of value to the community generally, any contribution to the aims pursued by 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”. Similarly in the case of “Re Howard Smith Industries Pty Ltd & Adelaide Steamship Industries Pty Ltd”, the Tribunal states that if a merger is likely to result in the achievement of economies of scale and a considerable saving in the cost of supplying a good or service then this may well be a substantial benefit to the public, even though the cost saving is not passed onto customers in the form of lower prices. This issue of private/public benefits was also considered by the ACCC in its Merger Guidelines, where it was stated at paragraph 6.42 that “the concept of benefit to the public is not limited to a benefit to consumers, a benefit to a private party which is of value to the community generally is a public benefit”. Therefore a benefit which is enjoyed by a particular group could be considered

to be a public benefit for the purposes of the TPA, as there is no requirement that the whole of the public actually benefit from the arrangement for which authorisation is sought, in order for the arrangement to obtain authorisation.[1]

11. There is no such confusion in Part X which sets out, in considerable detail, what is considered to be the "public benefit" in this industry.

12. SAL believes that it is important that those seeking withdrawal of the exemption have a responsibility to prove that this would result in a net public benefit.

13. As the EU Commission stated recently in its White Paper:

"In this context supporters of the block exemption (notably the European Liner Affairs Association) have emphasised that the burden of proof in the review of 4056 would be at least a shared one and that the Commission should show that a possible revocation or amendment of the liner conference block exemption is justified. Naturally it follows from Article 253 of the Treaty that, when proposing changes to existing legislation the Commission shall substantiate its proposals. This implies e.g. that if the Commission proposes to repeal the present block exemption for liner shipping conferences it will have to explain the reasons why price fixing and supply regulation by the conferences would, in the present market circumstances, no longer be exemptable from the prohibition of Article 81(1) of the Treaty."

14. SAL believes that the onus should be on those seeking to change the existing regulatory regime to justify how the "public benefit" would be enhanced and to provide evidence to support their case.

15. There have only been five investigations by the ACCC since 1989 but in the last one, ie. the investigation into the Asia-Australia Discussion Agreement under the exceptional circumstances provisions of Part X, the Commission found it difficult to obtain the information necessary to make a decision whether to recommend deregistration of the Agreement. Information can be sought by the Commission for example, by serving on relevant parties Section 155 Notices (under Section 10.91 of the TPA) which are court enforceable requests for information. However, what was quite noticeable in that investigation was that whilst there were significant price rises from very low freight rate levels, those increases did not lift the levels to those that previously applied, eg. in 1999, but those same rises were sufficient to actively encourage shipowners to add a large increase in vessel tonnage over a 6 month period (eg. from 30 to 48 vessels). This is a classic example of market forces at work under the Part X umbrella. The question is should the opposite occur and result in substantially lower demand, would some or all of those additional vessels be redeployed to other more profitable trade lanes?

[1] These cases and quotes were contained in page 13 of the 20 October 2004 application for authorisation under Part VII by the Federal Chamber of Automotive Industries.

16. The draft report claims that the immunities provided by Part X are now more permissive then those available in the United States and Europe. This is not a fair or accurate assessment of the situation.

17. There has been no change to Regulation 4056/86 by the EU but rather an interpretation by the EU Commission which has limited the extent of the block exemption.

18. In the United States, the Overseas Shipping Reform Act introduced the concept of confidential Individual Service Contracts which was a significant departure from the previous legislation but nevertheless the fundamentals of the exemption from the anti-trust law for rate setting including those for Discussion Agreements continues to apply. SAL agrees with the proposal by the PC to modify Part X to promote and protect confidential Individual Service Contracts between carriers and shippers. The current registered Australia New Zealand to Europe Liner Association constitution already provides, for example, in clause 8 of Appendix 2 "that members may also enter into individual contracts with transport users which will remain confidential to the member and the transport user involved".

19. Admittedly, the EU Commission has recently released a white paper questioning the continuation of the block exemption but it is understood it could be 2006/07 before the European Parliament finally makes a decision in relation to those recommendations. Whilst 20% of Australia's international liner trade is with Europe, there are very important differences, notably that;

    - The European Shippers Council does not support continuation of the exemption which is completely contrary to the situation here

    - The size of individual shipper volumes is generally much greater than those that apply in Australia

    - There is a separate regulation in relation to consortia which does not apply in Australia.

20. At the very least, it would be prudent for Australia to wait to view developments in Europe and if the exemption is withdrawn to then evaluate the implications in the context of Australian trade with the whole world instead of taking pre-emptive action, bearing in mind that Australia accounts for less than 5% of the world's international liner trade (according to the BTRE 2003) and other than Europe, no other region or country is contemplating changes to the regulatory regimes governing the activities of international liner shipping.

21. The draft report claims that if Australia were to abolish Part X, there would be no conflict of interest with the regulations being applied by our major international trading partners (eg. approximately 60% of our overseas international liner trade being with Asia which does apply this exemption) and even the ACCC acknowledges that there is potential for jurisdictional conflict but it was stated that the ACCC finds it preferable to use its cooperation

agreements with overseas agencies so that investigations can be carried out by the country in which the company is based. The question that is not asked here and does need to be answered by the PC is why would the country in which the company is based investigate activities which are perfectly legal in that country? **Unlike breaching competition laws that apply in various countries, the situation here is one where Australia would be completely out of step with most of our trading partners in terms of the application of this regulatory regime.** As Professor James Crawford, Whewell Professor of International Law at the University of Cambridge, UK (refer Appendix C of the original SAL submission page 122) said "if Asia, Australasia and North America maintain existing provisions – for example on discussion of forward rates – there would be a practical conflict: EU law (if it were to withdraw the exemption) would prohibit in its inwards trades what the law of the exporting state specifically permits and envisages in its export trade. To say in such a case that carriers may obey both laws by avoiding Conferences and Discussion Agreements is simply to assert that EU law is to trump."

22. The draft maintains that there have been major changes such as Discussion Agreements since the 1999 review by the PC which found in favour of Part X. However, by 1999 there were a significant number of Discussion Agreements in operation at that time including in the Asia/Australia trade, Australia/New Zealand trade, Australia/South East Asia trade, Australia/United States, Australia/Canada, Australia/Mexico, and in the Australia/Caribbean trades.

23. It is SAL's view that abolition of Part X and reliance on Part VII authorisation procedures (which would still be more uncertain, time consuming and more costly than Part X) would result in;

    a. **Surcharges** being applied in a more volatile way with little transparency concerning review and withdrawal mechanisms, arbitrary notice periods and different levels between carriers but which could well be higher than current levels

    b. **In terms of rates of freight**, there would also be greater volatility concerning the quantum and timing of future increases between individual carriers, creating instability and confusion in terms of the trades forward pricing arrangements. It should be noted that as a result of criticism from shippers that there has been inadequate notice of rate increases, Conferences and Discussion Agreements have generally adopted the position of publishing annual business plans including proposed rates increases, well in advance of implementation (eg. for the next twelve months).

    c. **Capacity** required by exporters and importers could be underestimated leading to capacity/service shortcoming because Conference or Discussion Agreement members would not be able to collectively review vessel capacities, utilisations and overall cargo demand as a means to determine overall service requirements and the supply of adequate, economic and efficient shipping services.

d. Without authorisation, groups of **shippers** would not be able to exert their significant ability to exercise their **collective buying power**/influence on the trade via Peak or Secondary Designated Shipper bodies which help to resolve commercial disputes over such issues as lack of specialised equipment, its positioning and standards applied, lack of space and reliability of sailing schedules etc.

24. These benefits of the light-handed system of regulation in Part X should not be summarily dismissed.

25. Any system of regulation can be improved and taking into account some of the Commission's findings and recommended options, SAL proposes that Part X be modified to streamline and make more effective its operation by:

a. Replacing the existing objectives of the Act with those recommended by the PC.

b. Providing for confidential Individual Service Contracts

c. Speeding up the existing registration process by eg. removing the 30 day period after final registration of Agreements before the exemption comes into effect, which in practice, serves no purpose. It is understood that, for example, the Federal Maritime Commission in the United States has decided that slot charter and vessel sharing arrangements and similar Agreements will no longer be subject to the 45 day waiting period before formal approval if the joint market share of the parties to the Agreement is less than 35%. These Agreements become effective upon filing.

d. Amending the role of the ACCC as an investigator of complaints under Part X to remove the "exceptional circumstances" provision and the right of the ACCC to undertake investigations on its own initiative.

Providing instead, for a Panel chaired by a senior officer of the Department of Transport and Regional Services along with senior officers from the ACCC and the Department of Foreign Affairs and Trade that could investigate complaints in terms of the Lines not meeting the public interest test contained in Part X as outlined above and any economic background data required could be provided by the Bureau of Transport and Regional Economics.

The Panel would act in a conciliatory role and independently weigh up the merits of the case in terms of the positions being adopted by individual parties and to either reject the application for review by the ACCC or alternatively to make a recommendation to the Minister who could in turn seek necessary undertakings to remove the need to withdraw the exemption or refer the matter for report by the ACCC prior to making a decision.

e. Financial penalties could apply for breaches of process that should be decided on the facts of individual cases and appealable to the Administrative Appeals Tribunal.

f. Included in the requirements for registration of any Agreements under Part X that include price setting in any form, would be that parties agree to adhere to any Agreement with shipper bodies designated for negotiations by the Registrar of Liner Shipping. (This should remove a major objection to Discussion Agreements raised by shippers.)

26. There are other suggestions for amending Part X which are contained in Attachment A to this submission.

27. Following are detailed comments on the recommendations/findings in the draft report.

Detailed Comments on Individual Chapters of the Draft Report

CHAPTER 2 THE MARKET FOR LINER SHIPPING

28. It is stated on page 9 of the draft report that the development of hub-and-spoke networks in liner shipping has prompted carriers, which previously specialised in the major East-West trades, to enter the North-South trades. This is not a recent phenomenon and certainly its occurrence has not been confined to the last five years or so since the last PC review. SAL would be interested in the source of this information and details of the particular shipping lines involved.

29. Transhipment has been an emerging and important development for the Australian liner trades over the last 10 years. It is acknowledged that transhipment does apply a competitive influence on direct services but there could be the perception from reading draft finding 2.1 (page 10 of the report) that it has been a recent trend in terms of the establishment of networks centred on regional hub ports. This is clearly not the case as far as Australia is concerned and during the last PC review, transhipment and the use of regional hub ports was acknowledged as an important competitive factor.

30. In relation to ship chartering at the top of page 13, the report says that chartering vessels enables a line to quickly respond to changes in demand and to have greater flexibility in matching vessel capacity with cargo volumes. It is often not easy to find suitable charter tonnage at relatively short notice and it is often necessary to enter into vessel charter arrangements of at least 5 years which can lock an operator into very high vessel charter rates particularly over a period when charter rates are declining. A question of whether the Australian trades can be considered “long and thin” is raised in the draft report but in terms of volumes it is very low compared to many other liner trades, particularly in the East-West trades.

31. Table 2.7 on page 28, reference is made to the ANSCON/ANZESC Pooling Agreement but such an Agreement no longer applies. There are two Trade Share Agreements in the North and Southbound trade between Australia and Europe but the old type pooling agreement has disappeared.

32. On page 30, the comment is made that the aim of Discussion Agreements is to provide an overall limit on route capacity to prevent instability in freight rates. This is not the objective of Discussion Agreements but rather they allow the lines to exchange information on market conditions, to discuss possible variations in capacity which would still remain the decision of individual lines or a consortium. Importantly they do not control capacity. They do discuss the possibility of general rates increases or, perhaps for a particular commodity a minimum or maximum level of rates but they rarely have tariffs and all rate setting is carried out on a non-binding consensus basis.

CHAPTER 3 ECONOMICS OF INTERNATIONAL LINER SHIPPING

33. In relation to surcharges and the comment at the top of page 48, it should be noted that Equipment Handover Charges and documentation fees are not collectively agreed surcharges. There is not an exemption under Part X to allow a collective agreement on Equipment Handover Charges.

34. In draft finding 3.2, the report claims that surcharges can also be a means by which Discussion Agreements or Conferences collectively impose price increases on the market. This finding does not take into account that they are negotiated and information is supplied to the peak shipper bodies in support of their application in a transparent way. In fact the benefits of transparency that are inherent in the Part X type regime are not highlighted anywhere in the draft report. Furthermore, Terminal Handling Charges, for example, were introduced on a revenue neutral basis.

35. On page 52, reference is made to the OECD 2002 report, and the comment is made that it provided evidence that more competition in shipping might promote more, not less, rate stability. What is not noted is that this was a secretariat report and it is not an official OECD publication. That report was not agreed by the member Governments of the OECD. In fact, there was a lot of criticism from certain quarters eg. the World Shipping Council and part of that criticism is contained in the SAL submission to this review. (Refer Attachment D of that submission)

36. On page 53, there is a theoretical discussion that destructive competition is more likely when capacity has to be added to a route in large, indivisible units and when individual demand is small relative to capacity deployed (increasing the prospect of excess capacity). This development is often observed in the Australian trades (and others) over a reasonable period of time. Slot chartering and vessel sharing have a minor impact but importantly, as evidenced recently in the North/East Asia and Australia trade, overall capacity is added in large "lumpy" amounts over a very short time period irrespective of the number of consortia or slot chartering arrangements in the trade. In addition, demand uncertainty can be reduced by entering into contractual relationships with shippers, to a limited extent, but there is still that percentage of the trade that is not part of those contractual relationships and the overall trade development, in terms of demand, can change quite rapidly and significantly over a reasonably short timeframe.

37. It is also assumed in the draft report that consortia and slot sharing would continue without the umbrella of Conferences or Discussion Agreements and there is no consideration of the impact of their abolition on consortia and slot sharing arrangements. The ability to discuss overall commodity or specific industry rates as well as surcharges provides an important foundation for the confidence needed to establish and maintain consortia arrangements. SAL challenges the draft finding 3.3 that seeks to reduce concern about "destructive competition" and its possible effect should existing regulatory arrangements be abolished.

38. The report compares this industry with a number of other industries, in particular transport industries and it is mentioned on page 57 that market access for international airlines is established through bilateral Air Service Agreements which establish conditions of entry and behaviour for airlines of the contracting countries. This effectively limits the capacity available but such agreements do not apply in the international liner shipping industry. It is also mentioned that approximately half of the world's air traffic moves in deregulated markets but there is no explanation why air traffic to and from Australia in most air corridors does not move to a totally deregulated market?

39. It would be interesting to debate the level of competition in the US domestic aviation market which is referred to but non-US air carriers are prohibited from operating in that market.

40. SAL believes that contrary to the assertion in the draft report that there are some similarities between road/rail transport and liner shipping, there are more differences in operational characteristics than similarities.

CHAPTER 4 COMPETITION IN THE MARKET FOR LINER SHIPPING

41. SAL does not agree with draft finding 4.2 in the report that "while at the industry level, barriers to entry are high, at the level of individual routes these barriers are comparatively low. Nevertheless, there are substantial costs involved in establishing a liner trade route (especially those associated with assigning a number of vessels, marketing and administration)". This is again a theoretical analysis that does not explain what happens in the real world. An examination of a number of the trade routes to and from Australia would lead to the opposite conclusion in that clearly there are very low barriers to entry and entry costs are not substantial. It is not considered that barriers to entry are high at the industry level.

42. Similarly in finding 4.3 there is the bold statement that exchange of private information on price and quantity among carriers can be a means of enforcing collusive agreements and may result in an anti-competitive detriment. Information exchanged is generally of a broad nature concerning the trade as a whole, or on a commodity basis and this is not mentioned in the report.

43. In the discussion on Conferences, the perception could arise that Conferences control supply. As mentioned above, the old pooling systems no longer apply and it should also be pointed out that Conferences and Discussion Agreements operate in a market which can change dramatically in terms of overall supply of capacity and over which they have no control. Members of Discussion Agreements can discuss supply but individual members or an individual consortium make up their own mind whether to introduce or withdraw capacity.

44. The comment on Discussion Agreements by the US Federal Maritime Commission at the bottom of page 77 is a fair summary of their emergence as the modern type of Conference but it was also acknowledged that, as in the case of Conferences, the ability of Discussion Agreements to influence market rates will rise with its market share. Nevertheless, Discussion Agreements are more open and provide more freedom for individual members to pursue individual pricing strategies then the traditional conference structure.

45. The 1999 review by the PC considered the regulation of Discussion Agreements and as outlined on pages 40 and 41 of the SAL submission, the conclusion was that Discussion Agreements appeared to reduce competitive forces but on closer examination it was acknowledged that prohibition may drive independents to join as full members of existing conferences in some cases and therefore they may be a better alternative as they are a less restrictive form of cooperation. It was also noted that in most shipping trades the market remains reasonability contestable. That conclusion is as valid in 2004 as it was in 1999.

46. Importantly the PC found, at that time, that Discussion Agreements should not be treated differently from other forms of cooperation amongst carriers. Part of the reason for reaching that decision was the difficultly of defining Discussion Agreements in Part X. (Refer to the comments later on in this submission).

CHAPTER 5 ELEMENTS OF PART X

47. Comment has already been made regarding the claim by the PC that registration of all types of Agreements is, for all practical purposes, automatic. Part X is really output focused and it is not the type of Agreement that is so important as it might be with authorisation under Part VII of the Act but rather what activities occur under those Agreements and whether they meet the ongoing public interest test. There is a suggestion on page 86 of the draft report that Agreements may also include any provisions that "would be necessary for the effective operation of the Agreement and of overall benefit to Australian exporters or importers." This means, according to the PC, that there is little effective limit to the anti-competitive provisions that can be included in a conference Agreement. Does this mean that the PC is saying that if an anti-competitive provision was of overall benefit to Australian exporters or importers (irrespective of the benefit or detriment to the carrier) it would breach the net public benefit test by the ACCC?

48. SAL therefore, rejects draft finding 5.1 that there is little limitation placed on provisions that could be included in these Agreements. If they are so permissive as suggested by the PC, then why does so much competition prevail in the international liner shipping market?

49. On page 92 comment is made that agreement is reached in 90% of cases regarding Minimum Service Levels (MSLs) without negotiations being entered into and the inference appears to be drawn that this is some automatic process. It is acknowledged that over time Lines now understand the type of information they have to provide to satisfy the Australian Peak Shippers'

Association's (APSA) MSL requirements both in terms of what has to be covered by the MSLs as well as the background information that has to be provided to satisfy APSA that they meet the minimum standards. For the other 10% of cases additional information was requested and eventually agreement was reached. Whilst technically, agreement does not have to be reached, SAL requests information from the PC on what occasions agreement has not been reached in relation to MSLs and whether such MSLs have subsequently been applied.

50. The ACCC is again quoted on top of page 93 saying that it considers that the negotiation provisions under Part X represent a weakness and provide minimal countervailing power to shippers. Whilst Part X talks about negotiation, there is no obligation on parties to mutually agree on proposals. SAL acknowledges there is no price control in Australia in relation to international liner shipping rates and surcharges and nor should there be. However, research and investigation into the negotiations that have been held between lines and APSA over the years would have found that in most cases negotiations have been successfully concluded or carrier proposals have been amended to go some way to meeting APSA's requirements prior to application. The use of the phrase countervailing power may not be entirely accurate as Part X provides for substantive consultation and the necessary background information is provided in order to ensure all parties are aware of the other parties points of view and importantly service requirements. This does result in a high level of transparency which would clearly be lost under a Part VII authorisation regime.

51. SAL completely rejects the suggestion at the bottom of page 93 that the requirements placed on Part X Agreement registration are essentially technical. In relation to time limits on the exemptions granted, there is the issue of continuous review which has been mentioned previously but also it is anticipated that Part X itself will be reviewed every 5 to 10 years which also places an effective time limit on the general exemptions available. In addition, unlike the comment in draft finding 5.2, there is still provision in Part X for investigation of the important obligations placed on lines to eg. provide adequate, economic and efficient shipping services.

Review and enforcement

52. SAL accepts that it would be appropriate to introduce some penalties into Part X for breaches of processes but for matters such as not meeting the public interest test in Part X and not providing minimum service levels, for example, then deregistration remains an appropriate remedy and it should remain with the Minister for Transport and Regional Services as he is responsible for the administration of Part X. The current provisions on undertakings should also remain.

53. We do agree with the PC that exceptional circumstances are not specified in Part X and SAL would recommend that these provisions be deleted from Part X (refer to Attachment A).

CHAPTER 6 INTERNATIONAL REGULATION OF LINER CARGO SHIPPING

54. As was mentioned previously, the United States does exempt similar activities of Conferences and/or Discussion Agreements as those contained in Part X with the exception of more recent provisions providing for Individual Service Contracts to be kept confidential. The Canadian legislation is similar except that conference freight rates are no longer required to be filed with the Canadian Transport Authority.

55. In relation to the European Union, it is important to draw a distinction between the existing regulations as contained in regulation 4056/86 and the interpretation of that legislation by Directorate IV of the EU Commission and the European courts. It is also important to recognise that the EU has a separate block exemption for consortia which is an important differentiation from Part X.

56. The Commission has generally objected to Discussion Agreements as noted on page 106 of the draft report. The more restrictive conference arrangements are therefore applied in the European trades which accounts for around 20% of Australia's international liner trade. However, the comment is made by the Commission that Discussion Agreements have tended to eliminate effective competition in the trade in which they operate. Yet in the Australian situation there is a lot of competition for Discussion Agreements as set out below.

57. Examples of competition for Discussion Agreements in the Australian trades;

- To North America
  As many as seventeen non-Discussion Agreement shipping lines carry cargo via North East Asia, South Africa or Europe to West Coast and East Coast of North America and together they accounted for about 10-11% of Australian export cargo to that region in 2003/2004.

- To North and East Asia
  A third of the tonnage providers on the major Australia to North and East Asia trades are non-TFA (Discussion Agreement) members.

- To South East Asia
  There are 6 non TFG services carrying cargo to South East Asia.

International conflict of laws

58. SAL does not agree with draft finding 6.3 which says that removal of immunities from competition laws for the liner shipping industry should not give rise to conflict of laws as no jurisdiction actually requires that carriers engage in anti-competitive behaviour. This appears to result from a quote from an OECD paper of 1998 in a paper entitled "Recommendation of Counsel Concerning Effective Action Against Hardcore Cartels". It suggested that this

could well of been taken out of context because as Professor James Crawford of Cambridge University stated in an opinion attached to the original SAL submission "again the discussion is tilted in the direction of the result DG IV apparently seek to achieve – in effect, the lowest common denominator approach and a 'false reversion' to general regulation of conferences under standard competition law principles. I say a false reversion because historically conferences have always required special treatment, and the liner trade has always been treated as raising special issues in all relevant jurisdictions. This is to take a narrow and formalistic view of what amounts to a conflict of laws or regulations. If Asia, Australasia and North America maintain their existing positions – for example on discussion of forward rates – there would be a practical conflict." Professor Crawford is a well recognised international trade lawyer and **SAL would recommend an opinion be sought from the Attorney Generals Department if the PC really believes that no conflict of law or regulations will arise should Australia abolish Part X.**

59. The EU Commission has now released its white paper on the review of regulation 4056/86 which proposes to repeal the substantive provisions of that regulation. The white paper includes an alternative proposal by the European Liner Affair Association which would not include an exemption for freight rate setting but provide a discussion of demand and supply conditions in individual trades, creation of a historical pricing index and agreement on the formulae for the passing through the system surcharges. The ELAA proposed that the latter be the subject of discussion with shipper bodies. In many ways, this is consistent with Discussion Agreements in Australia although the exemption does extend to eg. discussing general rates increases and at times minimum or maximum commodity wide rates.

60. There are many differences between Europe and its engagement in the high volume East-West trades and those involving the North-South trades such as to/from Australia and New Zealand, particularly with the latter trades often requiring more specialised equipment such as refrigerated equipment.

61. Another differentiating factor has been the high level consultation between shipper groups and parties to agreements registered under Part X and the exporter groups have valued this high level of consultation and the information provided in support of relevant negotiations as mentioned earlier.

62. A final point, previously mentioned, is that it is unlikely a final decision will be made in Europe until 2006/7 and it would be unwise for Australia to move in that direction not only prior to that decision being taken but also to assess its impact on the trades to and from Europe over a reasonable period of time, should the "rate setting" exemption be withdrawn in Europe.

CHAPTER 7 EVALUATION OF PART X

63. Reference is again made to Part X providing essentially all Agreements automatic immunity without an evaluation of the benefits and costs which, as commented upon earlier, is a misunderstanding regarding the operation of Part X. The benefits and costs are assessed on an ongoing basis under Part X by

those who are the direct recipients of the services received and generally pay the freight rates and surcharges. There is the public benefit test of whether services continue to be provided on a adequate, economic and efficient basis and if not, there are procedures for review to determine whether a recommendation should be made to the Minister to withdraw the exemption.

64. As mentioned earlier this is not to say that the operation of Part X cannot be improved and Attachment A scopes out the possible outline of a revised Part X which, in the view of SAL members, would provide for a more effective regulatory regime that will continue to facilitate Australia's international liner trade.

65. SAL can agree with draft recommendation 7.1 on what the principal objectives of Part X should be as it emphasises the relationship not only between rates and services but importantly the requirements of international liner shippers to add value to their own products in overseas markets.

66. SAL is surprised that draft finding 7.1 says that Part X restricts competition by limiting the pro-competition regulatory safeguards on the market conduct of ocean carriers. SAL would be interested in what evidence the PC has gathered to support this conclusion and what theoretical modal has possibly been developed to show that abolishing Part X would lead to greater competition with lower rates and higher levels of service then currently prevails under Part X.

Effects of Part X on competition

67. On page 123 of the report it is stated that no registered Agreements apply to liner shipping going to the Middle East but there is a registered agreement covering services between Australia and the Middle East, Gulf and Indian Sub-Continent as set out in the original SAL submission to this inquiry.

68. Consistent with the points raised in this submission, SAL does not agree with draft find 7.2. "Especially in light of recent development effecting the international liner shipping industry, the provision of immunity under Part X, on the presumption that all agreements registered would provide a net public benefit, is a flaw in Part X as currently structured." It is not a flaw because Part X clearly sets out the types of restricted activities that will be allowed a limited exemption from Part IV and there is an ongoing test to ensure that such activities continue to provide a net public benefit. The PC may have evidence to the contrary and if so, this should be clearly set out in the final report.

Countervailing power

69. As mentioned previously, SAL accepts that the description for "countervailing power" has a high threshold test associated with it but as a result of the close consultations and negotiations that are held between the major shipper groups, particularly APSA and AHEA, for example, and carriers there is clear evidence that many of these negotiations and consultations have resulted in a

win-win situation for both parties. There is no assessment of such negotiations in recent years in the draft report.

70. Comment is made at the bottom of page 126 that APSA simply accepts the MSLs offered by carriers in 90% of cases and negotiations do not take place. This is because the information is provided to APSA's satisfaction and the important determinates of such services are clearly set out in basically a standard format eg. provision of adequate equipment in good order and condition. This should not be taken to mean that agreement on MSLs in this respect is unimportant. The Importers Association of Australia has not sought to conduct negotiations on MSLs but they are given plenty of opportunity to do so if they wish.

71. At the top of page 127, it stated that the Minimum Level of Service commitment given by Discussion Agreements is typically only some 60% of that actually provided. This is a misunderstanding because the truth is that they vary from around 55% to 80% of space allocated to particular trades, as a general comment, and it should be noted that Australian exports are generally heavy and absorb available capacity prior to the TEU capacity being reached in the Northbound trades. This is not the case in the inward or Southbound trades. SAL would be happy to discuss this issue further with the Commission but in the meantime detailed below are the actual factors relating to Discussion Agreements operating to and from North and East Asia.

72. Asia–Australia minimum service level – Box 7.3.

SAL cannot reconcile the PC figures here and below is the actual situation.

	2003			2004		
	MLS	Capacity	Total Trade	MLS	Capacity	Total Trade
AADA	456,746	603,250	575,523	456,746	806,000	650,750
TFA	354,875	390,469	337,204	354,875	665,200	370,000
Combined	811,621	993,719	912,727	811,621	1,471,200	1,020,750

MLS as a percentage of:

	2003		2004	
	Capacity %	Total Trade %	Capacity %	Total Trade %
AADA	76	79	56	70
TFA	91	105	53	96
Combined	81	89	55	80

73. The Commission notes that they understand that the negotiations between Conferences and designated shipper bodies under Part X on freight rates typically result in an "open offer or ceiling rates being discussed which are then used in subsequent negotiations between individual shippers and carriers". This is an accurate statement in relation to some commodity groups but more generally the negotiations involve general rate increases if tariff rates are being increased or surcharges applied. SAL questions the investigation by the PC that lead to draft finding 7.3 that;

a. Existing arrangements to promote the countervailing power of Australian exporters and importers do not appear to be working; and

b. the fundamental nature of the markets within which Australian shippers now operate means that the countervailing power that Part X seeks to provide is unlikely to be effective.

74. It is difficult to reconcile these conclusions with the strong support of exporter groups and some importer groups for the continuation of the consultative mechanisms contained in Part X. The draft report does not contain any examples of the results of negotiations over the last few years other than the MSLs which is not accurate as mentioned above.

Review of enforcement processes

75. Reference was made to the ACCC recent investigation of the Asia-Australia Discussion Agreement which concluded that whilst the public benefits claimed by the AADA had not been substantiated (in the ACCC's view) there was no recommendation to deregister it. It is stated that 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. How can this be reconciled with the ability of the ACCC to issue Section 155 Notices which are court enforceable notices requiring the provision of information and how do they reconcile that with the public benefit test within Part X in itself? During that investigation the ACCC did not include in their report any comments on costs and revenues of the service and during the latter part of the investigation there was a significant increase in capacity which showed that market forces were at work. Detailed comments have been provided by SAL to the PC on the ACCC's investigation and it is disappointing that none of those comments have been reflected in the draft report. SAL rejects the draft finding 7.4 that the review and enforcement processes under Part X do not seem to be very effective but does accept the comment that financial penalties could be appropriate for a range of potential breaches in terms of the processes required under Part X.

Balance of benefits and costs

76. Given that the PC has not included in the debate the requirement for adequate, economic and efficient shipping services under Part X which is the public benefit test, we would ask the PC to review its draft recommendation 7.2 that the regulation of liner shipping agreements should be strengthened by adopting a selective approach aimed at allowing only those carrier Agreements which are likely to provide a net public benefit to Australia. A preferable alternative would be to concentrate on the activities that are permitted under Part X that require exemption rather than the Agreements which govern those activities.

CHAPTER 8 ALTERNATIVES TO PART X

77. Draft finding 8.1 suggests that not all existing carrier Agreements may need authorisation under Part VII. SAL would be interested in which Agreements currently registered, in the opinion of the PC, would not require such authorisation.

78. In this section of the draft report, there are quotes from the ACCC submission which suggests that there would be greater certainty if shipping lines were under the Authorisation provisions of Part VII. It is accepted that the ACCC does have difficulty with these investigations under Part X and that the exceptional circumstances issue is one that is a high threshold test for the ACCC to achieve. SAL recommends that a Panel including a representative of the ACCC oversight such investigations which would be chaired by a senior representative of the Department of Transport and Regional Services and a senior representative of the Department of Foreign Affairs and Trade could also be a member of that Panel.

79. The streamlined modification of Part X recommended by SAL therefore, retains a role for the ACCC under Part X but its quite different from the functions given to the ACCC in the last amendments to Part X which came into effect in 2001.

80. Whist it is acknowledged that the authorisation time scale could be reduced to 6 months as a result of Government implementation of some of the recommendations of the Dawson review of the TPA, this is still considered by SAL to be inadequate, particularly if there is then an appeal provision as, for example, happened with the proposed purchase by Qantas of a 22.5% share in Air New Zealand. This can be a lengthy and costly process and definitely uncertain.

81. The application of the authorisation provisions of Part VII have been extensively debated in the last two reviews of Part X and the conclusion has been that it does not provide the same degree of certainty, timeliness or cost effectiveness of the Part X regime. SAL maintains support for Part X and does not believe that the application of Part VII would be an adequate substitute. Subsequently SAL does not support draft finding 8.2 which concludes that authorisation under Part VII would provide a rigorous system for evaluating whether carrier Agreements seeking exemption from Part IV are in the public interest. It is SAL's contention that Part X provides a rigorous system in that it is ongoing and continuous in terms of the application of the pubic benefit test by those using and paying for international liner shipping services.

Transitional authorisation

82. The ACCC has suggested that Agreements registered under Part X should be deemed to be authorised pursuant to the amending Act until they have a chance to review them and decide whether they will allow them to continue or not but this does not take into account new Agreements or major variations to existing Agreements that occur quite regularly.

Would price fixing be authorised?

83. The comment is made in the draft report that the Qantas-British Airways Joint Service Arrangements involves price fixing and has been authorised three times since 1995.

84. There is insufficient detail provided in the draft report to compare that particular authorisation with arrangements that apply in the international liner shipping industry. However, in the past, the predecessor to the ACCC, the Trade Practices Commission stated they would find it extremely difficult to authorise price fixing. It is acknowledged that the implementation of a 6 month time limit for the authorisation process could help reduce concerns about the uncertainty of using Part VII but does not eliminate them, particularly in relation to the appeal procedures. Draft finding 8.8. also suggests that the cost of demonstrating a net public benefit and the uncertainly that the application will be accepted are borne by the carriers proposing the Agreement. This appears to be a misunderstanding of the significant public interest benefits to Australian exporters and to a lesser extent importers that arise from the operation of Part X.

Countervailing powers

85. Reference was made to the submission by the WA Shippers Council and the Chamber of Commerce and Industry of Western Australia (CCIWA). It is surprising that some exporters in WA did not see value in the continuation of Part X given that exporters in other States do so. The Importers Association of Australia does not support the continuation of Part X but they have no funds and it is questionable who they actually represent. The larger importers, admittedly, negotiate their own arrangements and it is interesting that the Australian Federation of International Forwarders which are heavily involved in the import trade support the retention of Part X because of what they regard as important countervailing powers for shippers as does most shipper groups covering both exports and imports such as the Australian International Movers Association.

86. Nevertheless, it is acknowledged that importers can feel frustrated because they do not often negotiate the freight rates which are undertaken by exporters overseas similar to exporters negotiating such rates in Australia in our outwards trades. This particular issue is not going to be resolved whether Part X is retained or abolished as it is a function of the actual market.

87. The comment is made at the top page 153 that only around 20% of cargoes are carried under collectively bargained freight rates. “Yet Part X requires all carrier Agreements to negotiate with designated shipper bodies even when the negotiated outcomes are largely irrelevant to the actual rate paid, or level of service experienced by shippers.”

88. Again the PC clearly misunderstands the process. The negotiations with major shipper bodies can set an upper limit for rates in terms of the contract negotiated rates and this is considered to be an important point by the

members of the Agreements registered under Part X. It also fails to appreciate the importance of negotiated surcharges which provide a degree of stability that clearly market determined freight rates do not. What has evolved over the last 10 years or so is the diminution of common tariff rates in Australia in favour of a situation where negotiating across the board rate increases and surcharges are negotiated.

89. It is accepted, for the above reasons that the countervailing powers for importers over inward freight rates under eligible Australian contracts which was only introduced in the 2000 amendments have been largely ineffective. Nevertheless, there is a role for the Association to negotiate land based charges in Australia and MSLs and this should be continued under Part X.

The alternatives to achieve the rationale of Part X

90. A surprising comment is made at the bottom of page 154 that Agreements that focus on freight rate cooperation (Conferences and Discussion Agreements) are not necessary for the efficient provision of liner cargo shipping services. SAL would be interested in what evidence or investigation was carried out by the PC to arrive at that conclusion. Many of these Agreements provide the confidence that underpin the cooperative and operational agreements that sit under those umbrella agreements. They provide that necessary means of confidence that facilitate the ongoing operation of eg. consortia agreements. More importantly, providing even a degree of stability of revenue assists carriers in meeting the high service level requirements demanded by international liner exporters and importers.

Jurisdictional issues

91. This has been commented upon previously in this submission but it is mentioned in this part of the draft report that the ACCC successfully prosecuted an international cartel of foreign firms that supplied vitamins to Australia. The question must be asked did those firms commit a breach of the competition laws in the countries in which they are domiciled. Almost certainly the answer to that question would be in the affirmative. In the case of international liner shipping you have a situation where the laws in our major trading partners allow certain behaviour that, if Part X was withdrawn in Australia, and there was no authorisation granted, would be illegal. This is a very different situation to anti-trust authorities cooperating on breaches of competition laws in various countries. The PC has to ask the question why would enforcement bodies in other countries cooperate with an investigation in Australia when the activity being investigated is quite legal in their own countries?

92. For all the reasons outlined in this submission, SAL completely rejects draft recommendation 8.1 that Part X be repealed and that the liner cargo shipping industry be subject to the general provisions of the Trade Practices Act.

CHAPTER 9 OPTIONS FOR MODIFYING PART X

93. SAL believes that this is a productive area for debate with the PC. In essence, SAL proposes that there be substantive amendments to make Part X more effective in achieving its goal of assisting Australian international liner exporters and importers and meeting their requirements for adequate, economic and efficient shipping services.

94. To achieve this requires exemption for certain price setting activities as well as discussions on market supply and demand conditions thus encouraging shipping lines to enter into consortia, slot chartering and vessel sharing agreements and enhance productivity and efficiency. Another important area to maintain is the extensive consultative mechanism set out in Part X which encourages international liner operator and shippers to resolve issues via negotiations.

95. Many of the points raised in the initial discussion under this heading have already been covered in this submission and will not be repeated here. However, in the second paragraph on page 164, the comment is made by the PC that member consortia that supply and manage the shipping services would be unaffected if the overarching Discussion Agreements ceased to operate. We reiterate that in our view it cannot be assumed automatically, that the operation of consortia would be the same under a regime of no Part X compared to that which currently applies because the framework within which the current regulatory regime applies would be very different if the full force of Part IV applied. There is the difficulty of authorisation but there would be that lack of confidence that even GRIs could not be discussed under umbrella agreements which could well impact on the operation of these technical agreements. SAL does not accept the unsubstantiated conclusion by the PC that there would be minimal disruption with the proposed transition arrangements.

96. Subsequently SAL rejects the draft recommendation 9.1 that Agreements that contain price fixing or setting of non binding guidance on freight rates should not be registered.

Discussion Agreements

97. This issue has been raised in a number of areas in the draft report and without repeating all the points made earlier by SAL, we note that APSA argued strongly before the previous review in 1999 that Discussion Agreements should not be allowed and this was rejected by the PC for the reasons outlined earlier in the submission. Whilst it is acknowledged that there has been an increase in the number of Discussion Agreements since 1999, the fundamental problems with them were well aired and discussed during the previous review and in many ways they are less anti-competitive, if that is a concern of the PC, than conference Agreements which have binding freight rates.

98. SAL accepts the problems that APSA raises with the regard to the lack of commitment by Discussion Agreement members where an agreement is reached with a designated shipper body and seeks to remove that problem by ensuring that Agreements registered under Part X that contain any price fixing arrangements, including Discussion Agreements, would bind the parties to the arrangement if agreement is reached. If agreement was not reached, reference could be made to the Panel to consider the cases being put forward by individual parties to determine if they could facilitate an agreement or, if more fundamental issues are apparent, a reference could be made to the Minister to refer the matter for report by the ACCC.

99. One page 167, the PC states that there is nothing to indicate that the level of service is inferior, or the level of freight rates higher on routes to and from the EU where Discussion Agreements do not receive exemptions from anti-trust law. SAL would be interested in what investigation was carried out in relation to other trades where Discussion Agreements are allowed to determine the validity of this assertion. It is noted that the Department of Transport and Regional Services expressed some reservations about the practicalities of excluding Discussion Agreements. The Department also sets out in box 9.1 some possible definitions for Conference Agreements and Discussion Agreements but they do not clearly differentiate the different institutional arrangements eg. a conference must involve some degree of rate setting to be a conference! In effect, this discussion shows how difficult it is to clearly define Discussion Agreements and therefore differentiate them from other types of arrangements. SAL rejects draft recommendation 9.2 that if Part X is retained, a separate option is to exclude Discussion Agreements from eligibility for registration under Part X because the PC has not made out a clear case for such an exclusion.

Individual service contracts

100. It is suggested at the bottom of page 173 that traditional Conference Agreements would be a problem for registration under Part X if Individual Service Contracts were made confidential but as pointed out earlier in this submission, a number of them, including the Australia to Europe Liner Association which is a Conference Agreement, provides for such confidential service contracts already. SAL agrees with the proposed amendments to Part X providing for the confidentiality for these types of agreements.

Differentiating between agreements on the basis of market share

101. SAL supports the reasoning of the PC in this section and would add that the issue of transhipment makes calculation of market share exceptionally difficult in the international liner shipping industry and agrees with the Commission's conclusion that on balance, introducing a market share criteria would involve too great a change to current arrangements and would involve a greater level of ongoing compliance and administration costs. (Draft finding 9.1)

Other modifications to Part X

102. As set out in the original submission there are only a couple of surcharges collectively agreed under Part X and Terminal Handling Charges essentially involve price itemisation but there are transparency benefits for making them separate because of the pressure they apply to a strong stevedoring duopoly in Australia. Nevertheless they remain competitive because it is the through rate that is the competitive rate between various shipowner or shipowner groups. The issue of Australian dollar freight rates or US dollar freight rates which is the common tariff currency worldwide is an issue best left, as the PC suggests, to commercial negotiation.

Making Agreements between conferences and shipper bodies binding

103. It is difficult to follow the PC argument on page 185, particularly if one compares a Discussion Agreement with a Conference Agreement. How in that respect could the provision of binding provisions in Discussion Agreements be used to introduce, legitimise and protect anti-competitive practices? This would only arise in the case where it is in the direct interests of the exporters and or importers involved. This is a fundamental problem with the preferred option of the PC to abolish Part X.

104. It is also suggested that the introduction of binding conditions raises the potential for conflict of laws in other jurisdictions. It is not being suggested that Part X would require that any agreement reached between the parties would be binding, but what is being suggested is that for registration purposes, that there would be an additional criteria in Part X that Agreements can only be registered if they had a provision that required the parties to adhere to any agreements reached with a designated shipper body.

105. The PC also repeats the point that a conflict of laws would only arise if one jurisdiction requires something that another jurisdiction prohibits. SAL challenges this interpretation and would be interested in a view by the Attorney Generals Department regarding that point.

106. In addition, there would be no potential conflict with the ability of individual shippers to negotiate directly with individual carriers. The agreements, as mentioned by the Australian Horticultural Exporters Association are usually maximum rates for across the board increases that are seen as a maximum and not a minimum. None of these agreements in over a decade have inhibited the ability of individual shippers to negotiate directly with individual carriers.

107. This binding provision would only apply to Discussion Agreements which, in that part of the Agreement, would effectively turn it into a Conference Agreement and it would not inhibit in anyway market rates being negotiated between individual shippers and individual carriers.

Code of Practice for negotiations

108. SAL accepts the PC conclusion such a Code developed by the parties should not be enshrined in legislation. However, SAL is prepared to enter into negotiations for the development of a Code of Practice if that could assist negotiations and consultation. In fact, SAL would propose that quarterly meetings with major shipper bodies outside the adversarial climate of negotiations could well be productive in achieving mutual interests and the overall objective of Part X to promote the interests of exporters and importers while still recognising the legitimate interests of carriers in the provision of the required shipping services. SAL believes that the authorised Officer under Part X performs a valuable role and does not accept that there is any conflict of interest with the Department being involved as this is the role the Department has in implementing the Government's policy in relation to Part X. Similarities could be drawn with the Office of Transport Security where the Department is a regulator and also policy advisor to Government on transport security and it is not considered there is any conflict in this area. SAL also rejects the PC conclusion that there should be no specific requirement for carriers to justify price increases in their discussions with designated shipper bodies. This has been a fundamental point in Part X since its inception in 1966 and when requested parties to agreements registered under Part X have provided information reasonably necessary for freight rate negotiations.

Conclusion on other modifications

109. At the bottom of page 191, the report states that countervailing power relies on collective negotiation and is antithical to the promotion of individual contracts and the development of a competitive market. SAL rejects this conclusion in that there is no evidence presented to support that proposition and the fact that there has been a reasonable degree of collective negotiation and yet individual contracts make up around 80% of arrangements that currently apply in many trades would tend to undermine the veracity of that statement.

Improvement in enforcement

110. SAL rejects the first bullet point that there is little incentive for carriers to provide the necessary information if it were to lead to an adverse finding by the ACCC.

111. SAL accepts some increase in financial penalties under Part X and supports the continued need for undertakings to possibly avoid deregistration because again this could well be in the interests of the exporters or importers involved.

112. It is appreciated that Ministerial discretion in terms of the imposition of penalties is unusual but the Minister should be involved in the issue of deregistration as it directly involves the interests and laws of other countries as well as Australia's international trading arrangements. However, SAL would be prepared to consider a proposition that the Secretary of the Department of Transport and Regional Services or his delegate be given the power to levy

financial penalties for breaches of specified Part X procedures as long as the ground rules are clearly outlined and understood and that an appeal mechanism is put in place.

Modifying the enforcement process

113. Once again, the report refers to the ACCC investigation of AADA and omits the armoury available to the ACCC to force those being investigated to provide the information necessary to complete their investigation. The Commission accepts the ACCC point that parties being reviewed should be required to demonstrate that conduct or proposed conduct has resulted in or is likely to result in a benefit to the public that outweighs any anti-competitive detriment resulting in any lessening of competition. Whilst carriers fully accept their responsibility to argue their case including the costs and benefits of the activities under investigation, this comment by the PC (and the ACCC) completely ignores the views of the traders ie. Australia's exporters and/or importers. They should have a direct say in determining what they consider is the benefit to the public or to them from the particular activities being investigated.

Initiating a review and role of "Material Change in Circumstances"

114. Whilst SAL acknowledges the initial logic to replace the "exceptional circumstances" provision in Part X with the "material change in circumstances" in Part VII of the Act, a more logical step is to remove the "exceptional circumstances" provisions from Part X as a whole as the ACCC, if it does remain the main investigator under Part X, can apply the major public benefit test which is the provision of adequate, economic and efficient shipping services.

115. All reviews by the ACCC should be initiated by the Minister but before reference to the ACCC, SAL would strongly argue for a review by the proposed Panel to determine if such a major investigation is warranted on the facts of individual cases.

Ministerial discretion

116. SAL is totally opposed to the ACCC assuming the powers of the Minister responsible for shipping to revoke exemptions provided for under Part X, where this is justified on "so called" public interest grounds.

117. As SAL has already stated, the Department has a role and responsibility as both regulator and policy adviser to the Minister on international liner shipping arrangements.

118. The Minister is clearly accountable to Parliament in relation to the operation of Part X and to ensuring that adequate, economic and efficient services are provided to Australian shippers.

119. In addition, removing any exemption would put Australia at odds with the regulatory regimes currently applied by all of Australia's major trading partners where competition law exists and such an important and serious move requires Ministerial consideration.

120. In the 1966 legislation, the Governor-General was responsible for making decisions in relation to withdrawing the exemption and this could again be considered if there was a problem with the Minister for Transport and Regional Services undertaking that task. However SAL does not advocate that approach but rather recommends that the Minister retain his role which has been so effective since the 1989 amendments.

Amending penalties

121. SAL has already acknowledged the need for financial penalties where appropriate in Part X in terms of adhering to the procedures contained in that Part short of withdrawing the exemption.

122. In the section on page 199, the draft report notes that particularly with the rise of Discussion Agreements on practically all routes, and these Agreements now include both Conference and Non-Conference carriers, the opportunities for shippers to take their business elsewhere is limited. This is clearly inaccurate as outlined on page 14 of this submission and again no evidence is presented by the PC and how they arrived at that conclusion.

123. SAL accepts the conclusion by the PC that monetary penalties should not, however, be used for fundamentally anti-competitive behaviour which threatens the balance between anti-competitive effect and anti-competitive public benefit and in that case deregistration could be appropriate.

The role of undertakings

124. The PC views here appear to be very restrictive and narrow regarding the potential role of undertakings. It can be expected that the Minister seeking undertakings from parties to the Agreement would indeed be a serious matter and would only be accepted if it would provide net public benefits in the future.

125. Part X is not simply another form of authorisation. Part X seeks to apply a balance between the interests of importers and exporters and those of carriers to assist in the facilitation of Australia's international trade. The Australian Government and those of many of its trading partners have accepted that to achieve this objective that some would see as anti-competitive behaviour as mentioned earlier in this submission is required but a great deal of competition still prevails under Part X.

126. It is therefore appropriate for there to be undertakings to prevent the continuation of any behaviour considered to exceed the grounds of reasonableness under Part X but they do not perform the same function as eg. breaching an authorisation provision under Part VII. SAL accepts the PC

conclusion that undertakings can remain as a tool in the enforcement regime, providing parties to an Agreement the option of avoiding the final penalty of deregistration through modifying future behaviour, but not as a means of avoiding financial penalties for past behaviour regarding procedures, as long as the criteria for the application of these penalties is clearly spelt out in Part X.

127. In light of the above comments, SAL can only accept those parts of draft recommendation 9.4 relating to financial penalties and the use of undertakings.

Scope of Major Modifications to existing Part X of the Australian Trade Practices Act, 1974 (Cth)

Proposed by Shipping Australia Limited

Given that Part X had two major amendments over the years, it is recommended that there be a complete review of the structure of Part X to streamline its operation and increase its effectiveness along the lines of the following:

Division 1 – Preliminary Section 10.01, the principal objects of the Part could be amended to conform with draft recommendation 7.1 by the Productivity Commission (PC) to:

a. Facilitate efficient coordination and joint provision of liner cargo shipping services within a pro-competition framework; and

b. assist Australian exporters and importers to have access to liner cargo shipping services of adequate frequency, geographical coverage and reliability at freight rates that are internationally competitive.

It is considered that Section 10.01(2) should remain as it emphasises the intention of Parliament regarding how these principal objects should be achieved.

There would be a number of consequential amendments to Part X arising from these modifications including the definitions as set out in Section 10.02. If a Section is not commented upon, it should be assumed that it should remain in Part X.

Division 3 – Minimum Standards for Conference Agreements.

Section 10.06(2) is a very general requirement that an outwards Conference Agreement must expressly permit any party to the Agreement to withdraw from the Agreement on reasonable notice without penalty. This has caused difficulties in interpretation. What is reasonable notice for the purposes of this Section must depend on the nature and intended duration of the Agreement in question and should be a matter on which the parties have some flexibility to tailor their arrangements, having regard to the need to create a stable environment for the commitment of large amounts of capital.

It is not proposed that there be any amendment to Section 10.07 regarding Minimum Levels of Service.

Section 10.08 provides that Conference Agreements may only include only certain restrictive trade practices provisions. This would be an appropriate place to include a provision that;

a. Agreements cannot preclude the entering into of confidential individual service contracts by parties to the Agreements;

b. Such individual service contracts, must remain confidential to the parties involved and

c. any Agreement that includes price setting in any form, must contain clauses specifying that the parties agree to adhere to any agreement with shipper bodies designated for negotiations by the Registrar of Liner Shipping.

Section 10.08(2) effectively restricts the operation of Agreements that permit or require the practice of exclusive dealing (within the meaning of Section 47). This was linked to Discussion Agreements in exceptional circumstances and should be deleted as it is proposed such Sections should be deleted to reinforce the importance of applying the major public benefit test of Part X eg. contained in Section 10.45(1)(a)(iv).

There is also an anomaly in Part X where negotiations by the IAA are restricted to eligible Australian contracts but no such restriction applies to an investigation by the ACCC into an inwards trade.

Division 5 – Exemptions from Certain Restrictive Trade Practice Prohibitions

Section 10.14 regarding exemptions applying to certain activities should remain. But Section 10.15 (1) and (2) relate to when exemptions commence to apply in relation to registered Conference Agreements. These Sections should be deleted as it is important to speed up the registration process for those activities and the current 30 day waiting period after final registration serves no practical purpose. It is proposed that the Registrar be given 7 calendar days to confirm that the proposed Agreement conforms with the requirements of Part X and then 14 calendar days should be provided for negotiations of Minimum Service Levels (MSLs), following which the Agreement should be registered with the exemption having immediate effect following the day of final registration, assuming all registration requirements had been met.

Sub Division B – Exemptions Relating to Loyalty Agreements

Section 10.21 – Exemptions cease to apply in relation to a shipper at the shipper's option

It is suggested that this section be re-examined in the light of equity and fairness where a shipper has voluntarily entered into a contract with the whole Conference or a group of shipowners in good faith, then all parties should be allowed to participate and should be required to observe normal contract law.

Division 6 – Registration of Conference Agreements

As previously advocated, it is recommended that this Division be substantially amended to simply provide for a registration process that involves 7 calendar days for checking that the proposed Agreement conforms with the requirements of Part X

and then 14 calendar days for the negotiation of Minimum Service Levels which would then result in registration and exemptions would apply from the day after the date the agreement is registered. As previously advised, any subsequent concerns can be conveyed to the proposed Panel for enquiry and report. There is no problem with a copy of the Conference Agreement to be given to the designated peak shipper body or those Sections of the Division concerned with the filing of the application etc. Similarly, Section 10.29 regarding negotiations of Minimum Levels of Shipping Services would apply after the expiry of the initial 7 day period.

Sub Division C – Confidentiality requests continue to apply

Section 10.39 regarding an application also being made for registration of varying Conference Agreements should remain with the required consequential amendment.

Section 10.40 regarding notification of "happening of effecting events" prior to final registration etc and Section 10.43 that parties to registered Conference Agreements notify "happening of effecting events" etc should be substantially modified.

It has never been clear what "the happening of an event by otherwise then by a varying Conference Agreement" actually means given the dynamic nature of the industry and it is strongly recommended that these provisions be withdrawn or actual "affecting events" be spelt out even in a generalised fashion such as "affecting events" only involve;

a. Change of name to a party to an Agreement

b. The change of a port of call in Minimum Service Levels from direct to indirect or visa versa

c. Introduction of vessels by the parties to an Agreement that results in a substantial (eg. 20% or over) increase in capacity offered by parties to the Agreement.

Division 7 – Obligations of Ocean Carriers in Relation to Registered Conference Agreements

Section 10.41 should be amended to;

a. Delete "Eligible Australian Contracts" as this has made no discernable difference to the Peak Importers Association of Australia (IAA) as these arrangements are effectively made overseas and there has been no case brought to the IAA since this Section was introduced in the 2000 Amending Bill. They tend to affect larger importers that do not seek the assistance of the IAA but importantly it does reflect the requirements of the exporting country to regulate their outwards trades although clearly a number of countries claim jurisdiction on both the outwards and inwards trades.

b. The definition of "negotiable shipping arrangements" should be amended to make it clear that it only applies to freight rates and surcharges etc that are

applied by all parties to the Agreement ie. not to bind or influence service contracts between an individual shipper and an individual carrier.

Division 8 – Powers of the Minister in Relation to Registered Conference Agreements

This is another area that requires substantial amendment and in particular Section 10.45 which sets out the circumstances in which the Minister exercises his power in relation to registered Conference Agreements.

The Minister's powers should be restricted to those areas where the withdrawal of the exemption is the appropriate penalty as suggested by the PC which would include application of the public benefit test regarding efficient, economical and adequate services which is contained in this Section as well as failure to negotiate when reasonably requested by a shipper body designated for those purposes. This will also include failure to negotiate Minimum Levels of Shipping Services. However, if the application of Australian law does not apply to an outwards Conference Agreement then the Agreement should not be registered.

The following could incur a financial penalty;

- Failure to refer to Minimum Levels of Service in the Agreement itself
- Failure to notify "happening of effecting events" (as outlined above) and if retained
- False and misleading statements
- Failure to provide information reasonably necessary for negotiations by either party to the negotiations

All these penalties would be subject to appeal to the Administrative Appeals Tribunal. Any breach of an undertaking should result in withdrawal of the exemption. It is suggested that the prevention of or hindrance of an Australian flag shipping operator engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable could be withdrawn. Alternatively, if there are good reasons to retain this provision, then SAL would not object.

Sub-Section 10.45(3) sets out what could be considered exceptional circumstances and it is recommended that these provisions be withdrawn and that the sole public benefit test be the provision of adequate, economic and efficient shipping services as set out in Section 10.45(1)(a)(iv). If the ACCC is conducting an investigation, then it should focus on that major public benefit test.

This Section of Part X should also include Sections relating to the referral to a Panel prior to the Minister taking action and/or subsequent investigation by the ACCC for report to the Minister. Section 10.48 regarding investigation and report by the Commission on its own initiative on application by an effected person should be withdrawn given the steps of referral to the Panel which would be chaired by a senior officer of the Department of Transport and Regional Services and include as

members, senior officers of the ACCC and the Department of Foreign Affairs and Trade. The Minister would still have the power to refer a matter for report by the ACCC if the Minister so decided.

Division 9 – Obligations of the Non-Conference Ocean Carriers with Substantial Market Power could be withdrawn as these provisions have not been used since their basic introduction in 1989. Questions of market power raise the issue of trade share and the PC correctly points out that this is difficult to determine and would impose a serious administrative burden under Part X.

Division 10 in relation to powers of the Minister Concerning Non-Conference Ocean Carriers with Substantial Market Powers should also be withdrawn for the same reasons.

Division 11 – Unfair Pricing Practices could also be withdrawn as it has also not been used since its enactment in 1989 and it would be actually quite difficult to implement.

Other Provisions

Some anomalies have arisen in Part X as amended in 2000, for example parties to inwards Agreements are required to negotiate collectively agreed land based charges with the IAA but the peak exporter body requires carriers in the outwards trades to negotiate charges such as Terminal Handling Charges at destinations outside Australia. Designated shipper bodies should only be empowered to negotiate land based charges in Australia and charges at destination should be considered to remain under the regulatory regimes of those other countries.