Australian Government

Department of Transport and Regional Services

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SUPPLEMENTARY SUBMISSION

to the

Productivity Commission Review of Part X

of the

TRADE PRACTICES ACT 1974

The views expressed in this submission are those of the Department and do not necessarily reflect those of the Minister for Transport and Regional Services or the Australian Government.

December 2004

CONTENTS

KEY POINTS

RECOMMENDATION TO REPEAL PART X

The Department is concerned that the Commission's draft preferred option, to repeal Part X and rely on authorisation under Part VII of the Trade Practices Act, ignores the compelling case expressed in the submissions made by most Australian shippers to the Commission, and risks adverse impacts on liner services for our exporters and importers.

The Department considers that such a regime change, if implemented at this time, would be premature, and would put Australia's liner shipping regime out of line with the specialist liner cargo shipping regimes of our major trading partners. We are not aware of any country that applies its mainstream domestic competition policy regime to international liner cargo shipping.

The Commission received submissions from significant shipper interests in favour of retaining Part X with appropriate modifications, and the Department considers that there continues to be a close alignment between the interests of Australian shippers and the national interest. Participants in the review who supported Part X include BlueScope Steel (formerly BHP), the Australian Peak Shippers Association, the Australian Meat Industry Council, the Australian Horticultural Exporters Association, the Wool Commodity Group, Australian Cotton Shippers Association, SPC Ardmona, the Australian Federation of International Forwarders, the Australian International Movers Association, the South Australian Shipping Users' Group, and the Tasmanian Freight Logistics Council.

As the Commission is concerned that there should be an up-front assessment of public benefit of liner agreements, the Department would suggest that Australian shippers, through the relevant peak shipper body, should be given the right of veto over the registration of agreements. As the Commission in 1999 found that the national interest was aligned with shipper interests in this area, such a veto would ensure that only agreements which shippers considered in their interests would be registered, rather than the assessment being made by the ACCC.

RECOMMENDATION TO RETAIN AND AMEND PART X

The Department considers that the preferred option is to modify Part X in a way that meets the concerns of shippers who pressed for an early review. The Department considers that a modified Part X should be retained as long as most Australian shippers think it is in their best interests, given the alignment between shipper interests and the national interest.

Exclusion of pricing provisions from exemptions

Recommendation 9.1, which proposes removing provisions for collective agreements on freight rates from the scope of Part X exemptions, is probably premature. Unless such a change has strong shipper support (and it was not evident in most submissions by shippers), the Department considers that Australia should not consider such a change until it is adopted by its major trading partners. There is a risk that agreements could be run from offshore if Australia's liner regime was excessively restrictive compared to those of our major trading partners and the end result could be that Australian shippers would lose the negotiating rights they have under Part X.

Other than the EU, which is showing definite signs of making this change in the foreseeable future, our major trading partners have not as yet indicated they are moving in this direction. With regard to likely EU developments, removal of the current block exemption for price-fixing conferences would still see the block exemption maintained for non-price-fixing consortia up to

a specified market share. Also, it is possible that the current conference block exemption will be replaced by an alternative EU legal instrument for the liner industry.

Exclusion of discussion agreements from exemptions
The Department notes that most shippers favour the second option to exclude discussion agreements (the primary cause of the call by shippers for the review to be brought forward) from Part X exemptions. The Department considers that lines would be able to operate satisfactorily under more traditional forms of conference agreement. However, the Department is concerned that there is some risk that discussion agreements might operate from overseas jurisdictions, with Australian shippers not having the right to call the parties to the negotiating table as at present under Part X. Nevertheless, the views of Australian shippers should be paramount on this issue.

Provision for confidential contracting with individual lines in conferences
Recommendation 9.3 proposes confidential contracts between individual members of a conference and shippers, and also prohibiting disclosure by one carrier to another of the terms of an individual service contract, an approach similar to the US Ocean Shipping Reform Act 1998, which has proved to be very successful in overcoming previous objections to the US's anti-trust immunities for liner shipping. This feature could usefully be added to Part X.

Reversal of the burden of proof
Recommendation 9.4 proposes a major and radical change by reversing the onus of proof in respect of reviews of shipper complaints - the onus would be on the members of the conference under review to demonstrate that there is a net public benefit from their conduct or proposed conduct. In its submission, the Department suggested that any such reversal of the burden of proof should be restricted to exceptional circumstances cases referred by the Minister. We note that the US Ocean Shipping Reform Act leaves the onus of proof of unreasonable conduct by conference lines on the Federal Maritime Commission (the US maritime competition regulator).

Replacement of "exceptional circumstances" test with "material change of circumstances" test
The Department considers that the current exceptional circumstances test is preferable to the proposed material change in circumstances test as the test of when the ACCC itself may initiate an investigation and report to the Minister. The material change in circumstances test could introduce a high level of uncertainty into the operation of registered agreements, as liner shipping is a dynamic industry where circumstances can change quickly as changes in national and world economic conditions, changes in currency relativities etc. affec trade flows.

Registration of agreements
The Commission has been critical of the registration process for conference agreements, which it alleges is, to all practical purposes, automatic. The Department does not agree (registration is not infrequently held up until the application is corrected or the agreement modified to meet minimum standards), but does consider that the registration process can be strengthened. The Department proposes that all registrations should be subject to veto by the appropriate peak shipper body, which would amount to an up-front public benefit test for agreements.

1. RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT

Having considered the views of stakeholders, expressed both in submissions to the Commission and the views expressed at the Commission's public hearings, and taking account of other stakeholder views, the Department offers further responses to the draft recommendations and findings of the Commission.

1.1 RESPONSE TO PRODUCTIVITY COMMISSION RECOMMENDATIONS

DRAFT RECOMMENDATION 7.1

The Commission considers 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.*

The Department considers this is a reasonable proposal. There is now very little Australian-flag involvement in international liner cargo shipping, and it seems no longer appropriate for protection of the interests of Australian shipping to be a principle objective. The provisions in s10.45 concerning Australian-flag operators should remain, however.

DRAFT RECOMMENDATION 7.2

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.

The Department notes that, until the advent of discussion agreements, the approach currently adopted in Part X, of giving all types of agreement "the benefit of the doubt" until shipper complaint and ACCC investigation proves otherwise, had proved satisfactory to Australian shippers whom Part X is intended to benefit. This was reflected at previous reviews by general shipper support for the retention of Part X, and by continued shipper support for Part X modified to exclude discussion agreements.

Rather than adopting a case by case approach to all agreements, the Department considers that such an approach should only apply to discussion agreements, an approach that would be supported by shippers generally. In reaching this conclusion, the Department notes, however, that precluding discussion agreements from receiving exemptions might result in such agreements being operated from overseas jurisdictions that still permit them (eg the US or Japan), so that the end result might be that Australian shippers lose their negotiating rights under Part X.

DRAFT RECOMMENDATION 8.1

Part X be repealed and the liner cargo shipping industry be subject to the general provisions of the Trade Practices Act. However, transitional arrangements should be introduced, which provide interim authorisation for existing Part X agreements and prioritise the review of these agreements according to their risk of anticompetitive detriment.

The Department does not support this recommendation, and notes that shippers who sought to have the scheduled 2005 review of Part X brought forward to 2004 did not seek the repeal of Part X. They sought to have discussion agreements excluded from registration under Part X.

Significant shipper interests made submissions to the Commission in favour of retaining Part X with appropriate modifications. These include BlueScope Steel (formerly BHP), Australian Peak Shippers Association, the Australian Meat Industry Council, the Australian Horticultural Exporters Association, the Wool Commodity Group, Australian Cotton Shippers Association, SPC Ardmona, the Australian Federation of International Forwarders, the Australian International Movers Association, the South Australian Shipping Users' Group, and the Tasmanian Freight Logistics Council.

Shipper views are especially noteworthy because shippers are affected by the operation of Part X, and if there were clear benefits from abolition of Part X it could have been anticipated that this would be reflected in shipper views generally. Australian shippers will bear the risks of a premature change of liner regime by Australia. However, the Commission appears to substantially discount the views of most Australian shippers, especially those of our exporters.

The Department is concerned that repealing Part X carries risks for Australian shippers in terms of the possible adverse impact such a change could have on shippers' ability to negotiate with carriers and on the standard of services, given that conferences would still be legal in all overseas jurisdictions (or, depending on timing, all bar the EU).

Repeal also would put Australia's liner shipping regime out of line with arrangements currently applied by Australia's major trading partners (eg. USA, EU, Japan, Korea and China). The Department notes that the Department of Foreign Affairs and Trade's submission also tended to a cautious approach.

DRAFT RECOMMENDATION 9.1

If Part X is retained, one option is to exclude from eligibility for registration under Part X, agreements that contain provisions:

- *for the fixing or other regulation of freight rates;*
- *for the setting of non-binding guidance on freight rates;*
- *for freight rates to be discussed between members; or*
- *that seek to limit the maximum level of capacity on offer.*

The Department considers excluding pricing and capacity limitation clauses from exemption under Part X is also probably too big a change at this stage, given that our major trading partners still permit them (and while this has been bruited in a secretariat paper from the OECD, only the EU has shown signs of moving against such provisions).

Unless such a change has strong shipper support (and it was not evident in most shipper initial submissions), the Department considers that Australia should not proceed with such a change unless it is also adopted by its major trading partners. The same risk mentioned in connection with discussion agreements again applies, namely that agreements could be run from offshore if Australia's liner regime was excessively restrictive compared to those of our major trading partners, and Australian shippers would lose the negotiating rights they have under Part X.

Shippers have indicated to the Department that, until the advent of discussion agreements, they had been able to do deals with the conferences. It needs to be remembered that quality and stability of liner services is often as important to shippers as the level of freight rates. Stability and predictability of freight costs is also important for shippers, and there would seem to be a risk that the freight rate cycle could become more volatile if pricing provisions were excluded from exemption.

The Commission has noted that it could find no evidence to uphold arguments concerning destructive competition. However, even with liner pricing agreements in place a freight rate cycle exists, and at the bottom of the cycle freight rates often reach unsustainably low levels as lines compete for relatively scare cargo. Liner agreement pricing provisions probably act as a constraint on this effect, which if unchecked could affect service levels.

The Department notes that removal of pricing exemptions would mean that conference members could not discuss or negotiate freight rates or surcharges with shippers except on an individual basis, and hence in the event recommendation 9.1 is adopted, it would be desirable also to adopt recommendation 9.3. It would be a matter for consideration whether Part X as could properly place any positive obligations (as opposed to removing any impediments) on individual carriers (other those that have been declared as non-conference carriers with substantial market power) to negotiate prices with shippers.

Part X contains provisions placing certain obligations on a carrier that has been declared as a non-conference carrier with substantial market power. These obligations parallel those placed on conference members. In the event recommendation 9.1 is adopted, these provisions could be modified to apply to any individual carrier that has been declared to have market power. The Department notes that section 10.04 of Part X provides that, in relation to section 46 [*Misuse of market power*] of the TPA, if parties to a conference agreement together have a substantial degree of market power, then each party is taken to have a substantial degree of market power. This approach could perhaps be extended to any circumstances where the ACCC finds the parties to an agreement collectively exercise a substantial degree of market power, although if pricing and route capacity provisions are excluded from exemptions, such an ACCC finding might be rare.

DRAFT RECOMMENDATION 9.2

If Part X is retained, a second option is to exclude discussion agreements from eligibility for registration under Part X.

Overall, the Department considers this option preferable, at this stage, to the option of excluding all price and route capacity provisions from exemption. The views of shippers should be paramount on this recommendation.

Discussion agreements were the catalyst for shippers calling for the scheduled 2005 review of Part X to be brought forward to 2004. Overwhelmingly, shippers favour the exclusion of discussion agreements from the exemptions provided by Part X.

Although the US regime allows discussion agreements, and they operate in many other world liner trades other than to/from the EU (which does not allow them), the Department considers that lines would be able to operate satisfactorily under more traditional forms of conference agreement.

However, there is some risk that discussion agreements might operate from overseas jurisdictions, with Australian shippers not having the right to call the parties to the negotiating table as at present under Part X.

Because of the difficulty of defining discussion agreements, in section 2 of this submission the Department proposes that if recommendation 9.2 is adopted, a condition of provisional registration of any agreement should be the agreement of the appropriate designated peak shipper body to its registration.

However, the Department also has another proposal concerning discussion agreements in section 2, a fairly radical proposal that both shippers and carriers might like to consider in place of an outright exclusion of discussion agreements.

DRAFT RECOMMENDATION 9.3

If Part X is retained, under either option, agreements should not be eligible for registration if they contain provisions that:

- *prohibit members from engaging in negotiations for individual service contracts; or*
- *require members to disclose negotiations or make public the terms and conditions of such agreements; or*
- *adopt rules or requirements affecting the right of members to enter intoindividual service contracts; or*
- *allow the discussion or development of non-binding guidelines that relate to the terms and procedures of a member's individual service contract.*

Part X should be amended to prohibit carriers from discussing or disclosing, directly or indirectly, the provisions of individual service contracts to other carriers.

This approach is similar to the provisions in the US Ocean Shipping Reform Act 1998, which has proved to be very successful in overcoming previous objections to the US's anti-trust immunities for liner shipping. Shippers would support this recommendation.

The Department again notes that this amendment to the US liner regime appears to have contributed to the reported replacement of conference agreements in various US trades by discussion agreements. Discussion agreements are strongly opposed by Australian shippers. Therefore, especially if discussions agreements were to be excluded from exemptions, and the risk of conferences being replaced by discussion agreements precluded, the Department considers this feature could usefully be added to Part X (which does not prohibit such arrangements).

DRAFT RECOMMENDATION 9.4

If Part X is retained, in the event of a review under the enforcement provisions, the following changes should be made:

a) *the parties to a registered agreement be required to demonstrate that the conduct under review has resulted, or is likely to result, in a net public benefit;*
b) *the 'exceptional circumstances' provision be replaced by the 'material change in circumstances' provision from Part VII;*
c) *inquiries conducted by the ACCC under Part X be undertaken as the consequence of referral by the Minister of a complaint by an affected person, or be initiated by the ACCC if it establishes that there has been a material change in circumstance;*
d) *the powers of the Minister responsible for shipping to revoke exemptions under Part X, or to impose any other penalty available under Part X, be transferred to the ACCC;*
e) *a range of penalties, including fines, be introduced for breaches of the procedural provisions of Part X; and*
f) *the use of undertakings be limited to situations where deregistration is threatened, and not be available as a means of avoiding fines resulting from procedural breaches of Part X.*

Recommendation 9.4 (a) proposes a major and radical change in reversing the onus of proof in respect of reviews of shipper complaints - under this recommendation the onus would be on the members of the conference under review to demonstrate that there is a net public benefit from their conduct or proposed conduct. The Commission has recognised the possibility that this arrangement could be seen as an ex-post authorisation process, and has proposed a safeguard that would limit the arrangement only to cases where the Minister has referred a matter to the ACCC for inquiry.

We note that the US Ocean Shipping Reform Act still places the onus of proof of unreasonable conduct by conference lines on the Federal Maritime Commission (the US maritime competition regulator).

In its submission, the Department suggested that any such reversal of the burden of proof should be restricted to exceptional circumstances cases referred by the Minister. With regard to likely EU developments, removal of the block exemption for (price-fixing) conferences would still see the block exemption maintained for non-price-fixing consortia up to a specified market share.

If price fixing provisions were to be excluded from exemptions, there would seem to be little need to take this additional step until our major trading partners have done likewise.

Regarding recommendations 9(b) and 9(c), the Department considers that the material change in circumstances test could introduce a high level of uncertainty into the operation of registered agreements, as international liner cargo shipping is a dynamic industry where circumstances can change quickly with changes in trade flows, changes in currency relativities etc. The Department considers that the current exceptional circumstances test is therefore preferable to the proposed material change in circumstances test.

Regarding recommendation 9(d), the Department sees no problems in the Minister's powers to revoke Part X exemptions (ie. de-register agreements in whole or in part) being transferred to the ACCC. The Department considers this a reasonable proposition provided the current process of first seeking undertakings is maintained, together with rights of appeal to the Australian Competition Tribunal against de-registration.

Regarding recommendation 9(e), the Department agrees that a range of penalties could usefully be added to Part X for breaches of procedural provisions, especially those relating to lines' obligations towards shippers.

The Department has no problems with recommendation 9(f).

1.2 COMMENTS ON FINDINGS IN THE DRAFT REPORT

DRAFT FINDING 2.1

The trend has been away from the provision of direct liner services and towards the establishment of networks centred on regional hub ports. As a result, carriers who previously serviced only major routes have joined networks servicing secondary routes. While larger ships service hubs, smaller second-generation vessels are deployed on feeder routes.

Many Australian shippers still value direct services, especially for refrigerated cargo.

DRAFT FINDING 2.2

The size of the average container vessel has increased dramatically since the 1960s. Average vessel size will continue to increase, although limitations may ultimately be imposed by port capacity limits and draught restrictions on sea channels.

To obtain good service frequency on Australia's long (including coastal inter-port distances) trade routes given Australia's modest trade volumes on particular routes, means Australia is served by small and mid-sized (by today's standards) container vessels. Draught restrictions in Melbourne, Australia's major container export port, already are another impediment to the use of large containerships in the Australian trades.

DRAFT FINDING 2.3

Concentration of ownership has increased appreciably in the market for international liner shipping over the past two decades, although, in comparison with other transport industries, concentration is still not high.

Concentration has not increased markedly since the 1999 review. There was significant merger and acquisition activity in the 1990s. Scaling back liner exemptions may well see a renewal of such developments.

DRAFT FINDING 2.4

Profitability of liner shipping appears to be low, suggesting that the industry does not enjoy strong pricing power, except in periods of strong demand (as seen in recent years). However, investment in additional capacity remains strong.

Due to a current large order-book, there may well be an oversupply of containership capacity in the next few years, turning the freight rate cycle in favour of shippers.

DRAFT FINDING 2.5

As with other international trade routes, Australian trade routes are subject to imbalances in container requirements. Typically, more containers are required for imports than are required for exports. The management of Australia's liner shipping requirements is complicated by different densities of export and import cargoes, the fact that a relatively high proportion of Australia's exports require refrigeration, and the seasonality of some exports.

Containerised trade flows and imbalances can vary quite rapidly with currency changes and changes in growth rates of different economies.

DRAFT FINDING 2.6

Australian trade routes involve long voyages running along north-south trade routes. Together with comparatively low cargo volumes, this is said to result in 'long and thin' trade routes. However, developments in the market for liner shipping, including the expansion of global networks and the growth of the Asian region, will act to further integrate Australian container trade flows with those of the rest of the world.

Australia is not integrated into the intra-Asian trades, being well to the southward. Global shipping networks will no doubt grow over time, but many Australia shippers, especially those with refrigerated products, prefer direct services to hub-and-spoke transhipment.

DRAFT FINDING 2.7

Freight rates on Australian trade routes have diverged since 1999, reflecting supply and demand conditions on individual routes. There have been notable increases in freight rates on general exports to Europe; on reefer exports to Japan and on imports from China.

Such freight increases can induce extra capacity to enter a trade, for example in the north Asia to Australia trade in 2003 after rates had risen rapidly from previous very low levels.

DRAFT FINDING 2.8

Conferences are the traditional form of cooperation designed to fix freight rates. Over recent years, conferences have declined in importance.

Conferences pre-date competition policy regimes, but have been granted special exemptions to operate in regimes around the world. In many trades discussion agreements have supplanted traditional liner conferences.

DRAFT FINDING 2.9

Discussion agreements have become more important as a mechanism for influencing freight rates on most major trade routes. On Australian trade routes where they occur, the capacity share of discussion agreement members is generally high. Discussion agreements do not operate on European trade routes.

Australian shippers oppose discussion agreements.

DRAFT FINDING 3.1

The existence of economies of scale in liner shipping makes a policy of charging a single price to all shippers inappropriate. Price discrimination — between cargoes and/or between shippers — is an appropriate mechanism for recovering high fixed costs. However, there are significant practical limitations to the practice of price discrimination in liner shipping, including the extent of competition on trade routes.

The prohibition on unjustified price discrimination was removed from Part X in 2000.

DRAFT FINDING 3.2

Surcharges can be a means of passing on unavoidable costs associated with container shipments to shippers. However, they can also be a means by which discussion agreements or conferences collectively impose price increases on the market.

Australian shippers generally oppose the use of surcharges in liner shipping, and would prefer all-in freight rates.

DRAFT FINDING 3.3

Concern about 'destructive competition' has been a powerful argument used in support of allowing ocean carriers to confer and form conferences to control the supply of shipping capacity and set freight rates on trade routes. However, there is a lack of empirical evidence to support that concern and its theoretical foundations are weakened by the other less collusive market arrangements that have emerged and would act to prevent the occurrence of 'destructive competition'.

Even with liner agreements in place, liner shipping freight rates can fall to unsustainable levels at the bottom of freight rate cycles. Presumably the agreements moderate the falls that would otherwise occur.

DRAFT FINDING 3.4

Parallels exist between the international liner shipping market and airline travel, particularly in large domestic markets such as the United States where there are no regulatory barriers to entry. Despite the lack of an exemption from competition laws for price setting agreements, there is no evidence that these markets have experienced 'destructive competition', although operational agreements relating to marketing and service rationalisation are extensively used.

The US airline industry has experienced a number of Chapter 11 bankruptcy protection arrangements, and there have been outright failures of carriers in this market. Any disruption of international liner cargo shipping services for Australian exporters may have serious longer-term implications, in terms of loss of overseas markets.

DRAFT FINDING 4.1

A number of business strategies have emerged as means of dealing with the conditions in the market for liner shipping. The most important of these are cost reduction, service differentiation, market development and limiting competition. Carriers typically enter into operational agreements to achieve any or all of the first three objectives. Discussion agreements and conferences are primarily means of limiting or regulating competition on capacity and price.

Service quality is very important to liner shippers, and a material deterioration in service levels could well outweigh likely reductions in freight rates from increased competition (which are likely to be less stable than under current arrangements).

DRAFT FINDING 4.2

While, at the industry level, barriers to entry are high, at the individual route these barriers are comparatively low. Nonetheless, there are substantial costs involved in establishing a liner trade route (specifically, those associated with assigning a number of vessels, marketing and administration).

It must be remembered that chartered vessels play an important role in international liner cargo shipping and allow operators to add new capacity without necessarily having to meet the capital cost of the vessels required. Barriers to entry can be low.

DRAFT FINDING 4.3

While a market needs to be informed to function properly, the exchange of private information on price and quantity among carriers can be a means of enforcing collusive agreements and may result in anticompetitive detriment.

This is one reason that Australian shippers oppose discussion agreements, because there is no joint service element (ie. between all the parties) to outweigh the detrimental effect of pricing discussions even if they are on a non-binding basis.

DRAFT FINDING 4.4

The evidence on whether conferences raise freight rates above levels necessary to sustain industry equilibrium is mixed. Conferences with higher market share appear to have more success in raising freight rates. Where the confidentiality of service contracts are protected by law — such as on US trade routes — conferences appear to have less success in fixing and raising rates. Closed conferences are more likely to be able to exert market influence and raise freight rates. However, open conferences may lead to operational inefficiencies.

Part X contains provisions {s10.45(1)(a)(ix)} that allow the ACCC to instigate an investigation on its own initiative if the parties to a registered conference agreement unreasonably prevent the entry of a prospective party to the agreement and this is contrary to Australian interests. It would be interesting to see whether, with Australia's semi-closed conference system, confidential service contracting by individual conference carriers would contribute to the replacement of conferences by discussion agreements, as appears to have been the trend in the US trades.

DRAFT FINDING 4.5

The ability of discussion agreements to impose rate increases is greater at times of strong shipper demand. The potential for anticompetitive detriment of a discussion agreement increases with market share.

Conversely, discussion agreements appear to be ineffective in times of excess capacity, when a non-binding consensus is likely to be difficult to sustain, especially when there is a large number of members.

DRAFT FINDING 4.6

The anticompetitive detriment of operational agreements that do not include provisions for price fixing is less than those which involve collusion over rates. The potential for anticompetitive detriment of an operational agreement increases with market share.

The longstanding and widespread support of shippers for retention of Part X over time suggests strongly that shippers do not see an anticompetitive detriment from conference agreements generally, although they do regard discussion agreements as having such a detriment.

DRAFT FINDING 5.1

Part X of the TPA provides significant immunity for ocean carriers from key elements of Australia's competition law. Eligible agreements are very broadly defined and little limitation is placed on the range of provisions that can be included in those agreements. As a consequence, practically all types of shipping agreement are eligible for immunities under Part X.

Part X gives agreements the benefit of the doubt until experience suggests otherwise and deregistration processes are begun after a shipper complaint.

DRAFT FINDING 5.2

Registration of conference agreements under Part X is, to all practical purposes, automatic, with no assessment being made as to the costs and benefits of these agreements, and with no time limit placed on the immunities granted. Only minimal obligations are placed on carriers in exchange for the exemptions from key anticompetitive provisions of the TPA.

Agreements must meet minimum standards before they can be registered under Part X. Shippers have indicated that, until the advent of discussion agreements, they have found the carrier obligations broadly adequate to do satisfactory deals with conferences.

DRAFT FINDING 5.3

Deregistration is the penalty that applies for all breaches, from the most minor failure to report to the registrar, to major anticompetitive behaviours at the expense of shippers. As a consequence, minor breaches are not enforced. The requirement to seek undertakings before deregistration can occur provides carriers with considerable opportunity to avoid penalty under Part X .

The object of Part X is to provide Australian shippers in all States and Territories with stable access to liner services of adequate capacity, frequency, reliability, port range etc, at freight rates that are internationally competitive. Deregistration has the risk of disrupting such services, and if undertakings can resolve shipper concerns (as happened in two of the five TPC/ACCC investigations necessary since 1989), then this course is to be preferred.

DRAFT FINDING 6.1

Part X of the TPA and the United States' Shipping Act make no distinction between different types of agreements, but the United States regulations now promote and protect individual service contracts. The European system is far more restrictive, especially in not allowing discussion agreements.

Australian shippers favour individual service contracts as a feature to be introduced into the Australian liner trades under the Part X regime.

DRAFT FINDING 6.2

Australia differs from both Europe and the United States in allowing Ministerial discretion in the decision to impose penalties on carrier agreements. The regulation in the United States also provides for financial penalties to be imposed for procedural breaches, whereas Part X contains no such provisions.

Part X contains provisions that apply Part VI in cases of breach of undertakings given to the Minister. Part VI provides for pecuniary penalties and actions for damages by a person who suffers loss or damage. The Department would support the removal of Ministerial discretion by Part X being amended to provide that the Minister shall (rather than may) direct the registrar to deregister an agreement (wholly or in part) in cases where satisfactory undertakings have not been given.

DRAFT FINDING 6.3

The removal of immunities from competition laws for the liner shipping industry should not give rise to a conflict in laws as no jurisdiction actually requires that carriers engage in anticompetitive behaviour.

If Australia's liner regime is out-of-step with those of our major trading partners, the possible result is that Australia may have to pursue foreign companies for conduct that took place in overseas jurisdictions and is legal in those jurisdictions.

DRAFT FINDING 6.4

Both the United States and Europe have introduced greater competition within the regulation of the liner cargo shipping industry, including the use of confidential individual service contracts between shippers and carriers.

At this stage both regimes retain special exemptions for international liner cargo shipping. In respect of confidential service contracts, Part X does not preclude such arrangements, but could usefully be amended to facilitate them, as Australian shippers have indicated that they would favour such a facility in Part X.

DRAFT FINDING 7.1

Part X restricts competition by limiting the pro-competition regulatory safeguards on the market conduct of ocean carriers.

Part X restricts competition in the interests of providing Australian shippers in all States and Territories with stable access to liner services of adequate capacity, frequency, reliability, port range etc, at freight rates that are internationally competitive. Australian shippers have over time supported the retention of Part X, as shippers generally value service quality at least as highly as the level of freight rates, provided they are internationally competitive.

DRAFT FINDING 7.2

Especially in light of recent developments affecting the international liner shipping industry, the provision of immunity under Part X on the presumption that all agreements registered will provide a net public benefit is a flaw in Part X as currently structured.

As noted previously, Part X gives agreements the benefit of the doubt until experience suggests otherwise and deregistration processes are begun after a shipper complaint. The Department would prefer to continue this approach in conjunction with bolstering the ACCC's ability to perform its role of assessing overall benefit or detriment and reporting to the Minister regarding deregistration.

DRAFT FINDING 7.3

- *The existing arrangements to promote the countervailing power of Australian exporters and importers do not appear to be working; and*
- *the fundamental nature of the markets within which Australian shippers now operate means that the countervailing power that Part X seeks to provide is nlikely to be effective.*

Australian shippers have indicated to the Department that until the rise of discussion agreements to prominence in the Australian trades, they have been able to make use of their countervailing powers under Part X to do satisfactory deals with conferences. However, since the last review it has become apparent that shippers' countervailing powers under Part X could usefully be strengthened. Accordingly our initial submission made a number of suggestions for strengthening shipper powers in relation to discussion agreements, surcharges and Australian dollar freight rates. This supplementary submission makes further suggests that a feature of the Japanese liner regime be adopted, namely that parties to conference agreements must give notice to relevant shipper bodies of proposed changes in negotiable shipping arrangements prior to a public announcement being made (see section 2).

DRAFT FINDING 7.4

- *The review and enforcement processes under Part X do not seem to be very effective; and*
- *the range of penalties available under Part X is very limited and relatively severe, although there are a wide range of potential breaches, both minor and major.*

Since the last review it has become apparent that review and enforcement processes, and the sanctions available under Part X could usefully be strengthened. However, the Department notes that the range of sanctions applicable under Part VI applies where a breach of undertakings has occurred.

DRAFT FINDING 8.1

Not all existing carrier agreements may need authorisation under Part VII. As well, authorisations can be framed so as to apply to other carriers which become members of an authorised carrier agreement at a time after it is made, or after it has been authorised, subject to the market impact of additional members.

DRAFT FINDING 8.2

Authorisation under Part VII would provide a rigorous system for evaluating whether carrier agreements seeking exemption from Part IV are in the public interest. A six-month time limit for consideration of applications under Part VII is planned. Safeguards are also provided in the TPA to ensure authorised agreements continue to meet the test and that the ACCC does not arbitrarily revoke an authorisation where it still provides a net public benefit, or where an amended authorisation would result in an overall net public benefit.

Carrier interests have indicated in the past that the ACCC is unlikely to authorise the agreements they would be seeking to have in place. The Department is concerned that the end result may well be that liner agreements are run from offshore and Australian shippers lose their countervailing powers.

DRAFT FINDING 8.3

If Part X were to be repealed, transitional arrangements would be appropriate to minimise the costs to carriers and shippers, and achieve an orderly transition. The ACCC proposal provides for the process to be predictable and manageable administratively. Also, it gives priority to the assessment of arrangements that could pose the highest risk of not providing a net public benefit.

If Part X were to be repealed despite the views of most exporters, it would be imperative that satisfactory transition arrangements should be put in place in order to minimise the disruption to services that could occur. A long transition period would minimise the effects of Australia's regime being out of step with those of its major trading partners.

DRAFT FINDING 8.4

The notification process would be of little practical use for carrier agreements. While it may be less costly, it does not provide protection from section 45 of the TPA.

DRAFT FINDING 8.5

The proposed collective bargaining notification process would be of little help for the majority of shippers as their contracts with carriers would typically exceed $3 million per year. Authorisation would therefore need to be sought for such collective bargaining arrangements.

In canvassing this as one among many possible options, the Department noted that a notification regime for liner shipping would involve extending and modifying the existing notification regime. The Department favours as an option the retention of Part X, suitably strengthened to enhance shipper protection.

DRAFT FINDING 8.6

The export agreement exemption may be of limited use to Australian outward shippers due to the uncertainties of its application. Shippers would need to apply for authorisation if they wish to collectively bargain.

As an advantage of Part X is that it minimises uncertainties in liner shipping for shippers and carriers alike, the Department would not favour this option.

DRAFT FINDING 8.7

Agreements containing price-fixing provisions can still be authorised under Part VII, provided that the anticompetitive detriment is outweighed by public benefits and those public benefits are passed on to users.

Please see comments regarding draft finding 8.3.

DRAFT FINDING 8.8

Under Part VII:

- *the implementation of a six-month time limit on the authorisation process should help reduce concerns about the uncertainty of using Part VII; and*
- *the costs of demonstrating a net public benefit and the uncertainty that the application will be accepted are borne by the carriers proposing the agreement.*

Please see comments regarding draft findings 8.1 and 8.2.

DRAFT FINDING 8.9

The likely compliance costs for liner shipping carriers under Part VII would be higher than under Part X. However, it is unlikely that the cost alone would prohibit carriers from seeking authorisation for agreements that can demonstrate significant public benefits.

The Department agrees that the costs of authorisation, although substantial, would not be the decisive deterrent for carriers from seeking authorisation for their agreements.

DRAFT FINDING 8.10

Anticompetitive arrangements made outside of Australia would still be subject to Part IV of the TPA so long as members of the arrangement engage in business activities within Australia (including the delivery of freight to Australian ports). Gathering evidence, and enforcement of offshore agreements would be more difficult for the ACCC. However, the establishment of multilateral and bilateral agreements has made this issue manageable.

Considering the evidentiary difficulties the ACCC has found in dealing with liner shipping matters in Australia, at least in recent years, and the potential for international relations effects, the Department considers that it would be preferable to retain and strengthen Part X as supported by the majority of shipper interests, especially exporter interests.

DRAFT FINDING 9.1

Introducing a market share threshold would involve a major change to the current arrangements, present significant transitional costs, and involve a much higher level of ongoing administrative and compliance costs.

The Department agrees with this finding.

DRAFT FINDING 9.2

The best way to help shippers is to encourage greater competition in the liner shipping market rather than by way of government intervention aimed at prescribing or influencing the outcome of commercial negotiation between carriers and shippers.

The Department is concerned that adopting the Commission's preferred option at this stage would not help Australian shippers if conferences were run from offshore and Australian shippers lost their countervailing powers (existing and potential) under Part X.

Part X has an object of reduced Government regulation of routine commercial matters, and it pursues this object by placing various conditions on the exemptions that are provided to conferences. The suggested ways of strengthening shippers' countervailing powers under Part X merely add to the conditions placed on parties to conference agreements in return for their exemptions.

1.3 RESPONSES TO COMMISSION REMARKS

Undertakings (pXXXI, p193)
Concerning undertakings, the Department notes the Minister accepted undertakings in 2 of the 5 cases of TPC/ACCC investigation and report that have been necessary since 1989.

Price fixing (pXXXII, p165)
To say that the US "effectively precludes price fixing" is going too far, as the US exemption for price-fixing conferences is retained. It would, however, be fair to say that the US has made price fixing something that cannot be enforced on individual conference members, which have a mandated right to enter service contracts with shippers on an individual basis.

Confidentiality (pXXXV)
The Commission's view that Part X should preclude disclosure to other carriers of the provisions of individual service contracts goes further than the US regime. The US regime does not mandate confidentiality, which is up to the contracting parties. It merely removes the previous requirement that the terms and conditions of such contracts had to be made public. So carriers in liner agreements are free under the US regime to agree to make known to each other the terms and conditions of individual service contracts, unless of course this is contrary to what is specified in the agreement with the shipper. In 2001, the Federal Maritime Commission[1] found that only 35% of service contracts had confidentiality clauses, some of which allowed the carrier to disclose terms to other carriers in the agreement. No doubt this percentage has since increased.

Binding offers by discussion agreements (pXXXV)
The Commission appears to have misinterpreted the proposal by the Department that any outcomes of negotiations between parties to discussion agreements and shippers should be binding obligations on the parties to a discussion agreement to the extent that those parties have reached an agreement with shippers. The Department made this proposal in the context of an alternative to prohibiting the registration of discussion agreements, a step which could see such agreements being run from offshore with Australian shippers not having any rights to negotiate. The Department suggested that any such amendment would need to prevent the binding nature of obligations to shippers from any crossing over to agreements purely between the parties to the agreement, which need to remain clearly non-binding in agreements with such typically wide membership. This approach was not suggested for conference agreements generally.

[1] *The Impact of the Ocean Shipping Reform Act of 1998*, Federal Maritime Commission, September 2001, p22.

Other proposed modifications to Part X (pXXXV)
The other proposed modifications to Part X listed on p XXXV were all proposed as an avenue to strengthening shipper powers in dealing with conference agreements generally. Part X provides carriers with exemptions from the general provisions of the TPA but places a variety of conditions on the carriers in the form of obligations to shippers. The Department's proposals, which perhaps could have been explained more clearly, would merely add several more obligations, namely to be prepared to negotiate in good faith with shippers on an all-in freight rate basis and on an Australian dollar freight rate basis if that is what the shipper wanted. To the extent that total freight cost was negotiable (ie without a substantial proportion being set by CAF and BAF formulae etc), the extent that any extra costs were passed forward to shippers would depend on market conditions at the time.

Industry code (pXXXV, p186 et seq)
The Department raised the issue of an industry code in the context of an alternative examined by the Commission in the 1999 review. The Commission then examined the option of an industry code of practice agreed between conference members and shipper bodies in place of Part X, such a code being subject to authorisation by the ACCC. After noting that the Commission had then rejected such an option, the Department suggested that an ACCC-sanctioned code for negotiations under Part X might be a way to increase the effectiveness of shippers' negotiating powers under Part X. Part IVB of the TPA deals with such codes, and a voluntary code might be developed by shippers and carriers, and if successful, could reduce government intervention. The Department offered, as background information, an in-house attempt at a voluntary code to govern negotiations that had been developed with input from the peak exporter body and the peak carrier body.

In relation to a reference in that voluntary code to a possible complaint to the Minister or to the ACCC, the Commission commented that it was not clear on what grounds a complaint could legitimately be made. Section 10.45 sets out a wide variety of grounds on which, if proved, the Minister can direct the Registrar of Liner Shipping to deregister a conference agreement. Section 10.45(1)(a)(iv) sets out as a ground for deregistration that the parties to a registered conference agreement have given effect to the agreement without due regard for the need for services to be efficient and economical, and provided at a level to meet the needs of shippers. If the subject of negotiations was a matter that bore on these criteria, and the failure to reach a satisfactory outcome was viewed by the shippers as sufficiently serious, then the shippers may well be able to approach either the Minister or the ACCC with a complaint along those lines.

The Department considers that an industry code governing shipper/carrier negotiations could be a useful adjunct to a modified Part X.

Number of carriers on long, thin trades (p22)
The Commission considers that a characteristic of long, thin trades is a small number of carriers. This would be undoubtedly the case if lines had to operate independently, but with the collaboration Part X facilitates various lines may contribute vessels to a joint service string and others can participate by chartering slots in other lines' vessels. The wish of major carriers to establish integrated global networks would also contribute to more carriers being involved in long, thin trades than otherwise would seem justified.

ACCC's investigation into the AADA (p78)
The Commission states that AADA members did not significantly increase capacity in response to the entry of new competitors in the Australia/Northeast Asia trade in mid-2004. Nevertheless, capacity available in this trade increased from under 800,000 teu pa in mid

2003 to over 1,000,000 teu pa in mid 2004 (*LLDCN*, 21 October 2004, p13). Reporting that the number of ships deployed had increased from 35 to 48, the *LLDCN* noted the difficulty of obtaining the extra vessels in the tight shipping market of the time.

Negotiations of minimum levels of service (p92, 93)
The Commission notes that agreements can be registered even if agreement is not reached with the appropriate peak shipper body regarding the minimum levels of service proposed to be provided under the agreement. In practice this does not seem to have been a problem, and shippers have not raised the issue with the Department, at least in recent time. Nevertheless, the Department (in section 2 of this submission) is proposing an amendment to strengthen the hand of shippers in this regard.

The Commission comments that it understands that minimum levels of service are rarely changed during the life of an agreement. In practice, minimum levels of service are not infrequently adjusted when a variation (varying conference agreement) is registered, most commonly when a party leaves or enters the agreement.

"Automatic" registration (p93)
While registration under Part X is a far less exacting and time-consuming process than authorisation under Part VII, it is not fair to say that registration is automatic. It would be fair to say that agreements may be registered provided that they meet certain minimum standards.

Rather than rejecting applications for registration, registrations are often delayed while defects in the application or the proposed agreement are rectified. The Registrar of Liner Shipping seeks the agreement of the applicant to this course as an alternative to outright rejection of the application.

The most common defect in agreements is an unsatisfactory withdrawal clause in outwards agreements, usually where the notice period is not reasonable (s10.06) in the view of the Registrar. In such cases, registration does not occur until a satisfactory provision is inserted in the agreement to replace the original provision. While not a frequent occurrence (there have been two cases in 2004 to date), the most notable example in recent times involved one of the central agreements in the counter-rotating round-the-world services in the Europe and US trades. Although the agreement had already been lodged with the FMC, the Department refused to register the agreement in the form proposed for registration under Part X. The Department eventually accepted a revised agreement, with a much shorter withdrawal notice period, for registration. From a minor variation registered later, it is understood that the EU required much the same withdrawal notice period.

Countervailing power (p126 *et seq*)
The Commission appears to regard APSA seeking to negotiate minimum levels of service in only 10% of cases as proof that the countervailing powers of shippers under Part X do not work. However, it is surely more likely to indicate that in 90% of cases the proposed minimum levels of service are considered adequate at the time by the exporter peak body.

In any event, the right to negotiate minimum levels of service before final registration of an agreement is only part of the negotiating rights of shippers. Shippers have a right to call for negotiations on negotiable shipping arrangements as set out in s10.41. Shippers have indicated to the Department that, until the rise of discussion agreements, their countervailing powers were adequate for them to be able generally to reach satisfactory agreements in negotiations with conferences.

Regarding the proposition (p127) that it is easy for carriers to reduce minimum service levels by registering another agreement, then negotiating but not reaching agreement with shippers about the proposed lower levels of service, the Department notes that it is grounds for deregistration if an agreement does not have due regard for the need for services to be efficient and economical, and provided at the capacity and frequency reasonably required to meet the needs of shippers (see s.10.41(1)(a)(iv)).

Even if large shippers do not require the countervailing powers of Part X, the exercise of such powers under Part X by small and medium sized shippers acting together in designated shipper bodies would not appear to conflict with the use of confidential individual service contracts. Although such bodies do not have the right under Part X to require an individual conference member to negotiate, there is nothing in Part X that precludes them requesting such negotiations. Presumably, if individual conferences members had a legislated right to break ranks and enter an agreement with a shipper body, past experience when cargo is short seems to suggest that many carriers would be happy to do so. The Department notes that the loyalty agreement provisions of Part X (Subdivision of Division 5) apply to loyalty agreements between a shipper or shipper body and an ocean carrier or conference. But protecting confidentiality would seem a positive move.

Uncertainty (p139)
The Department does not agree that Part VII of the TPA provides greater certainty to liner agreements than Part X. Part X provides assured, but limited, exemptions for agreements that meet minimum standards, subject to undertaking various obligations to shippers. Under authorisation there must be considerable uncertainty as to what will or will not be authorised after the extensive processes have been completed. The possibility of revocation after a material change in circumstances must add considerable uncertainty.

Under Part X there is no obligation on the ACCC to investigate instances of 'unreasonable' increases in freight rates regardless of market conditions: rather the ACCC has been given the right to initiate an investigation itself in such circumstances if it thinks fit considering market conditions and other factors, subject to informing the Minister that it has done so (see s10.48). Only if a matter has been referred to the ACCC by the Minister is there an obligation on the ACCC to investigate and report. The provisions thus do not give rise to uncertainty in respect of agreements the parties to which have not infringed any of the deregistration provisions.

The Department notes the view of the Commission (p142) that the costs to shippers applying for authorisation to negotiate collectively should not be too onerous. However, additional costs imposed on shipper bodies, even if modest by general standards, could be a serious matter for such bodies. There is no cost for declaration as a designated shipper body under Part X.

Demonstrating public benefits (p151)
The Commission states that for deregistration Part X requires the ACCC to prove that such agreements result in a net detrimental effect, an apparent reference to s10.45(3) (c) which states the criterion that an agreement has not resulted in a benefit to the public that outweighs the detriment to the public from the lessening of competition. In fact this is only one of nine criteria for deregistration, and one of two that allow the ACCC to initiate an investigation (ie without referral by the Minister or receipt of a shipper complaint).

There are other criteria that may apply on referral by the Minister or on receipt by the ACCC of a shipper complaint. For example, depending on the nature of the shipper complaint the ACCC might choose to investigate whether the parties to the agreement have given effect to the agreement without due regard for the services provided under the agreement to be efficient and economical and provided at a level reasonably required to meet the needs of the relevant shippers (see s10.45(1)(a)(iv)).

Differentiating between agreements (p161 *et seq*)
If Part X were to be modified so as to grant exemption only to some classes of agreement, while other agreements would be subject to the authorisation procedure, the Department considers that this would most appropriately be done on the basis of the content of the agreement rather than on market share. The Department agrees with the Commission's view that the latter would involve higher costs in the form of ongoing monitoring and administration.

The Department agrees that differentiation between classes of agreements would not be unique (p165), but notes that at this stage the EU has a block exemption for both conferences and consortia. The US still provides exemptions for price fixing, but prevents conference members from forcing individual members to adhere to such prices.

Transitional arrangements (p164)
If Part X were to be modified so as to grant exemption only to some classes of agreement, a transitional arrangement would be needed whereby the parties to a currently registered conference would either:

- ask the Department to review the agreement for compliance with new standards for registration; and
- if necessary, seek to register, by the end of the transition period, a variation capable of being registered under the new standards; or
- having obtained a deemed authorisation from the ACCC, request the deregistration of the agreement; failing which
- all other agreements would be deregistered as from the end of the transition period.

In order to give the parties sufficient time to renegotiate agreements where necessary and to give the Department sufficient time to process the resulting applications, including seeking legal advice where necessary regarding new or amended provisions, it is suggested that a period of 12 months would be required.

Government involvement in negotiations (p188)
The Department agrees with the Commission's view that the Department should not be involved in the negotiation process. The Department notes the limited role of authorised officers in attending Part X negotiations. That role is mainly to give advice as to the requirements of the legislation, but also to observe the progress of the negotiations in the event of a complaint being made to the Minister, and to make suggestions designed to help keep matters from reaching a deadlock that might result in such a complaint or a complaint to the ACCC. The Department also agrees with the Commission's view (p188) that a voluntary code should be developed by shippers and carriers.

Strengthening carrier obligations to provide information (p189)
The Department does not agree with the Commission's view that it is unnecessary to strengthen existing carrier obligations in relation to the provision of information justifying proposed freight rates. Obtaining such information appears to be a continuing problem for shippers. The Department in its proposal referred to "adequate justification, including

relevant quantitative data", and the inference that this meant only costs is an unwarranted one that the Commission has drawn, and on which it appears to have based its arguments. There could be many factors, including a variety of non-cost ones, which could be part of such a justification.

The existing obligation {s10.41(1)(b)} is for the parties to registered conference agreements to make available to the relevant shipper body information reasonably necessary for the purposes of the negotiations provided the shipper body has done likewise. The Department has observed a negotiation regarding a tariff when negotiations were terminated by the conference after the shipper body declined to make available its membership list. As the negotiations were for tariff rates that would be available to all shippers of the particular class of products, whether or not members of the shipper body, there is at least a good argument that the membership list was not reasonably necessary to the negotiations.

The Department considers that it would smooth the path of shipper/carrier negotiations if the information provisions were to be amended so that there was a clear requirement, subject to a test of reasonableness, for information to be provided to justify increases sought under the agreement. It would likely save time and cost of attending an extra round of negotiations in many cases, and much inter-sessional wrangling, which would mitigate any increased costs to the carriers above those of the current ad-hoc information provision.

Exceptional circumstances provisions (p196)
Regarding the exceptional circumstances provisions introduced in the 2000 amendments to Part X, these were largely intended to assist in dealing with discussion agreements. We cite the Minister's Second Reading speech.

> *The Minister and the Australian Competition and Consumer Commission will be granted increased powers to deal with concerns about conduct which has resulted in, or is likely to result in, a substantial lessening of competition and which is likely not to result in a public benefit. Such a situation could arise with the operation of discussion agreements that cover parties to traditional shipping conference agreements as well as independent operators.*
>
> *The increased powers will only be used in 'exceptional circumstances', such as where the operation of an agreement results in an unreasonable reduction in shipping services and/or an unreasonable increase in liner shipping freight rates, and where the public benefit from the conference agreement may be lost. In these circumstances the Minister will have the power to suspend, in whole or in part, such an agreement.*
>
> *As a guideline for exercising the additional powers, exceptional circumstances will be taken to apply where:*
>
> - *an agreement has the effect of giving its parties a substantial degree of market power;*
> - *the conduct of the parties to the agreement has led to, or is likely to lead to, an unreasonable increase in freight rates or an unreasonable reduction in services; and*
> - *the anti-competitive detriment of the agreement outweighs the benefit to shippers flowing from the agreement.*
>
> *Exceptional circumstances will also be taken to apply where the agreement in question is substantially similar to one that has previously been deregistered pursuant to section 10.44 of Part X.*

The Commission's proposal for the use of a material change in circumstances test before the ACCC can initiate an investigation and report in the absence of a shipper complaint or referral from the Minister is potentially much broader in application than the exceptional circumstances test. The latter contains in the test an unreasonableness element regarding the outcome of conduct under the agreement which it would appear the former does not.

As Part X has been based on a premise of "innocent until proven guilty" in terms of providing exemptions for registered agreements until conduct under an agreement justifies their removal, the material change in circumstances test would seem to sit somewhat oddly with that schema.

If, as seems to be the case, the ACCC's powers need to be strengthened, the Department prefers the option of reversing the burden of proof of public benefit in cases referred to the ACCC by the Minister where the ACCC considers there is a *prima facie* case that exceptional circumstances exist.

Register of Conference Agreements

The Department is disappointed that, having made a copy of the Register of Conference Agreements available to assist the Commission, the Commission has chosen to be critical of the Register, at its public hearings, for not doing something that the register was not designed to do. Rather than providing a snapshot of the current arrangement of liner agreements, the Register is designed to record agreements that meet the minimum standards for granting conditional exemptions from ss45 and 47 of the *Trade Practices Act 1974* and to which registration has accordingly been granted.

Section 10.75 states that, if the Registrar is satisfied that an entry in the Register is obsolete, the Registrar may delete the entry (the word "shall" is used in s10.74 in respect of wrong entries). As the consequences of wrongly deleting an entry might be quite serious, the practice has been that the Registrar only deletes entries upon written advice from (or on behalf of) the parties to the agreement. Accordingly, the Register contains entries for agreements that may be in abeyance or otherwise non-operational at any given time, pending formal advice to that effect.

In section 2.3 below, the Department proposes a mechanism for safely purging the Register of agreements that are no longer in operation.

2. FURTHER OPTIONS FOR STRENGTHENING PART X

The Department would like to offer for consideration by the Commission, shippers and carriers, a number of further options for strengthening the Part X regime.

2.1 Shipper veto on provisional registration

The Commission has been critical of the registration process of conference agreements, which it regards as to all practical purposes, "automatic". While the Department does not agree with that assessment (registration is not infrequently held up until the application is corrected or the agreement modified to meet minimum standards), there is scope to strengthen the registration process if Part X were to be retained.

Under Part X the stress is on behaviour under the agreement rather than the content of the agreement provided that it meets minimum standards. Currently, if shippers judge that the outcomes under the agreement are unsatisfactory, the legislation provides that they can ask the Minister to refer the matter to the ACCC for investigation and report, or approach the ACCC directly.

The Commission has stressed the need for an up-front assessment of the net benefits of liner agreements, and proposes the authorisation processes of the ACCC under Part VII of the TPA. Most shippers and the carriers regard this proposal as unsatisfactory,

The Department proposes, as an alternative approach, that provisional registration of all new conference agreements should be subject to veto by the appropriate designated peak shipper body. As shipper interests are aligned with the national interest, there would be an in-built public benefit/national interest test applied before registration.

In this model, the exercise of a shipper veto would require a statement of reasons to be given to the Minister by the peak shipper body, and the Minister would have the power to overturn such a veto after appropriate consultations, perhaps involving undertakings.

Such an option would, in the event that it was decided that discussion agreements should be excluded from registration under Part X, also avoid the problem of having to define discussion agreements in the legislation.

2.2 Negotiation of minimum levels of service

Currently Part X requires that parties to conference agreements must, after provisional registration, take part in negotiations with the appropriate peak shipper body regarding minimum levels of service (s10.29). The parties to the agreement must consider the matters raised, and representations by the shipper bodies (s10.29(1)(a)), but there is no requirement for agreement to have been reached before the agreement is finally registered.

Given the objects of Part X, consideration might usefully be given as to whether a conference agreement or varying conference agreement should not be finally registered unless formal agreement has been reached with the relevant Australian shippers as to the adequacy of the minimum service levels proposed to be provided under the agreement.

To ensure stability of services, there would probably need to be a requirement on shippers to negotiate within a reasonable time, and to provide a statement of reasons to the Registrar of Liner Shipping as to why agreement could not be reached with the parties to the agreement, in order that shippers could not effectively exercise a veto by refusing to

negotiate or unreasonably withholding agreement. The views of shippers would be instructive as to this proposal.

2.3 Notification that agreement has been terminated

The Department proposes that s10.43 (*Parties to registered conference agreement to notify happening of affecting events etc.*) should be amended to clarify that if the parties to a conference agreement agree that the conference agreement should terminate, this is an affecting event for the purposes of s10.43, and must be notified to the Registrar of Liner Shipping within 30 days. This will ensure that obsolete entries can safely be removed by the Registrar from the Register of Conference Agreements. At present there are a significant number of seemingly obsolete agreements on the Register that it is not safe to remove, given the serious implications of so doing, without written advice from the parties to the agreement.

2.4 Conferences to discuss with relevant designated shipper bodies proposed changes to negotiable shipping arrangements before a public announcement is made

This is a feature of the Japanese regime of shipper/carrier negotiations (mentioned in the submission of the Japanese Shipowners Association) that might usefully be adopted in the Part X regime. The views of shippers should be sought on this issue.

2.5 ACCC to be given the express power under Part X to recommend to the Minister, in any report following an ACCC investigation, that particular undertakings be sought from the parties to a registered conference agreement

If the power to deregister agreements were to remain with the Minister for Transport and Regional Services rather than being transferred to the ACCC, this would introduce greater flexibility into the sanctions regime of Part X, and emphasise the role of undertakings rather than deregistration. It would enable the ACCC to give the Minister guidance as to the form in which undertaking might usefully be sought.

2.6 All Designated Shipper Bodies (DSBs) to be treated as relevant shipper bodies for the purposes of s10.45.

At present, DSBs must be nominated by the Registrar of Liner Shipping before they are relevant shipper bodies in respect of the obligations placed on the parties to registered conference agreements. As nominations are in respect of particular conferences, this is a cumbersome process. Each party must be notified of the nominations, and if a new agreement replaces an existing agreement, the process must be gone through again.

As a result, until the last couple of years, in which several DSBs have sought such nominations, it was the practice of shipper bodies to operate using the powers of APSA (a relevant body by virtue of its peak DSB status) delegated to its members by letter, rather than using the nomination process. However, there were instances of communications breakdowns between shipper bodies and nomination was sought by a shipper body. Another DSB did not want to operate through APSA and also sought nomination.

It would streamline procedures, and remove the potential for misunderstandings or communications failures if any DSB had to be treated by conferences as a relevant body for the matters that came within the scope of its designation, whether (for secondary DSBs) by commodity type or geographical area.

2.7 Discussion agreements to include designated shipper bodies in discussions

The Department has been giving thought to how discussion agreements might, in the Part X context, be made acceptable to Australian shippers, thus avoiding both the risk that they would continue to operate from overseas jurisdictions without Australian shipper input and the consequent potential for jurisdictional conflict if they were to be excluded from Part X.

The Department has noted Shipping Australia's comment in its Supplementary Submission (p11) that the information exchanged within discussion agreements "is generally of a broad nature concerning the trade as a whole, or on a commodity basis ….".

The Department would like to float the concept that discussions between the parties to a registered discussion agreement could only be held under the auspices of Part X and after representatives of designated shipper bodies affected by the operation of the agreement had been given the opportunity to attend and participate in the discussions. The location and timing of such discussions would have to be acceptable to the shipper bodies affected by the operation of the agreement. An authorised officer could attend such discussions at the invitation of shippers or carriers.

Such a condition would apply only to registered discussion agreements (ie to registered conference agreements that did not relate to a joint service provided by all the parties, or however discussion agreements were defined). Part IV would apply to any other discussions between the parties to a registered conference agreement that fell within the definition of discussion agreement.

This proposal may have the potential to promote a positive working relationship between Australian shippers and carriers in a trade, in place of the current, apparently dysfunctional, relationships involving shippers and discussion agreements. It could provide the basis for shippers and carriers in a trade to exchange information about market conditions for cargo commodities, freight markets, and other matters of mutual interest concerning liner cargo shipping services.

In conjunction with the proposal in 2.1 above, this proposal would effectively preclude the registration of discussion agreements that did not have the necessary provisions to include shipper bodies in their discussions on a basis acceptable to shippers.

The Department proposed in its initial submission that offers to shippers by the parties to registered discussion agreements should be made binding on the parties to the agreement (but the non-binding consensus basis should continue to apply between the parties themselves). That proposal would address another concern of shippers regarding discussion agreements.

The Department would like shippers and carriers to consider whether discussion agreements operated on the basis outlined above could be acceptable and practicable as an alternative to the option of their complete exclusion from Part X registration, and to provide their views to the Commission before the final report is completed.

3. COMMENTS ON REMARKS OR PROPOSALS MADE IN OTHER SUBMISSIONS AND SUPPLEMENTARY SUBMISIONS

The Department of Transport and Regional Services (the Department) offers the following comments in respect of submissions made to the Productivity Commission by various other parties.

3.1 BUNBURY PORT AUTHORITY (BPA)

Part X has mechanisms to allow industry interests, like BPA, to work to ensure a satisfactory level of liner cargo shipping services are received by shippers in all States and Territories. The Department suggests that BPA should use membership of the Western Australian Shippers Council Incorporated (WASC) as an avenue to ensuring, through membership of the Australian Peak Shippers Association (APSA), that the interests of Western Australian regional ports are taken into consideration when minimum levels of service are being negotiated, under Part X, with the parties to conference agreements that have applied for provisional registration.

3.2 FLINDERS PORTS

To maintain current levels of liner service, the Department suggests that Finders Ports should use membership of the South Australian Shipping Users Group as an avenue to ensuring, through membership of APSA, that the interests of South Australian ports are considered when minimum levels of service are being negotiated, under Part X, with the parties to provisionally registered conference agreements.

3.3 AUSTRALIAN SHIPOWNERS ASSOCIATION (ASA)

The Department supports the view of the ASA of the importance of the stability provided by Part X.

3.4 DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (DFAT)

The Department notes DFAT's concern about small importers, but suggests that importers generally do not appear to have made use of the negotiating powers available to them under Part X, either in regard to minimum levels of service or in regard to negotiable shipping arrangements generally.

The Department supports DFAT's view that any recommendation regarding Part X will need to take into account how liner operators are regulated in other States.

3.5 AUSTRALIAN PEAK SHIPPERS ASSOCIATION (APSA)

Surcharges

The Department proposes that, rather than a ban on the collective setting of surcharges, this practice should be allowed as part of the process of setting an "all-in" freight rate as an option for shippers.

Discussion Agreements
Rather than an outright ban on discussion agreements, which could cause jurisdictional problems, the Department suggested consideration of a reversal of proof regarding the public benefit test in exceptional circumstances cases (most discussion agreements would meet the required criteria). The burden of proof of public benefit in any ACCC investigation of shipper complaints would likely make the parties to discussion agreements much more considerate in their dealings with shippers.

The Department's proposal to make offers made by parties to discussion agreements binding on the parties to the discussion agreement would address shippers' other major concern with discussion agreements.

The Department notes that shippers favour the approach of Recommendation 9.2 (to exclude discussion agreements, the primary cause of the call by shippers for the review to be brought forward) from Part X exemptions. The Department considers that lines would be able to operate satisfactorily under more traditional forms of conference agreement. However, the Department remains concerned that there is a risk that discussion agreements might operate from overseas jurisdictions, with Australian shippers not having the right to call the parties to the negotiating table as at present under Part X. Nevertheless, the views of Australian shippers should be paramount on this recommendation.

Stevedores
Part X currently provides (s10.02) that ancillary services provided by a third party to the provider of a scheduled cargo shipping service are taken, for the purposes of Part X, to have been provided by the provider of the scheduled cargo shipping service instead of by the third party. Ancillary services include stevedoring services.

If the scheduled cargo shipping service is part of a terminal-to-terminal service, the service is taken to include an ancillary service that relates to the scheduled cargo shipping service. Ancillary services thus are included in the negotiable shipping arrangements over which, if they are part of an eligible contract (as defined in s10.41 and s10.52), shippers have negotiating rights with the carriers. The Department doubts that stevedores and other entities that may have a contractual relationship with the parties to a conference agreement could realistically be brought directly under sections 10.41 and 10.52 of Part X where they have no direct contractual relationship with shippers.

However, it may be possible to amend s10.24A to require that stevedoring contracts made by parties to registered conference agreements must not be entered into on a basis that prevents Australian shippers sighting those contracts for the purposes of negotiations under Part X.

However, the best approach may be to mandate "all-in" freight rates as an option available for shippers, removing as an issue the terminal handling charges that are used currently by lines to recoup most of their stevedoring costs from shippers as a separate surcharge.

Negotiating powers
The Department supports APSA's call for strengthened negotiating powers for shippers under Part X, and has made a number of suggestions for changes that would strengthen the hand of shipper bodies.

The Department notes that anything approaching a shipper veto regarding proposed changes in existing negotiable shipping arrangements could have adverse effects on existing service levels and quality.

However, as discussed above, the Department suggests that consideration be given as to whether new conference agreements and variations should not be finally registered until shippers have agreed to the proposed minimum service levels.

The Department notes APSA's view in its supplementary submission that guidelines for negotiations should be included in legislation. However such guidelines may need a degree of flexibility and the ability to be amended from time to time that would make such guidelines unsuited to inclusion in legislation. A voluntary code gazetted under Part IVB of the TPA may be more suitable.

Round voyage cost information
The Department supports APSA's call to be provided with round voyage cost information so that the allocation of costs to inwards and outwards legs can be verified.

The Department has proposed in its original submission that the information provisions of s10.41 should be strengthened to require parties to registered conference agreements to provide shippers with sufficient information to justify any proposed change in negotiable shipping arrangements, separate from the requirement to exchange information, so that shippers can reach a judgement about that justification.

Funding shipper bodies
The Department supports APSA's call for consideration of alternative means of funding, because of the "free rider" problem.

Ministerial involvement
The Department notes the preference of APSA for the role of the Minister to be retained.

3.6 WESTERN AUSTRALIAN SHIPPERS COUNCIL (WASC)

The proposal, in the absence of Part X, to require overseas shipping lines to maintain a registered office in Australia may infringe Australia's WTO and various FTA obligations. As noted in the DFAT submission, existing reservations are couched in terms of the requirement for lines engaged in providing liner shipping services to or from Australia to be represented, by a person resident in Australia who will act as an agent for the purposes of Part X.

3.7 INTERNATIONAL CHAMBER OF SHIPPING (ISC)

The Department supports the ISC contention that Australia needs to take full account of regimes governing liner conferences in the rest of the world.

3.8 AUSTRALIAN FEDERATION OF INTERNATIONAL FORWARDERS (AFIF)

The Department supports the concern of AFIF that if Australia moved unilaterally to remove conference exemptions then conferences would be run entirely from overseas jurisdictions, and Australian shippers would lose their influence on conference decisions.

Regarding AFIF's concern about undue market power of any particular shipping line, the Department notes that Part X contains provisions (Division 10) that treat non-conference carriers that have been determined to have substantial market power to be treated in much the same way as conferences.

The Department also notes, in relation to AFIF's view that the stabilising benefit of shipper/carrier loyalty agreements has not been made use of to the same degree in Australia as it has overseas, that Part X contains provisions (Subdivision B of Division 5) that allow for loyalty agreements.

3.9 DEPARTMENT OF TRANSPORT AND REGIONAL SERVICES

Several issues that were not dealt with in the Department's initial submission have been canvassed in section 2 of this submission.

3.10 PORT OF BRISBANE CORPORATION (PBC)

The Department notes the PBA view of the importance of conferences to the confidence of shipping lines that facilitates their investment in shipping services, and in expensive refrigerated containers. The PBA states that the Australasian trades would not be sustainable without ship- and space-sharing arrangements

3.11 JAPANESE SHIPOWNERS' ASSOCIATION (JSA)

The Department notes the JSA's reference to the consultation mechanism of the Japanese regime, and notes that Part X contains provisions (Divisions 7 and 9) that set up consultation, information sharing and negotiation arrangements for shippers and carriers. The Department's initial submission proposed strengthening these arrangements in various ways for the benefit of Australian shippers.

A feature of the Japanese regime that might usefully be adopted in Part X is that the carriers must offer to discuss with the Japan Shippers' Council any proposed changes in shipping arrangements, before a public announcement is made.

3.12 TASMANIAN FREIGHT LOGISTICS COUNCIL (TFLC)

Industry interests, like the TFLC, if they obtain designated shipper body status under Part X, can make use of Part X provisions to work to ensure a satisfactory level of liner cargo shipping services are received by shippers in their area. The importance of liner co-operative arrangements to regular liner services for Tasmania, especially for reefer cargo, is supported by the Department.

3.13 AUSTRALIAN HORTICULTURAL EXPORTERS ASSOCIATION (AHEA)

The Department's proposals in its initial submission regarding surcharges and strengthening the negotiating position of shippers would appear to address concerns of the AHEA in this area.

The Department notes the AHEA's proposal to ban the registration of discussion agreements, but is concerned that this approach is likely to cause jurisdictional problems, and has proposed instead to strengthen the negotiating position of shippers in dealing with such agreements, and strengthening the position of the ACCC in investigating any shipper complaints generated by discussion agreements.

3.14 AUSTRALIAN INTERNATIONAL MOVERS ASSOCIATION (AIMA)

The Department agrees with AIMA's view of the importance of Part X in ensuring service stability for Australian consumers.

3.15 AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY (ACCI)

The Department notes that the ACCI's view that Part X should be repealed differs from the views of most of the shipper bodies that deal directly with liner shipping matters. The only exporter shipper body to call for the repeal of Part X, the WASC, is closely linked with the Western Australian Chamber of Commerce and Industry.

The Department does not agree that the market circumstances of international aviation are the same as those of international liner cargo shipping. There is no parallel in international liner cargo shipping to the bilaterals system which controls entry and capacity offered. On the contrary, entry is virtually free to all comers in international liner cargo shipping.

3.16 SHIPPING AUSTRALIA LIMITED (SAL)

More pro-active role for the Department of Transport and Regional Services
SAL has proposed (p35) that the Department of Transport and Regional Services should play a much expanded role in conciliation and facilitation when there is failure by shippers and carriers to reach agreement. SAL proposes that background investigations should be undertaken by the Bureau of Transport and Regional Economics (BTRE)

The Department does not favour this proposal, which cuts across the schema on which Part X is premised. Section 10.01(2)(b) states that it "*is the intention of the Parliament that the principle objects of Part X should be achieved: (b) through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters.*"

However, the most important reason for not adopting such a proposal is that it weakens the only sanction open to shippers who are left with a grievance after negotiations with the parties to a conference agreement – a complaint to the ACCC (which may choose to investigate and report to the Minister) or to the Minister (for possible referral to the ACCC for investigation and report).

This sanction is intended to give the conferences a strong incentive to be reasonable in their dealings with shipper bodies and shippers generally. To weaken this incentive by interposing a potentially very time-consuming bureaucratic process would be to undermine the whole approach underpinning Part X.

The Department is not equipped to investigate or reach judgements on commercial disputes involving competition policy. Good data on liner shipping is difficult to obtain and rapid changes in market circumstances can quickly make available data of little analytical value.

Judging by the information provided by conferences to shipper bodies it is hard to see that the BTRE would be able to draw any useful conclusions to assist the Department to reach appropriate decisions.

The Department considers that the current basic arrangements should remain, and if they need improving to obtain better outcomes for shippers, it should be in the direction of strengthening the ability of the ACCC to deal with shipper grievances in an expeditious manner. One possibility is reversing the burden of proof in the test for deregistration, at least in exceptional circumstances cases ie those under s10.45(3).

Another possibility for short-circuiting the process of dealing with shipper complaints would be for the ACCC to be able to seek undertakings from the conferences at an early stage (at present this step is undertaken by the Department under s10.45(1)(b) after an ACCC investigation and report to the Minister that recommends deregistration).

Inwards agreements

SAL regards as an anomaly the ability of the ACCC to investigate and report on any inwards registered conference agreement, while shipper body negotiating rights are restricted to eligible Australian contracts (as defined in s10.41). The Department does not agree with this view. If an inwards agreement is operated in a manner that leaves Australian importers with a grievance, then it should be open for them to approach either the ACCC or the Minister with a request for an investigation and report so that the exemptions that apply to the agreement may be withdrawn if the circumstances are found to warrant that cause of action.

On the other hand, the Department recognises that it is not appropriate that importers should seek to have negotiations on shipping arrangements that were contracted by the exporters in the countries of origin.

Destination terminal handling charges

SAL also recommends that APSA should be prevented by Part X from seeking to negotiate destination terminal handling charges. The Department regards this as a commercial matter to be negotiated between APSA and the parties to the conference agreements concerned, and not a matter for legislation.

Monetary penalties

The Department agrees that a system of monetary penalties for less serious breaches of the provisions of Part X, such as breaches of processes, would add to the flexibility of the regime. The views of the ACCC would be instructive in this regard. However, deregistration must remain the ultimate sanction.

Streamlining the registration process

SAL has proposed that the registration process be expedited in respect of variations to existing registered conference agreements, including dispensing with the 30 day delay after final registration before the exemptions apply to the new variation. SAL states that the delay period serves no discernable purpose.

The presumptive purpose of the 30 day delay is to give Australian shippers time in which to make any adjustments to their shipping or other arrangements that may be desirable following the variation. Variations often relate to changes in minimum levels of service negotiated under agreements or to particular parties leaving or entering agreements.

Parties to registered conference agreements must give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice (s10.41(2)).

The Department proposes that if each relevant designated shipper body agrees to a request from the conference for a lesser period before exemptions apply to a variation, and so informs the Registrar of Liner Shipping, then a lesser period should apply, and be entered in the Register of Conference Agreements accordingly. Amendments to sections 10.15, 10.17A and 10.18A would be needed. The onus for seeking a shorter period should be on the parties to the conference agreement concerned rather than on the Department.

FURTHER COMMENTS: SAL SUPPLEMENTARY SUBMISSION

Complete review of structure of Part X
The Department will consider a review of the overall structure of Part X in the event that Part X is retained.

Provisions concerning withdrawal from conference agreements: s10.06(2)
The Department considers the withdrawal provision a useful one that adds to flexibility and competitiveness within the conference system.

While the provision may be difficult to interpret, the Department endeavours to consider what is reasonable in the circumstances of each agreement. A longer period before withdrawal will be considered reasonable for an agreement which establishes new and complex shipping arrangements than would regard the as reasonable for, for example, a simple slot charter agreement between two lines.

Adherence to agreements with shippers
The Department notes that it is the Minister who declares designated shipper bodies. Currently the Registrar nominates those shipper bodies regarded as relevant to negotiations with particular conferences.

However, in section 2.5 above, the Department is proposing that, to streamline procedures and remove the potential for misunderstandings or communications failures, any DSB must be treated by conferences as a relevant body for the matters that came within the scope of its designation, whether (for secondary DSBs) by commodity type or geographical area.

Speeding up the registration process for conference agreements
The Department considers that current registration processes are sufficiently expeditious, where applications are properly made, not to warrant changing. The Department has made a proposal to substantially strengthen the registration process.

Delays currently occur where applications are not properly made or where there are issues to be resolved regarding the agreement itself, either with the Registrar or with shippers regarding minimum levels of service. As noted above, the Department has an alternate proposal regarding the delay before exemptions come into force.

Loyalty agreements
It might be thought that binding shippers to loyalty agreements is a counterpart to binding parties to discussion agreements to offers made to, and accepted by, shippers. However various conditions and obligations are placed on conference members by Part X as a *quid pro quo* for the exemptions they receive from the mainstream competition policy regime.

The Department considers that the ability of shippers to extricate themselves from loyalty agreements with conferences is a useful way of maintaining a degree of competitiveness within the conference system. This view would not extend to confidential service contracts between shippers and individual lines, which should be governed by normal contract law.

Provisions concerning non-conference carriers with substantial market powers
The Department does not support SAL's call to withdraw provisions concerning non-conference carriers with substantial market powers (Divisions 9 and 10). Although it is true that these provisions have not been invoked in a formal sense, ANL Limited testified to their usefulness in its submission to the 1993 Brazil review. ANL noted (p30) that while matters did not proceed to the stage at which the Minister took formal action, "*all parties were aware that this could have happened had a negotiated settlement not been reached.*"

Divisions 9 and 10 are mainly directed to the protection of Australian shippers rather than Australian flag shipping. The Department considers that shippers could find them useful in dealings with large carriers on matters outside the conference framework, and that they should be retained.

Provisions concerning unfair pricing practices
The Department considers that withdrawal of Division 11 would be premature. The Division is aimed at protecting Australian liner services from disruption by carriers that enjoy non-commercial advantages, given by a government, over other carriers in the trade. If those advantages result in pricing practices that are determined by the Minister (after ACCC investigation and report) to threaten to prevent or hinder the provision of efficient and economical liner services of the quality required by Australian shippers, and the Minister is satisfied that the practice is contrary to the national interest, the Minister may order the ocean carrier not to engage in the practice.

Although, with the decline in government ownership of shipping lines, these provisions are of less relevance than formerly, the Department considers that they should be retained for the time being.

3.17 THOMPSON CLARKE – ACIL TASMAN (TCAT)

The Department's initial submission makes it clear that the scheduled review of Part X was brought forward because of widespread shipper dissatisfaction with discussion agreements generally. Export shippers played the leading role in having the review in 2004 rather than 2005 as scheduled.

The TCAT submission is critical of the ACCC for considering shipper complaints based on rapid increases in so-called "headline" freight rates in the East Asia–Australia trade. This begs the question of whether the lines, relying as they do on specialist competition exemptions retained (so far) on the basis of general shipper support, might usefully have shown more restraint in setting "spot" freight rates when the cargo/capacity situation turned in their favour in 2003 in the East Asia–Australia trade. While the lines may have earned some extra revenue from non-contract shippers from the rapid rises in rates paid by a minority of shippers, the end result was unhappy shippers, some diminution of shipper support for Part X, and significantly more competition entering the trade. It also contributed to the holding of an earlier-than-scheduled review of Part X that puts at risk the specialist competition regime enjoyed by the lines.

3.18 BLUESCOPE STEEL

The Department notes the view of this long-term shipper that market forces have operated effectively in the Australian liner trades, and that there had been a general downward trend in liner freight rates until the 2003 rebound.

3.19 IMPORTERS ASSOCIATION OF AUSTRALIA (IAA)

The Department notes the concern of the IAA that service standards should be included in Part X negotiations. The amendments to s10.41 that were made in 2000 extended to eligible Australian contracts in inwards trades the negotiating rights of shippers in regard to negotiable shipping arrangements (which encompasses service standards under a registered conference agreement) that previously were enjoyed by exporters.

However, the rights of importers were consciously restricted only to those contracts entered into in Australia or to which Australian law was to apply, as it was not then considered practical for importers to be able to seek negotiations concerning carriage for which the contract was negotiated by the shipper in the country of export. The views of carriers and shippers might be sought as to whether it might be practicable to broaden the negotiating rights of importers to encompass other circumstances.

Importers (via the IAA) have the same rights to negotiations in respect of minimum levels of service for new conference agreements (or variations of existing agreements) before final registration. The Department is not aware that the IAA has ever exercised that power.

3.20 UNIVERSITY OF CANBERRA, Centre for Customs and Excise Studies

Penalties and civil remedies

The Department notes that Part X was amended in 2000 to insert s49A, which makes Part VI of the TPA apply where there is a contravention of an undertaking given under s10.49 (in which the Minister may accept an undertaking as an alternative to deregistration of a registered conference agreement). The measures available in Part VI include pecuniary penalties (s76) and civil remedies, including injunctions (s80), actions for damages (s82), and other orders (s87).

Responsibilities of the Department and of the ACCC

The Department notes that its responsibilities encompass the administrative of the Registrar of Liner Shipping, the Registrar's advisory role as to the administrative requirements of Part X, and the role of authorised officers in respect of negotiations conducted under the auspices of Part X.

These latter responsibilities encompass the roles of observer, adviser as to the requirements of Part X in relation to such negotiations, and a low level facilitation role aimed at ensuring that a mutually satisfactory outcome is eventually reached. Where this is not possible and the matter is referred to the Minister by a dissatisfied shipper, authorised officers will advise the Minister as to whether the matter should be referred to the ACCC for investigation and report. Where a matter is taken up directly with the ACCC by a shipper, and the ACCC chooses to investigate and report to the Minister, authorised officers will provide advice to the Minister as to whether the agreement should be deregistered (after first seeking undertakings on behalf of the Minister from the parties to the agreement that would make deregistration unnecessary).

The Department sees the role of the ACCC as being investigation and enforcement, at arm's length from the day-to-day operation of Part X. It is in the investigation that general trade practices expertise is required in order to reach a judgement about whether the agreement provides any public benefit. The enforcement role, apart from making recommendations to the Minister regarding deregistration, involves the application of Part VI in the event of any breach of undertakings given to the Minister by the parties to registered conference agreements in order to avoid deregistration.

Door-to-door operations
The Department notes that the exemptions for collective setting of door-to-door freight rates was removed in 2000. Exemptions may be on a terminal-to-terminal basis (including to an inland terminal), but no longer apply door-to-door.

Discrimination
The Department notes that s10.05 (which prohibited conferences from discriminating between shippers, except where justified by costs) was repealed in 2000.

Applying Part X to all import and export shipping services
Part X is intended to apply a countervailing power model by designating shipper bodies to negotiate with shipping service providers that are taken to have market power ie conferences and certain non-conference carriers. The Minister, after an investigation and report by the ACCC, may direct the Registrar to register a carrier as a non-conference carrier with substantial market power.

As most carriers appear to be members of a discussion agreement at least, there seems little to be gained by bringing other non-conference carriers under the aegis of Part X if they cannot be demonstrated to wield substantial market power. It would also remove an incentive for such carriers to maintain their independent style of operations.

Resourcing shippers
The 1999 review of Part X by the Productivity Commission concluded that shipper bodies should be funded by their members, but, recognising the "free rider" problem suffered by APSA and other shipper bodies, the Department supports APSA through an annual contract for APSA to provide assistance to small shippers, and is also a member of APSA. APSA operates on a very small budget so this support is significant.

The Department has not favoured a levy arrangement to fund shipper bodies due to the high proportion that collection and administration costs would form of the total amount collected, given the small amounts involved in running APSA. The Department notes that there are a large number of levies operating in the maritime sector already.

A levy of the level suggested would raise approximately $2m per year from about 35 million tonnes of liner general cargo and about $60 million per year if all bulk cargoes were levied (a levy of $1 per 10 tonnes of bulk cargo generally might have a significant adverse impact on bulk exporters, and in any case could not be countenanced to fund Part X-related shipper functions). Presumably the suggestion is to levy only bulk cargoes carried on liner vessels, in which case very little revenue would be raised from bulk cargoes.

Given that many of the expanded or additional functions suggested as uses for additional funding from a levy are either not related to APSA's role under Part X or only peripherally

so, the Department would not at this stage favour a levy under the auspices of Part X to fund such an expanded role. Nevertheless, the trust concept might usefully be explored further by the Centre for Customs and Excise Studies.

3.21 AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

Economic models of liner markets
The Department supports the ACCC's statement that the Productivity Commission would need to form a view of the potential impact of changes to existing arrangements on incentives for carriers to provide services.

The Department does not see how the repeal of Part X would encourage new entry seeking short term profit opportunities, as there are basically no barriers to entry to the Australian liner trades under Part X. Rather the Department would expect to see, in the event of repeal of Part X, an exit of some existing participants that considered that they could not operate sustainably in the Australian trades without the exemptions Part X provides for collaborative behaviour.

Extraterritorial enforcement
The Department remains to be convinced that, despite mechanisms such as the International Competition Network, effective regulation can be achieved where, in the absence of Part X, conferences might operate entirely from overseas jurisdictions that still permitted conference operations.

Education programs for shippers
The Department would agree that importers have shown little understanding of Part X since they were given various rights under Part X in 2000, despite the Department publishing *A Users' Guide to the New Trade Practices Legislation for International Liner Cargo Shipping* that set out the new obligations of carriers towards inwards shippers, and conducting a round-table for the IAA, and seminars for shippers and carriers in Melbourne and Sydney. However, export shippers have, over the years, shown a fair understanding of the Part X regime, and have made good use of its provisions.

Nevertheless, the Department would consider an education program for shippers, conducted in conjunction with APSA and the IAA, if Part X were to be retained.

AADA investigation
With regard to the AADA investigation, the Minister wrote to Mr Samuel of the ACCC on 13 August 2004 in terms that conveyed that the Minister would not be making a decision to deregister the agreement on the basis that the ACCC formed the view that exceptional circumstances did not exist that warranted the Minister giving such a direction.

The Department notes that a substantial increase in capacity offered in the Australia-North Asia trades has occurred. As the "reference period" used by the ACCC in its analysis was so narrow (April 2003 to February 2004) it is perhaps a little unreasonable to have expected public benefits from investment in new tonnage to have materialised during that period.

ACCC's regulatory alternative
The ACCC's proposed grandfathering/authorisation model, with no further Part X investigations by the ACCC, begs the question of sanctions for shipper complaints about

an operating conference agreement. Possibly a shipper complaint may be the trigger for a review of an agreement that has been authorised (or that has been deemed to have been authorised), in addition to reviews initiated by the ACCC without shipper complaint. If so, shipping lines would be faced with an ongoing prospect of heavy costs to justify existing arrangements, and a great deal of uncertainty regarding the future of those arrangements. This may inhibit the willingness of shipping lines to continue to service the Australian trades, and any increased costs are likely to be passed forward to shippers.

The Department considers that Part X, after amendments to reverse the burden of proof in some, or perhaps all, ACCC investigations in cases of shipper complaint, would offer superior protection to shippers with less risk of adverse effects on service levels or shipper influence generally.

The Department notes that it has provided the ACCC with copies of all registered conference agreements as part of the registration process. However, to avoid complications with obsolete agreements, the Department would favour, in the absence of Part X, a regime whereby parties to registered conference agreements had to provide the ACCC with copies of all conference agreements for which they wished to receive deemed authorisation.

Cost of regulation
The Department queries whether abolition of Part X would result in reduced costs of regulation of the liner industry. The costs of ACCC investigation (only 5 in 15 years) would be replaced by the costs of authorisation processes for all new liner agreements (and presumably for variations of existing agreements). The costs of ACCC investigations, to industry and the ACCC, plus the minor cost to DOTARS and industry of administering Part X, may well be heavily outweighed by the ongoing costs of authorisation processes. It may well be more difficult for industry to prove a public benefit than it would be for the ACCC, in a case of equal merit, to prove a public detriment, because of the ACCC's expertise in such matters.

Burden of proof
The Department notes the ACCC's concerns about the hurdle of the burden of proof involved with a Part X investigation. However, the Department would not agree that the 5 investigations over 15 years have shown that the process has not been successful. Two of the investigations resulted in the parties to the agreement offering undertakings to the Minister, an outcome which Part X envisages and which the Department understands was acceptable to shipper bodies at the time. The circumstances that gave rise to the other three investigations resolved themselves as the freight rate cycle moved on. Nevertheless, the Department would support changes to the Part X investigation regime that would assist in achieving quicker, less resource consuming investigation processes.

Costs and benefits of the authorisation process compared to Part X
The ACCC states that Part X is based on the premise that all liner agreements will produce public benefits that outweigh anticompetitive detriments. The Department would say that Part X gives such agreements the benefit of the doubt until proven otherwise, by allowing a liner agreement to operate until an ACCC investigation after complaint by shippers demonstrates that it should be deregistered. The Department notes that this latter approach has had general shipper support at a number of reviews over a long period.

While the ACCC states that its proposed approach is not intended to result in the dismantling of liner conferences, the risk remains that the burden of proof will routinely be

so costly for firms whose expertise is in transport and logistics rather than competition policy that conferences would be run entirely from overseas on a round-voyage basis, and that Australian shippers largely would lose their influence over shipping arrangements.

Consistency
The ACCC states that its proposed approach is consistent with that applying to all other industries. This may be true as regards industries operating in Australia, but international liner cargo shipping operates principally between nations, and operators are headquartered overseas in jurisdictions which, if they have a competition regime, provide exemptions for liner conferences on a basis that is consistent with the approach adopted by Part X. Thus, the ACCC's experience with industries operating within Australia may not be the best guide to the welfare gains anticipated by the ACCC from a repeal of Part X.

Industry-specific regulation
The ACCC states that its approach would remove industry-specific provisions for which the need has not been demonstrated. The Department notes that industry-specific regulation is common in the shipping/maritime sector, and that many aspects of international shipping are dealt with under specialised international conventions that have been developed over many decades to fulfil particular perceived needs in international transport and trade.

Independent carriers
The ACCC states that independent carriers that have substantial market power are obliged to register under Part X. This is not quite the case. If an independent carrier has been declared by the Minister, the Minister will direct the Registrar of Liner Shipping to register it as a non-conference carrier with substantial market power, after which it has much the same obligation to shippers as do the parties to a registered conference agreement.

3.22 AUSTRALIAN MEAT INDUSTRY COUNCIL (AMIC)

The Departments supports the desire of the AMIC to expand the role of designated shipper bodies in collectively engaging in open and frank discussions with carriers in the North American trades with a view to assuring future service levels.

3.23 DR TONY FLETCHER

The Department notes that ANL Limited, which was active in various international liner cargo shipping trades, accumulated losses of almost $250 million. The Department considers that incorporating cargo reservation schemes in free trade agreements would not likely be in the best interests of Australian shippers, although the views of shippers might be sought by the Commission.

In his supplementary submission, Dr Fletcher appears to have included the costs of bulk shipping in his calculations of the cost of liner services. The value of liner cargoes was about $110 billion in 2001-02. The Department notes that, in the example given, the combined cost of ocean freight and insurance is no more than the total of the costs of domestic freight to port and export documentation.

3.24 UNIVERSITY OF NEWCASTLE - Maritime Law & International Trade Group

The Department supports the view that a liner regulatory scheme that balances the interests of shippers and carriers is very important for a nation that has a very small role in international shipping. The Department supports the view that Part X contributes to stability in liner services for Australian shippers.

11: CONTACT DETAILS

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