

# **A REVIEW OF PART X OF THE TRADE PRACTICES ACT 1974**

**Submission by the Australian Peak Shippers Association  
Incorporated  
to the Productivity Commission**

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## **Abbreviations**

|          |   |
|----------|---|
| AESA     | Australian Exporters Shipping Association |
| APSA     | Australian Peak Shippers Association Inc. |
| ASC      | Australian Shippers Council               |
| DPSB     | Designated Peak Shipper Body              |
| MLS      | Minimum levels of Service                 |
| SHIPPERS | Exporters and/or Importers                |
| SMA's    | Statutory Marketing Authorities           |
| TPA      | Trade Practices Act 1974                  |
| TPC      | Trade Practices Commission                |

## EXECUTIVE SUMMARY

This submission is submitted by the Australian Peak Shippers Association Inc. (APSA) which:

- is the designated peak shipper body under Part X of the Trade Practices Act 1974 (TPA)
- represents Australia's Liner Shipping Exporters generally.

The issues dealt with in this submission relate only to the containerised liner trade and conventional shipments.

Australia is a nation of shippers, and the interests of Australian shippers must be balanced against the interests of foreign carriers. It will never be more than a happy coincidence if the interests of carriers and shippers are the same.

There is no doubt that Australian exporters are a diverse group who are largely uncoordinated and who are direct competitors with each other into their foreign markets.

On the other hand, the carriers have considerable power through their conference arrangements which have enabled them to develop an international overview of shipping arrangements, and is the means by which they coordinate their conduct in dealing with Australian shippers.

In other words, the carriers are in a powerful position and with this in mind the imbalance in their favour needs to be redressed towards a more balanced position.

In short, this submission:

Supports the retention of Part X, with a number of major amendments.

This involves the retention of the protection given to exporters in particular under:

- Section 10.29
- Section 10.41
- Section 10.52

Part X is fundamental to the continuing success of Australian exporters in ensuring that:

- carriers participate in negotiations with exporters
- all Australian exporters have access to export markets
- carriers are not able to disregard the interests of exporters
- carriers have to provide information to exporters

- carriers are able to form alliances

APSA believes that the removal of Part X exemptions from Part IV 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.

APSA believes that carriers may opt out of any authorisation procedure, and will be tempted to operate their Australian services without regard for Australian law, by for example, using the US Federal Maritime Commission Tariff registration process as a means of circumventing any allegations of contraventions of Part IV, or Part VII.

APSA proposes and supports the introduction of the following amendments to Part X:-

- price fixing of freight surcharges by shipping conferences and consortia no longer be exempt from the full force of Part IV of the TPA
- current discussion agreements be de-registered
- discussion agreements no longer be eligible for registration by the Registrar of Liner Shipping
- Sections 10.41 and 10.52 to also include servants of the carriers with substantial market power eg. stevedores
- the requirement of carriers to negotiate and its definition be strengthened to maintain the intent and spirit of open and meaningful negotiations, see Section 10.29, Section 10.41 and Section 10.52.

## **BACKGROUND**

### **THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION INC.**

The Association was formed in November 1990 having been granted status as the designated peak shipper body by the Federal Minister of Shipping pursuant to Section 10.03 of the TPA.

APSA represents the interests of some major Australian commodity exporters and export shippers generally in relation to outwards liner cargo shipping services.

APSA was formed at the request of major export commodity organisations after previous peak bodies had ceased operations.

A short history of previous exporter bodies follows:

- The Australian Exporters Shipping Association (ASEA) March 1989 to April 1990.

ASEA ceased operations due to insufficient funds from members to enable the secretariat to function in the absence of government funding.

- Australian Shippers Council (ASC) August 1972 to March 1989

ASC was partially funded by the Federal Government on the basis of \$2.00 for every \$1.00 contributed by the ASC membership.

ASC was Australia's first designated shipper body and led the way to the formation of a number of national shipper bodies in Asia.

ASC was heavily involved in previous reviews of Part X in 1977, 1980 and 1987 and the increased protection that exporters enjoy today and the current legislation is a tribute to the ASC and its work.

In 1988 the Federal Government announced it would be withdrawing support and no alternative funding arrangements could be put in place.

## **Objectives and functions of APSA**

The objectives of APSA are to ensure that exporters have the opportunity, whenever necessary, to negotiate with shipping conferences, consortia and individual shipping lines as set out in Sections 10.29(1), 10.41(1) and 10.52(1) of the TPA.

The APSA Memorandum of Understanding setting out its functions is at Annexure 1.

## **Relevant Provisions of the TPA**

The following provisions of the TPA are fundamentally important to the preservation of the interests of Australian shippers:

Part V - Consumer Protection

Division 2 - Conditions and warranties in consumer transactions

Section 74 - Warranties in relation to the supply of services

Part X - International liner cargo shipping

Division 6 - Registration of conference agreements

Section 10.29 - Parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement

Division 7 - Obligations of ocean carriers in relation to registered conference agreements

Section 10.41 - Parties to registered conference agreement to negotiate with certain designated shipper bodies etc

Division 9 - Obligations of non conference carriers

Section 10.52 - Non-conference ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc.

## Recommendations

APSA believes that all sections of Part X of the TPA which support the negotiating position of Australian exporters should be retained.

However APSA believes that in light of “experience” since the last review in 1999 there should be some amendments to give greater safeguards to exporters. These are:

1. Exporters to be able to negotiate confidential agreements directly with individual members of a conference or consortia - similar to arrangements contained in the US Ocean Shipping Reform Act 1998 which came into force on 1 May 1999.
2. Price fixing of freight surcharges by shipping conferences and consortia no longer be exempt from the full force of Part IV of the TPA.
3. Discussion agreements no longer be eligible for registration by the Registrar of Liner Shipping. All current D/A's be de-registered.
4. Sections 10.41 and 10.52 to also include servants of the carriers with substantial market power eg. stevedores.
5. The requirement to negotiate be strengthened.
6. APSA to have access to round voyage costs rather than only costs related to the outwards voyage. This would avoid the incidence of inclusion of some inwards voyage costs being applied to outwards voyage costs thereby “boosting” cost figures currently provided by APSA for the benefit of negotiations.

APSA believes that some costs attributed to exports are already recovered by carriers from importers.

7. A broader source of funding of APSA beyond its actual members is required to meet the costs of:
  - protecting the interests of all Australian exporters;
  - research of shipper issues;
  - conduct of negotiations;
  - education of shippers.

APSA is a non-profit organisation representing public rather than private interests, and funding must be increased if APSA is to extend its role as the representative of exporters in general.



Currently exporters receive the benefit of APSA's work without being obliged to take up membership.

Funding along the lines of statutory marketing authorities (SMAs), is an example.

## Key issues

### 1. Should part X be retained?

#### Q. Should Part X be retained?

A. It is APSA's belief that Part X with some major amendments be retained.

- (i) APSA believes that international liner shipping is a unique industry and in recognition of its uniqueness warrants special treatment ie. some exemptions from Part IV of the Australian Trade Practices Act (1974).

Professor J E Davies in his study "Contestability and the Australian Liner Trades" BTE Occasional Paper 78 states that there are differences in operational characteristics between liner shipping and most manufacturing industries in that, in liner shipping, output cannot be stored or quickly adjusted.

Marketing experiments are much more risky for international liner shipping than for manufacturing; manufacturing industries are better able to accommodate variations in the pattern of demand than are shipping lines.

Professor Davies also states that the long-lived nature of vessels also means that even under the most utopian of competitive conditions there is no guarantee that surplus tonnage could be eliminated by the market place alone.

The "Liner Shipping Report" 1986, p69 also views liner shipping as a unique industry when it states that:

"Liner shipping is an industry which perhaps more than any other is intrinsically multi-national in its economic structure and in its operations. Any nation which seeks to regulate its liner shipping must have regard not only to the industry, but also to the policy framework, legislation and regulations operating in those countries with which it trades and those which share in the provision of its liner services. Governments need to develop policies which as far as possible avoid unnecessary conflicts with the regulatory approaches of other countries".

In Australia's case, this consideration is underlined by the fact that its trade is carried by foreign-based operators.

- (ii) APSA believes that Part X has been instrumental in shippers being able to secure comprehensive shipping services and freight rates across a very wide range of destinations from a diverse range of Australian ports.
- (iii) It is APSA's view that Australia could not sustain a deregulated shipping industry against more competitive and rewarding global trades.

(iv) Overseas governments that have sought to regulate the operations of shipping conferences have fully recognised the industry's uniqueness and have introduced tailor made regulatory regimes.

- In 1986, for example, the EEC introduced four regulations which had the following effect:

(4055) applied the principle of freedom to the provision of shipping services between member states and third countries;

(4056) applied the competition rules of the Treaty of Rome to international shipping trades to and from EEC countries, thus giving liner Conference shipping an automatic exemption from the ban of restrictive business practices - subject to the Conference members meeting certain specified requirements (similar to the current Australian legislation);

(4058) safeguarded free access to cargoes in international trades;

(4057) dealt with unfair pricing practices.

- The USA has the Ocean Shipping Reform Act (1998).
- Canada has the Shipping Conferences Exemption Act (2001).
- Japan has the Fair Trade Commission, the Maritime Transport Bureau and the Ministry of Transport, all of whom support anti-trust exemptions.
- South Korea has the Maritime Transport Act (1999).

All these bodies recognise the uniqueness of international liner shipping.

(v) It is interesting to note that neither the ACCC nor its predecessors have provided a proven case for the removal of Part X.

**Q. What are the market characteristics of liner shipping markets that may justify exemption from competition regulations?**

A. Shipping lines need to form alliances such as Conferences and Consortia to be able to provide the comprehensive services that shippers require.

**Q. Is the traditional rationale for trade practices exemptions for liner cargo shipping still relevant in light of recent developments in international liner cargo shipping and of developments in methods of conducting business in risky markets?**

A. In APSA's view the rationale is still relevant.

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

In APSA's view the rationale is even more relevant when one is seeing a concentration of shipping in the hands of fewer and fewer lines.

**Q. Does Part X restrict competition and if so, is this restriction necessary?**

A. Currently Part X allows the fixing of rates and surcharges and the operation of discussion agreements. In these areas APSA believes there is an effect on competition and is the reason why APSA is proposing amendments to Part X as stated earlier. However, Part X facilitates the provision and formation of shipping services which are vital to Australia's export programme. APSA believes that carriers operate in a contestable environment and that the continuing viability of more than one carrier group is highly desirable.

**Q. Does Part X impede the development of other market based forms of co-ordination between carriers?**

A. Co-ordination and agreements between carriers are classed as Conferences for the purpose of Part X. APSA has no knowledge of any other forms of co-ordination between carriers.

**Q. (i) What are key developments in the international liner cargo shipping market?**

**(ii) What are the implications for shipping services to Australian shippers?**

**(iii) What are the implications for Conferences and for Part X exemptions?**

A. (i) Firstly there has been a continuation of concentration of shipping involving a few of the world's major shipping lines into various forms

of alliances. These alliances virtually control the shipping on round the world services and on the major East-West trades into and out of Europe, the USA and Asia. Secondly a major development is the massive new-building programme for containerised vessels. Some 728 new vessels of various sizes are currently on order and due to be delivered into service by early 2006. At the same time the demolition programme for container vessels is negligible. When these new-buildings have been delivered it will increase the current world fleet capacity by 45% (See Annexure 2). APSA cannot see this huge amount of new shipping being put into service without some detrimental effect on the profitability of shipping services (See Annexure 3).

- (ii) Australian shippers stand to benefit from this perceived over-supply of shipping.
- (iii) The implications for Conferences will be that the economics of Conferences will be under threat again. Part X should not be affected by these changes.

**Q. Have market developments, technological and regulatory changes in other developed countries affected the arguments for and against the need for Part X exemptions?**

A. APSA understands that some countries in Asia are calling for anti-trust immunity to be removed from Conferences or at worst be severely restricted. European shippers believe that price fixing is now outdated and shipping Conferences should be subject to the same competition laws as other industries. In APSA's view no developments in other countries has effected the arguments for Part X. In some cases in fact it has reinforced the case for Part X.

Asian shippers councils with which APSA is associated are envious of APSA's Part X protection.

**Q. Given the emerging international trend to limit anti-trust exemptions for Conferences and Consortia, what are the reasons for retaining Part X in Australia?**

A. APSA does not believe there is a trend! However anti-trust exemptions are being debated world-wide without any decisions having been made about their future.

Australian shippers believe that Part X in an amended form should be retained because:

- it compels Conferences and Consortia to meet and negotiate with shippers.
- it allows shipping lines to form Conferences which are vital to Australia's export programme.
- complaints to the Minister have been satisfactorily resolved.
- Australia is a nation of shippers and the interests of Australian shippers must be balanced against the power and interests of foreign carriers.
- it embodies a comparatively hands-off approach relying largely on market forces including shipper buying power.
- Part X has been instrumental in shippers being able to secure comprehensive shipping services and freight rates across a very wide range of destinations from a diverse range of Australian ports.
- APSA does not believe Australia could sustain a deregulated shipping industry.

It must be recognised that Australia's ability to transport its product quickly, efficiently, in perfect condition and at a competitive cost, is a crucial component of its comparative advantage in the global market place. Australia therefore depends on strong commercial relationships with international carriers.

It is interesting to note that neither the ACCC nor its predecessors have provided a proven case for the removal of Part X.

## **2. What are the alternatives if Part X is abolished?**

**Q. What are the alternatives if Part X is abolished?**

A. The alternatives in APSA's view are not attractive! Authorisation via Part VII is not a commercial alternative because:

- the period for ascertaining any public benefit can be lengthy.

- it is a costly exercise.
- any approval may be unworkable or at best unsatisfactory.
- any approval may be of limited validity.
- any approval can be revoked at short notice.

**Q. What other alternatives to Part X are there?**

A. APSA is not aware that there are any.

**Q. What market-based responses are likely to appear if the exemptions from aspects of trade practices legislation for Conferences are removed on Australian routes?**

A. If all the exemptions were removed the effect on Conferences and Australian trades would be dramatic. However shippers are calling for the removal of exemptions on price-fixing of freight surcharges and discussion agreements only. APSA believes Conferences can still operate without price-fixing of surcharges and discussion agreements.

**Q. (i) What would happen to the level of service provided to Australian shippers if Conferences were not allowed to operate?**

**(ii) What would happen if Part X were repealed?**

A. (i) There would be a decline in the level of shipping services which are vital to Australia's export programme. Currently Conferences provide frequent and comprehensive services to Australia's major markets.

(ii) If Part X was repealed, Australia would be the worse for it. Carriers would be able to service their own interests without regard for shippers.

**Q. If Australia repealed Part X, what conflicts, if any, would arise with regulation of cargo liner services in other jurisdictions?**

A. APSA has little knowledge of shipping regulations of other jurisdictions.

### **3. If Part X is retained, how could it be improved?**

- Q. (i) What problems have been experienced with the operation of Part X, in particular by shippers, and how should they be addressed?**
- (ii) Can processes under Part X, be streamlined, for example, the registration of a Conference occurs in two stages - provisional and final?**

**A. (i)** Any problems that have been experienced by shippers have generally been resolved through commercial negotiations under Part X. However with the increase in the number of discussion agreements in recent times, shippers have found it very difficult to reach agreement on rates. In addition discussion agreements have facilitated the practise of Conferences to impose freight surcharges.

Anti-trust immunities granted for liner shipping members should be further restricted as follows.

- Discussion Agreements should not be granted anti-trust immunities. The immunities should be restricted to the traditional conference arrangements, which provide reasonable compensating benefits for users in exchange for anti-trust immunity.
- Anti-trust immunities should extend only to the setting of all inclusive freight charges (ie. the collective setting of surcharges such as THCs should not be allowed).
- The requirement to negotiate and its definition be strengthened to maintain the intent and spirit of open and meaningful negotiations.

**(ii)** The registration process as far as APSA is aware has operated well and needs little, if any, change. However discussion agreements should no longer be registered and all current discussion agreements be de-registered.

**Q. Have the Minister's powers to enforce Part X been effective? If not, how could they be improved?**

**A.** The threat of the use of the Minister's powers has been useful. Only on two occasions since APSA was formed has the Minister been directly involved.



On each occasion after the Minister had intervened personally the problem was resolved. However, penalties should be considered on shipowners commensurate with the commercial benefits they derive from the exemptions from Part IV as simply cancelling an agreement may not be a sufficient deterrent.

**Q. How should the efficiency of shipping services be assessed?**

A. APSA believes that the efficiency of shipping services generally is assessed by the market. Historically shipping lines and services that have been inefficient have left the trade.

**Q. With the retention of Part X what changes should be made to improve the efficiency of liner cargo shipping services?**

A. In APSA's view efficiency equates to competition or competitiveness. As APSA proposed earlier, discussion agreements which are anti-competitive and therefore inefficient should not be eligible for registration.

**Q. What are advantages and disadvantages of providing such a broad range of exemptions from the TPA to ocean carriers?**

A. APSA has proposed a reduction in the number of exemptions for ocean carriers! The advantage to shippers essentially is that shipping lines be allowed to form Conferences and Consortia as long as they are registered. In proposing the removal of exemptions for price-fixing of surcharges and discussion agreements, the disadvantages are removed.

**Q. Why does Australia need broader exemptions than, for example, the USA and Europe?**

- A.
- (i) Australia is a nation of generally smaller shippers compared with the USA and Europe and the interests of Australian shippers must be balanced against the interests of foreign owned carriers.
  - (ii) Foreign owned carriers have considerable power through their Conference arrangements which have enabled them to develop an international overview of shipping arrangements, and is the means by

which they co-ordinate their conduct in dealing with Australian shippers.

- (iii) Part X exemptions are generally not dissimilar to those of USA and Europe.
- (iv) However Part X does oblige Conferences to meet with shippers when requested to do so.
- (v) Carriers must negotiate minimum levels of service agreements.

**Q. Should the Part X exemptions be narrowed, and if so, in what way, for example by region or route, or by particular regional or route characteristics?**

A. Part X exemptions should be narrowed as proposed earlier ie. exemptions for price-fixing of surcharges and discussion agreements should be removed and these reductions in exemptions should apply to all Conferences, Consortia, Alliances and Shipping Associations on all of Australia's outward trades.

**Q. Are there unique features of Australian trade which would justify a different regulatory regime from those of its trading partners?**

- A.
- (i) Australia's distance from markets, volume of trade and long distances between main ports presents particular conditions unattractive to carriers. In addition, very few of Australia's main cargoes could be classed as commodity volume, making exports dependent on smaller shipments which require a regular scheduled service twelve months of the year.
  - (ii) 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 the exemption from Part IV to form Conferences and Consortia.

- Q. Should the exemptions to carrier agreements be limited to ones that result in the combined market share of the carriers being less than a specified percentage (similar to the European block exemptions)?**
- A. In APSA's view - Yes. The market share of carriers agreements should be limited to less than fifty percent. Additionally in trades where there are few carriers ie. Europe and USA no individual carriers should command more than thirty percent of the trade.
- Q. Part X requires that no carrier be "unreasonably" excluded from Conference membership. Is this requirement sufficient to ensure the free entry and exit of Conference members?**
- A. APSA believes it is.
- Q. Should Part X be amended so as to include a specific requirement for Conferences to be open?**
- A. In APSA's view - Yes. Most Conferences these days are open anyway.
- Q. Does Part X require amendment to ensure the confidentiality of agreements entered into by individual carriers and shippers?**
- A. APSA believes yes - similar to U.S. legislation (OSRA).
- Q. How prevalent is the use of discussion agreements on Australian trade routes? In practise, how do these agreements differ from traditional Conferences? What are their strengths and weaknesses relative to traditional Conferences?**
- A. Discussion agreements operate in all of Australia's outward trades except to Europe. Discussion agreements differ from traditional Conferences in that the results of negotiations with shippers are non-binding on the members of the discussion agreement. In practical terms it means shippers have an agreement when there is not an agreement with the discussion agreement members. APSA believes there are no strengths in these discussion agreements from a shippers' view and the weakness is that they are anti-competitive.
- Q. Do discussion agreements as registered under Part X result in a substantial lessening of competition in any Australian trade route.**

- A. (i) APSA believes competition is substantially lessened! It is the strong view of shippers generally that discussion agreements are formed to limit or even eliminate competition on price and capacity by combining Conference members and independent carriers in any particular trade where they can discuss issues such as the level of freight rates that each is charging. Discussion agreements have been the chief target of Australian shippers who seek to end such agreements by taking away their right to operate with anti-trust immunity for these agreements. APSA has no problem with cost-savings and efficiency enhancing agreements such as vessel sharing agreements or space chartering agreements all of which operate in Australia's trades. Although issues discussed by members of discussion agreements are said to be voluntary or non-binding on agreement members, there is a view that voluntary guidelines may not be truly voluntary and whether they actually interfere with individual carriers' behaviour, especially that of independent carriers or non-Conference carriers. Additionally, shippers have had great difficulty in endeavouring to finalise freight negotiations because of the non-binding nature of these agreements.
- (ii) APSA believes that discussion agreements were deliberately designed by them to allow the maximum protection under Part X but with the minimum or no obligations on behalf of the carriers to abide by any agreement.

**Q. What would be the consequences if the exemption was no longer extended to discussion agreements?**

A. The consequence would be that shipping lines would have to revert to arrangements that were in place prior to the advent of discussion agreements. As an example, in the Australia to S.E. Asia trade where currently all lines servicing the trade are part of a discussion agreement - the lines would revert to the situation where previously the lines were divided into three Consortia which competed for the trade.

APSA believes that there would be greater competition between shipping lines with the removal of discussion agreements, additionally there would be a great

deal less risk of manipulation by the lines in areas such as the repositioning of empty reefer containers into the Australian trade leading to shortage of equipment.

It can be argued that with greater competition individual consortia would be more likely to have invested in larger vessels or greater numbers of vessels to improve their market share.

APSA believes discussion agreements should be removed for another reason and that is their unhelpful involvement in freight negotiations.

Currently Discussion Agreements meet with shippers before Conferences.

The rates negotiated with the Discussion Agreements are non-binding and voluntary but the result of those negotiations filter down to the Conferences and Consortia with whom shippers must have genuine binding negotiations for firm and workable arrangements.

The negotiations with Conferences and Consortia in this situation are to all intents and purposes a complete sham.

**Q. How is international liner cargo shipping regulated by Australia's major trading partners and what changes have been made or are proposed?**

A. APSA is aware that international liner shipping arrangements are being reviewed or have been reviewed in recent times. USA, Canada, Japan, South Korea and Thailand have all introduced legislation which has provided greater protection for shippers. Europe is currently considering changes. However APSA has little or no knowledge of these changes.

**Q. What is wrong with freight surcharging?**

A. The current "freight surcharging mentality" began in 1973/74 when the Australian dollar was significantly devalued and the price of fuel oil doubled overnight. At that time APSA's predecessor, the Australian Shippers Council, was forced into negotiating surcharges with Conferences known as "currency adjustment factor" (CAF) and the "bunker adjustment factor" (BAF). It was intended that these surcharges remain until shipping lines could adjust to these "cost shocks". However both these surcharges are still applied today to freight rates.

Additionally with the introduction of Discussion Agreements further surcharges are being applied and a list of some of these is attached, ANNEX 4. The problem, or burden, for exporters is that overseas buyers will not accept prices for our products qualified by various surcharges. Exporters must incorporate some allowance for surcharges in their sale price but in the event that any particular surcharge increases during the validity of a sales contract the exporter carries that increase.

For example up until 8 July 2004 the BAF to the USA was US\$75 per teu. On 9 July 2004 the BAF jumped to US\$180 per teu.

Shipping lines will state that surcharging is a means of making freight costs more transparent for the shippers. As the lines have been told repeatedly exporters have no interest in transparency because there is no way to ensure that the surcharges are truly transparent anyway. Shippers require all-inclusive rates.

Additionally, shippers have no input into negotiations between shipping lines and their service providers. For example who knows what is agreed in negotiations between P & O. Stevedores and P & O Shipping.

APSA has repeatedly rejected surcharges suggesting that shipping lines have at their disposal various hedging options, for example, to cover movements in currencies and fuel prices. However, the standard response from lines is that it is too difficult and at the end of the day the shipper carries the risk.

APSA has a view that, in fact, lines may well be hedging but at the same time claiming surcharges as well - a classic case of double-dipping! Therefore APSA believes that immunities should extend only to the setting of all-inclusive freight rates ie. the collective setting of surcharges such as THCs, etc. should not be allowed

## **Conclusion**

APSA believes that one very important aspect of Part X is that it has not restricted competition in the containerised liner trades out of Australia.

Additionally Part X embodies a comparatively hands-off approach as shown by the fact that the ACCC and its predecessors and Minister of Transport have had to

become involved on very few occasions as problems have generally been resolved by commercial means.

APSA is involved with overseas shipper bodies and it has been proved that these bodies who do not have Part X type legislation have been unable to resist the imposition of general rate increases and unfavourable conditions of carriage by carriers.

In short, experience has shown that the competitive supply of shipping alone is an insufficient safeguard against abuse by Conferences and Consortia of their privileged place outside the constraints of anti-trust legislation.

APSA believes in summary that with the recommended amendments as set out earlier in this submission, Part X should be retained.

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**MEMORANDUM OF UNDERSTANDING**

It is hereby agreed by the members of the APSA that the Association be administered in Victoria. The Association's rules shall adequately accommodate the following principles:

1. The objectives of the Association are to fill the role of the Designated Peak Shipper Body as defined under the Trade Practices Act (1974).
2. In accordance with those objectives the Association's principal functions will be to co-ordinate direct representation from relevant exporters of the DPSB. Further, the Association will have the task of disseminating information on the outcome of these negotiations.

In addition the aims of the Association are:

- (a) to consolidate and communicate the views of its Members to liner shipping operators, other industry groups, port authorities and governments on all matters concerning the shipment of liner commodities;
  - (b) to provide a point of contact for consultation with liner shipping operators, other industry groups, port authorities and governments, and
  - (c) to ensure that the needs of and constraints on Australia's liner trades are properly considered in the formulation of government policy.
3. The Association shall be governed by an Executive Committee representing financial members of the organisation. Elections will be held each year. There will be two categories of membership, full and associate. Full members only will be entitled to voting rights. The Committee will be limited to a maximum number of seven members who will be entitled to hold office for 12 months renewable for up to five years. Any three members of the Executive Committee shall constitute a quorum for the transaction of the business of a meeting of the Committee.



4. All the Association's members who are either shippers or the organisations representing the different industry categories will be entitled to receive the Association's services and general advice. Subscribers participate in servicing the administration of the Association through their relevant nominee.
5. The Association shall co-ordinate the appointment of negotiators and representatives from interested parties on behalf of the DPSB with regards to relevant trade interest and shipping matters in general.
6. Initial funding has been contributed by industry associations. It is expected in the future that the Association will be funded by Member subscriptions.
7. The income and property of the Association wheresoever derived from shall be applied solely towards the promotion of the objects of the Association as set forth in this memorandum of understanding and no portion thereof shall be paid or transferred directly or indirectly by way of dividend bonus or otherwise howsoever by way of profit to the members of the Association or to any of them.
8. If upon the winding up or dissolution of the Association there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the Association but shall be given or transferred to some other institution or institutions, having objects similar to the objects of the Association.

#### 4. THE CONTAINERSHIP FLEET & ORDERBOOK

*At the start of Q2 2004 containership fleet capacity had reached 6.63 million TEU, and the orderbook had expanded to a record 45% of the existing fleet in terms of capacity. Containership contracting continued its searing pace of 2003, with over 490,000 TEU of fully cellular capacity ordered.*

##### 4.1 Containership Fleet Developments

- At the start of the second quarter of 2004, total capacity in the containership fleet stood at 6.63 million TEU. As Table 4.1 shows, this figure is expected to reach 7.14 million TEU by the start of 2005, and 7.93 million TEU by the start of 2006. It is estimated that in the five years to the end of 2005, containership fleet capacity will have grown by an average of 10.4% per annum.
- The containership fleet in terms of vessel numbers hit 3,232 at the start of April 2004, up from 3,203 at the end of 2003. The current fully cellular boxship orderbook contains 728 vessels, with 158 remaining scheduled for delivery in 2004, and then 244 on order for 2005, and 236 for 2006 (up from 180 at the start of the year). Now 406 'Deep Sea' vessels of 3000 TEU and above are on the containership orderbook.
- The containership sector continues to exhibit consistently strong growth relative to most other shipping sectors, and the fully cellular fleet has grown accordingly, its capacity expanding by more than 9% in all of the last ten years bar one, driving the overall container capable fleet size onwards and upwards. As a result, capacity in that container capable fleet as a whole, has also shown consistently sturdy growth levels, and as Section 3 illustrated, it is set to show an average of 8% per annum growth in standing slot TEU terms over 2004 and 2005 combined.

*The containership orderbook now contains a record 728 vessels, including over 406 'Deep Sea' units.*

# AP Møller-Maersk's cautious outlook for 2004 seen as 'tactic' – not true forecast

Janet Porter, London

AP MØLLER-Maersk's conservative outlook for 2004 that sent shares tumbling on March 26 was probably more of a negotiating ploy than a true forecast, a leading analyst maintains in a report on the group's results.

Handelsbanken Capital Markets is predicting another strong year for the container trades that should greatly benefit Maersk Sealand, which did not see the full effect of higher freight rates in its 2003 performance.

"We expect this to happen in 2004, and with the annual rate negotiations coming up on the Pacific in April/May, Maersk Sealand may even be able to negotiate a further hike this year," Handelsbanken says in a detailed analysis of AP Møller-Maersk's figures.

The report's authors, Stephen Rammer and Torben Sand, predict the container market bonanza will continue for another couple of years, "although 2004 could turn out to be the peak year".

Global outsourcing is fuelling demand for transport, with port volumes strong and container freight

rates experiencing the strongest rebound in a decade.

As market leader, "we believe [Maersk Sealand] will enjoy a sustained growth period compared to its peers". Neither is Handelsbanken taken in by the flat profit forecast that AP Møller-Maersk issued, disappointing some industry-watchers and depressing the share price.

"The company put forward a very conservative outlook, which we believe was more of a statement to put it in a better negotiating position with its clients than an actual forecast for the company's earnings."

Earnings before interest, tax, depreciation and amortisation from container transport and ports are forecast to rise to DKr19.2m in 2004 and DKr20.8m in 2005 from DKr14m last year.

Even so, Handelsbanken admits the industry's orderbook "worries us". And although the bulk of the containers on order will be delivered in 2006, freight rates could start to be affected next year.

"We are not convinced that the market can absorb this massive number of new vessels, which are faster and more productive than the existing fleet," the report said.

## Five-year newbuilding plan

Janet Porter, London

MAERSK Sealand has mapped out a five-year containership newbuilding program, with deliveries scheduled up to May 2009, Handelsbanken Capital Markets says in a report on AP Møller-Maersk's 2003 results.

Brokers have said for some time that Maersk Sealand has up to 16 post-panamax containerships on order with the group's Odense shipyard in Denmark through to 2009.

However, Handelsbanken is thought to be the first firm to publicly state that the ordering schedule extends so far ahead.

Maersk Sealand is one of five mega-carriers that dominate newbuilding activity.

New figures from BRS-Alphaliner put confirmed orders for very large containerships, with nominal capacity in excess of 7,500 teu, at 146 units. Of these, 86 are for a select quintet: Mediterranean Shipping Co, CMA CGM, China Shipping, Cosco, and Maersk Sealand.

After taking delivery recently of the Adrian Maersk, Maersk Sealand now has a fleet of 24 ships of about 8,000 teu capacity, BRS-Alphaliner estimates. Of total orders for super post-panamax boxships, South Korean yards are building 118.

The greatest number will be delivered in 2006, with some due for completion in 2007, but Maersk Sealand is thought to have booked building berths at Odense right through to 2009.

Handelsbanken believes AP Møller-Maersk, which has a strong track record in reading the market and invariably pursues a counter-cyclical strategy, may this time have been late in ordering new vessels.

"This means that AP Møller-Maersk will have more than 50% of its container vessels delivered in 2006/07, which is when we expect the market to have peaked," Handelsbanken said. However, "some orders may represent re-placement tonnage, which may be an explanation for this late ordering".

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Annex 3

**AUSTRALIAN PEAK SHIPPERS ASSOCIATION (APSA)**

THE ADVENT OF DISCUSSION GROUPS IN RECENT YEARS HAS SEEN A STEEP RISE IN THE NUMBER OF NEW SURCHARGES TO OCEAN FREIGHT RATES.

CURRENCY ADJUSTMENT FACTOR (CAF)  
BUNKER ADJUSTMENT FACTOR (BAF)  
TERMINAL HANDLING CHARGE (THC)  
BERTH HIRE ADDITIONALS  
PORT CONGESTION SURCHARGES  
PEAK SEASON SURCHARGES  
EQUIPMENT HANDLING SURCHARGES  
EQUIPMENT REPOSITIONING SURCHARGES  
WAR INSURANCE RISK SURCHARGES (WRIS)  
TEMPORARY RISK SURCHARGES  
EMERGENCY SURCHARGES  
ADVANCE MANIFEST COMPLIANCE CHARGE  
BILL OF LADING SURCHARGES

ALL SUCH VARIABLE SURCHARGES MAKE ACCURATE COSTING FOR SALES OR PURCHASE CONTRACTS ALMOST IMPOSSIBLE!