



Supplementary Submission to the Productivity Commission

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

August 1999

1. Introduction

A preliminary assessment from the review of Part X was released in June 1999 as a Productivity Commission Position Paper.¹ The Australian Competition and Consumer Commission (ACCC) is concerned with the approach taken in the preliminary assessment.

The ACCC is concerned that due regard has not been taken of the ‘guiding principle’ of the legislative review process as set out in the Competition Principles Agreement (CPA). The ACCC is making this short supplementary submission to highlight these concerns.

The preliminary assessment of the Productivity Commission as outlined in their Position Paper is that the repeal of Part X and the reversion to the general provisions of the *Trade practices Act 1974* (TPA) and, in particular, the Part VII authorisation provisions, *could* achieve similar outcomes to Part X. However, it was unconvinced that this alternative would provide a regulatory framework that generates outcomes as good as or better than those currently achieved under Part X.

In forming this view the Productivity Commission set out those issues which caused it to have major reservations about alternatives to Part X, in particular it was unconvinced about :

- the desirability of a case-by-case approach in this industry
- the need for potential third party intervention on public interest grounds when the public interest appears to be aligned with and represented by Australian shippers

Other concerns were also raised about:

- the ability to enforce Australia’s competition laws, in relation to the conduct of foreign carriers, in the absence of Part X and in the absence of an authorisation being granted; and
- the administrative and compliance costs of alternatives.²

From the ACCC perspective it is not clear that such a preliminary assessment is warranted given the rationale for the inquiry.

¹ Productivity Commission : *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, June 1999

² *Ibid*, p.xxx

2. Rationale of the Inquiry

As the Productivity Commission's Issue's Paper (March 1999) explains the inquiry stems from the National Competition Policy. As one of the agreements implementing National Competition Policy reforms, the Competition Principles Agreement (CPA) establishes principles for the review of legislation that restricts competition. Under the CPA all Australian governments agreed to review and, where appropriate, reform any existing legislation that restricts competition by 31 December 2000. Each review is to be approached according to the 'guiding principle' set out in the CPA

The guiding principle is that legislation (including Acts, enactments and Ordinances or regulations) should not restrict competition unless it can demonstrate that:

- *the benefits of the restriction to the community as a whole outweigh the costs: and*
- *the objectives of the legislation can only be achieved by restricting competition.*

The CPA also outlines how reviews should be conducted (clause 5(9)). The Productivity Commission sees this approach as being in broad alignment with the terms of reference to the Liner Shipping inquiry.³

2.1 Application of the Guiding Principle in the Productivity Commission Inquiry

Implicit in the legislative review process is a preference for pro competitive legislation. If competition is to be restricted it must be that the benefits of the restriction to the community as a whole outweigh the costs.

The Productivity Commission argues that public interest appears to be aligned with and represented by shipper interest. However, a detailed analysis should be undertaken as to whether the benefits of the restrictions on competition to the community outweigh the costs to the community. If it is just assumed that shipper interest represents nation interest a major area of inquiry is pre-empted.

Given the implicit preference for pro competitive legislation the major task for the inquiry is to review all regulatory and other options for the liner shipping services on the basis that regulation restricting competition would only be appropriate if other alternatives did not achieve the required objectives outlined above. Given this it is necessary to assess whether an efficient liner shipping service would be available to Australia without industry specific regulation like Part X.

³ *Ibid*, Box 1.1, p 4.

3. Assessment of Community Benefits

The Productivity Commission raises concerns in their Position Paper about the case -by -case approach being applicable to the liner shipping industry. These concern arise from their broad conclusion that shippers' interests act as a close proxy for public interest. If there is an assumption that all shippers have a common interest which is also the public's interest there is no need for a case- by -case approach. Nor is there the need for potential third party intervention on public interest grounds if public interest is aligned with and represented by Australian shippers.

Individual competing interest is a basic tenet upon which most theories of market behaviour are built and it underpins the case -by -case approach used by the ACCC. That is, the particular and specific circumstances of a case have to be understood before the ACCC can make a decision on an access undertaking, an authorisation or other Trade Practice Act issues.

The argument presented in the Position paper is that Australian shippers have an interest in obtaining high quality shipping services at the lowest possible price and that achieving quality service at the lowest price will be in the national interest. Subsequently in a competitive economy lower prices will be passed on to consumers and this will be in the national interest.

However, preferences for a particular price /quality/timeliness trade-off is likely to vary between shippers. The interests of some shippers are likely at certain times to be in conflict with others with regard to their requirements for shipping services. Exporters requiring frequent services might be well served by arrangements providing regular service but at the cost of a premium on freight rates. However, for shippers or potential shippers that don't require regular services but do want low freight rates the arrangement would be less satisfactory and might restrict some potential shippers/exporters being able to take up a market opportunity. That is there is a diversity of shippers needs with regard to their specific requirement for an efficient liner shipping services.

Some Australian businesses are only able to export if the transport options available to them allow their goods to compete on international markets. The liner shipping services that potential shippers require cannot be assumed to be the same as current shippers.

Under Part X inward liner shipping services receive the same exemptions as outward conferences from Australian competition law. They are not however, provided with the same offsetting power as exporters are under Part X. As the Productivity Commission Position Paper indicates many importers have traditionally purchased on a cif basis but more recently there has been a movement to purchasing fob and negotiating shipping rates.⁴ Also as highlighted in the Position Paper there is a significant difference in

⁴ *Ibid*, p 43

composition of Australia exports compared to imports.⁵ The diversity of interest between importers and exporters and the relationship to the public interest requires specific exploration. Prima facie there are grounds to believe that they have quite different interests and that current anti –competitive legislation impacts on importers in a different way to exporters.

4. Role of Anti-Competitive regulation

The Position Paper suggests that the review of Part X is unusual in the context of other legislative reviews under the CPA as

it reviews an exemption (Part X) to general competition law allowing individual shipping firms to enter cooperative arrangements that otherwise contravene that law. Though the exemption allows shipping lines to enter conferences and similar arrangements (which prime facie restrict competition) it does not require them to do so. Nor does it constrain market entry, as in the case for most other legislation deemed to restrict competition. In this sense, Part X could be described as taking a permissive stance towards market behaviour. Whether market outcomes under Part X are efficient depends largely on the degree of market contestability and the countervailing strength of Australian shippers.⁶

Certainly the exemptions under Part X allow shipping lines to enter anti competitive arrangements but do not require them to do (unless it is in their best interest). However, this would not seem to be the key aspect of liner shipping regulation that differentiates it from other industry regulation. The key issue is that liner shipping is the only industry that currently enjoys special status in terms of the market conduct rules of the TPA.

Competitive conduct rules are aimed at protecting the competitive process and thereby avoiding misallocation of resources and inefficiency that adversely affects community welfare. Exemption of particular businesses, sectors of businesses or kinds of conduct has the potential to induce inefficiency and disadvantage consumers. It is the exemption from competition rules that all other industries are subject to that is the key anti competitive aspect of Part X. That the exemptions can or cannot be used as determined by market interest, does not make the initial exemption any less anti competitive.

Currently the liner shipping industry is characterised by global trends towards low freight rates, a high level of merger activity and the increasing role of independents. Non conference liners provide competition to conferences in the different segments of the market for liner shipping. Given these trends it is not clear that anti-competitive

⁵ *Ibid*, p. 2

⁶ *Ibid*, Pp. xxix - xxx

regulation such as Part X is required to achieve the objectives of a stable service providing frequent and reliable service at internationally competitive prices⁷.

5. Assessment of Alternatives to Part X

In assessing options to Part X it is necessary, to minimise distortions between different sectors of the economy, to seek out workable alternatives with comparable competitive conduct rules as apply to all other sectors in the economy.

The Position Paper raises a number of concerns about the authorisation process. In particular the Productivity Commission seems to be concerned that price fixing might not be authorised by the ACCC, that the authorisation process allows for uncertainty, that administrative and compliance costs are high and that there are issues on international compatibility.⁸

As the Position paper acknowledges, authorisation

*... is designed to provide a safeguard against applying the prohibition on anti-competitive conduct, where it can be shown that the public benefits of the proposed conduct outweigh any anti-competitive detriment.*⁹

Therefore if an authorisation is not granted or is subject to review and then revoked it is because the public benefit of the proposed conduct does not outweigh the anti-competitive detriment. It is not clear why the liner shipping industry should receive special protection to operate in the market in such a way that is on balance *not* in the public benefit.

While a range of options have been presented to reduce authorisation costs it is not clear why liner shipping should be exempt from the regulatory and compliance costs met by other sectors of the economy.

The liner shipping industry is not different to the airline industry with regard to issues of international regulatory compatibility. For example IATA agreements have been subject to authorisation in Australia. The ACCC has advised the Productivity

⁷ The principle objectives of Part X are described in section 10.01 of the TPA as being

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

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: and

c) to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping task

⁸ *Position paper*, pp 85 -86

⁹ *Ibid*, p86

Commission that there is jurisdiction to look into agreements made overseas that impact on Australia notwithstanding problems of evidence gathering.

The ACCC's preference is for authorisation. However, a range of transitional measures have been proposed in different forums which could be applied when moving from Part X to Part VII to allow for industry adjustment.

6. Conclusion

The inquiry into Part X stems from National Competition Policy and the Competition Principles Agreement. The ACCC is concerned that the approach to the review conducted by the Productivity Commission should be in accordance with the 'guiding principle' set out in the Competition Principles Agreement. Alternatives to Part X should be assessed from the perspective of whether they minimise regulatory distortions between the liner shipping industry and other sectors of the economy.