RESPONSE BY THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION INC. TO THE PRODUCTIVITY COMMISSION DRAFT REPORT OF THE REVIEW OF PART X OF THE AUSTRALIAN TRADE PRACTICES ACT

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1. The Australian Peak Shippers Association Inc. ("APSA") is the Designated Peak Shipper Body under Part X of the **Trade Practices Act** and represents Australia's liner shipping exporters generally.

Objects of Part X

(1) The principal objects of this Part are:

(a) to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive; and

(b) to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories;

(2) It is the intention of the Parliament that the principal objects of this Part should be achieved:

(a) by permitting continued conference operations while enhancing the competitive environment for international liner cargo shipping services through the provision of adequate and appropriate safeguards against abuse of conference power, particulars;

(c) by the exercise of jurisdiction, consistent with international law:

(i) over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services; and

(ii) to enable remedies for contravention of the provisions of this Part to be enforced within Australia.

There have been regular calls for the abolition of Part X from the time of the BRAZIL review in 1993. These calls have been advocated by those with an understanding of the theory and ideals of competition objectives and policy. However, these same parties lack the experience of the differences between the resources and the negotiating strength of foreign owned carriers and shippers, the operation of Sections 10.41 and 10.52 of Part X and an understanding of the global shipping industry generally.

Australia is a nation of shippers and the interests of Australian shippers must be balanced against the interests of foreign carriers.

However for the Productivity Commission (the "Commission") to opt for the repeal of Part X would not in APSA's view improve protection for Australian exporters but put in jeopardy a system that although not perfect, has worked very well since APSA was formed in November 1990.

Surely if the exporters found that Part X worked to their disadvantage they would be the first to complain!

APSA is surprised that the Commission wants Part X repealed, especially when in its 1999 review of Part X the Commission stated that Part X is the most effective form of regulation to achieve the objective of a competitive liner shipping service of quality for shippers.

In addition, after the 1999 review, the ACCC called for shipper's powers under Part X to be strengthened in regard to negotiations, under Section 10.41, of negotiatable shipping arrangements.

2. In APSA's view, the incidence of Discussion Agreements which are anti-competitive has been a major change in the industry since 1999 and there are calls for Discussion Agreements to be excluded from the registration process. However, there are also concerns that if these Agreements were excluded from the registration process in Australian shipping lines would do their dealings off-shore to the detriment of Australian exporters.

   There is no doubt that Discussion Agreements have great influence on individual traditional Conferences, for example, in the South East Asia trade where the traditional Conferences are AAA, AAX and ASA.

   It is this influence that has to be curbed so that Exporters can be confident/comfortable that in dealing with individual Conferences any agreements concluded are confidential to that particular Shipping Conference. Exporters do have the option of dealing with Discussion Agreements or not, however it is felt that even in this situation members of traditional Shipping Conferences could still be influenced by Discussion Agreements.

3. APSA finds it quite extraordinary that when 19/22 public submissions (ACCI and ACCC are excluded as theoretical exercises only) call for Part X to be retained, the Commission can seek the repeal of Part X. However, if the Commission's views are based on submissions/complaints by importers, then the Commission needs to look very carefully as to why importers are unhappy and what importers need to do to improve their situation.

   Apart from the likes of Coles and Woolworths and a few other large importers who are large enough to look after themselves, the majority of importers do not make use of the counterveiling powers of Part X given to them after the 1999 Part X Review.

   APSA is concerned that the Commision's Draft Report is 'coloured' by too many presumptions/assumptions and with too much emphasis on abstract or

theoretical studies by academics and also on what is happening in Europe and the USA.

In addition, the phrase "Australian Shippers" is frequently used by the Commission when there are distinct differences between the operations and interests of exporters and importers and comments should be identified as applying to either exporters or importers. For example, the Commission states that "the counterveiling powers provided for Australian Shippers under Part X are not, and can never realistically be effective". APSA rejects this comment in relation to the counterveiling powers of exporters. These powers have been used extensively and successfully by APSA and others in many instances. Areas that need addressing though are the powers of Shipping Conferences to impose surcharges and a review of Discussion Agreements.

These areas were addressed in APSA's original submission in **August 2004**.

4. Long and thin trades

The Commission makes the comment that Australia is no longer disadvantaged because of increased "global networks". Networks have been in existence since the introduction of containers in 1970 when Singapore was used as a port connecting exporters to all ports of the world not serviced by direct shipping services from Australia.

The point here is that the ships have to come to Australia in the first place to take a place in these networks!

The unique feature of Australian trades are Australia's distances from markets, volume of trade and long distances between main ports which present particular conditions unattractive to carriers. Very few of Australia's liner cargoes could be classed as commodity volume, making exports dependant on smaller shipments which require frequent, regular scheduled services twelve months of the year to a comprehensive range of destinations.

Because of Australia's remote geographical position, it does not have the luxury of numerous shipping lines 'passing the door' as do countries in the East-West trades. It is therefore vital to retain Part X so that those shipping lines which are prepared to service Australia are provided with exemptions from Part IV of the **Trade Practices Act** to form Conferences and Consortia.

Even the ACCC recognises the thinness of Australia's shipping trade!

5. Minimum levels of service (MLS)

MLS agreements are attached to all liner agreements which are registered with the Registrar of Liner Shipping in Canberra. Prior to final registration of these agreements APSA has, as one of its counterveiling powers, the responsibility of assessing every MLS proposal as to whether the proposed MLS are adequate
or not.

Soon after APSA was formed in November 1990, APSA reached agreement with Liner Shipping Services (now Shipping Australia Ltd) on the provision of data which would assist APSA in assessing these MLS proposals. The data provided for each proposal is:

- names of load and discharge ports.
- names of vessels to be used.
- deadweight of each vessel.
- capacities of each vessel - dry and reefer.
- number of sailings per annum.

This data enables APSA to calculate the maximum number of containers the service can provide in a twelve month period, **see attached No. 1.**

A figure of 80% of the maximum these vessels can carry becomes the minimum for the purposes of final registration. In about 90% of occasions that lines seek to register a new agreement or amend an agreement, no negotiations are required because of the above. It is only in about 10% of occasions that negotiations are required and that is when the party seeking registration is not Shipping Australia Ltd.

APSA therefore totally rejects the Commission's assumption that "in some 90% of cases APSA simply accepts the minimum levels of service offered by the carrier and negotiations do not take place".

There is no record of minimum levels of service agreements not having been concluded!

6. Shipping Conferences

The Commission makes frequent comments as to the competitiveness of Conferences believing that ocean carriers enter into agreements for the main purpose of limiting competition. APSA does not agree with the Commission's comments.

In 1929 Prime Minister Bruce convened a meeting of shipping lines and shippers to bring about some order into what had previously been excessive competition leading to frequent bankruptcies and unstable freight rates. The meeting concluded with the following agreements:

1. That for the development of the commerce of Australia and the carriage of her produce, an efficient and speedy service of suitable vessels is necessary at stable rates.

2. That if increases in rates of freight to and from Australia are to be avoided, and reductions in freight made possible, it is necessary to

secure great economies and we must explore not only dues, charges and other expenses at ports, but the major economy possible by the most efficient use of expensive vessels, ie. rationalisation.

3. That in so much as Australia buys and sells overseas, and to reach far distant markets, requires a regular service of fast, special vessels at stable and not excessive rates...recommends that any legislative bar to the making of agreements for the carriage of produce should be removed as being injurious to the welfare and economic development of Australia....

4. That the Conference accepts the principle that rates of freight should be determined in the country of origin of the cargoes.

APSA believes that the reasons for ocean carriers entering into agreements was to develop the commerce of Australia, the carriage of its products with an efficient and speedy service and suitable vessels at stable rates. However, Discussion Agreements have been set up with the most important aim being to limit competition.

7. Authorisation process

The retention of Part X is called for by exporters because it provides certainty and the Commision would have noted from the public submissions that frequent reliable shipping services at rates that the trade can bear are vital to the expansion of Australia's export programmes.

This is the most serious consideration in the current review of Part X.

The authorisation process under Part VII does not provide any certainty in APSA's view. Additionally, if Part X is repealed, there is a question as to whether foreign owned liner shipping would seek authorisation but do all their dealings off-shore and service Australia as independent lines out of reach of legislative control.

8. Surcharges

The incidence of surcharges has been a serious concern for most exporters. APSA's members want a return to all-inclusive freight rates which shipping lines have traditionally provided in the past. Shippers therefore want the option of all-inclusive rates to be provided by shipping lines as well as the current arrangement of rates plus surcharges.

This should be an important amendment to Part X.

Pricing

One of APSA's roles has been to negotiate tariff rates. However it is questionable as to whether in today's trading environment tariff rates serve

any useful purpose and could be removed from Conference tariffs and abandoned.

Shipper commodity groups such as Wool, Cotton, AHEA and Meat require current arrangements to be retained where they negotiate rate agreements with Conferences on behalf of their members and rather than class these rates as tariff rates they could be called AHEA contract rates, as an example.

Individual shippers see benefits however in having access to confidential rate agreements with individual shipping lines and this should be an important amendment to Part X.

As an additional option, Conferences should be required to offer rates in Australian dollars.

9. Additional amendments to Part X
Stevedoring

Currently a powerful duopoly operates in Australia ie. Patricks & P & O Ports.

From time to time Shipping Conferences and Consortia approach APSA and other shipper bodies for increases to freight rates brought about by increased costs emanating from this duopoly.

When APSA requests the sighting of these Stevedoring/Conference contracts to verify the costs, APSA is advised that the Contracts cannot be viewed for confidentiality reasons.

As an addendum to Sections 10.41 and 10.52, the Servants of Conferences and Consortia with substantial market power should be obliged to provide sightings of contracts.

10. Round-voyage costs

Also as an addendum to Sections 10.41 and 10.52, Conferences/Consortia should be required to provide round-voyage costs when requested to avoid the possibility of double-dipping of costs on inwards and outwards voyages.

APSA believes that some costs supposedly attributed to exports may already have been recovered from importers.

11. A code of practice for negotiations

The requirement of ocean carriers to negotiate and its definition be strengthened to maintain the intent and spirit of open and meaningful negotiations, see Sections 10.29, 10.41 and 10.52.

The concern of APSA for many years has been that the representatives of shipping lines that attend negotiations do not have the power to make decisions on behalf of their Conference.

APSA believes an amended Part X should contain, at least, the following guidelines for negotiations:

1. Genuine negotiations in good faith will be held under the existing provisions of Part X, with the attendance of an Authorised Officer if requested by either side, until either an acceptable compromise or a deadlock has been reached:

    - genuine negotiations requires that both sides are prepared to move, if necessary, from their initial positions in order to move towards a compromise;

    - genuine negotiations requires that the representatives of both sides have the authority to commit their principals to a negotiated outcome; and

    - good faith implies each side has a genuine wish to achieve a negotiated settlement of the outstanding issues;

    - each side will use its best endeavours to provide, in a timely fashion, the information requested by the other side that is reasonably necessary for the negotiations;

    - negotiations should be face to face;

    - the Authorised Officer may suggest that the parties hold further negotiations;

    - in general terms, each side will use its best endeavours to reach a **commercial resolution**.

2. If **complete** deadlock is reached in negotiations between shippers and the parties to a Conference agreement, before a complaint is made to the Minister or directly to the ACCC:

    (a) Either side (or both) may request the Authorised Officer, having considered the issues. to develop a strategy for further progressing matters. This may involve the Authorised Officer requesting further information from either side or from both sides.

    (b) The Authorised Officer, having received any information requested of either side, will consider the issues in the context of the objects of Part X, and use his or her best endeavours to develop a strategy for further progressing matters for both sides to consider.

    (c) Both sides will consider the Authorised Officer's suggested approach, and should conduct at least one further round of genuine negotiations in good faith.

(d) If deadlock is again reached, each side should provide the Authorised Officer with a Statement of Reasons outlining why it is not prepared to move further towards a compromise position. The Statements of Reasons may later be given to the ACCC.

(e) The Authorised Officer and the opposing parties will consider the Statement of Reasons, and consider whether there is the possibility of further movement.

(f) If there is no such possibility, then both sides and the Authorised Officer will formally consider the question of whether all avenues for a compromise settlement have been exhausted, covering issues of amounts, timing, scope of application, offsets etc.

(g) If all avenues have been exhausted, the Authorised Officer will formally advise both sides of the options (including a complaint to the Minister or directly to the ACCC), and may also give an assessment of the likely response of the Minister or the ACCC.

(h) There will then be a "cooling off" period of 14 days before such a complaint is made.

12. Ministerial involvement

Part X provides remedies for shippers if Conferences do not operate in accordance with the objectives and provisions of the legislation. Shippers may complain to the ACCC or to the Minister who may refer it to the ACCC for investigation.

Depending on the outcome of the investigation, the Minister has the power to de-register the Shipping Conference. The presence of this Ministerial role has been useful over the years in order to resolve a dispute with Conferences.

Only once, in 1993, was it necessary for the Minister to threaten a Conference with de-registration.

The particular Conference backed down and settled the dispute.

APSA believes this role by the Minister has been important and should be retained.

13. Financial penalties

As set down in APSA's submission in August, de-registration of a Conference would not necessarily rectify a problem because the Conference could be re-registered under another name.

APSA believes financial penalties commensurate with the seriousness of the offence should be considered.

14. Conclusion

It is important that the Commission understands the commercial reality of the export industry and that a theoretical approach can be very dangerous.

Whilst Part X provides certainty for exporters, any authorisation process would put in jeopardy current arrangements and would serve only to:

- take away the powers of export bodies which have been so important in formulating stable shipping services.
- destabilise current shipping services which are vital to the continuance and furtherance of Australia's export drive.
- hinder the development of forward marketing strategies by industry.
- promote domination by major lines or strategic alliances in Australia's export trades.

Ships are mobile assets with high fixed operating costs. Left purely to market forces, carriers would concentrate on lucrative trades and abandon the not so lucrative ones.

APSA does not believe the authorisation process would provide an environment as predictable or as efficient as the Part X process and Part X with the above amendments should be retained.

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Attach 1.

AANA - Master Slot Agreement

Vessel name	Cargo Dwt	Slots available	Including reefers	Voyages per annum	Total slots
ANL Australia	33,600	2530	256	8.7	22011
ANL Explorer	27,500	2530	256	8.7	22011
ANL Esprit	28,000	2530	256	8.7	22011
OOCL Fidelity	32,000	2530	256	8.7	22011
OOCL Fair	32,000	2530	256	8.7	22011
CSCL Yantai	28,000	2530	256	8.7	22011
		15,180	1536	52	132,066

MLS: 132,066 teus x 80% = 105,650 teus
52 sailings x 80% = 42 sailings

ATTACH 1.

APPENDIX V

Minimum Levels of service to be provided by ANL and ACE

1. **EXTENT OF UNDERTAKING TO PROVIDE MINIMUM LEVEL OF SERVICES**

With a view to providing adequate, economic and efficient shipping services, ANL and ACE (collectively referred to as 'Operating Lines') agree, subject to the conditions set out in this Appendix, to provide the following minimum levels of service specified in Paragraph 3.

2. **BASIS OF PROVIDING MINIMUM LEVEL OF SERVICES**

The minimum levels of service specified in Paragraph 3 are established having regard to the forecast operational conditions in the twelve months to December 2004. In the event that any of these conditions change to a degree which could prevent the achievement by any party of the specified minimum levels of service, the parties have the right, with prior notice to the relevant Designated Shipper Body, to provide proportionately a lower level of service for a period not exceeding 90 days.

If the minimum levels of service specified in Paragraph 3 below is not amended in respect of minimum service levels within the 90 day period, parties would take whatever action is necessary to provide the minimum levels of service specified in paragraph 3.

3. **STATEMENT OF MINIMUM SERVICE LEVELS**

The minimum service levels for the purpose of this Agreement on the basis in Paragraph 2 are as follows:

SOUTH AND EAST COAST OF AUSTRALIA TO NORTH AND EAST ASIA

Minimum Capacity

The Parties to this Agreement collectively intend to maintain sufficient vessels in the trade to provide 105,650TEUs per annum including 10,700TEUs for refrigerated cargo, and to provide 42 sailings per annum on a regular basis with sufficient container equipment that is in good order and condition:

weekly Service

Loading Ports

- Melbourne
- Adelaide (may be served direct or cargo fed to Melbourne)
- Sydney
- Brisbane

Discharge Ports

Japan

- Yokohama
- Osaka

Korea

- Busan (Pusan)

PRC

- Qingdao
- Shanghai
- Ningbo
- Xiamen

Hong Kong

Taiwan

- Kaohsiung

When or where cargo is accepted for shipment on a direct call vessel but received or delivered on a transhipment or feeder basis such receival or delivery will be provided at base port rates at no additional cost to exporter, shipper or consignee (the ports for direct call vessels are listed in the range of load/discharge ports of this document).

4. **OTHER PORTS**

Other Ports of Loading or discharge may be included in a vessel's itinerary, or may be subject to centralisation/decentralisation arrangements according to cargo requirements. In such cases additional or on-carrying charges may apply.

5. **LIABILITY IN RESPECT OF CONTRACTUAL ARRANGEMENTS**

Parties in making this commitment do so without liability in respect of contractual arrangements with exporters other than those specified in the conditions of Bills of Lading, tariffs and other contracts of carriage, which apply.

6. **AMENDMENT**

This Annex is subject to amendment by Operating Lines, after negotiation if required with the relevant Designated Shipper Body, currently the Australian Peak Shippers Association.

October 2004