17 December 2004

Professor Judith Sloan
2004 Review of Part X of the Trade Practices Act 1974 Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Professor Sloan

Inquiry Into Part X, Trade Practices Act, 1974 (Cth)

SAL appreciates the invitation you extended at the public hearings held on 1 December and 6 December respectively for interested parties to put before the Commission any other matters of relevance to this inquiry and/or provide further elaboration on previous arguments as a result of the issues raised at the public hearings.

SAL wishes to raise a number of factual issues over and above those contained in its two previous submissions to this inquiry and initially we wish to address some of the more fundamental concepts that appear to underlie the preferred option in the draft report of abolishing Part X and for carriers and shippers to make use of the Part VII (authorisation procedures) of the Act if any exemptions from Part IV (restrictive business practice provisions) are required to meet the net public benefit test whereby the benefits exceed any perceived anti-competitive detriment.

From your questions and those of the Assistant Commissioner, Mr Gary Potts, it is apparent that at this stage of the process you do not see the international liner shipping industry being sufficiently different to warrant a specialised regulatory regime such as that contained in Part X and even if such a case exists, in your view, the Part VII provisions provide the best mechanism to achieve the necessary exemptions and provide a public review process as to the costs and benefits of any particular arrangements that, in accordance with your reasoning, are denied under the Part X regime.

The superficiality of this analysis would escape the casual observer and an in-depth analysis is required to counter its initial attractiveness.

Why does international liner shipping require a specialised regulatory regime particularly in a relatively small container trade such as Australia?

Of the many industries in Australia, only a limited number extend their activities internationally with the remainder being solely domestic. Of those that do have international activities, only two industries provide scheduled transport services, namely the air and sea transport industries. Both of these industries, unlike domestic industries, have to cope with varying Government policies and differing regulatory regimes of at least two governments (and often many more), a multiplicity of port and land transport customs, different practices of border protection agencies (including Customs, security, and quarantine), different taxation and banking regimes and so on.

Secondly, the provision of scheduled international transport services as enabled by Part X allows the carriers to meet the demands of exporters and importers. This derived demand creates its own difficulties in terms of capacity that will be required to meet that demand. The supply and positioning of specialised refrigerated equipment, or non-standard General Purpose Containers is another pre-requisite in certain trade routes, especially those to and from Australia. The general standard of containers used especially for the carriage of food, the insurance arrangements that apply, the level of service delivery and so on may not all be unique to international liner shipping but in combination they challenge any regulatory regime to facilitate such outcomes and such a regime cannot be solely domestic focused.

Thirdly, as mentioned above, the only other industry that has similar challenges is the more concentrated and more highly regulated international aviation industry. However, until Government to Government Air-Service Agreements which control capacity are abandoned there can be NO such comparison with international liner shipping. Over eighty percent of international airfreight is carried in the bellyholds of passenger aircraft governed by just over 3,000 such inter-Government Agreements currently in force in Australia. There are no comparable limitations on capacity that can be introduced into the international liner shipping trades. Thus, international liner shipping retains a high degree of contestability.

A further fundamental issue is the question of **transparency and the application of a public benefit test prior to the Agreements presently registered under Part X becoming operative.**

Whilst there are over 60 Agreements presently registered under Part X, as mentioned at the hearing, they all fall into four broad categories and within each category there are more similarities than differences between each Agreement.

A. Discussion Agreements (DAs) that provide for some rate (price) setting but only on a non-binding consensus basis.

B. Conferences which provide for binding rates on the members but they have declined in number.

C. Consortia or Operational/Technical Agreements that provide for rationalised, economic services with the sharing of space on the vessels of individual carriers party to the arrangement.

D. Joint Service Arrangements often between two parties only which are also technical or operational in nature.

It was mentioned during the hearings that these arrangements do not apply in the really long/thin trades such as to/from South Africa and South America but clearly they are so small at this point in time as not to warrant or offer sufficient inducement for a number of carriers to jointly service these trades and so require the types of exemptions available under Part X. We have re-examined the figure used in the draft report to describe the percentage of the world liner trade accounted for by Australia ie. 5% in 2003 and have found it to be significantly overestimated. The source was the quote in the original submission by the Department of Transport and Regional Services (footnote 45 on page 33) but the total container trade of 66 million was underestimated as it would have been closer to 150 million making Australia's three million containers; 2% of the total. Even if it was 2.5%, it is only half the estimate used in the draft report. This lower percentage was also confirmed in the ACIL Tasman/Thompson Clarke Shipping submission.

In Part X terms, the "public benefit" is contained within the regime itself; viz not only the need to provide adequate, economic and efficient shipping services but also the requirement for transparency in many of the carriers activities that impact on Australian liner exporters.

It was an ingenuous remark by the ACCI representative that if arrangements could be concluded offshore, in a non-transparent manner, then carriers would have no objection to the repeal of Part X anyway. For almost forty years since Part X was enacted in 1966 carriers have taken their obligations in Australia seriously and all within an internationally compatible regulatory framework. Removal of Part X and the introduction of a more stringent regulatory regime compared to those prevailing in our major trading partners, introduces a completely new dynamic and raises serious questions regarding the extra-territorial application of Australian laws. It is understood that the potential for international jurisdictional conflict and the ramifications thereof will receive more comprehensive treatment in the final report compared to the comments on this issue in the draft report.

Dr Davis representing the ACCI also mentioned that users of the service were attracted to trading off a lower service for a lower freight rate. To the best of our knowledge no shippers are prepared to accept that trade-off. When freight rates fall, shippers still insist on the maintenance of the existing service level. This is an important point. Meat exporters, for example, have complained that service levels, at times, are not fully meeting their requirements, and have agreed to freight rate increases on the basis that the service must remain viable. We would be interested to hear from shippers willing to trade-off service levels for freight rate reductions!

The reason for stressing the international nature of this industry is that it is important the public benefit test is applied by those whose business regularly involves international trading. They bring a level of expertise to the application of the public benefit test that the ACCC we are sure would acknowledge would not normally be available to a domestic competition regulator. Furthermore, under Part X, a multi-faceted test is applied over the life of the Agreement. For example, you mentioned at the hearings that, in your view, the benefits of Minimum Service Levels being attached to registered Agreements to the shippers and therefore, the Australian community at large, look quite small. To the contrary, it is an important obligation for

parties to such Agreements not to fall below these service standards for any lengthy period given that they set out the minimum capacity in the total supply of both dry and refrigerated containers that must be provided in good order and condition, the total number of sailing specified must be provided to the loading and discharge ports listed and so on. These commitments are very meaningful and provide surety of supply for exporters that would otherwise not exist.

In our submissions we acknowledge that shippers have complained about the lack of notice regarding proposed rates increases and the fact that the results of negotiations between carriers and shippers cannot be binding on the parties to DAs and we have suggested modifications to Part X to resolve this problem. In addition, carriers party to DAs are releasing their forward business plans at a earlier date to assist shippers with their planning.

The representatives of the Australian Horticultural Exporters Association mentioned that the tariff currency which had been converted from Australian dollars to United States dollars was imposed on the Association without negotiation. This in not an accurate statement. Following negotiations and unlike other commodity shippers that pay in US dollars, the following tariff conditions were agreed:

> "shippers wishing to pay the Ocean Freight in a currency other than US dollars may do so at the National Australia Bank's selling rate of exchange prevailing seven (7) calendar days prior to the scheduled arrival date of the vessel at its first Australian load port."

It is considered that this was an acceptable compromise between the application of a currency that has become the norm of tariff currencies worldwide and the particular requirements of the horticultural exporters.

In addition, the impression could have been gained that those exporters were subject to various surcharges at irregular intervals ie. at short notice. The only collectively agreed surcharges are Terminal Handling Charges which have been remarkably stable over the seasons, the Port Service Charges which are determined by Port Corporations in Australia and the Bunker Additional. This latter surcharge has not fluctuated very often as there needs to be a price differential of US$25/tonne or more, over five successive weeks, to trigger a discussion between the Discussion Agreement parties and APSA/AHEA.

There is also a booking cancellation charge and of course, the application of GST in specified circumstances but the above surcharges are the major additionals. Unlike the evidence given, the formula and justification for these surcharges have to be negotiated with the AHEA, if the parties to the registered Agreement are required to do so.

You mention that the Commission is not persuaded by the fact that 80% of the submissions received before the public hearings advocated retention of Part X in one form or another but rather the Commission is persuaded by force of argument. Yet, it appears the issues raised by the ACCC in its submission have been given prominence in the draft report without similar detailed attention having been given to the contrary arguments advanced by the supporters of Part X.

You also commented that there was a level (unquantified) of concern out there by shippers and/or shipper groups (un-named) that were interviewed by the Commission and who had declined to make submissions. We are also aware of shippers who support Part X but they did not put those views in writing to the Commission believing others such as APSA would undertake that task for them. It is not possible to address the concerns of shippers who prefer the veil of secrecy and are not prepared to comment publicly.

The New South Wales Road Transport Association complained that stevedores appear to give priority to their customers; the shipping lines rather than the trucking companies. On one level this is not surprising given that the Lines pay for stevedoring services. However, in the context of Part X, only Consortia not Conferences (or obviously Discussion Agreements) negotiate stevedoring contracts. It would be an impossible situation if there were four shipping lines sharing slots on one vessel, for example, as occurs with Consortia, if they had stevedoring contracts with different stevedores.

In addition, we gathered from comments at the hearing that there is a belief that the freight forwarding industry could assist any small to medium sized shippers that may not be fully catered for in terms of their shipping requirements in the event of Part X being abolished. This would not only add to their costs of exporting but also it does not address the serious concern we have that service levels will decline in that situation. No individual forwarder in the Australian trade would be big enough or be able to become big enough to match the larger liner exporters or importers. Therefore, the risk of lower service levels in a non-Part X environment remains a real risk!

Overall, we are hopeful that following re-consideration of these issues the Commission will see fit in its final report to change the preferred option to one of modification rather than abolition of Part X so that the regulatory regime governing Australia's $120 billion international liner trade will remain compatible with those of our major trading partners and the regulatory regime will continue to facilitate rather than hinder this valuable generator of economic activity.

The model in the currently preferred option may appear to be ideologically sound but such a "leap of faith" without a clear view of its implications for our Nation's trading community requires at the very least a cautious rather than a bold and untested initiative with all the attendant risks such a move would entail.

We remain ready to respond to any further questions or expand on points of view, if required by the Commission.

Yours sincerely

Llew Russell
Chief Executive Officer