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

ACCC submission to the Productivity Commission Draft Report

ACCC Submission to Productivity Commission Draft Report on Part X of the *Trade Practices Act 1974*.

The Productivity Commission's Preferred Option – Revoke Part X

The Productivity Commission's draft report presents a strong case against retaining Part X of the *Trade Practices Act 1974* (TPA). The Australian Competition and Consumer Commission (ACCC) shares the view of the draft report that industry outcomes can be improved by amending the current arrangements.

Foremost, the ACCC supports the Productivity Commission's preferred option of repealing Part X and relying on authorisation under Part VII to exempt from competition law those agreements that have a net public benefit. This is consistent with the ACCC's submission to the Productivity Commission's Issues Paper.

The draft report makes a number of important conclusions that warrant emphasis:

Draft finding 4.1

…Discussion agreements and conferences are primarily a means of limiting or regulating competition on capacity and price.

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.

Draft finding 7.2

…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.

Importantly, the provision of scheduled liner services to Australia is unlikely to be jeopardised by a change in the regulatory environment. The ACCC recognises there are strong arguments that the provision of scheduled liner shipping services to and from Australia constitutes a benefit to exporters and the community. Where the provision of a particular scheduled service is dependent upon an anti-competitive arrangement, the ACCC would take this into account in deciding whether to authorise the arrangement. Further, the transition arrangements involving deemed authorisation that the ACCC proposed in its submission are designed to ensure that those involved in the industry have an opportunity to assess whether their current arrangements would risk breaching Part IV and, if so, to prepare a case for authorisation under Part VII.

Shipping lines and Part VII

During the PC's review, concerns have been raised regarding the apparent slowness of the Part VII authorisation assessment process and whether it would be able to accommodate the industry's requirement that parties to agreements may change rapidly. Other concerns are that the authorisation process is time consuming and potential reviews by the Australian Competition Tribunal lead to delays and uncertainty.

It should be noted that authorisation has the effect of taking away from third parties the right to take legal action under the TPA for breaches of the competition law. The TPA imposes large penalties for anti-competitive conduct because such conduct can result in significant damage to businesses, consumers, the Australian economy and the community. This explains the importance of having a transparent, public process before the ACCC grants an authorisation. It means the applicant's public benefit claims are tested and those who may be adversely affected by the granting of an authorisation are given an opportunity to put their views to the Commission.

Public consultation can be time-consuming, especially when the conduct for which authorisation is sought is complex, controversial or affects many individuals and businesses. However, adequate public consultation ensures that:

- applicants and interested parties are afforded procedural fairness
- the validity of the applicant's public benefit claims are rigorously tested so that the ACCC can be satisfied the conduct is likely to benefit the public
- sufficient market inquiries are conducted so that the ACCC fully understands the likely impact of the conduct on competition and the community more generally

Notwithstanding the need for consultation, it is important to note that the proposed legislation to implement the Government's response to the Dawson Inquiry into the competition provisions of the TPA is expected to impose set timeframes for the ACCC's consideration of applications for authorisation. Once enacted, this legislation will require the ACCC to make a decision on authorisation applications within six months[1] from the date of lodgement or authorisation will be taken to have been granted by the ACCC. This is significant in the context of the concerns raised as to the timeframes associated with authorisation process.

It is also important to note the interim authorisation process provided for under the TPA. Interim authorisation allows an applicant to engage in the conduct for which authorisation is sought while the ACCC considers the merits of the authorisation application.

The ACCC endeavours to make decisions in response to requests for interim authorisation within 30 days. In 2003 and 2004, a number of applications for authorisation sought and were granted interim authorisation as set out in the

[1] may be extended by up to six months, but only with the agreement of the applicant.

attachment to this submission. In relation to the matters finalised in 2003, seven out of ten applications for interim authorisation were granted. In these cases, interim authorisation was granted between 9 and 34 days from the day of lodgement (averaging 22 days). In relation to matters finalised in 2004, all nine applications for interim authorisation were granted in an average time of 23 days.[2]

More recent applications for authorisation, still under consideration, have also been provided interim authorisation. In the current application lodged by AWB and GrainCorp, in relation to complex joint venture issues, the ACCC granted interim authorisation in 10 days. This allowed the applicants to implement the arrangement for the current harvest and improve their co-ordination with the rail transport providers in managing the harvest and export task. Applications by the Board of Airline Representatives of Australia (BARA) and Port Waratah Coal Services (PWCS) were also granted interim authorisation within five weeks, following consultations with interested parties.

As indicated in the ACCC's previous submission, decisions about whether to grant interim authorisation are based on a variety of different factors. On one hand, interim authorisation is more likely to be granted in cases where it will maintain the status quo in the market. In that regard, where the conduct the subject of an authorisation application has been engaged in for some time prior to lodgement of the application, this would be an important factor the ACCC would take into account when assessing a request for interim authorisation. For example, in granting interim authorisation to certain processes of the Royal Australasian College of Surgeons (RACS), the ACCC took into account the fact that these processes had been in place in various forms for many years prior to RACS lodging the application. The granting of interim authorisation by the ACCC allowed RACS to continue to engage in the conduct with full certainty that they were protected from legal action under the TPA while the ACCC was assessing the application.

In 2003 and 2004, the ACCC completed 29 applications for authorisation, revocation and substitution and minor variations, granting[3] authorisation to all except the proposed alliance between Qantas and Air New Zealand. Details of assessment timeframes are provided in the attachment to this submission.

It is important to note that authorisation decisions are often delayed because of circumstances specific to particular applications beyond the ACCC's control. With regard to the applications completed in 2003 and 2004, the variation in the assessment time has been mainly affected by delays in obtaining information from applicants, or key interested parties, as well as subsequent amendments being made to applications by applicants. Removing the six authorisations identified in the attachments as being significantly delayed beyond the ACCC's control, the average length of the authorisation process for matters finalised in 2003 and 2004 has been 8½ months.

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[2] This excludes one application for minor variation where the ACCC delayed its consideration of the request for interim authorisation (and consultation with interested parties on that issue) while it waited for the applicants to respond to issues arising from the application. The ACCC also granted interim authorisation in relation to one matter at a later stage at its own instigation.

[3] Granting in full, in part or subject to conditions.

However, as noted above, interim authorisation was granted, on average, 22 days from the date of lodgement.

Changes to membership of agreements

The authorisation process provides some flexibility which would allow it to deal effectively and efficiently with changes to membership of agreements that may be the subject of authorisation should Part X be abolished.

An authorisation can be expressed to apply to parties who become involved at a later stage in the conduct for which authorisation is granted – that is, authorisation can apply to current and future parties to an arrangement, meaning that the addition of new parties would not result in a loss of immunity for the arrangement. For example, the application for authorisation lodged by RACS was expressed to apply to "*the College, its officers, employees, current and future Fellows. The current and future members of the College's affiliated specialist societies and associations*". This would be directly applicable to shipper bodies applying on behalf of their members to collectively negotiate with shipping lines.

Changes to the membership of a consortium which may be granted authorisation could possibly be dealt with in the same manner. That is, it could be envisaged that such an authorisation could be expressed to apply to present and future members to the consortium, but would need to include safeguards, in the form of conditions, to ensure that changes to the membership is not likely to increase the anti-competitive effect of the arrangement.

The ACCC has granted authorisations with this type of conditions in the past. For example, in the application for authorisation lodged by the Australian Dairy Farmers Federation (now Australian Dairy Farmers), the ACCC and subsequently the Australian Competition Tribunal granted authorisation for dairy farmers to collectively bargain with processors on a number of conditions, including that the dairy farmers in any group were not to comprise all farmers within specified regions.

An alternative way of dealing with changes to consortia membership may be through the process of minor variation (where appropriate) or the revocation and substitution process (both discussed in the ACCC's earlier submissions).

It is important to note that the ACCC has been prepared to consider innovative ways of expressing authorisation applications, so that such applications are able to achieve the practical objectives of the applicants, provided they meet the public benefit test.

Shipper Groups and Part VII

Collective negotiations between shippers and shipping lines

If Part X is abolished, shippers and their representative organisations could retain their ability to collectively negotiate prices and/or service levels with shipping lines through the authorisation process, provided the conduct generates a net public benefit.

Such authorisations could be designed to cover the process of collective negotiations between shippers and shipping lines generally (both individually and/or in grouping) for a period of time. This could allow immunity to apply to any agreement negotiated and put into effect with any individual or group of shipping lines during the authorisation period, without the need to seek authorisation for each agreement shippers may be entering into with particular shipping lines.

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

Export agreement exemption (s.51(2)(g))

The ACCC is strongly of the view that the export agreement exemption contained in section 51(2)(g) of the TPA would not provide an alternative to the exemption under Part X for shippers to collectively bargain with shipping lines.

The export agreement exemption only applies to contracts, arrangements or understandings that relate exclusively to the export of goods from Australia or the supply of services outside Australia, that is the supply of goods or services to overseas buyers for consumption or resale in overseas markets. Agreements may contain provisions that relate to the export of goods from Australia and other provisions that relate to the supply of goods or services to customers in Australia. However, only those provisions that relate to the export of goods or the supply of services outside Australia would be eligible for an export agreement exemption.

The ACCC considers that collective bargaining between shippers and/or their representative bodies and carriers would not fall under the export agreement exemption, as it does not relate exclusively to the export of goods from Australia or the supply of services outside Australia. Collective bargaining between shippers and carriers relate to the supply of international shipping services by carriers to Australian shippers, ie the supply of services to customers in Australia. The supply of such services takes place in market(s) in Australia, that is the market(s) for international shipping services from Australia to overseas ports. The conduct would also impact on the ability of Australian exporters to compete in international commodity markets.[4]

It should be noted that the ACCC only has an administrative role as regard to the export agreement exemption of the Act. The ACCC does not grant immunity in the same way that it does under the authorisation process. The ACCC considers that if shippers wish to rely on the export agreement exemption as outlined above, then they will take the risk of being exposed to legal action by the ACCC or third party.

In addition, it should be noted that the details of export agreements lodged with the ACCC are confidential. The ACCC considers it essential that if Part X is abolished,

[4] Similar markets were identified in the ACCC Discussion Paper A90855/2 on IATA Cargo Agency System (26 October 2004)

any request for immunity by shippers to collectively bargain with carriers be subject to a transparent process provided by the authorisation process.

International Jurisdiction

The ACCC notes some concerns expressed by industry that reforms to Part X could expose certain liner agreements to Australian competition law where those same agreements are not prohibited in other jurisdictions that the agreement operates in. For example, Shipping Australia Ltd has questioned the degree of cooperation that the ACCC could expect from enforcement bodies in other jurisdictions should it seek to pursue conduct that is prohibited in Australia but not prohibited in the foreign jurisdictions.

The PC's draft report sets out the ACCC's jurisdiction in those cases where agreements between lines affect competition in an Australian market, and also recognised the complications and difficulties of pursuing potential breaches of the TPA. Basically, where a breach of the TPA may have occurred, the ACCC may pursue that breach notwithstanding the uncertainties and complications of enforcing claims against foreign based firms. This is consistent with the ACCC's increasing activities in pursuing international cartels. While lines may have views regarding the practicality of the ACCC enforcing its claims, it is clear that lines (and their staff) engaging in anti-competitive activity run the risk of enforcement action (unless that conduct has been authorised pursuant to Part VII). In any case, potential complications that may occur in enforcing a breach of legislation would not appear to be a sound justification for granting exemptions to that legislation.

Looking forward, one of the objectives of the ACCC's international activities, and more specifically its technical assistance activities, is the establishment and enhancement of competition, consumer protection and regulatory regimes, particularly in the Asia-Pacific region, to improve domestic efficiency and consumer welfare in these countries, improve access for Australian exporters (by the provision of assistance to Australia's trading partners), and facilitate enhanced enforcement mechanisms for cross border conduct. As a developed country, with a long tradition of promoting competition policy and law, Australia (including the ACCC) continues to engage in capacity building and information sharing on competition, consumer and regulatory policy, law and enforcement at a bilateral, regional and multilateral level.

PC's less preferred options (Draft Recommendations 9.1 and 9.2).

Given the strength of the case to move away from Part X, the ACCC's view is that modifications to Part X should only be seen as transition measures – essentially alternative means of allowing the industry to adjust to imminent changes in the regulatory environment. In this respect, were either of the less preferred options to be adopted then a clear time frame should be established to ensure the gradual progression away from Part X.

The ACCC's view is that further amending Part X (rather than revoking it) will do little to improve its ease of use – it will remain an esoteric and poorly understood piece of legislation and regulation. In its submission to the PC's Issues Paper, the ACCC noted the poor level of understanding of Part X amongst the importer community in particular. Indeed the cost to the ACCC itself in conducting action under Part X is significant and usually necessitates specialist legal advice.

The two options for amending Part X described in the draft report seek to distinguish those agreements which *prima facie* have a lower likelihood of providing a net public benefit and remove the block exemption provided by Part X.

Option 1 (draft recommendation 9.1) distinguishes agreements by feature, allowing non-price fixing agreements to continue under Part X but agreements involving price fixing or quantity controls can only achieve protection via Part VII. The ACCC views this method of discrimination as useful as it recognises that situations that allow competitors to reach arrangements or understandings to "supply less and/or charge more" risk distorting market signals and causing harm to customers. Consistent with this, arrangements between competitors on price are deemed by s.45A of the TPA to substantially lessen competition.

Option 2 (draft recommendation 9.2) distinguishes agreements by agreement type, allowing consortia and conference agreements to continue to enjoy blanket exemption pursuant to Part X but Discussion Agreements can retain immunity by establishing a net public benefit through the authorisation process under Part VII. As the draft report discusses, a risk with Option 2 is the problem of definition – proscribing an agreement by name may only lead to similar agreements being struck with differences only sufficient to place them outside the definition. ***For this reason, should Part X not be revoked, the ACCC would regard draft recommendation 9.1 as a superior approach to draft recommendation 9.2.***

Confidential Individual Service Contracts

Under both Options 1 and 2, the draft report proposes that Individual Service Contracts between a line and a shipper be mandated a right to confidentiality. Provisions of agreements that allow for members to deal with shippers directly without the scrutiny of fellow agreement members would appear to provide a control on the potential market power of an arrangement.

Enforcement

The draft report discusses the criteria set out under Part X which provide for ACCC investigation of conduct by anti-competitive liner agreements that appear to be detrimental. Specifically, the draft report recommends that the onus of proof that a particular agreement results in a public benefit that outweighs the anti-competitive detriment be placed on the members to the agreement. In effect, this amendment would become a retrospective net benefit test, albeit without the benefits of transparency and consultation that authorisation provides. As such it is still less satisfactory than requiring the parties to the agreement to establish likely net public

benefit prior to engaging in the conduct. Nevertheless, it would assist to lower what is currently an unusually high and convoluted burden of proof that the ACCC faces in Part X investigations and would help to ensure that members to an agreement have an incentive to provide information to the ACCC.

Certain of the Part X investigation criteria also currently provide that "exceptional circumstances" be present in order for the ACCC to recommend that an agreement be deregistered. The draft report recommends replacing the "exceptional circumstances" provision with a "material change in circumstances" test. The ACCC's view is that administration of a "material change in circumstances" test may be impractical. While the test works consistently with Part VII, where the ACCC carries out the initial assessment of market circumstances, it would be difficult to administer where another agency carries out the initial registration under Part X. Further, as no competition analysis or assessment of circumstances takes place at the time an agreement is registered under Part X, it would be difficult for the ACCC to subsequently establish whether a change had occurred in circumstances.

As an alternative to amending the "exceptional circumstances" criteria, the Productivity Commission may consider whether it is more appropriate to remove the "exceptional circumstances" provision altogether. As it stands, the criteria in s.10.45(1)(a)(viii) set out a four-stage process that may roughly be broadly described as:

- The presence of an anti-competitive agreement;
- Parties to the agreement give effect to that agreement;
- The detriment flowing from the parties' conduct is not outweighed by a public benefit; and
- Exceptional circumstances exist.

The term "exceptional circumstances" is not defined although guidance suggests it implies a further test of net public benefit, as well as the presence of market power, and the "unreasonable" reduction of services or increase in freight rates. Issues of market power, capacity constraint and monopoly pricing would all form part of the ACCC analysis of the third leg of the test, the assessment of anti-competitive detriment and public benefit. The ACCC's view is that this fourth leg of the criteria could be removed as a method of simplifying the regulation and strengthening the enforcement provisions of Part X.

Finally, should Part X be modified rather than revoked, the ACCC suggests that an expiry period should apply to agreements registered pursuant to Part X. As it stands, it appears that registered agreements are not reviewed as a check on whether they are still relevant to ongoing conduct. The presence of redundant registered agreements further complicates the ACCC's task in investigating potential breaches of Part X. Taking into account the largely automatic registration process, the ACCC suggests that the Productivity Commission give consideration to what may be an appropriate period beyond which registration would lapse if not renewed.

Summary of Authorisations Granted in 2004 (up to 7 December)

Application*	Lodged	Interim	Draft	Final	Days from lodgement to interim	Months from lodgement to Draft	Months from Lodgement to Final	Decision	Comments
Tasmanian Farmers & Graziers Association - A90914	23/03/2004	21/04/2004	23/09/2004	17/11/2004	29	6	8	granted	
Clay Brick and Paver Institute (CBPI) for itself and on behalf of the Concrete Masonry Association of Australia (CMAA) - A90895	18/12/2003	N/A	21/04/2004	4/11/2004		4	11	granted for 12 months	
Port Waratah Coal Services Ltd - A90906, A90907 and A90908	5/02/2004	5/03/2004	8/04/2004	9/07/2004	28	2	5	granted	
Allianz Australia Insurance Limited QBE Insurance (Australia) Limited and NRMA Insurance Limited - A30217 and A30218	22/10/2002	28/11/2002	28/04/2003	24/03/2004	37	6	17	granted with conditions	applications amended on 15/12/2003
Sisters of Charity Health Service Ltd - A30216 and A30219	21/10/2002	21/08/2003#	21/08/2003	5/03/2004		10	17	granted	
Mortgage Industry Association of Australia (MIAA) - A90880	19/08/2003	24/09/2003	26/11/2003	18/02/2004	36	3	6	granted	
ASX Settlement and Transfer Corporation, Australian Stock Exchange Limited	14/08/2003	27/08/2003	19/11/2003	25/02/2004	13	3	6	granted with conditions	
Victorian Brick and Blocklaying Training Foundation and Clay Brick and Paver Association of Victoria - A90887	4/12/2003	10/12/2003	21/04/2004	4/11/2004	6	4	11	granted	
Inghams Enterprises - A90888	5/12/2003	17/12/2003	15/04/2004	19/05/2004	12	4	5	granted	
International Air Transport Association - minor variation to passenger agency program	24/12/2003	03/06/2004^		20/10/2004			10	granted	consideration of interim delayed while ACCC waited for applicant to respond to issues arising from application. ACCC consultations with interested parties started on 12/05/2004
International Air Transport Association - minor variation to passenger agency program	16/07/2004	4/08/2004		20/10/2004	19		3	granted	
* Excludes applications in gas and electricity sectors									
^ granted with conditions									
# interim granted at the ACCC's instigation									

Summary of Authorisations Granted in 2003

Application*	Lodged	Interim**	Draft	Final	Days from lodgement to interim	Months from lodgement to Draft	Months from Lodgement to Final	Decision	Comments
Recruitment & Consulting Services Association (RCSA) - A90829	5/04/2002	N/A	12/03/2003	24/09/2003		11	17	granted	application amended on 23/09/02
Qantas Airways Limited and Air New Zealand Limited - A30220, A30221, A30222, A90862 and A90863	9/12/2002	N/A	10/04/2003	9/09/2003		4	9	denied	
Golden Casket Agents Association Ltd - A90853	17/10/2002	Sought but not granted	28/04/2003	4/09/2003		6	11	granted	
Air New Zealand Ltd on behalf of the Members of the Star Alliance - A30209 and A30210	26/04/2002	Sought but not granted	30/05/2003	4/09/2003		13	17	granted	
Australian Hotels Association (NSW) - A90837	17/07/2002	N/A	26/03/2003	27/06/2003		8	11	granted	
NSW Department of Health - A90754 and A90755	1/11/2000	N/A	21/10/2002	27/06/2003		23	31	granted	legal issues raised by application resolved by April 2001; request for information from applicant received in Oct 2001; clarification from applicants in Dec 2001
CSR Ltd - A90808	29/10/2001	7/11/2001	6/11/2002	10/06/2003	9	13	20	granted	delays while legal proceedings were underway between certain parties to the arrangements
Myer Stores Ltd - A40082	17/09/2002	9/10/2002	17/04/2003	4/06/2003	22	7	9	granted	
Repco Ltd - A90870	19/02/2003	Sought but not granted	23/04/2003	4/06/2003		2	4	granted	
BHP Billiton Minerals Pty Ltd - A70015, A70016 and A70017	10/09/2002	N/A	22/01/2003	5/03/2003		4	6	granted	
CSR Ltd - A90769	23/11/2000	N/A	6/11/2002	3/02/2003		24	27	granted	initially 2 applications lodged; one was subsequently withdrawn, the second was amended on 22/08/2002; supporting submission provided on 31/07/2001
Inghams Enterprises Pty Ltd - A90825	3/04/2002	23/04/2002	4/12/2002	22/01/2003	20	8	9	granted with conditions	
Royal Australasian College of Surgeons	28/11/2000	4/05/2001	6/02/2003	30/06/2003	34	27	31	granted with conditions	application for interim and supporting submission received on 30/03/2001; delays in obtaining information from key interested parties

Summary of Authorisations Granted in 2003

Medicine Australia - A90779 and A90780	16/01/2003	N/A	27/06/2003	14/11/2003		5	10	granted with conditions	
Refrigerant Reclaim Australia Limited - A90854	4/10/2002	6/11/2002	26/02/2003	7/05/2003	33	4	7	granted	
Investment and Financial Services Association - A90857 and A90869	25/11/2002	6/12/2002	8/10/2003	3/12/2003	11	11	13	granted	
International Air Transport Association - minor variation to passenger agency program	24/12/2002	16/01/2003		5/03/2003	23		3	granted	
Agsafe - minor variation application	15/12/2002	N/A		21/05/2003			5	granted with conditions	
* Excludes applications in gas and electricity sectors									