

# 1234

## **Australian Shipper 2001**

*Australian Liner Shipping Regulation*

Hilton on the Park, Melbourne

19 March 2001

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## 1. Introductory Remarks

I am pleased to have the opportunity today to talk to you about some regulatory issues in our maritime industries. The ACCC and before it its predecessors the Trade Practice Commission (TPC) and the Prices Surveillance Authority (PSA) have had a significant involvement in this area. The TPC undertook much work on issues connected with port reform while the PSA monitored stevedoring charges and had a role in assessing price increases for the harbour companies operating in the major ports. This involvement in maritime industries has been maintained by the ACCC – the price costs and profits of the container stevedore industry are monitored and the harbour towage companies at the major ports continue to be declared under the *Prices Surveillance Act, 1983*.

This high level of involvement in a particular sector of the economy is not coincidental. There has been a long standing concern by Government about the lack of competition in the maritime industries and about the consequent lack of efficiency of these industries and the subsequent adverse impact on the Australian economy. I think we all know realise that for a country like Australia the efficiency of our maritime transportation system is an imperative if we are to compete in the international economy.

The ACCC's role in the harbour towage industry is to apply some pressure to the companies in the major ports to moderate price increases. All of these companies are sole operators and are therefore without the constraint of competitive pressure. The ACCC's role here is quite clear cut, where competition does not exist and is not likely to exist as a result of any structural reform the ACCC uses its pricing power to limit the market power of the towage companies. However for the liner shipping industry the ACCC's role is much more difficult to explain.

The key role of the ACCC is to administer the *Trade Practice Act, 1974* (TPA). The principle objective of that Act is to enhance the welfare of Australians by promoting competition and fair trading and by the provision of consumer protection. But as you know under Part X of the TPA shipping lines are exempt from most of the anti-competitive provisions of the TPA and allowed to form cartels and agree on price and

service levels. Part X is administered by the Department of Transport and Regional Services. Nevertheless, the ACCC does have a role in the Part X regime.

In today's presentation I will provide an overview of the Commission's role within Part X and also the efficacy of the regime from our perspective. I will also deal with the recent amendments to Part X and how these may impact the role of the Commission.

## **2. Part X and the Commission's Role**

Australia's approach to regulation of liner shipping services is similar to that adopted in many other developed countries. Part X of the Trade Practices Act 1974 provides the legislative framework for shipping companies and their exporting customers to negotiate the terms and conditions for the provision of liner shipping services. Essentially, Part X gives concessions to providers of liner shipping services to behave in ways that would not otherwise be permissible under the TPA.

Part X does this by providing liner shipping companies limited exemptions from trade practices laws to enter into co-operative arrangements in providing outbound shipping services to Australian exporters. Specifically, from the application of section 45 (arrangements restricting dealings or affecting competition) and section 47 (exclusive dealing) but not in respect of third-line forcing. Part X does not provide exemptions from section 46 on misuse of market power.

The arrangements permitted under Part X include joint provision of services and agreements on capacity, service levels and prices charged. In return for these exemptions, Part X imposes certain obligations and requirements on lines including negotiation with shipper bodies and information provision. Part X also includes provisions that aim to enhance the countervailing power of shippers in their dealings with shipping lines.

The Commission's role under Part X is a limited one. Essentially, the Commission undertakes investigations into specific agreements with a view to recommending to the Minister whether or not there may be grounds for deregistering the agreement and subjecting the lines to the provisions of the TPA.

Up to recently, the Commission could only investigate an agreement following a request from either the Minister or a complaint from shippers. With the recent

amendments, the Commission is now empowered to initiate investigations on its own account. But can only do so in exceptional circumstances.

Even with the amendments, the Commission considers that its functions under Part X are rather limited and that from the ACCC's perspective, the regime has some fundamental flaws. I will have more to say about the amendments in a moment.

### **3. Commission's Attitude to Part X**

The Commission's attitude towards Part X is well known. The Commission does not consider that the arrangements permitted under Part X are appropriate for the liner shipping industry or indeed other sectors of the economy. Part X gives concessions to providers of liner shipping services not otherwise permissible under the TPA. These views have been clearly expressed in submissions to the Brazil Review in 1993 by the Commission's forerunners, the Trade Practices Commission and the Prices Surveillance Authority, and in the 1999 inquiry by the Productivity Commission.

#### **3.1 ACCC Submissions to Public Inquiries**

In the Brazil review, the TPC recommended that agreements between shipping lines be a matter for general assessment under the provisions of Parts IV, VI and VII of the TPA. Specifically, the provisions of Part VII were the means of resolving the question of which agreements are in the public interest. A number of other general conclusions about an appropriate regulatory regime for liner shipping were made to the Brazil review in 1993 and reiterated to the PC in 1999:

- ? A transparent and public process is essential for any scheme that is constructed to assess whether exemption should be granted to collective agreements between competitors.
- ? An appropriate procedure must exist which recognises the differences in liner shipping agreements and allows for a range of appropriate measures to test if exemptions should be granted and maintained.
- ? The onus for proving public benefit in industry segments should be placed on those seeking exemption and made subject to the same public benefit test that applies for **authorisation** under Part VII.

- ? Remedies available to parties detrimentally affected by liner shipping agreements should be extended to more than simply the removal of protection for the agreement. Appropriate remedies need to be made available for parties that have suffered commercial detriment as a result of the agreements.
- ? Sanctions for breaches of conference obligations should address the root causes of the breaches and act as a deterrent for future behaviour.
- ? The mechanisms available to parties in a dispute with a non conference operator having substantial market power, should also equate to a large extent with those available to the wider community, such as those found under the general provisions of the TPA.

These observations are still very pertinent today.

It is sometimes argued, in justifying the retention of Part X, that it is warranted by the economics of the liner shipping services industry, that the provision of these services cannot be guaranteed at levels required by exporters without some intervention to regulate the market. In particular, it is said that the provision of liner shipping services in trades that exhibit the characteristics of many Australian trades, that is, long and thin, tends to be naturally oligopolistic. Given these characteristics, it may not be possible for shipping lines to provide Australian exporters shipping services of an adequate standard without allowing some level of coordination. Thus, a blanket approach to immunity from the anti-competitive provisions of the TPA is required. The Commission's view is that the authorisation process provides a more appropriate context for assessing claims for immunity.

A move to apply the authorisation process to liner shipping is not intended to result in the dismantling of shipping conferences. Exemptions for most of the conduct prohibited by the TPA can be provided through **authorisations** when the conduct is likely to result in a benefit to the public which exceeds the associated detriment. The conduct involved in typical industry agreements (joint venture provisions, price fixing, income pooling, self regulatory schemes and collectives of users to achieve countervailing balance of power) can all be allowed under the authorisation process. The relevant shipping companies would be required, like any other business, to demonstrate the benefits that offset the anti-competitive costs if the arrangements were to remain.

But there is no justification in providing blanket immunity to all arrangements without a public benefit test. There is a real risk that in doing so arrangements will be allowed to exist which are against the interests of exporters and the Australian economy generally. The ability to apply a public benefit test up front is the key advantage of the authorisation process over the current system.

Shipping is the only industry that currently enjoys special status in terms of the market conduct rules of the TPA. Other industries engaged in similar forms of activity, including the aviation industry, in which alliances are typical, have the authorisation process available to them if the parties desire exemptions, on public benefits grounds, from Part IV prohibitions of anti-competitive arrangements or conduct (ss 45 and 47).

There is no clear reason for liner shipping to operate under a regulatory regime different to all other sectors of the economy.

#### **4. Practicalities of Dealing with Part X**

The Commission's experience in dealing with Part X suggests that there are a number of aspects of the regime that reduce its effectiveness. Since 1993, the ACCC/TPC conducted four investigations under section 10.45(a) (iv) of Part X. None of these have resulted in deregistration of an agreement. Two were not completed, in one case because of lack of information provided by the complaining shipper body, the other following withdrawal of the complaint. In a third investigation, the Minister decided not to follow the Commission's recommendation. In the most recent investigation, the Commission was not able to gather sufficient evidence to recommend deregistration. This investigation concerned shipping services provided by lines operating under the Trade Facilitation Agreement (TFA) in respect of exports to SE Asia. Because the Commission recently completed the investigation and because it generated significant interest, I will spend a bit of time going over the details of this particular case.

#### **4.1 TFA investigation**

Following complaints from several exporters, the Minister for Transport, the Hon John Anderson, referred in March 2000 the ACCC to investigate the operation of the discussion agreement, Australia/South East Asia Trade Facilitation Agreement (TFA).

The TFA authorises the parties to the agreement to discuss and exchange information with regard to matters of interest such as terms (ie freight rates) and conditions of service in the trade and the quantity or kind of cargo to be carried. The agreement provides for a non-binding consensus on these matters.

The purpose of the investigation was to report to the Minister whether or not there are grounds in relation to the matters referred to in section 10.45(a) (iv) to recommend deregistration of the TFA or for seeking undertakings that would make deregistration unnecessary.

The critical terms in this investigation against which the services of the lines are to be assessed are the terms “economic” and “efficient”. These terms have not been defined in the legislation and their interpretation in the past has been a matter of considerable conjecture. The Commission could not show that services were uneconomic or inefficient. In addition, Part X was found to impose very slight legislative requirements on parties to the agreement. Part X imposes **minimal** requirements on members of the TFA in relation to the provision of services. The available evidence did not highlight a major problem with this minimal service provision. Finally, the Commission considered the key issue of negotiations, but, again, it did not have evidence that indicated that the behaviour of the lines, contravened the minimal provisions of Part X. While Part X **talks about negotiation**, there is no obligation on parties to actually agree on proposals. The Commission considered that the negotiation provisions under Part X represent a weakness and provide minimal countervailing power to shippers.

Given the available evidence as well as the minimalist requirements of the Part X regime the Commission was not in a position to recommend de-registration.

#### **4.2 Lessons from ACCC Investigations**

Investigations carried out by the Commission under Part X have clearly shown how difficult it is to police the regime adequately. As I said, although four investigations

under Part X have been carried out in the past eight years, none have resulted in deregistration.

I believe this is a reflection of the permissive nature of the regime and the minimalist obligations it imposes on lines. An example is the negotiation process which the Commission has found difficult to assess. Part X essentially provides the basis for self regulation. It is an outcomes-based regime where lines and shippers are encouraged to negotiate directly to achieve mutually acceptable outcomes.

However, the Commission has found that the negotiation provisions are not sufficiently strong to ensure that effective negotiations take place when market conditions favour the lines. While the regime envisages negotiations, it does not require that negotiations lead to an actual outcome. I understand that the Minister for Transport has asked the Department of Transport and Regional Development, which has responsibility for administering the provisions of Part X, to consider how the effectiveness of the negotiations process can be enhanced. It appears that non-legislative changes are being considered.

Also, as I've mentioned, in two of the investigations carried out by the Commission, there were difficulties with the information gathering process.

These difficulties highlight just how hard it is for the Commission to carry out its investigatory function under Part X. I should stress that these investigations are quite resource intensive, from both the Commission's point of view and the key industry players, in particular the shipping lines. As, I'm sure, Liner Shipping Services would testify, the recent investigation into the TFA, was a rather long and protracted matter for all concerned.

## **5. Recent Amendments**

While the new amendments to Part X give scope for the Commission to be more proactive in initiating investigations, it is difficult to predict just how the changes will actually work in practice.

The legislative amendments grant increased powers to the Minister and to the Commission (including undertaking on its own initiative an investigation with a public benefit test) to deal with concerns about the operation of agreements which potentially

cover a large proportion of a trade. However, these concerns are expected to arise only in exceptional circumstances.

The key amendments that are most relevant to the Commission are those that grant the Commission the power to investigate agreements without a Ministerial directive or a complaint. These fall into two main areas:

- ? the power to investigate agreements in the context of the provision of liner shipping services (section 10.45 (1)); and
- ? the power to investigate agreements where member lines unreasonably refuse another line entry to the agreement (section 10.45 (4)).

### **5.1 The power to investigate agreements in the context of providing liner shipping services**

The amendments introduce the concepts of “substantial lessening of competition” and “public benefit” into Part X thus improving the degree of consistency with the general provisions of the TPA. But the powers in relation to these factors are to be applied only in “exceptional circumstances”. The Minister’s Second Reading Speech and the Explanatory Memorandum provide some guidance on what constitutes exceptional circumstances:

- ? an agreement that has the effect of giving its parties a substantial degree of market power;
- ? where the conduct of those shipping lines has led to, or is likely to lead to an unreasonable increase in freight rates or an unreasonable reduction in services;
- ? where an agreement covers a substantial majority of shipping lines and capacity in a trade; and
- ? when the public benefit from the operation of the agreement is outweighed by an anti-competitive detriment.

But the exact nature of the thresholds that may trigger an investigation is still a matter for the Commission to evaluate properly. The Commission is currently looking very closely at these amendments and considering the triggers for an investigation and the best way to be pro-active within the context of “exceptional circumstances”.

The new powers can be seen as reserve powers that the ACCC holds in order to strengthen the regulatory framework generally aimed at discussion agreements. The Explanatory Memorandum states that the increased powers “... provide a form of reserve power to deal with situations where conferences might act in a manner contrary

to the national interest. It appears that it is expected that the very existence of such a reserve power is likely to induce conferences to behave in accordance with the objects of Part X”.

## **5.2 The power to investigate agreements where entry is refused.**

The Commission can now also initiate an investigation as to the reasonableness of parties to a registered agreement refusing or proposing to prevent entry to a line which was contrary to the interests of a number of specified shipper groups. The purpose of this change is to enable the Commission to initiate an investigation where a line, for reasons of its own, may not want to formally request an investigation by the Commission under section 10.48(1).

## **6. Conclusion**

The Commission remains firmly of the view that the regulatory regime covering liner shipping services does not represent an appropriate arrangement for the industry. As the Commission has publicly stated previously, it is considered that there are no logical reasons why liner shipping services should be treated differently from other industries. The authorisation process, applied on a case by case basis, offers the most appropriate means of assessing the merits of arguments for exemption from the anti-competitive provisions of the TPA on public interest grounds.