



## **Federation Of Asean Shipowners' Associations**

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### **Comments on The Review of Part X of the Australian Trade Practices Act 1974**

#### **Introduction**

The Federation of ASEAN Shipowners' Associations (FASA) is a Non-Governmental Organisation of the Association of South East Asian Nations (ASEAN). FASA represents the interest of six shipowners' associations and one national shipping line, which namely are as follows:

- Filipino Shipowners' Association (FSA);
- Indonesian National Shipowners' Association (INSA);
- Malaysian Shipowners' Association (MASA);
- Myanma Five Star Line (MFSL);
- Singapore Shipping Association (SSA);
- Thai Shipowners' Association (TSA); and
- Vietnam Shipowners' Association (VSA)

Based on the UNCTAD Review of Maritime Transport 2003, the four countries of Singapore, Malaysia, Philippines and Indonesia are among the 35 most important maritime nations in the world. Also based on Lloyd's Register – Fairplay World Fleet Statistics as at 31 December 2002, ASEAN shipowners own and operate over 9,200 ships of more than 41.9 million GT. They are very active in all aspects of the shipping market: liner, liquid and dry bulk, ro-ro passengers, cruises, reefers, fishing etc.

ASEAN countries are important trading partners of Australia.

#### **Background**

The Australian Parliamentary Secretary to the Treasurer, the Hon. Ross Cameron MP announced, on 23 June 2004, that the Australian Productivity Commission (PC) had

been instructed to undertake a review of Part X<sup>1</sup> of the Australian Trade Practices Act (1974). It was however noted that a review of Part X had already been conducted in 1999.

In his press announcement, he added that the PC would release an issues paper and invite expressions of interest from parties who would like to contribute to the review.

FASA was informed that the PC, following the review, had released a draft report on 22 October 2004. In the communiqué that was sent out, the PC invited parties to examine this draft report, to provide written comments and/or to present submission.

The FASA has the opportunity to review and consider the arguments in this draft report.

### **The PC's Review in Essence**

In brief, the PC's task in reviewing Part X is to consider:

- Whether such industry – specific regulation is justified; that is, whether Part X should be retained;
- Alternatives to Part X if it were to be abolished; and
- If Part X were to be retained, could changes be made to improve its effectiveness.

The PC, in its draft report, considers that there are two ways in which the current arrangements could be amended to improve outcomes, namely:

1. repeal Part X and, as occurs for other industries, rely on authorization under Part VII of the TPA, under which agreements are assessed individually on the basis of their net public benefit. This is the Commission's preferred option; or
2. modify Part X to promote and protect confidential individual service contracts between carriers and shippers and either
  - (i) register only agreements that do not contain provisions to discuss or set prices and/or limit capacity offered on a trade route, or
  - (ii) exclude discussion agreements from eligibility under Part X. Agreements not eligible for registration under Part X would remain eligible for authorization under Part VII.

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<sup>1</sup> Part X of the Trade Practices Act (TPA) (1974) is the regulatory regime for international liner cargo shipping operations in Australia. It describes the conditions under which international liner cargo shipping operators are permitted to form conferences to provide regular, reliable and lower cost shipping services. In particular, Part X offers conferences limited, conditional exemptions from the general provisions of the TPA.

In its many arguments to support the preferred option in the draft report, the PC had commented that Part X, as it stands at this moment, is more permissive than those regimes in Europe and the US. It has further based much reliance on the OECD Secretariat's report which called for special regulation of conference agreements, and which had proposed three principles. The OECD report recommended that OECD member countries use these principles to guide further assessments of the validity of antitrust exemptions for price fixing, rate discussions and capacity agreements between competitors in the liner shipping sector.

### **FASA's Case Against the Repeal of Part X of the Australian Trade Practices Act (1974)**

The FASA, following its review and considerations, submits below its comments to support its case for the PC not to repeal Part X of the TPA (1974):

- The PC has provided several arguments in support of the options to either repeal Part X or to modify it. In all respects, the FASA has found these arguments not only unrealistic but also seriously flawed.
- The current immunity system, contrary to the draft report, is very useful for the shipping industry as well as the whole trading industry, including shippers. In the Australian liner trade, ocean carriers are able to perform their business effectively and efficiently, and the market is highly competitive without regulatory conflicts with its major trading partners.
- Under the current regime, it should be noted that Australian importers and exporters have largely benefited from the robust service options and reasonable rates with the trade expanding significantly over the years. Between 1994 and 2004, the number of shipping lines offering services between South East Asia and Australia has increased significantly.
- There are also specific provisions under Part X that ensure Australian flagged ships are not unreasonably hindered or discriminated against.
- The FASA holds the view that a stable regulatory environment is indispensable for the shipping industry to provide reliable and regular services, and a long term service commitment to the shippers and the trading community. The existing Part X therefore provides this stability.
- The FASA therefore strongly favours the retention of Part X of TPA, that is, maintaining a regime for liner shipping under Australian competition rules which will allow the preservation of the conference system and Discussion Agreements.
- A repeal of Part X, the FASA fears, would lead to destructive competition among the ocean carriers and therefore seriously disrupt the smooth flow of international

shipping and trade. Such competition may also result in an oligopoly situation in liner shipping that would bring several negative consequences for the whole trading industry, such as fewer service choices, reduced efficiency and quality in services.

- It will also seriously weaken shipowners' ability to invest in new ships and other shipping and trade infrastructures that the global economy is so greatly dependent upon. Considering the high proportion of specialized equipment (ie refrigerated containers) required for the Australian trade, this would be especially damaging for Australian exports.
- The growing demand for ocean transportation, especially in the Asia Pacific, will far exceed its supply, thus creating greater imbalance and instability to the liner trade.
- If the Government were to accept the preferred option contained in the draft report, then a much more unstable operating environment would be created as it is clear that the authorization provisions are more uncertain, lengthy, time consuming and expensive when compared to the public benefit tests already contained in Part X.
- Whilst the Australian Government is considering imposing a time limit of months for any authorization application to be decided, the actual period could be much longer if it goes to appeal. This would be untenable, bearing in mind that operational consortia and slot sharing agreements between carriers, could well require such authorization, and not just price setting agreements. In the carriers' view, such authorization would not be a viable alternative.
- Abolition of Part X would be inconsistent with the regulatory regimes of Australia's major trading partners.

## **Conclusion**

FASA hopes that these brief comments are useful. In conclusion, FASA therefore strongly favours the retention of Part X of Trade Practices Act 1974, that is, maintaining a regime for liner shipping under Australian competition rules which will allow the preservation of the conference system and Discussion Agreements.

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