

**SUBMISSION TO THE PRODUCTIVITY COMMISSION
BY THE TRADE PRACTICES COMMITTEE
BUSINESS LAW SECTION
OF THE LAW COUNCIL OF AUSTRALIA**

REVIEW OF PART X OF THE TRADE PRACTICES ACT

EXECUTIVE SUMMARY

- The competition provisions (Part IV) of the Trade Practices Act ("the TPA") should be of general application to the provision of all goods and services throughout Australia unless exceptional circumstances require particular industries to be treated differently.
- No such special circumstances have been demonstrated to exist in relation to international liner cargo shipping as would justify the exclusion of application of pro-competitive safeguards in Part IV of the TPA.
- To the extent that international liner cargo shipping has special characteristics, they can be adequately taken account of by relatively minor modifications in the application of Part IV to shipping agreements and practices.
- In other respects the stated objectives of Part X should be able to be achieved through the ordinary application of Part IV and Part VII of the TPA.
- Part X should therefore be repealed.

1. OVERVIEW

- 1.1 This submission has been prepared by the Trade Practices Committee of the Law Council of Australia's Business Law Section to be put to the Productivity Commission for its review of the legislation governing Australia's international liner cargo services, Part X of the Trade Practices Act ("the TPA").
- 1.2 The Trade Practices Committee has always held, and consistently promoted the view that the TPA should have general, rather than piecemeal, application to the provision of all goods and services throughout Australia. Shipping services from and to Australia ought to be in no different position. That general application would be subject, of course, to exclusions under the TPA for conduct which is notified to or authorised by the Australian Competition and Consumer Commission ("the ACCC") or Australian Competition Tribunal ("the Tribunal"), or which is exempted under section 51 of the TPA.
- 1.3 The Trade Practices Committee's view of the general application of Part IV of the TPA to all industries is fully consistent with the principles in the Competition Principles Agreement. Part X does not, however, fit easily within this framework.
- 1.4 The founding philosophy behind most competition laws throughout the world, including the TPA, is often said to go back to the words of Adam Smith in 1776:

*"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."*¹

While this quotation is frequently used in isolation as a justifications for any regulation of anti-competitive behaviour (and claimed by others to be an unduly cynical view of business), the next two sentences of the quotation are rarely mentioned but equally relevant:

*It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."*²

¹ Adam Smith, The Wealth of Nations, Chapter X, Part II.

² Ibid

- 1.5 The difficulty which the Trade Practices Committee has with Part X of the TPA is that not only does it exclude the normal application of competition law, but worse, it facilitates agreements between otherwise competing ocean carriers, and may even "render necessary" (to use Adam Smith's words) agreements between competing shippers, or the creation of a "designated shipper body", or compel negotiated shipping arrangements between parties to registered conference agreements and designated shipper bodies. Such a legislative scheme would seem to be the antithesis of competition law and policy, and quite contrary to the competition policy principles espoused at the Special Premiers' Conference.

2. HISTORICAL BACKGROUND

- 2.1 The reasons why Part X appears, in a number of ways, to be the antithesis of all other Parts of the TPA probably are as much historical as they are a result of conscious policy. The original Part X (admittedly much more anticompetitive and secretive than the current Part X) was introduced under a very different trade practices regime, well before the Trade Practices Act 1974. At the time Part X became law, general trade practices law provided for registration of anticompetitive agreements, which gave those agreements protection from the Act. It was only after such agreements were found, on examination by the Commissioner of Trade Practices, to be against the public interest, that giving effect to those agreements became unlawful.

- 2.2 In that context, the original shipping provisions created a regime not that far different from the rest of the Act. However, even Part X was quite prescriptive in the behaviour it sought to regulate. As Deane, J. said in 1980³:

"The conclusion which I have reached from an overall consideration of the Act is that the provisions of Part X were intended by the Parliament to constitute an exhaustive code controlling and regulating, in so far as restrictive practices are concerned, outward cargo shipping."

- 2.3 When the Trade Practices Act 1974 changed the regime to one where anticompetitive conduct and agreements were made prima facie unlawful, subject to authorisation or notification, Part X retained its existing, opposite regime.
- 2.4 While the current Part X, introduced in 1989, no longer contains many of the anticompetitive and secretive elements of the earlier Part X, it still adopts a similar regime in some respects with such elements as automatic protection for conference agreements upon (or even before) registration, and protection

³ Refrigerated Express Lines A/asia Pty Ltd v. Australian Meat & Livestock Corporation (1980) 44FLR455 at 461.

for loyalty agreements from full application of section 47. It also still adopts a structured approach, such as requiring conference members to negotiate with designated shipper bodies.

- 2.5 Whenever it has been suggested that Part X be changed or repealed, it has been claimed (but without any supporting evidence) that such change would cause massive disruption to the shipping industry, to the detriment of Australia's national interest. This was part of the rationale for the present structure of Part X being only a limited departure from the pre-1989 highly anticompetitive regime under which both carriers and shippers had operated for over twenty years. With the rather less anticompetitive regime which has operated since 1989, it would now be less disruptive to carriers or shippers to abandon Part X altogether and rely on Part IV and Part VII, than was the case in 1989.

3. PROPOSED SOLUTION

- 3.1 We have outlined above the difficulties we see with allowing Part X to continue in its present form. In our view there is no longer any place (if there ever was) for automatic protection for anticompetitive agreements upon registration, particular where the removal of that protection is dependent on the exercise of Ministerial discretion, rather than by public determination of an independent body using public, objective criteria. While we do not suggest that any Minister has in the past exercised, or necessarily would in future, exercise his or her discretion other than fairly, it is, in our view, clearly preferable to have decisions of this sort made by bodies such as the ACCC or the Tribunal.
- 3.2 Section 2.7 of the Productivity Commission discussion paper asks whether there are other ways to achieve the objectives of Part X. In the Trade Practice Committee's view, Part X should be repealed, and conference agreements, loyalty agreements, unfair pricing practices, activities of carriers with substantial market power, and the conduct of designated shipper bodies, and any other possible restrictive practices, should come under the general operation of the remainder of the TPA, particularly Part IV and Part VII. There may, however, be justification for retaining a limited number of aspects of Part X in the TPA, to take account of some aspects peculiar to the shipping industry which may not be adequately addressed by the existing provisions of the TPA outside Part X. These are discussed later.
- 3.3 While some elements of Part IV already apply to liner cargo shipping, the main effect of giving Part IV full application would be to have sections 45 and 47 apply to conference agreements, and section 47 apply to loyalty agreements. This need not, however, mean that such agreements would necessarily be unlawful and unable to be given effect to.

- 3.4 As far as conference agreements are concerned, they would be capable of being authorised on public benefit grounds under Part VII of the TPA, using the same public, objective assessment procedure which applies to other agreements between competitors or would-be competitors. It is considered that the existing public benefit test, and the authorisation procedures (including treatment of claims of confidentiality) are just as appropriate for assessing conference agreements as they are for agreements in other industries. If the carriers are unable to justify their conduct on public benefit grounds to the ACCC or on review to the Tribunal, there would seem to be little or no justification for otherwise exempting them from section 45. The same argument applies in relation to section 47; authorisation and notification are available. In both cases there is no constraint on the matters which can be taken into consideration when assessing public benefits - certainly that could include the extent to which the conference agreements promote the objectives currently set out in Part X, so far as that is relevant.
- 3.5 Similar arguments apply to loyalty agreements. Despite the perception in some quarters that loyalty agreements are uniquely part of the shipping industry, they are exclusive dealing arrangements, no more, no less. In that respect they would be treated in the same way as other exclusive dealing arrangements. Again, such arrangements are capable of authorising on public benefit grounds. Alternatively, the notification procedure set out in Division 2 of Part VII may be used. In either case the existing provisions of the TPA provide sufficient opportunity for those wishing to take advantage of loyalty agreements to do so if they can justify their position.

4. RETENTION OF SOME PART X PROVISIONS

- 4.1 This submission makes it clear that we favour the universal application of the TPA to all sectors of the economy. We nevertheless recognise that there may be particular circumstances where those provisions are not totally appropriate. There are a very limited number of such circumstances in relation to shipping, which are discussed below. However, we emphasise that even if no changes were made to the TPA (apart from repealing Part X) the existing provisions should be able to deal quite effectively with conduct within the shipping industry as a whole.
- 4.2 One area with which the TPA does not deal definitively is the issue of shared market power. Within the shipping industry, conference members have been able to exercise significant market power when, considered individually, it may not have been apparent that they were able to exercise such market power. This is understood to be the main justification for the introduction of section 10.04 in 1989. Whether or not part X is repealed, conferences are still likely to exist and to have substantial market power, and individual

conference members are still likely to be able to exercise that power. It could be argued that the rationale for the enactment of section 10.04 would still exist if Part IV applies generally, and conferences had been authorised pursuant to Part VII. Thus there could be an argument for retaining section 10.04, with any necessary modification, as a part of section 46. While we do not necessarily advocate this course, the matter is worthy of consideration.

- 4.3 Division 12 of Part X, which provides for the registration of ocean carrier agents, was intended to assist in overcoming difficulties which could occur in relation to unlawful conduct within Australian jurisdiction by non-resident businesses. International shipping, by its very nature, presents such difficulties. Since such problems would occur equally whether part IV or Part X were to apply, it is recommended that provisions similar to Division 12 of Part X be retained in the TPA, to try to help overcome the problems associated with non-resident corporations carrying on business in the Australian jurisdiction through provision of international shipping services.
- 4.4 The nature of international shipping means that some conduct will take place, or some agreement will be made, offshore, yet there will be a very direct effect of that conduct or the making of that agreement in Australia. To assert that such conduct is within Australian jurisdiction does not, in our view, extend the jurisdiction of the TPA beyond its existing limits. Sections 5 and 6 already relate to conduct that may occur outside Australia, as does Part X. It is submitted that this position should continue. This could be clarified by amending section 5 to provide that for the purposes of section 5(1), an ocean carrier which supplies shipping services to or from Australia shall be taken to be a body corporate carrying on business within Australia, in relation to the supply of those shipping services.
- 4.5 An amendment along these lines should, in our view, suffice to bring the relevant parties within the jurisdiction, without Australia being able to be criticised for claiming extra-territorial jurisdiction. This latter point is important. Australia has previously adopted a strong stand against United States claims for extra-territorial jurisdiction for its anti-trust laws, and we should not appear to be doing likewise. The proposal here is not intended to extend the territorial reach of the TPA beyond its present limits.

5. COMMENT ON THE INQUIRY'S OBJECTIVES

- 5.1 The approach adopted in this submission has been to look at the issues from the underlying principles of competition law and policy and to suggest practical changes to the legislation to best achieve the desired outcome, rather than focussing narrowly on the particular terms of reference. In this concluding section of the submission we make some brief comments on the three objectives set out in paragraph 3 of the Minister's Term of Reference to the Productivity Commission, dated 12 March 1999.
- 5.2 In relation to objective 3(a) of the ministerial reference, this submission does not purport to include an exhaustive cost/benefit analysis; the Trade Practices Committee does not have ready access to the data necessary to make such an analysis. However, the Committee is firmly of the view that the objectives can be achieved more efficiently through the repeal of Part X and the application of the general provisions of Part IV and Part VII of the TPA to liner cargo shipping.
- 5.3 In relation to objective 3(b) of the ministerial reference, this largely paraphrases, but in more general terms, the specific objects of Part X, as set out in section 10.01 of Part X. In that respect, the first objective, broad access to the shipping services market at internationally competitive rates, is best achieved by subjecting that market to the full rigours of competition. Competitive forces are in most cases a far better market regulator than artificial government regulation or worse, cartelisation by the major market participants. The approach we propose would do away with existing government sanctioned cartelisation, and promote a competitive market. Indeed, it is difficult to see how the objective of internationally competitive freight rates could be achieved without encouraging open international competition.
- 5.4 The objective of stable access to export markets for all exporters should also be able to be achieved through the competitive supply of shipping services, if the demand is there. If there is not adequate demand at a particular port or in particular circumstances, then any arrangement which forces a carrier to provide uneconomical access would have to be cross-subsidised by other exporters from other ports.
- 5.5 Again, the full application of the TPA should mean that efficient Australian flag shipping should be able to participate on a normal commercial basis, provided the Australian flag shipping is price competitive. If it is not, then maintaining prices at a level which would enable Australian flag participation could involve an indirect subsidy from shippers, and a windfall profit for other, cost efficient carriers. If, however, there is concern about predatory pricing by foreign government owned carriers, that should be able to be remedied through application of section 46 of the TPA.

- 5.6 Among the benefits claimed for Part X is the obligation imposed on conferences to negotiate with shippers, though designated shippers bodies, on certain aspects of their trading arrangements. This benefit need not be lost were our recommendation accepted that Part IV and Part VII should govern conference agreements. In considering authorisation for conference agreements, it would be open for the ACCC to make an authorisation conditional on, for example the conferences agreeing to negotiate with shippers.
- 5.7 In relation to objective 3(c) of the ministerial reference, as indicated in paragraph 1.3 of this submission, the Trade Practices Committee considers that repealing Part X and subjecting the shipping industry to the general provisions of the TPA is consistent with the Competition Principles Agreement and with objective 3(c).

6. OTHER RELEVANT ISSUES

- 6.1 The following matters, while not necessarily the subject of specific questions in the issues paper, are nevertheless worth nothing.

(i) *Effect of Repeal of Part X*

- 6.2 While the repeal of Part X and adoption of the other measures advocated in this submission would no doubt come as a culture shock to many participants in the industry, the actual effect should not be sudden or detrimental at all. As has been emphasised above, if the industry can prove public benefit, it can retain most if its existing arrangements; if it cannot, the arrangements do not deserve to survive. Most international carriers are used to competing openly in a number of markets, and could readily adapt to that situation in Australia. Shippers should find major benefits and increasing market opportunities. All parties should benefit from reduced government intervention in, and control of, their commercial conduct.

(ii) *Removal of the pooling exemption*

- 6.3 If any exemptions are to be retained, that should certainly not include pooling or apportionment of earnings, losses or traffic. Such pooling arrangements remove completely any efficiency incentive and reward the highest cost suppliers. Competition between carriers in such circumstances is illusory, and competitive benefits will not result.

(ii) *Regulation of inwards liner trades.*

- 6.4 As indicated earlier, there would be difficulties in seeking to extend Australia's jurisdiction here through extra-territoriality. It is considered that the desired results can be achieved without changing the existing jurisdictional reach of the TPA. This should still permit adequate controls over inwards liner trades, as they affect markets in Australia.

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