

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

This submission is from the Trade Practices Committee of the Law Council of Australia's Business Law Section, in relation to the Productivity Commission's current review of Part X of the *Trade Practices Act (TPA)*.

The Trade Practices Committee strongly supports the discussion and draft findings contained in Chapter 8, *Alternatives to Part X* of the Commission's draft report dated October 2004. In particular, the Trade Practices Committee supports recommendation 8.1 that:

Part X be repealed and the liner cargo shipping industry be subject to the general provisions of the Trade Practices Act. However, transitional arrangements should be introduced, which provide interim authorisation for existing Part X agreements and prioritise the review of these agreements according to their risk of anticompetitive detriment.

When the Productivity Commission previously reviewed Part X in 1999, the Trade Practices Committee submitted to that review that Part X should be repealed, with shipping agreements and practices being dealt with by the regular application of Part IV and Part VII of the TPA. In its submission in 1999, the Trade Practices Committee noted that it 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 to authorisation and notification and to exemptions under section 51 of the TPA (including the exemption for export agreements).

Nothing has changed in the five years since the Trade Practices Committee's last submission to the Productivity Commission, which would cause the Committee to alter its position. Thus the Trade Practices Committee still holds firmly to that view which it expressed in 1999 about Part X, which accords with the preferred option of the Productivity Commission in its draft report on the current Part X review.

The arguments supporting the repeal of Part X are succinctly stated in Chapter 8 of the draft report and, without repeating them in this submission, the Trade Practices Committee endorses those points. There are perhaps two issues only which require further comment.

First, reference is made in Chapter 8 to the cost of authorisation and the lengthy process involved. The recommendations of the Dawson Committee, which are likely to be enacted in the near future, should address some of those concerns. While there is a cost

involved in that process, the cost is small in comparison to the value of the commercial arrangements which the parties are seeking to protect. In any event, it is not unreasonable that there may be some administrative cost if a person seeks to be exempted by authorisation from the application of a law which applies to all other persons engaging in similar commercial conduct.

Secondly, the Trade Practices Committee agrees that transitional arrangements should be introduced on the repeal of Part X to provide interim authorisation for existing Part X agreements and prioritise the review of these agreements by the ACCC according to their risk of anticompetitive detriment. While the Committee would expect that the ACCC would undertake its review of existing Part X agreements reasonably promptly, it always has competing calls on its limited resources, so may face pressure to give a lower priority to reviewing existing Part X agreements than to, for example, investigation of complaints.

It would not be appropriate, and may create some confusion or uncertainty, if some Part X agreements were allowed to continue indefinitely, effectively as "grandfathered agreements", because of these transitional arrangements, without having been finally reviewed by the ACCC.

Accordingly, the Trade Practices Committee suggests that the Productivity Commission consider whether the transitional arrangements for existing Part X agreements should have a time limit of perhaps three years, by which time the ACCC would have been required to review all former Part X agreements. Such a lengthy transition period should not cause any hardship to any parties to Part X agreements, and should also ensure that the ACCC completes its review of those agreements in a reasonable time.

In summary, the Trade Practices Committee strongly supports the Productivity Commission's preferred option set out in draft recommendation 8.1 of the draft report.

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