

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



**Submission by the Australian Horticultural Exporters Association  
Incorporated  
to the Productivity Commission**

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## Abbreviations

AESA	Australian Exporters Shipping Association
AHEA	Australian Horticultural exporters Association Inc.
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

## 1.0 EXECUTIVE SUMMARY

This submission is submitted by the Australian Horticultural Exporters Association Inc. (AHEA) which:

- is the designated secondary industry shipper body for horticultural products under Part X of the Trade Practices Act 1974 (TPA)
- represents Australia's horticultural shipping Exporters generally.

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

Australian horticultural exporters are increasingly dependant on shipping to export, and the interests of Australian shippers must be balanced against the interests of foreign multi national carriers. The interests of carriers and shippers are never the same.

The Australian horticultural exporters are a unique and diverse group who are largely uncoordinated and who are direct competitors with each other into their foreign markets. Unlike their global competitors horticulture in Australia lacks scale and its structure is uniquely fragmented with little involvement from multinational corporations and lacks the concentration of volume of cargo to allow forceful negotiation of freight rates with foreign multi national carriers.

On the other hand, the foreign multinational carriers have considerable resources at hand, with global turn- overs often in excess of Australia's total horticultural exports and thus power through their global market size and shipper 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, when playing them off against each other and against exporters in other markets such as New Zealand.

This is particularly important for refrigerated cargo which is a smaller proportion of the total cargo trade, and is regularly thrown at exporters in negotiations with carriers as a threat, that “*carriers are making decisions at head offices offshore about where they position refrigerated containers to gain the best returns*” ...and if Australian exporters don't accept rate increases then “*containers will be repositioned in alternative markets*”, which will lead to a shortage and ultimately a reduction in the levels of service to exporters.

The foreign multi national carriers remain in a powerful and advantageous position and with this in mind the negotiating imbalance in their favour needs to be redressed towards a more balanced position.

In summary, this submission:

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

This involves the retention of the protection provided for Australian horticultural exporters in particular under:

- Section 10.29
- Section 10.41
- Section 10.52

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

- carriers participate in freight negotiations with exporters
- all Australian horticultural exporters have access to export markets
- carriers are not able to disregard the interests of some exporter groups

- carriers have to provide information to exporters as part of the negotiation process
- carriers are able to form alliances

AHEA believes that the removal of Part X exemptions from Part IV would :

- 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 future exports by the horticultural industry
- promote domination by major lines or strategic alliances in Australia's export trades who would only pick the eyes out of the export business.

If shipping was left purely to market forces, carriers would concentrate on lucrative trades and abandon the not so lucrative ones. This would mean relatively low value trades such as horticultural ( in terms of ability to pay higher prices for freight ) would get the lowest level of service.

AHEA supports the introduction of the following amendments to Part X:-

- price fixing of all freight surcharges and additional charges 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 and disallowed
- 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 strengthened to maintain the intent and spirit of open and meaningful negotiations, see Section 10.29, Section 10.41 and Section 10.52.

## **2.0 BACKGROUND**

### **THE AUSTRALIAN HORTICULTURAL EXPORTS ASSOCIATION INC.**

The Association was formed in 1987 to represent horticultural exporters views and was granted status as the designated secondary peak shipper body by the Federal Minister of Shipping pursuant to Section 10.03 of the TPA in 2000 upon application.

This was seen as a supporting role to that of APSA, which represents the interests of some major Australian commodity exporters and export shippers generally in relation to outwards liner cargo shipping services, and one that concentrated on horticultural exporter issues that are unique to Australian export shipping generally.



### 3.0 Recommendations

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

However, AHEA believes that in light of changing circumstances since the last review in 1999, there should be some amendments to maintain the spirit and intent of the legislation and 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 all freight surcharges and additional 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 and definition to negotiate be strengthened.
6. AHEA to have access to full round voyage costs, rather than only costs related to the outwards voyage. This would give full transparency and avoid the incidence of inclusion of some inwards voyage costs being applied to outwards voyage costs thereby "boosting" cost figures currently provided to AHEA for the benefit of negotiations.

AHEA believes that some costs attributed to exports are already recovered by carriers from importers or other markets. Eg: New Zealand exports via Australia to Europe.

7. A broader source of funding of AHEA beyond its actual members is required to meet the costs of providing meaningful negotiation and liaison with carriers and their representative body Shipping Australia in:

- protecting the interests of all Australian horticultural exporters;
- greater research of shipper issues;
- conduct of negotiations;
- education of horticultural shippers.

AHEA is a non-profit organisation representing the whole of the horticultural industry rather than just its member organizations interests, and funding must be increased if AHEA is to continue to provide resources for representation to continue its role as the representative of horticultural exporters in general.

Currently the whole horticultural industry who benefit from exports and specifically many horticultural exporters receive the benefit of AHEA's ongoing work without being obliged to take up membership or provide any funding for the significant benefits enjoyed.

Funding along the lines of those funds provided to APSA and those of statutory marketing authorities (SMAs), is an example.

## **4.0 Key issues**

### **4.1. Review of the Retention of Part X**

#### **4.1.1. General position**

It is AHEA's position that Part X with some major amendments be retained.

- (i) AHEA believes that international liner shipping services 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).

There are differences in operational characteristics between liner shipping and most manufacturing industries in that, in liner shipping, operators have floating assets, the supply of which cannot be quickly adjusted to meet changing demand as there is a lead time of 2 to 4 years to increase the supply of tonnage, as is the case with world supply to meet China's recent increase in demand. The result has been a global shortage, causing freight rates to climb steeply for both imports and exports in Australia in the last 12 months.

Furthermore, Australia is today totally dependant for its trade to be carried by foreign-based operators. The decisions on supply of services are made off shore, and are not directly influenced by local conditions or political situation.

- (ii) AHEA maintains that Part X has been instrumental in horticultural exporters being able to secure comprehensive scheduled shipping services and freight rates across a very wide range of destinations from a diverse range of Australian ports.
- (iii) Australia could not sustain a competitive deregulated shipping industry against more competitive and rewarding global trades, particularly in the northern hemisphere.
- (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.

The EEC, the USA, Canada, Japan & South Korea have all introduced regulations recognising the uniqueness of international liner shipping.

- (v) In Australia, the ACCC have not provided a convincing case for the removal of Part X.

#### **4.2 The market characteristics of liner shipping markets**

Shipping lines need to form alliances such as Conferences and Consortia, to be able to share assets and spread the cost of the enormous capital infrastructure necessary to provide comprehensive liner services to Australian ports, where volumes are relatively low on a global scale and do not justify the investment alone.

#### **4.3 Part X affect on competition**

Currently Part X is used to agree ceiling rates and allows the operation of Conferences, Consortia and Discussion agreements. This has had a negative effect on competition in some areas and is the reason why AHEA is proposing amendments to Part X.

However, Part X facilitates the provision and formation of stable shipping services, which are vital to Australia's horticultural export programmes. Carriers operate in a highly contestable environment and the continuing viability of more than one carrier group is highly desirable.

The fixing of ceiling rates allows market conditions and competition to adjust rates below the ceiling rates and for horticultural exporters to normally obtain competitive rates.

#### **4.4 Developments in the international liner cargo**

- (i) There has been a continued concentration of shipping lines, involving a few of the world's major carriers, into forming various alliances. These alliances virtually control shipping on round the world services and on the major East-West trades into and out of Europe, the USA and Asia.

(ii) A major development is the massive new building programme for containerised vessels. 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% AHEA cannot see this substantial amount of new shipping being put into service without some major impact on the profitability of shipping services

Australian horticultural exporters stand to benefit from this perceived over-supply of shipping and the Carriers may see the use of Conferences could protect Carrier rates, if used in an orderly manner rather than to be under threat again.

## **5.0. Alternatives if Part X is abolished?**

### **5.1 Authorisation**

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.

### **5.2 Open Market-based responses**

If all the exemptions were removed, the effect on Conferences and Australian trades would be dramatic. It would possibly lead to the formation of offshore alliances and the trade would be dominated by these very large monopolistic groups, who would set the rates and supply to meet then demand. Generally rates would increase and services would be reduced to major ports only.

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.

## **6.0. Recommended Improvements to Part X**

Most problems experienced by shippers, have generally been resolved through commercial negotiations under Part X.

However, with the development and increase in the number of Discussion Agreements in recent times, shippers have found it very difficult to reach meaningful agreement on rates. In addition, Discussion Agreements have led to the practise of Conferences imposing freight surcharges in addition to the blue water rate.

### **6.1 Restriction of Immunities**

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

- (i) 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.
- (ii) Anti-trust immunities should extend only to the setting of all inclusive freight charges (ie. the collective setting of surcharges such as THC's should not be allowed).
- (iii) The requirement to negotiate and its definition strengthened to maintain the intent and spirit of open and meaningful negotiations.

### **6.2 Unique situation of Australian shipping.**

- (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 coordinate 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.
- (vi) Australia's long distances between main ports, distance from overseas markets and volume of trade present 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.
- (vii) 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.

### **6.3 Combined Market Share under Part X**

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. This will address the issue of monopolistic power currently enjoyed by Discussion Agreements.

### **6.4 Prevalence of Discussion Agreements on Australian trade routes**

- (i) 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. AHEA believes there is no strength in these Discussion Agreements from an exporters' view and the weakness is that they are strongly monopolistic and anti-competitive.

(ii) 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. AHEA 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 may 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.

(iii) Discussion agreements were deliberately designed by them to allow the maximum protection under Part X, but with minimum or no obligation on behalf of the carriers to abide by any agreement.

(iv) The consequence of the removal of Discussion Agreements 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 previous situation, where they were divided into three Consortia, which competed for the trade.

There would be greater competition between shipping lines with the removal of discussion agreements, in addition to 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.



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.

## **6.5 Freight Surcharging**

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 to freight rates today.

Additionally with the introduction of Discussion Agreements, further surcharges are being applied and a list of some of these is attached.

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, but 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.

AHEA 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.

It is believed Lines are hedging, but at the same time claiming surcharges as well - a classic case of double-dipping! Therefore, immunities should extend only to the setting of all-inclusive freight rates ie: the collective setting of surcharges such as THC's etc, should not be allowed

## **7.0 Conclusions**

AHEA believes that Part X 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, its predecessors and the Minister for Transport have only become involved on very few occasions, as problems have generally been resolved by commercial means.

AHEA is aware that overseas shipper 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.

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.

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