Trade Practices Act 1974

Part X section 10.47

Ministerial referral of complaint for investigation by the Trade Practices Commission

Report by the Trade Practices Commission

March 1993

TRADE PRACTICES COMMISSION

BENJAMIN OFFICES, CHAN STREET, BELCONNEN, A.C.T.

OFFICE OF
THE CHAIRMAN

24 March 1993

Senator the Honourable Bob Collins
Minister for Transport and Communications
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

On 11 August 1992 the Minister for Shipping and Aviation Support, in accordance with section 10.47 of Part X of the *Trade Practices Act 1974*, referred a complaint by the Australian Peak Shippers Association, to the Trade Practices Commission for investigation and report.

A Division of the Commission consisting of Mr Allan Asher and Mr Hank Spier have prepared the attached Report for your consideration.

A copy of the Report will be placed on the public register maintained by the Commission in this matter, as required pursuant to section 10.13 of Part X of the Act.

Yours sincerely

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Chairman

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Executive summary

This report to the Minister for Shipping and Aviation Support, pursuant to Section 10.47 of Part X of the Trade Practices Act (TPA), is the first such referral directing the Trade Practices Commission to carry out an investigation.

The investigation concerns a complaint by the Australian Peak Shippers Association (APSA) against container lines operating under registered conference agreements and providing a service between Australia and the USA. Two lines (Blue Star and Columbus) have formed 'joint venture conference agreements' providing a joint service from Australia to East Coast USA and the Pacific Coast, collectively known as NACON. In addition, Blue Star, Columbus, ANZDL and Nedlloyd lines have formed a 'discussion conference agreement' concerning the trade between Australia and East Coast USA and the Pacific Coast known as AUSDA. All the agreements are 'registered conference agreements' under Part X and as such are exempted from the general provisions of the TPA governing collusive conduct.

The complaint relates to the introduction in 1991 by the above lines, and others, of a terminal handling charge (THC) at ports on East Coast USA and an increase in the existing THC level on the West Coast. APSA alleged that the introduction of THCs was accomplished without due regard to the notification and negotiation obligations of registered conferences under Part X of the TPA. It also claimed that the THCs were presented as a fait accompli and that they had undermined reductions in tariff rate levels negotiated in 1990 as a result of competition. Following an unsuccessful attempt to negotiate a settlement between NACON and some APSA members who allegedly were commercially disadvantaged by the lines' actions, the matter was referred to the Commission for investigation.

The Commission duly conducted interviews, made enquiries and received submissions from the industry concerning the allegations. It has found that there was inadequate notice of the impending THC and that there was confusion in the terminology used to describe the range of services covered by the lines' tariffs and the THC. This has led some APSA members to believe that the tariffs they negotiated in 1990 included some cost components that were also incorporated in the new THC.

The THC is levied by the lines as a separate charge to be paid before a container is allowed to exit the port of discharge in the USA. Some Australian shippers were required to pay the charge and suffered a commercial disadvantage as the amount had not been factored into the cost of landing their products in the USA. The THC can be paid by either the US consignee or the Australian shipper depending on the contract between the parties. Regardless of who pays the charge, it is part of the overall cost of exporting containerised cargo to the USA.

The Commission has also found that the lines gave shippers inadequate notice of the impending THC prior to and during the tariff negotiation stages in late 1990. The inadequacy of communications has led APSA to believe that the THC resulted in an overlapping of cost recovery by the lines and that this has increased the cost of shipping containers to the USA.

The Commission tends to agree with APSA's assessment of the matter. This is based largely on the documentation used by the lines to describe tariffs and the THC and also because of inadequate communication by the parties to the conference agreements in not giving notice of the new charge. Accordingly, the Commission is of the opinion that, pursuant to section 10.45 of Part X of the TPA, grounds exist for the Minister to be satisfied that

- parties to the above registered conference agreements have given effect to the agreements without due regard to the need for outwards liner cargo shipping services provided under the agreements to be efficient and economical; and

- adequate and timely notice was not given of a change in negotiable shipping arrangements.

Some of the parties to this dispute had earlier come to an arrangement with NACON to settle the matter in a commercially acceptable manner through the offer of reduced rates. However, one shipper group could not agree with the terms offered as it wanted direct monetary payment for its commercial loss. In the absence of their agreement the dispute remained unresolved and other shippers were deprived of the opportunity to settle.

The Commission is concerned that Part X does not provide a flexible basis for the commercial resolution of disputes on terms which are acceptable to all parties and which also preserve whatever benefits conferences (as joint ventures) may bring to the industry.

The only remedies available under Part X of the TPA are those that provide for the Minister to direct the Registrar of Shipping to cancel the registration of an agreement in whole or in part.

Had conduct **not exempted** under Part X occurred, the provisions of Part VI -- relating (for example) to pecuniary penalty, actions for damages or enforceable undertakings -- could be considered. However there is insufficient evidence presently available for the Commission to take any action in relation to any non-exempt conduct that may have occurred.

The Commission does not recommend that the Minister use coercion in attempting a commercial settlement acceptable to all shippers, for example by threatening to deregister a conference agreement unless a form of compensation is paid. In the first place NACON claims it is unable to offer any refunds of rates by virtue of subsection 10 (2) of the US Shipping Act 1984. Second, such a threat would be a gamble which could result in NACON choosing to disband rather than pay a price it found commercially unacceptable. This might have disruptive consequences for Australian trade to the USA in terms of shipping capacity and frequency.

In any event, it appears to the Commission that the existing Part X remedies were framed with the intention of redressing any anti-competitive effects of a conference agreement rather than coercing a conference to reach a commercial settlement. It follows that the Minister's actions should be primarily directed at eliminating anti-competitive detriments of registered conference agreements that give rise to complaints.

The Commission's enquiries do not indicate that APSA's complaint reflects a misuse of market power that would justify dissolution of the NACON joint venture. The shippers' problems arose because of the collusive nature of the industry, and the fact that it is supported by a regulatory framework in Australia, the USA and elsewhere that readily exempts discussions between competitors;

for example through the AUSDA conference agreement. It was this protected collusive environment that allowed not only NACON but other lines jointly to introduce a new charge and a new methodology in calculating their returns (i.e. partial cost-plus pricing through a THC) with seeming indifference to the interests of some APSA members.

Accordingly, the Commission recommends that the Minister should consider the deregistration of the discussion conference agreement (AUSDA). This would not be satisfactory to the APSA members who gave rise to the complaint because it would not produce a commercial settlement. However, the problem is that the inadequacy of remedies under Part X in these circumstances limits the options for action by either the Minister or the Commission.

1. Introduction

1.1 Background

On 11 August 1992 the Minister for Shipping and Aviation Support referred to the Trade Practices Commission a complaint by the Australian Peak Shippers Association (APSA) alleging that lines operating under registered shipping conferences providing services from Australia to the East Coast USA and Pacific Coast had breached certain provisions of Part X of the Trade Practices Act (TPA). The matter related to the introduction of a terminal handling charge (THC) by the conferences (and other non conference lines) for the movement of export containers through shipping terminals in the United States of America. A copy of the Minister's letter is at Appendix A.

Negotiations and consultations between exporters and the conferences pursuant to sections 10.41 and 10.45 (b) of the TPA, and commercial discussions, had failed to resolve the dispute and on the basis of advice provided to the Minister it was considered that the complaint warranted investigation by the Commission. The complaint was therefore referred to the Commission pursuant to section 10.47 of the TPA. This is the first such referral to the Commission.

1.2 Purpose of investigation and process

Section 10.47 of Part X of the TPA sets out a procedure whereby the Minister may refer to the Commission, for `investigation and report' the issue of whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of one or more specified matters referred to in paragraph 10.45 (a) of Part X.

A copy of paragraph 10.45 (a) is attached to this report at Appendix B. The paragraph sets out a number of circumstances in which the Minister may exercise powers in relation to registered conference agreements. APSA alleged that the conferences had not satisfied obligations under Part X and that two of the circumstances in paragraph 10.45 (a) existed. Those circumstances were as follows:

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(i) The THCs were presented as a fait accompli, enforced by the lines refusing to release cargo at US ports until THCs were paid. Accordingly members of the conferences had not satisfied the **obligation to negotiate** with a designated shipper body pursuant to section 10.41.

(ii) The introduction of THCs undermined and destroyed economies previously gained, in that they 'clawed back' freight rates reduced by competition. Accordingly members of the conferences had not satisfied the obligation under subsection 10.45(a)(iv)A, to have due regard to the need for services to be **'efficient and economical'** in giving effect to or applying a conference agreement.

APSA was also concerned that the THCs were introduced collectively with non-conference lines.

The Minister's referral required the Commission to investigate the allegations and report in a timely fashion. It did not specify any matters to be given special consideration.

The Commission is required to maintain a public register of its investigations pursuant to section 10.13. The register contains, apart from the Minister's reference, written submissions and documents provided by interested parties and this report. There is a procedure enabling confidential material provided by interested parties to be excluded from the register. Some information provided by the conferences has been excluded on the grounds that the material was commercial in confidence.

1.3 Relevant conference agreements

In the light of APSA's letter of complaint (attached to the Minister's reference), the Commission considers that the conference agreements to which the complaint from APSA directly relates (and which therefore are under scrutiny) are the following agreements appearing on the register of conference agreements (kept pursuant to section 10.33) that are concerned with trade to the East Coast USA and Pacific Coast.

Australia - Pacific Coast Rate Agreement (up to and including Variation No 3) First registered on 14 December 1989. Variation registered on 3 October 1991)

Australia - Eastern USA Shipping Conference Agreement (up to and including Variation No 3) First registered on 14 December 1989. Variation registered on 3 October 1991)

The parties to the above agreements are:

Hamburg - Sudamerikanische Dampfshifffahrts - Gesellschaft Eggert Amsinck (Columbus Line);

Associated Container Transportation (Australia) Limited (ACT A); and

Blue Star PACE Limited (formerly known as Valuemodel Limited) (Blue Star)

It was noted in both agreements that Associated Container Transportation (Australia) Limited 'has, or will shortly sell its assets the subject of the Trade under the Conference Agreement to Blue Star'. The acquisition took place in late 1991.

The stated purpose of both agreements is to provide a vehicle for co-operation among the carriers in providing an efficient, reliable and stable service in the trade from Australia to the East Coast USA and the Pacific Coast. The agreements authorise the parties to meet and reach consensus or decision on a range of matters including rates and charges applicable to the trade. Another related registered conference agreement, the Columbus / Pace Space Charter Agreement, between the above parties, authorises each line to charter space on each other's vessels operating in the trade. The above conference agreements are in essence a joint venture between Blue Star and Columbus to provide a competitive service in the trade from Australia and the East Coast USA and Pacific Coast. A Chairman and Secretariat is appointed under the agreements to (amongst other things) maintain records of the conferences' activities, file

documents with relevant government agencies and give notice of any change in negotiable arrangements as may be required under the TPA.

Australia/US Discussion Agreement (up to and including Variation No 2) First registered on 4 April 1990. Variation registered on 3 October 1991 between

Columbus;
Associated Container Transportation (Australia) Limited;
Blue Star PACE;
Australia - New Zealand Direct Line (ANZDL); and
Nedlloyd Lijnen B.V. (Nedlloyd Lines)

The purpose of this agreement is stated to be the promotion of service, stability and efficiency in the Australia /US trade. The agreement authorises the parties to discuss and reach a non binding consensus (and to give effect to any consensus arrived at) in regard to rates, rules, terms and conditions of common carrier service in the trade. A Chairman and Secretariat is appointed under this agreement to (amongst other things) maintain records of meetings and discussions), file documents with relevant government agencies and give notice of any change in negotiable arrangements as may be required under the TPA.

Secretariat services in Australia for all the above agreements are provided by the same persons. However there is a separate Chairman for the discussion agreement and for the joint venture conference agreements. In addition the discussion agreement Chairman is also the Secretary of the joint venture conference agreements. The administration of all conference agreements is therefore provided by the one organisation, with the Chairmen and the secretarial staff overlapping in their responsibilities under the agreements. This reflects the fact that the activities of all of the above conference agreements overlap to some extent as they are all concerned with joint discussions on the trade to East Coast USA and the Pacific Coast. The conference agreements between Blue Star and Columbus are referred to in this report as NACON. The term AUSDA is used to refer to the discussion agreement between Blue Star, Columbus, ANZDL and Nedlloyd.

The above agreements have also been filed with the US Federal Maritime Commission (FMC) and have exemption from US anti-trust laws in a similar manner to exemptions provided under Australian law.

In a letter dated 5 November 1992 to the Minister for Shipping and Aviation Support, Blue Star sought clarification of the precise terms of reference to the Commission in relation to this investigation. It raised a concern that the relevant registered conference agreements had not been clearly identified. Blue Star pointed out that it had not been a party to the conference agreements which were in place when the THC was introduced in 1991 and it queried whether the Columbus/PACE Space Charter and Sailing Agreement came within the ambit of the reference to the Commission.

The Commission took the position that identification of relevant registered conference agreements in the Ministerial reference was not a matter of critical importance as to whether or how the Commission should carry out an investigation. Notwithstanding the Ministerial reference to carry out an investigation, the Commission felt it was not precluded from conducting investigations or making enquiries into any matters affecting trade or commerce as it thinks fit. In any event APSA had, just prior to the Ministerial reference, raised directly with the Commission its concerns regarding NACON's introduction of THCs.

The identification of relevant registered conference agreements is important to the following three questions:

- Are the parties to collusive conduct (in these circumstances) exempt from certain provisions of the TPA or are they at risk under the Act?
- In regard to which conference agreements (if any) should the Minister exercise power under section 10.44 of Part X to direct the Registrar of Liner Shipping to cancel the registration of a registered conference agreement (and thereby deprive parties of an exemption)?
- To which conference agreements (if any) have parties given effect, or applied, without due regard to the obligations under subsection 10.45(a)(iv) or section 10.41?

Those questions can be answered only following a broad range of enquiries designed to test the allegations by the complainants. Strict identification of agreements would appear necessary only if it were intended to cancel registration, challenge non-exempt conduct, or confirm that obligations under subsection 10.45(a)(iv) have not been fulfilled.

1.4 Submissions received

On 7 October 1992 the Commission distributed an issues paper to approximately 40 organisations which it believed had an interest in this matter. The distribution list included APSA members, other exporters, the NACON member lines, other shipping lines, Australian, New Zealand and US government regulatory bodies, relevant trade unions and stevedores. The issues paper (a copy of which is at Appendix C) asked interested parties to comment on the allegations made by APSA concerning firstly, the alleged failure to negotiate, and secondly, the allegation that services were not efficient and economical.

Written submissions were received from the parties listed below. Copies of the submissions were placed on the public register maintained by the Commission and the various parties to the dispute (the NACON lines, APSA and its members that made submissions) were asked to reply to the comments in the submissions.

- **Australian Peak Shippers Association**

APSA is the designated peak shipper body registered under Section 10.03 of Part X of the TPA, representing the interests, in relation to outward liner cargo shipping services, of Australian shippers generally.

APSA was formed in November 1990, representing more than 90% of Australia's liner exports, drawing its membership from industries such as wool, meat, metals and minerals, malt, dairy, onions, table grapes, and bodies representing regional interests.

In addition to the allegations which gave rise to the Ministerial referral, APSA's submission observed that NACON had 'taken a very cavalier attitude to life for

many years' and had never seriously been prepared to negotiate rates in the absence of competition.

It further stated that:

> '... generally NACON has announced freight increases on a take it or leave it basis and very few concessions have been made over the years...
>
> It has only been during the ultra competitive years when up to ten independents were vying for business that NACON was prepared to consider concessions.'

- **Australian Horticultural Corporation (AHC)**

The Australian Horticultural Corporation (AHC) is a statutory marketing authority established to encourage, facilitate and co-ordinate horticultural marketing, particularly export. Under the AHC (Export Control) Regulations, a licence is required to export apples, pears, citrus and nashi pears outside the Australian domestic market. Previously the Australian Apple and Pear Corporation and now the AHC (alongside representatives of licensed exporters and growers) had undertaken negotiations with shipping conferences for apple and pear freight rates and services. The Australian Horticultural Exporters Association (AHEA), which was declared the designated secondary shipper body for the industry on 31 October 1990, did not make a submission.

AHC stated that it had never received official notification of the THC for trade to East and West Coast USA and that the lack of notification gave the AHC and industry no ability to negotiate better rates knowing all up costs to obtain an overall competitive position in the US. As a result of the lack of notification and negotiation by NACON, growers who had exported product to the US had suffered economic loss.

- **The Metals and Minerals Shippers Association of Australia Limited (MAMSAAL)**

MAMSAAL was declared a designated secondary shipper body under Part X of the TPA on 17 May 1990, representing exporters of metals and minerals.

MAMSAAL submitted that, through introducing THCs into Australia's northbound trade with North America, the conferences involved were 'clearly intent on achieving a de facto freight increase'. It said that, to its knowledge, no notice of the THC implementation was given to either the peak shipper body or MAMSAAL's shipper members generally.

- **Australian Dairy Corporation (ADC)**

ADC is a member of the Dairy Industry Shipping Association which was declared a designated secondary shipper body under Part X of the TPA on 2 May 1990. ADC, which claimed not to have been informed of the impending introduction of the THC also contended that NACON did not provide the Australian dairy industry with competitive rates and that the THC surcharge made the industry even more uncompetitive.

In particular, ADC submitted that freight rates offered for shipment from Australia to North America are 48%-62% higher than those for shipments from New Zealand for the same product, shipped on the same vessels, owned by the same ship's owners.

In addition to objecting to the THC it pointed to alleged collusive conduct on the part of conference and non-conference members (particularly through the Australia/US Discussion Agreement) and called on the Commission to 'commence prosecution of relevant carriers, and ... to ask the Court to make findings of fact upon which dairy exporters can rely in claiming a refund from the relevant carriers of THCs imposed unlawfully'.

- **Wool Industry Shipping Group (WISG)**

WISG, which was declared a designated secondary shipper body under Part X of the TPA on 17 May 1990, is a related body of the Australian Council of Wool Exporters (ACWE).

WISG stated that it was made aware of the proposed introduction of THCs (in a letter of 5 December 1990 from NACON to ACWE) and protested the matter. It met with NACON to try to discuss the charge but claimed that the meetings had failed to make any progress on its concerns. WISG stated that the wool industry

had great difficulty in negotiating with NACON over previous years. In its opinion there was little flexibility in NACON's tariff pricing structure and agreement by commercial negotiation was difficult to achieve.

All of the above four shipper groups, representing dairy, wool, metals and horticulture, provided detailed information in addition to that provided by APSA on the circumstances surrounding the introduction of THCs in the North American trade and the effects on their particular members. The four groups are occasionally referred to in this report as the 'APSA complainants'. No other shipper group members of APSA provided written submissions or complained to the Commission.

- **NACON**

NACON provided two submissions. The first directly addressed both the negotiation process undertaken prior to APSA making its complaint to the Minister and the issue of economy and efficiency of service.

Costing information on THCs was also provided and confidentiality was requested. The Commission granted confidentiality to a portion of the information (which it deemed to be commercially sensitive, but denied confidentiality to some material which it believed should be on the public register. NACON agreed with the Commission's assessment on confidentiality and consented to the material being made public.

In summary, NACON submitted that the APSA complaint was without merit and that in all the circumstances the Commission should not in its report make findings which could form the basis of directions by the Minister under section 10.44 of the TPA (to cancel registration of a conference agreement). It contended that the conference had fulfilled its obligations to negotiate the introduction of THCs and that the services negotiated met the economic and efficiency standards under the Act.

The second submission was made in response to matters raised at a meeting between staff of the Commission and the NACON lines on 14 December 1992.

- **New South Wales Shippers Association (NSWSA)**

The NSWSA is an association of NSW shippers that is not registered as a designated shipper body under Part X although it intends to seek registration in the near future. NSWSA's submission:

- objected to the imposition of THCs by conference and non-conference carriers to US ports;
- alleged that the THCs were imposed by ABC Containerline (a non-conference carrier) in breach of Part IV of the TPA;
- requested the Commission to commence prosecution of relevant carriers by way of exemplary action;
- requested the Commission to ask the prosecuting Court to make findings of fact upon which all Australian shippers rely in claiming:
  - refund from the relevant carriers of THCs imposed unlawfully; and
  - damages suffered by ADC in its US markets.

The Commission also held interviews with shippers and lines to obtain general information on the trade to West and East Coast USA. The parties interviewed were as follows.

Shippers

- APSA
- AHC
- ADC
- MAMSAAL
- WISG
- NSWSA
- Australian Meat Exporters Federal Council (AMEFC)

Lines

- The NACON lines (Blue Star and Columbus)
- ANZDL
- Nedlloyd Lines
- ABC Containerline
- Cool Carriers
- Mediterranean Shipping Company

None of the parties interviewed chose to have a record of interview placed on the public register as an oral submission, although information obtained at the interviews and subsequent telephone calls is included in this report.

2. Terminal handling charges

2.1 Definition

In general, for the purposes of this complaint, terminal handling charges (THCs) are container port charges levied by container liners for the service of moving a container from a ship to a position some distance away within the confines of the container terminal at the port of discharge to enable clearance from the port. The containers, either twenty foot equivalent units (commonly known as TEUs) or forty foot equivalent units (know as FEUs) are placed within an area of the terminal that allows consignees or their agents to pick them up and deliver them to their next destination.

The introduction over the years of container terminals utilising sophisticated cranes and moving equipment has changed port layouts so that private vehicles are prohibited from travelling to and from the ship's side. On conventional wharves, consignees are able to place their vehicles alongside the ship and receive goods, generally known as 'break bulk cargoes', directly onto their vehicle. The dangers inherent in allowing public access to the ship's side within container ports have prevented similar access to container ships. Schematically, the range of services involved in moving containers at the port of discharge can be represented (in general) as follows:

- from **ship's tackle** to a **terminal stack**, by crane and moveable chassis (usually provided by the lines);
- from the **terminal stack** out of the port through the **terminal gate**, by consignee.

The question of which of the above services are incorporated within the THC and their relationship with the freight rate (or the 'blue water' or 'open water' component) is important to an understanding of APSA's complaint.

In its submission APSA quoted the definition of THCs used by NACON in its North American Tariffs, introduced in January 1991, as:

'The services performed in moving or conveying cargo from **ship's tackle** direct to **place of rest** on the terminal shall be known as a terminal handling charge'

However, in the course of negotiations during this dispute in 1991-1992, NACON acknowledged that the above tariff rule did not accurately describe the services relevant to terminal handling charges. The definition was subsequently changed in late 1992 to read:

> 'The cost of services performed in moving or conveying cargo from under **ship's tackle** along side vessel on discharge terminal to exit of **terminal gate** shall be known as the terminal handling charge'.

Whereas the earlier 1991 definition suggested that the services falling within the range of the THC fell between the ship's tackle and the terminal stack (as interpreted by APSA because of the use of the words 'place of rest'), the new definition made it clear that the THC included all services from the ship's tackle to the terminal gate -- not only those services up to the terminal stack.

APSA views this distinction as important because the definition of the freight rate at the time the THC was introduced (according to NACON's published tariffs) was on a 'terminal to terminal depot' basis.

APSA's interpretation is that the terminal depot is synonymous with the terminal stack and that the freight rate at the time therefore incorporated both the 'blue water' service component (i.e. from the port of departure to the port of discharge) as well as the container handling service component from the ship's tackle to the 'terminal stack', which was described in the tariffs as the 'place of rest'.

It is this interpretation of services from the ship's tackle to terminal stack (or terminal depot , or place of rest) that has led APSA to allege that an overlapping of cost recovery has occurred. The contention is that NACON has recouped its costs of moving containers from the ship's tackle to the terminal stack from both the shippers (through the freight rate) and from the US consignees, or others, who were required to pay the THC (covering all services from the ship's tackle to the terminal gate) before they could remove containers from the port.

2.2 Terminal handling charge costs

The actual costs to move containers from the ship's tackle to a stacking location within the terminal for delivery to consignees can vary between different ports and between conferences for the same ports. APSA provided a list of USA-inward THCs that described the amounts charged by different conferences and independent lines. APSA said that a large component of THCs was negotiable between the shipping lines and the terminals, and this presumably is reflected in the varying amounts charged. The amounts charged for TEU containers ranged for example from a low of $175 for the Calcutta, East Coast India, Bangladesh/USA Conference, to $686 for the Japan-Atlantic and Gulf Freight Conference (All Water), and for the Trans Pacific Freight Conference of Japan (Mini Landbridge).

NACON provided a copy of a report prepared by Dart Maritime Service setting out details of THC filings with the US Federal Maritime Commission as at 17 December 1991. The report listed THCs for a number of trade routes from and to US ports with wide ranging amounts being applied similar to those examples provided by APSA.

During the course of negotiations with APSA to resolve this dispute in 1991, NACON explained the various costs associated with THC operations falling between the ship's discharge tackle and the exit gate of the terminal (which they claimed justified the charge) as follows :

stack/wheels: This refers to the cost of lifting a container from the ground (from stack) onto a chassis to facilitate delivery to the receiver.

gate charges: These apply to all movements into and out of terminals and relate to costs associated with matters of safety, inspection, security and cargo/container control. NACON stated that gate charges are an inherent part of terminal costs incurred by the lines.

royalties/assessments: These relate to levies paid by carriers to cover terminal employees' union welfare, medical expenses and pensions etc.

miscellaneous terminal assessments: These cover subsidies paid by carriers to ILA manned container freight stations.

chassis leasing, M & R and refurbishment and owned chassis provision: These relate to costs associated with providing suitable equipment to facilitate efficient terminal movement and delivery of containers. The equipment is owned or leased either by the lines or the terminal.

customs and inspection charges: These represent the average cost of physically presenting cargo for customs inspection of bonded seals in order to allow movement from the terminal. The costs are not associated with customs clearance or duty.

administration: This is a pro-rated charge based on the various administrative functions carried out at terminal locations which are related to cargo delivery. This includes provision for administrative costs involved in the care and maintenance of refrigerated cargo.

northbound full throughput: These are charges based on TEUs which cover conversion from FEUs and relate to load containers only.

refrigeration costs: These reflect the lines' actual costs incurred from management information systems for holding refrigerated cargoes at terminals. These costs include liquid nitrogen together with supply tanks and labour costs associated with the handling, administering and monitoring of refrigerated cargoes.

wharfage: This is an assessment by the port authority against the cargo as a charge for the use of property and facilities provided by the authority.

percentage cost increase element: This is a provision for known and anticipated cost increases.

2.3 Introduction of THCs in the North American trade

The THCs complained of were introduced by the parties to the relevant conference agreements (i.e. the NACON lines and ANZDL) on 1 January 1991, following filings in November 1990, as required, with the US Federal Maritime Commission. Nedlloyd and ABC Containerline also filed the same THCs in November with the same effective date i.e. 1 January 1991.

The THC amounts were as follows:

Australia	-	East Coast USA	-	US$290 per TEU
			-	US$580 per FEU
Australia	-	West Coast USA	-	" "

NACON said it had introduced the THCs because operating and US terminal related costs had risen to the point that it had become necessary to recover a greater proportion of the lines' operating expenses. It was said that for a prolonged period base ocean freight rates had not significantly increased and that for the majority of commodities such increases as had been secured were substantially below the rate of inflation. NACON provided details on freight rate movements from 1986 to 1992 for a variety of commodities which showed that rates had not kept pace with the CPI.

NACON said that THCs were now common in the US trades. ACT(A) and Columbus, the NACON lines at the time of the introduction of THCs, were said to be among the last to file and the THCs filed did not give full cost recovery. NACON claimed that as a THC of $US290 was already at that time established in the southbound trades, it was thought appropriate by ACT(A) and Columbus that the level should be no higher for northbound cargo. It was considered that to charge full cost recovery in one application would be too much too soon and so partial cost recovery was introduced. With regard to cost recovery, and the claim that shoreside costs were being absorbed by the lines, NACON stated:

> 'The practice of ocean carriers absorbing shoreside costs in many areas goes back to the introduction of containerisation. It appears to have its genesis in the concept, which was urged strongly on behalf of shippers at

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the time, that the then new container method of handling cargoes should not cost shippers more than the conventional method. The custom and practice has been that container carriers traditionally absorbed most terminal costs in most ports, incurred from the time the container was released from the hook to the time it was delivered to the consignee. With the gradual and continued erosion of freight rates in real terms, container carriers were compelled to the realisation that they could no longer continue to absorb the high level of these costs without recovery.

In recent times, throughout the shipping industry, container carriers have been embarking upon a program of cost recovery. Specifically in the Australia to United States trades the then NACON lines (ACT(A)/Columbus) had absorbed shoreside costs for many years. However, over time, many other trades into the US had changed their practice in this regard and inbound THCs into the US are now the rule rather than the exception in most trades. In collecting these shoreside costs through the application of a THC, the NACON lines adopted the approach that in the first instance the costs should be recovered at the point where they were incurred, in much the same way that a THC had been introduced in the southbound trades in 1986. There is no suggestion that the NACON lines' shoreside cost structure suddenly rose by US$290 per TEU, thereby precipitating introduction of the THC.'

NACON further submitted that, for an extended period on the US East Coast, ACT(A) and Columbus had absorbed all the costs associated with terminal operations and that on the US West Coast a substantial amount of these costs had been absorbed up until July 1990 when existing terminal, wharfage and handling charges were consolidated into a THC at US$240. This left the US East Coast as the only part of the Australia to North America trade not having a consolidated THC.

ANZDL (which provides only a US West Coast service) informed the Commission at interview that it also introduced a THC on the US West Coast at US$240 for TEU in July 1990 and increased it to US$290, effective 1 January 1991. The THC increase was filed in November 1990 at the same time as NACON. ANZDL's THC definition included those services performed in moving

cargo from the ship's tackle to place on the terminal where loaded into railroad car, truck or other vehicle or place of rest on terminal.

ANZDL claimed to have costed the various THC component services at more than US$290. However they were aware that NACON was to charge US$290 and decided to charge the same amount.

ANZDL confirmed that it was a member of the registered discussion agreement AUSDA between itself, Columbus, and ACT(A) at the time THCs were introduced and amended in 1990 and1991. ANZDL and NACON both provided copies of minutes of meetings, under the agreement, indicating that an increase in the existing West Coast THC and the proposed introduction of an East Coast THC was discussed and agreed prior to the filing in November 1990.

NACON stated that prior notice of the impending introduction of the THC on the US East Coast was given in writing to ACWE on 5 December 1990, (copy of letter at Appendix D) and to AMEFC on 15 November 1990 (copy of letter at Appendix E). NACON also wrote to APSA on 11 December 1990, welcoming its formation and claimed to provide copies of all registered conference agreements and freight tariffs as an attachment to the letter(copy of letter at Appendix F). The tariffs were said by NACON to include the THC changes filed with the Federal Maritime Commission (FMC) in November 1990 although the letter does not specifically mention this. APSA disputes that it was informed of the impending THCs and does not recollect that the relevant THC filing pages were attached to the letter of welcome.

Notwithstanding the advice to the wool and meat shippers, not all shipper groups received prior notice of the impending charge. For example, MAMSAAL in its submission stated that the first it heard of the THC was in early February 1991 when one of its members, Queensland Nickel, was obliged to pay a THC to secure release of their bills of lading even though a tariff rate per TEU had previously been set for 1 January 1991 to 30 June 1991 subject only to currency adjustment and bunker adjustment factors (CAFs and BAFs).

The AHC claimed that it had still not received official written notification from NACON of the THC. It claimed that the first notification horticulture exporters received was in April 1991 when an Australian exporter was informed by an East

Coast US importer that a THC had to be paid before the importer could pick up a container of pears. AHC said that goods in this industry were sold on consignment and all costs were deducted by the importer and exporter before the final amount was received by the grower. AHC stated that, as neither it nor the industry generally had been given notice of this forthcoming charge during tariff negotiations between November 1990 and January 1991, exporters had no chance to incorporate the additional cost in their quotes to North American importers and expected returns quoted to growers. AHC wrote to NACON on 18 April 1991 expressing the industry's concern at lack of notification, that the additional charge could not be absorbed in costings at that stage and that it would be the grower who would lose out. A copy of AHC's letter is attached at Appendix G.

Although the wool industry was informed of the impending introduction of a THC (even though notification was to a related body of the registered shipper association), there was criticism of the manner in which they were introduced. For example, a 15 December letter from the Boston Wool Association to ACWE stated:

> 'The timing and the manner in which this has been generated and presented, could not be more ill-advised or financially unworkable.
>
> On business already concluded for shipment January 1, 1991 and onward, there is no possible way for these additional costs to be either absorbed by merchants and mills or passed on to clients. Accordingly, we do not believe the trade here will be able or willing to pay. This could obviously lead to serious problems between shippers in your country and their clients in the U.S.A.'

2.4 Payment of THCs

NACON submitted that THCs had existed for many years prior to January 1991 in the Eastern Canada trade at between Can$100 to $165 per TEU, and as wharfage and handling charges (converted to a uniform THC of $240 from 1 July 1990), in the West Coast North America trade. For the West Coast North America trade, the wharfage and handling charge (prior to 1 July 1990) had been assessed by the lines (aside from any wharfage charges imposed by the

ports) at $5.00 per 2000 lbs. Thereafter a charge of $9.40 per 2000 lbs applied until the $240 THC became effective.

NACON said that these charges were for the account of North American importers and that Australian exporters had never raised the matter of these charges with the NACON lines, nor had the charges formed part of northbound freight rate negotiations. NACON submitted a 24 April 1991 letter of reply to AHC's complaint regarding lack of notification. This said '... these charges were regarded purely as a matter between North American importers and the lines and should not be construed to be forming part of the northbound ocean freight structure, much the same as Australian port charges do not form part of the negotiated base freight rates'. A copy of NACON's letter is at Appendix H.

In view of the prior existence of THCs in Eastern Canada and the West Coast America trade, the essence of APSA's complaint must be seen as first, the increase from US$240 to US$290 for THCs on the West Coast and second, the introduction of THCs (replacing any previous wharfage and handling charges) on the East Coast at US$290. APSA's letter of complaint refers only to US ports.

Commercial shipping arrangements are usually arranged as free on board (fob) or cost , insurance and freight (cif). For fob contracts , the exporter is responsible for transport to, and loading of cargo at, the port of origin. The importer is responsible for arranging all other transport and insurance. With cif contracts the exporter is responsible for the transportation (freight rate) and insurance of cargo up to the port of discharge. In some cases, the exporter might also agree to pay on-shore costs at the port of discharge. Most shipments are cif.

APSA submitted that:

> '... up until January 1991 containerised freight rates had always been negotiated on a Terminal/Terminal Depot basis as set out in the Tariffs. All costs to move containers from point of receival in Australian ports to point of delivery at US Ports were included in the Terminal/Terminal Depot rates. This was the custom up until January 1991 and accepted by NACON since, APSA believes, from the introduction of containerisation in the early 1970s.'

As noted previously, APSA understood that the rates payable by the shipper included coverage of all costs up to the place of rest on the terminal, commonly understood as the terminal stack. APSA submitted that prior to the introduction of THCs on East Coast USA in January 1991, a handling charge of US$70-90 was levied against the consignees for collection of the containers from the terminal stack. APSA contends that the terminal costs for moving containers from the ship's tackle to the terminal stack had been absorbed by NACON since the early 1970s as part of the operational costs built into the freight rate but that NACON had decided to charge that cost over and above the terminal/terminal depot freight rate in the form of a surcharge additional to the agreed tariff, (albeit as a charge to US consignees) incorporated in the previous handling charge of around US$70-90. NACON claimed not to be aware of this previous handling charge.

APSA contends that, as there was no concurrent reduction in the freight rate negotiated with APSA members to take into account the new THC, the NACON lines had recovered the costs of moving containers from the ship's tackle to the terminal stack from both the Australian shippers (through the rates negotiated in 1990), and the US consignees (or others) through the new THC. As the US consignees had (according to APSA), previously paid only US$70-90 to collect TEU containers, APSA considered that around US$200 was being collected twice.

As stated previously, some Australian shippers were required to directly pay the THC for a number of reasons notwithstanding that the charge is ordinarily levied against US consignees. For example:

- shipments by consignment where charges such as THCs are deducted as costs in the final payment to growers;
- shipments where the Australian shipper has agreed to pay handling charges at the port of discharge ; and
- where the Australian shipper is also the North American importer.

Regardless of whether Australian shippers were required to pay directly THCs or US consignees paid the charge, the cost would be reflected in the final price

obtained by Australian shippers to market their products in North America. The Commission has estimated, based on information provided by the complainants on TEU rates negotiated just prior to introduction of the charge (and accepting that some components of the THC were formerly paid by consignees), that the US$290 charged for a TEU represented an increase in costs of approximately 4% to 10%, depending on the cargo.

3. International considerations

To put this complaint in context it is helpful to examine the circumstances in the US surrounding the introduction of THCs. This section looks at the role of the FMC in the introduction of the charges and how THCs were introduced in other trades.

3.1 Federal Maritime Commission

Regulation of liner shipping in the USA is administered by the FMC. This body oversees a system in which carriers are granted anti-trust immunity to form conferences on condition that the tariff rates on offer are made available on a non-discriminatory basis and that the rates (both inbound and outbound), are filed with the FMC and made open to public inspection.

In accordance with s. 8 of the US *Shipping Act of 1984*, filed tariffs are required to:

(Section 8)

(a) state the places between which cargo will be carried;

(b) list each classification of cargo in use;

(c) state the level of ocean freight forwarder compensation, if any, by a carrier or conference;

(d) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part of the aggregate of the rates or charges; and

(e) include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

The NACON lines accordingly are required to comply with the above tariff filing procedures.

Section 10 of the US *Shipping Act 1984* also lists a number of prohibitions, in particular that no common carrier may (inter alia),

(Section 10)

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

(4) ....

(5) ....

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of -

(A) Rates

A general exemption power is provided at s. 16 of the Act. This allows the FMC, upon application or on its own motion, to order or rule exempt for the future any class of agreements between persons subject to the Act or any specified activity of those persons from any requirement if it finds that the exemption will not substantially impair effective regulation by the FMC, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.

3.2 FMC hearings

There are two recent FMC hearings that have a bearing on this matter.

- **FMC Docket No. 91-16 Meat Importers Council of America, Inc v Australia-Pacific Coast Rate Agreement Et Al - February 25, 1992;(MICA Inquiry).**

The MICA Inquiry concerned a complaint by an association of US meat importers (MICA) in March 1991 alleging breaches of ss 10 (b) (1) and 10 (b) (6) (D) of the Shipping Act of 1984 in that certain ocean common carriers had unlawfully required MICA to pay THCs before containers of Australian meat exports could be released from US ports.

MICA's main contentions were that:

- the THCs were properly considered part of the freight costs assessed against the cargo; and

- in light of the cif nature of the US importers' purchase contracts with the Australian shippers (who consign cif), and the fact that the carriers accept cargo for delivery based on a contractual arrangement with shippers that the freight will be paid by the latter, THC as a matter of law must be paid by the shipper.

MICA contended that the carriers had unlawfully assessed the US *importers* for THC instead of the shippers and that they had refused to release the cargo until the THC had been paid by the US importers.

MICA did not contend that the carriers had no right to file a separate handling charge in their tariffs. MICA's complaint was that the carriers were prohibited under the Shipping Act of 1984 from looking to the US importers for payment of the THC and that, if the carriers were to recover the THC costs, they had to do so from the shippers.

The Administrative Law Judge hearing the matter concluded that MICA had not shown that the respondent lines had violated the Act by collecting THCs from the complainant's members and therefore dismissed MICA's complaints. In the course of the hearing, the Judge observed (at page 7):

> 'Prior to implementation of the THC, cif importers in the United States had historically paid the wharfage and handling charges (of about $161 per

TEU) applicable on cargo imported to the US West Coast ports, and shippers-consignees of meat did not generally prepay this charge. Since the ocean carriers introduced the THC in February 1991, shippers-consignors have generally not been paying THC charges for shipments of frozen meat. THC has occasionally been prepaid on meat shipments, but this is not normally the case. With respect to all cif shipments (except those few with prepaid THCs), the carriers have looked to the US cif importers for payment of the THC, and they have paid the THC as a condition for release of the cargo.

Invoices issued by the meat sellers in Australia and New Zealand indicate that the meat is sold cif, but in cases where the sellers have broken the charges for freight and insurance out of their total cif price, the freight charges have not included the amount of the THC.'

In its 'Order Adopting Initial Decision' of the initial hearing, the FMC confirmed the Judge's finding that MICA had not shown that the carriers were engaging in unfair practices within the meaning of section 10(b)(6)(D) of the Shipping Act. The FMC noted:

'To the extent the unfairness standard necessarily requires a subjective determination, MICA's argument is further weakened by the fact that its members have the power and opportunity to obviate the impact of the THCs when they bid on the cargoes in the first place. MICA's real complaint appears to be that Respondents' rate structures enable the shippers to claim that THCs are not considered freight charges under a cif contract. Invocation of section 10(b)(6)(D) against the carriers, however, is not an appropriate substitute for a contract action against the shippers in a court of law. Nor are the Commission's processes the preferred alternative to the consignees' adapting to evolving commercial practices when they make their contract bids.'

- **FMC Docket No. 91-14 - Notice of Inquiry concerning the use and effect of surcharges by Common Carriers and Conferences - January 17, 1992 (Surcharges Inquiry).**

The FMC's Surcharges Inquiry concerned a petition sought by the Agriculture Ocean Transportation Coalition (representing US shippers) in 1991 which sought an amendment to the FMC's tariff and service contract rules to define surcharges and prohibit inclusion of a profit component in a carrier or conference surcharge.

The objections to surcharges were essentially twofold. Firstly, that they resulted in excessive charges, and secondly that they were confusing in that they were difficult to compute and anticipate.

The FMC denied the petition on the grounds that there was no factual basis for rulemaking and in any event the petitioner did not propose a workable solution.

The FMC did note (at page 42) that current surcharge practices, including proliferation of new surcharges (such as THCs), do complicate the process of identifying the applicable bottom line cost to shippers. The FMC did not attempt to strictly define the term 'surcharge' (preferring to use the term as a matter of convenience), but took it to mean any non line haul commodity rate.

As to the effect on rate levels, the FMC noted (at pages 40-42), as follows:

> 'Oft-cited examples about THCs being increased at paces far exceeding public port access fee increases appear based on the unfounded belief that THCs are pass-throughs of those fees, although the record does not clearly reflect whether that belief derives from a lack of shipper-carrier communication or from actual carrier misinformation. It is evident from the conference responses in this proceeding that THCs are intended to compensate carriers for terminal-related services provided by carriers, some of which may otherwise be included in the line-haul rate, as the shippers argue has traditionally been the case.
>
> Other objections relating to rate levels appear premised on the position that structuring rates to include surcharges or break-outs necessarily yields a higher bottom-line cost to shippers. This may be so, if carriers are, in fact, so reluctant to raise their freight rates that despite any decrease in or elimination of surcharges, they would resist raising their commodity rates accordingly. On the other hand, lump-sum rates,

rolled-in charges, or limitations on surcharge usage versus line-haul increases could result in the same bottom-line costs but with different or fewer component parts. There is no basis in the record for the notion of some shippers that if, for example, THCs were prohibited, those charges would somehow disappear, and not simply be added to the freight rate. It is also possible that in some instances, restrictions on surcharges could yield higher overall rates. Automatic roll-ins, and rates not advising shippers of component part descriptions could, in fact, be used to increase rates.

The Commission will assume that carriers' general pricing strategies, which include heavy reliance on use of surcharges, must prove advantageous to carriers; otherwise we doubt the carriers would choose this method of pricing. We note, however, that the Commission does not have statutory authority to regulate the level of rates charges, nor does the 1984 Act prohibit carriers from seeking to earn profits. Any cost-inflating effect occasioned by the use of surcharges, even if inferred or proven, has not been established by the shipper participants in this proceeding to be unlawful.

Another questionable premise for many of the shipper grievances is that carrier unwillingness to discuss any detailed justification for their pricing practices, or deliberate carrier deceptiveness in characterising their charges, results in significantly higher carrier rates. The overwhelming majority of shippers not only recognise but vociferously complain that carriers' surcharges are not exact cost-recovery devices, but are instead revenue-enhancing mechanisms. It is, therefore, unclear how shippers are being deceived. Clear and voluntary explanations by carriers of their charges, citing extrinsic factors or particular services, would appear to be a sound business practice and essential to good carrier-shipper relationships. In this regard, the carriers have demonstrated not only a significant public relations problem but also a surprising apparent lack of concern about it. However, carrier explanations and representations to shippers of their charges have not been shown necessarily to have a real impact on the actual rate levels. Accordingly, allegations that surcharge practices yield higher overall costs to shippers have not been proven, and

would not constitute grounds for Commission regulatory action in any event.'

3.3 Relevance of FMC hearings

The relevance of the above hearings to APSA's complaint has a number of dimensions.

First, it is clear that, at the time of introducing the uniform THC in January 1991, the carriers were moving to a clearly defined separation between shore based and off-shore costing. The result was that charges increased for shore based services. The FMC declined to become involved in discussion of the appropriateness of this methodology.

Second, according to the FMC, the question of who pays the shore based costs is a matter for contractual negotiation between the shipper and the consignee, not FMC regulation.

Third, there was a concerted effort on the part of shippers and importers in the US to deflect the burden of increased on-shore charges to others.

The difficulties that some Australian exporters faced in marketing their products in the US (i.e. being forced to pay the THC) appears to have occurred partly because of the disruption and confusion that occurred through the arbitrary introduction of the THC, the challenges before the FMC and possibly the low level of bargaining power of some Australian exporters.

3.4 Application of THCs in other trades

General details on how THCs (or their equivalents) were introduced in trades from Australia to other geographic locations were provided by some of the complainants.

MAMSAAL stated that THCs in other trades, e.g. UK/Europe and certain Asian ports, were negotiated 'sensibly and without too much consternation' between the respective conferences and the peak shipper body of the day. For example In the case of the UK/Europe trade, the conference broke its terminal depot to terminal depot rates down into three parts -- port service charge (or THC) at port of loading, ocean carriage leg and port service charge at port of destination.

However, MAMSAAL stated that this reduced the ocean carriage leg commensurately so that the total transport cost was not affected.

AHC stated that THCs or port service charges (PSCs) had been advised during negotiations for many years. For example with the Australia to Europe Shipping Conference (AESC) the PSCs are detailed during negotiations and set for the season at a local currency figure. Conversion to the Australian dollar equivalent is set on the exchange rate as of 1 February each year for cases where PSCs are prepaid in Australia. It is only the actual freight rate which is negotiated. However the PSC/THC is taken into account in the overall costs of shipping cargo.

WISG stated that THCs in other trades for wool shipments have come about through negotiation. For example, an attempt by the AESC to introduce a five part tariff for the 1989-90 season, including a European port service charge component, was unsuccessful and wool exporters are still not paying a charge separate from the wool rate of freight. On the other hand, THCs were successfully introduced on all containerised shipments of cargo from Australia to Taiwan, agreed between the Australia Northbound Shipping Conference and APSA at formal negotiations in August 1992.

4. Competition factors

4.1 Australia/US (North America) liner trade

The liner based export trade from Australia to North America for the period 1990 - 91, has been valued at $2257 million (representing a volume of 1366 million tonnes).[1] The total value and volume for liner trade to all regions for the same period has been reported as $16 398 million (representing a volume of 9881 million tonnes).

The Australian export trade to the USA is characterised by a cargo mix of predominantly basic agricultural and primary products, In addition, it is generally accepted that the volume of the trade is such that it can sustain only a few large carriers.

NACON made the following observations on the Australia to North America trade:

> 'From the perspective of the ship operator, the trade is a difficult one in which to operate. Historically, it has been plagued with over tonnaging and depressed freight rates. In the past decade these conditions have claimed many casualties and a number of prominent lines have been forced to withdraw from the trade. The passing parade includes such names as:
>
> ACT(A) (1971-1991), ANL (1971-1985), ANZCL (1984-1988), Atlanttrafik (1960-1986), Farrell Lines (1965-1983, FESCO (1977-1980), Hong Kong Island Line (1984-1988), Hyundai (1984-1990), Karlander (1970-1986), PAD Line (1921-1988).
>
> In the East Coast US trade, there have been no new entrants since ABC Containerline in 1979.
>
> The Australia to North America trade is not viewed by shipowners as

[1] Prices Surveillance Authority Report No. 42 'Inquiry into Land Based Charges in Australian Ports by Ocean Carriers and Conferences' 28 August 1992 p.8

giving adequate return on investment and the NACON lines and other longer-term carriers in the trade have not been able to make forward plans to replace their ageing tonnage.

That Blue Star Line and Columbus Line have been able to continue to offer a conference service to North America is due largely to the fact that they have re-engined and taken other measures to make fuel efficient their ageing fleets, coupled with the lines' ability as conference operators to make efficient, rationalised use of tonnage and equipment.

Collectively, Blue Star Line and Columbus Line - the only two NACON lines - currently offer Australian exporters some 80 sailings to North America each year. The NACON lines' northbound liftings in the Australia to United States are made up of:

Commodity	**Approx %**
Frozen meat	80.0
Wool (ACWE)	3.0
Dairy (ADC)	2.5
Metals and minerals (MAMSAAL)	2.5
Apples and pears (AHC)	2.0
Other cargoes (including beer, wine, household effects, manufactured goods)	10.0
	100.0'

There are two US reports, one published in 1989[2], (the FMC Section 18 Report), and another published in 1992[3] (the Advisory Commission Report), that make a number of observations on the inbound US Australia/New Zealand trade.

[2] Federal Maritime Commission 'Section 18 Report on the Shipping Act of 1984' September 1989 Washington DC

[3] United States 'Advisory Commission on Conferences in Ocean Shipping' April 1992 Washington DC

The Advisory Commission Report noted that in the Australia/New Zealand liner trades, meats were the most important exports to the US and that reefer requirements therefore distinguished the major types of vessels used.

The FMC also observed that although the trade was able to sustain only a few large carriers, it remained vulnerable to competition from transhipment services via Far Eastern ports. It noted that there had been relatively little growth over the past 12 years in the cargo mix (predominantly basic agricultural and primary products).

Commenting on rates in the inbound US-Australia trades, the FMC observed that the recessions in the US in 1980 and 1982 had cut the growth of imports from Australia over the next several years and that the reduction in cargo volumes had resulted in decreasing rate levels. Since that time cargo volumes had resumed their growth to the Pacific Coast and, since 1985, the trend in declining rates had ceased. This contrasted with the volumes to the Atlantic Coast, which remained depressed. One important factor in this was the growth in intermodal cargo moving from Pacific Coast ports (by land across to the East and elsewhere). The weakness in volumes had resulted in a downward trend in rate levels to the Atlantic Coast.

4.2 Shipping capacity

The following information on present shipping capacity in the trade was obtained from interviews with shippers and lines, from records maintained by the Department of Transport and Communications and the US Advisory Commission Report. According to those sources the export trade to West and East Coast USA is serviced by the following.

Blue Star Line and Columbus Line

Both these lines combine as NACON to provide a weekly conference service to East Coast North America.

- from: Sydney, Melbourne, Brisbane and also accepting cargo in the Fremantle to Cairns range.

to: Philadelphia, New York , Charleston, Norfolk, Jackonsville, Halifax, New Orleans, Port Everglades, Houston

Using eight vessels with a general capacity of approximately 1300 TEUs each, (including reefers)

- The conference also offers a weekly West Coast North America service:

  from: Sydney, Melbourne, Brisbane and also accepting cargo in the Fremantle to Cairns range.

  to: Honolulu, Seattle, Tacoma, San Francisco, Los Angeles and also delivering cargo to Vancouver.

Using five vessels of lesser TEU capacity (between approximately 738 to 1203) including reefers

ACT(A) was the line operating in conjunction with Columbus at the time the THC was introduced in January 1991. Blue Star Line became involved in NACON after it purchased ACT(A)'s service to the East and West Coast of North America from P&O which purchased ACT(A) in 1991.

ABC Containerline

Offers a sailing every 18 days

from: Fremantle, Melbourne, Sydney

to: New Orleans, Charleston, Philadelphia, Halifax

Using five vessels with a capacity of over 1400 TEUs each, with reefer capacity. The line's container service is operated in conjunction with a bulk service contracted to supply mineral sands to the DuPont Corporation of USA.

International Marine Transport Line,

BHP International Transport Line and

Nedlloyd

Trading as: **BHP-IMTL Service**

Nedlloyd has exclusive rights to market containers while IMTL markets bulk space. Containers are offered with monthly frequencies only.

Offer a monthly West Coast service

from:	Melbourne, Sydney, Brisbane, Fremantle
to:	Los Angeles, New Westminster, Oakland, Tacoma

and a monthly service

from:	Tasmanian ports
to:	Los Angeles, New Westminster, Oakland, Portland

Using six vessels, three of which have no set capacity for TEUs, one with 674 TEUs including 54 reefers and two with capacity for 504 TEU including 36 reefers. Configuration of vessels changes from time to time.

Australia-New Zealand Direct Line

ANZDL offers an integrated intermodal service with sailings every 12 days

from:	Melbourne, Sydney, Brisbane (cargo from Tasmania, Fremantle and Adelaide is centralised at the line's expense)
to:	Oakland and Los Angeles intermodal service is used to move cargo throughout United States, and Canada.

Using four vessels, two with capacity of 1400 TEU and two with capacity of 900 TEU, both including reefer capacity.

Cool Carriers

Cool Carriers has a world wide pool of 70 ships, some of which are used in the Australia to US trade. The ships are not container ships but use a specialised refrigerated pallet service. The ships for this trade are diverted from the US West Coast to Tokyo route to Australia. Until recently the line offered two monthly services but has rationalised this to a three weekly service using smaller capacity ships.

from:	Broome, Darwin, Townsville, Mackay, Port Alma, Brisbane Newcastle, Melbourne, Adelaide (subject to seasonal conditions)
to:	Huneme (West Coast USA) where an intermodal service is used to distribute cargo to required destinations.

Using six vessels of palletised reefer capacity. Cool Carriers is not a container line and does not use a container terminal.

Mediterranean Shipping Company

Offers an East Coast service to the US East Coast

from:	Sydney, Melbourne, Fremantle
to:	Baltimore, Boston, New York, Norfolk, Wilmington

Using container vessels drawn from a pool of 45 ships. The service is conducted via South Africa and Europe with a 35-40 day delivery time.

Others

The US Advisory Commission Report noted that 20 carriers, four of which were stated to be conference members, were operating in the US-Australia/New Zealand trade in 1990. (ANZDL and ACT/Pace were included as conference members). Not including the independents mentioned above (interviewed by the Commission), the report also listed the following lines:

- American President Lines
  Hyundai Merchant Marine (Hyundai Australia Direct Line)
  Ocean Star Container Line
  Sea-Land Service
  Scan Carriers/Barber Blue Seas
  Wilhelmsen Lines
  COSCO
  Compagnie Generale Maritime
  K Line
  Neptune Orient Lines
  Nippon Liner System
  Orient Overseas Container Line
  Safbank Ltd
  Zim Israel Navigation

From these lines there are a number of transhipment services available to shippers utilising services through the major Asian hubs of Tokyo, Singapore and Hong Kong. There was general consensus among the shipping lines interviewed by the Commission, that transhipment services account for about 10% of the trade to North America and that the share is growing.

4.3 Conference market shares

The Department of Transport and Communication (DOTAC) provided the following information on conference and non-conference shares of Australian exports (by volume) to North America for the period 1987-88 to 1990-91.

Year	Conference	Non-conference
	%	%
1987-88	45.7	54.3
1988-89	33.1	66.9
1989-90	47.5	52.5
1990-91	43.5	56.5

NACON estimated that current conference listings as a proportion of the total JOC (Journal of Commerce) statistics for USA, by weight (excluding bulk shipments of aluminium, sugar, iron and steel and sand), to be approximately 46%. Including bulk cargoes, Conference shares would be approximately 20%.

The US Advisory Commission Report noted the following inbound US-Australia/New Zealand market shares for conference and independent lines. (Note that for 1990 ANZDL could also have been included as a conference member).

% by tonnage

	1984	1985	1986	1987	1988	1989	1990
Independent	26	54	64	52	47	50	47
Conference	73	45	35	45	51	48	52

% by value

	1984	1985	1986	1987	1988	1989	1990
Independent	33	46	54	51	51	50	43
Conference	66	53	44	46	48	49	56

The above information is indicative of general market shares for the overall trade to the US. However, a more relevant indication of the state of competition (for the purposes of APSA's complaint),is the shares held by NACON and others in relation to the specific commodities marketed by the APSA members which gave rise to the complaint.

The competition among lines for the business of different commodity groups can vary depending to a large extent on the peculiar characteristics of the commodities being transported. For example, horticulture products, meat and (to a large extent), dairy products, require refrigerated transportation. This can result in a limitation on the available services. Dry cargo, for example wool or metals, would not be restricted to the same extent but in any event may require specific port destinations and delivery times, as would other shippers. Some commodities, such as meat, would generate greater and consistent volumes — making them a more attractive cargo.

The Commission asked the APSA complainants (and the meat exporter association AMEFC) to identify the source, extent and impact of competition to NACON over a five year period to 1992 for their particular commodity. NACON also provided information and estimated market shares between the commodity groups (based on seven month figures projected to 12 months), as did some other lines through interviews with the Commission.

Dairy

ADC stated that the Australian Dairy Industry exported (approximately) the following tonnnages to the US in the years 1990-91 and 1991-92.

Tonnes p.a.

- cheese - 5000
- casein/milk powder - 3000 .
- whey powder - 300 .

Total - 8300 .

It said that the bulk of dairy exports were shipped to the US East Coast. The approximate value of the trade is A$16 million p.a.

ADC believed that the independent and non-conference carriers to US ports, such as ANZDL and ABC Containerline, had provided some competition. However, with ANZDL forming a 'Discussion Agreement' with NACON, the competition had been reduced. It believed that, without the agreement, exporters would be able to negotiate lower freight rates with non-conference carriers.

Regardless of the competition between the lines it was generally dissatisfied with rates offered from Australia to North America compared to those for shipment from New Zealand to North America. ADC claimed that Australia's rates were 48% to 62% higher for the same product, shipped on the same vessels owned by the same ship's owners.

NACON estimated its dairy freight market shares (based on a total of 10 513 tonnes p.a.) to be as follows:

NACON	77%
non-conference	28%

Wool

WISG stated that the total value of wool exports shipped to the US for 1990-91 was 37 586 tonnes, valued at A$16 667 000 (source:Australian Bureau of Statistics).

WISG stated that the main direct competition faced by NACON in northbound trade has come from ABC Containerline and ANZDL. It also made the point that in recent times member lines of NACON and ANZDL had formed a Discussion Agreement which, in their opinion, had further reduced the marketplace competition.

NACON estimated wool freight market shares (based on a total of 42 827 tonnes p.a.) to be as follows:

NACON	24%
non-conference	76%

WISG noted that the NACON projected figures were based on highly active months and that consequently, a current poor share of the total wool liftings would seemingly distort NACON's actual liftings.

WISG also made the following comment on NACON's shares:

> 'By way of note, we would point out that we understand the non-Conference liftings advised by NACON include the liftings of ABC Containerline and ANZDL. Under the Australia United States Discussion Agreement it is Wool's understanding that, effectively, all wool shipments for the 1992/93 wool season, for which freight rates were effective from 1st August 1992, will be treated by Wool as Conference liftings which includes NACON and ANZDL, previously a non-Conference operator.
>
> We consider the summary figures of the attachment to be misleading as one cannot clearly determine the proportion of wool liftings to NACON's total business. NACON are predominantly a container operation in the trade from Australia and therefore the inclusion of figures for bulk cargoes

> distorts the NACON share of total trade where their major business is container cargoes.'

Nevertheless, WISG noted that NACON has lost support in the market place for wool shipments resulting from a number of events, including the withdrawal of direct calls to Charleston, delays in deliveries by their alternative service arrangement, the handling of the THC issue and not coming to agreement with the industry during commercial negotiations.

WISG further stated:

> 'NACON do react competitively in the market place and over recent times there has been very competitive intermodal rates quoted for wool shipments between NACON and their competitors ANZDL and ABC Containerline. This has resulted in lines receiving good support whilst they were competitive, with support shifting between all the lines as they have reacted to marketplace competition. Over recent times NACON support has been low whilst they were uncompetitive.'

Horticulture

The AHC estimated that the total value of apple and pear exports to North America in the years 1990 to 1992 was approximately A$4-5 million p.a. It also stated that the apple and pear industry has been restricted to using only the NACON service for many years due to the United States Department of Agriculture's (USDA) quarantine regulations. Under USDA regulations, containers, equipment and vessels must be approved by USDA for carriage of products to address any phytosanitary requirements. It was said that, until recently, alternative services such as those offered by ANZDL and Nedlloyd were not prepared to ensure their equipment met USDA standards. Hence it was impossible to ship the fruit with other lines in competition with NACON.

In 1992 AHC developed a service with Cool Carriers, but only one vessel carried pears to the East Coast. AHC said the timing of the vessels and increased trade into the West Coast at the expense of the East Coast in North America, plus other factors, saw this service under-utilised. During the period 1988 to 1991 no service to North America other than NACON was used by the Australian apple and pear industry.

Metals

MAMSAAL contended that the main genuine liner competition faced by NACON (northbound) over the last five years would have come from ANZDL and ABC Containerline, although Hoegh Line, Nedlloyd, Hyundai and others have had some multi functional presence. MAMSAAL also stated that ANZDL successfully promoted its intermodal concept from main West Coast ports to virtually anywhere within the USA whilst ABC Containerline's focus was East Coast. MAMSAAL alleged however that the impact of ANZDL's competitive presence had given rise to the Australia United States Discussion Agreement involving NACON member lines and ANZDL in a co-operative role.

It argued that freight rates from Australia to North America were not competitive with northbound freight rates from Australia to other major trade areas and possibly not with rates from New Zealand to USA. The point was made that various transhipment arrangements (via other countries rather than direct) can produce equivalent or lower freight rates from Australia and that this is perhaps an indication of relative international competitiveness. Examples cited were transhipment via Europe, Singapore, Far East and North Asia. MAMSAAL also contended that FMC rules (e.g. tariff filings), seriously inhibited market competition.

MAMSAAL stated that its support for conference services was as follows

conference	-	6 000	tonnes p.a.	8%
non-conference	-	68 000	"	92%
		74 000	"	100%

MAMSAAL estimated that the value from primary metals/minerals exported to North America by MAMSAAL members is A$250 million per annum

Meat

Even though meat exporters did not join the other APSA members in complaining about the introduction of THCs, the Commission feels it important to

at least include meat exporters in considering the competitive environment in which NACON operates.

Meat exports are a substantial and important part of Australia's trade with North America and their presence in the market for container services would play a large part in the marketing and pricing decisions made by containerised ocean carriers.

The current total export value of meat to North America (as advised by the Australian Meat and Livestock Corporation to NACON) is A$1.4 billion p.a.

Varying estimates of market shares were provided to the Commission by the lines interviewed. The Commission's extrapolation of these figures is:

	%
NACON	60
ANZDL	25
ABC Containerline	10
Cool Carriers and others	5
	100

5. Negotiations

5.1 The premise underlying Part X exemptions

Shippers' interests are equally served by ensuring not only that goods are transported at the lowest possible price, but that adequate returns are obtained by liners to ensure the long-term availability of efficient services. In most markets this is brought about through open competition where market participants compete with each other. In international liner shipping where conferences exist (historically for the purposes of ensuring that long-run availability of efficient services is maintained), the influence of competition is diminished and safeguards are therefore required to ensure that shippers' interests are protected from the collusive nature of conferences.

Efficiencies are brought about through the pooling arrangements of conferences. Safeguards for shippers are achieved by control of the content and working of conference agreements and the imposition of negotiation obligations on lines. The understanding is that effective negotiation can occur only when adequate information is available to both parties.

The information needs of the conference parties are the service requirements and technical aspects of the cargo to be transported. There are two aspects of shippers' information needs. First, they need to be assured that a service is provided with the right capacity and frequency. The second need has more to do with ensuring that the tariffs on offer do not take advantage of the diminished competition implied by the collusive nature of conferences. In this respect, shippers need to know the relationship between aspects of the quality of service and the costs.

The Commission believes that the requirements of s. 10.41 of Part X of the TPA were designed to meet this need for information on the part of shippers.

5.2 Obligation to negotiate

In general, s. 10.41 requires that parties to registered conference agreements negotiate with relevant designated shipper bodies when requested in relation to

negotiable shipping arrangements. A full copy of s. 10.41 is attached at Appendix I.

Specifically, s. 10.41 requires that parties to conferences

- take part in negotiations whenever reasonably requested and consider matters raised;
- make available to shipper bodies information reasonably necessary for the purposes of negotiation;
- provide a duly authorised officer of the Department (DOTAC) with information the officer requires relating to the negotiations; and
- give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements.

5.3 Chronology of negotiations

In its first submission to the Commission NACON produced a chronology of events which listed a number of meetings between the NACON lines and APSA. NACON stated:

> 'Blue Star PACE and Columbus suggest that the chronology set out ..... speaks for itself. The lines maintain firmly their views as to the validity of it and their belief that, as the chronology shows, the lines have met their obligations under Part X concerning taking part in negotiations with APSA and making available to APSA information reasonably necessary for the purposes of those negotiations.'

As noted earlier in this report, some of the shippers involved in bringing about the complaint against NACON and other lines were made aware of the THC changes only some time after January 1991. The changes were made known to the meat shipper body only in November 1990 and to the wool industry shipper body in December 1990. The existence of the charge was made known indirectly to other Australian shippers by US importers, not officially by NACON or the other lines. A process of negotiation pursuant to Part X of the TPA and discussion involving the NACON conference lines, ANZDL, the conferences'

secretariat and officers of DOTAC, was carried out up until the Minister's referral of the complaint to the Commission.

What follows is a chronology of the events preceding APSA's complaint and the attempts at settling the dispute through negotiation, constructed from information provided by NACON, the other lines, the APSA complainants and DOTAC.

1990

- Tariff negotiations were held in late 1990 between Australian shippers and NACON, as well as other lines, to settle rates for the following yearly rate period.

  AHC for example, accepted rates from NACON for 1991 subject only to CAF and basic service charge (BSC). There was no indication in letters from NACON to AHC dated November and December 1990 and January 1991, setting out proposed rates, that new THCs or handling charges would be levied.

  MAMSAAL and ADC also negotiated rates in late 1990 for the following year. MAMSAAL's rates with NACON were qualified only to include CABAF (currency adjustment and bunker adjustment factors), while ADC's rates were stated to be subject only to CAF, BSC and Tasmanian arbitraries for transhipment to Melbourne.

November 1990

NACON, ANZDL, ABC Containerline and Nedlloyd filed amendments with the US FMC introducing THCs on the US East Coast and increasing existing THCs on the West Coast.

15 November 1990 -- NACON wrote to AMEFC advising of THCs to be introduced effective from 1 January 1991.

29 November 1990 -- Minister for Shipping and Aviation Support issued press release on the formation of APSA.

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December 1990

5 December 1990 -- NACON wrote to ACWE advising of THCs to be introduced effective from 1 January 1991.

11 December 1990 -- NACON wrote a letter of welcome to APSA.

January 1991

- 1 January 1991 -- THC became effective on US East Coast. Existing West Coast THC increased. NACON's filings noted that the charge did not apply to refrigerated meat until 10 February 1991.

February/April 1991

- AHC was informed in April by an exporter that Columbus had announced to US importers in February that a charge of $US290 was to be levied per container on East Coast USA. The US buyers were unwilling to pay the extra fee and Australian growers ultimately paid the difference.

  Similar complaints made to APSA by exporters of wool, dairy and minerals to East Coast USA. Representations made to APSA to negotiate with NACON and ANZDL.

July 1991

- 12 July 1991 -- TPA Part X negotiations initiated by APSA with Columbus, ACTA(A) and NACON Secretariat. APSA, MAMSAAL, ACWE, AHC and DOTAC present.

  NACON's response was that, as there were legal proceedings currently before the US FMC, brought by the Meat Importers Council of America (the MICA Inquiry), on who should pay THCs in the US, any release of data on the THC would have an adverse impact on the lines' defence before the FMC. Negotiations were adjourned until further information could be obtained from overseas.

- **23 July 1991** NACON letter to APSA providing confidential costing information on the THC service components (See Appendix J). In addition to providing the confidential costing information, NACON made the following points:

  - The Australia to East Canada and Australia West Coast North America trades have had THCs (or equivalents in place 'for many years').

  - The charges had never formed part of, or been referenced in, any negotiations of northbound rates.

  - In the past the lines had absorbed all costs at East Coast US terminals and to a lesser extent at West Coast North America beyond the ship's hook principally for administrative and competitive reasons. However as a consequence of the gradual and continued erosion of freight rate returns on the one hand and increasing terminal costs on the other, the lines could no longer continue to absorb these costs resulting in the decision to move to a position of cost recovery and place terminal charges where they properly lie, in common with the custom and practice of practically all other US trades.

  - The lines recognised that the language accompanying the THC in their tariffs might not fully describe the services covered. They viewed the rates as being 'hook to hook'. The THC was designed to cover costs incurred from the time the cargo was discharged from the vessel up to the time it was delivered to the receiver. NACON said the terminology was subsequently to be reviewed.

August 1991

- 7 August 1991 -- resumption of TPA Part X negotiations on THC with Columbus, ACTA(A), NACON Secretariat. APSA, MAMSAAL and DOTAC present.

  The NACON Secretariat had made a condition on the resumption of

negotiations that only those shipper representatives who were at the previous negotiation could attend and that substitute representatives were not acceptable, the reason being that confidential information on costs could be discussed. This condition meant that, because of previous commitments, wool and horticulture shippers could not be represented.

APSA was of the view that the information provided on THCs was incomplete and that several of the cost components were for services outside those falling within the THC definition as understood by it. It sought a suspension of the THC until this dispute had been settled and until an audit of the THC costing figures had been performed. MAMSAAL queried why the THC was uniform for all US ports. NACON replied that it was to avoid charges of discrimination by US ports.

September 1991

- 12 September 1991 -- resumption of TPA Part X negotiations on THC. Columbus, ACTA(A), NACON Secretariat, APSA, MAMSAAL, ACWE, AHC, DOTAC present (also negotiated minimal service levels pursuant to provisional registration of three varying conference agreements -- Aust/Canada, Aust/East Coast USA, Aust/Pacific Coast).

- NACON agreed that the definition in the tariff rules concerning terminal to terminal rates was misleading but that its legal advice was not to amend it pending outcome of the FMC hearing and not to suspend the THC.

October 1991

- 29 October 1991 -- TPA Part X negotiations were instituted by APSA with ANZDL pursuant to the Australia / US Discussion Agreement, concerning the THC. (Columbus, Blue Star Line and NACON Secretariat attended as observers). Also present were representatives of the table grapes, horticulture, wool, dairy and malt shippers and MAMSAAL.

  APSA queried the reasons for ANZDL introducing the THC and sought explanation on the quantum of costs and the uniformity of the THC compared to other lines. ANZDL responded that it would provide THC

cost details and how it was developed if confidentiality could be guaranteed.

December 1991

- 18 December 1991 -- a Ministerial consultation with the NACON lines (Columbus and now Blue Star following its acquisition of ACTA(A)), pursuant to subsection 10.45 (b) was instituted by DOTAC's Ministerial Delegate to obtain an undertaking or action from the parties in an attempt to settle the dispute.

  Options for an undertaking were discussed and the lines agreed to consider and resume discussions with APSA on their complaint and a form of undertaking.

January 1992

- 28 January 1992 -- Columbus and Blue Star wrote to DOTAC stating that they were willing to provide further data on the quantum of THC costs to address the issue of whether its services were efficient and economical. The lines declined to enter into a formal undertaking but stated they would consider pursuing another course of action. They also declined to suspend THCs or reimburse for THCs previously paid.

February 1992

- 21 February 1992 -- letter from Columbus and Blue Star to APSA addressing the THC costs (copy attached at Appendix K). The lines noted that:

  'Shipping lines in a heavily competitive position are very like any other business and at times absorb charges that normally rest elsewhere and we acknowledge in the East Coast North America trade that Terminal Handling Charges have not been passed on to the consignees in the past despite a clear acceptance in North America of the Terminal Handling Charge concept.

  This does not mean that lines are obliged to continue the practice

indefinitely as they must be guided by economic and efficiency aspects.

The lines do not accept the charge of 'double dipping'. We have merely, for a time, absorbed a shore side cost that rightfully belongs elsewhere but there comes a time that such absorptions cannot continue if lines are to remain efficient and economical.'

- 24 February 1992 -- resumption of Ministerial consultation with NACON lines pursuant to s. 10.45 (b) by DOTAC Ministerial Delegate to obtain an undertaking or action from the parties to the dispute. (Columbus, Blue Star, APSA, MAMSAAL and WISG present).

  The NACON lines tabled information on the THC components (see Appendix K) which, according to APSA, identified that an allowance for terminal costs had been built into the 1990 conference freight rates. In APSA's view this demonstrated that at least some terminal handling charge components had been paid by shippers in 1991 and that the conference had not been absorbing those costs.

  APSA reiterated that it would accept the THC subject to checking the figures, as long as the previous allowance for terminal costs was taken out of the freight rate structure.

  DOTAC proposed that the lines reduce their freight rates to take account of earlier allowance for terminal costs and give APSA 30 days notice (pursuant to Part X of the TPA), of intention to increase rates to reflect the current commercial situation. The lines agreed to give the matter consideration.

July 1992

- Columbus and Blue Star in correspondence with DOTAC stated that they had reached a satisfactory agreement with three of the four commodity groups (metal, dairy and wool), through offering a reduction in rates for one year, as an attempt to settle the dispute.

  AHC argued that because some of its growers (who were affected by the

1991 THC introduction), were no longer in the US market, they could not take advantage of any future decrease in rates. AHC proposed that the NACON lines provide financial assistance in promoting Australian horticulture in the US which would increase the prospects for their growers re-entering the market. A figure of A$124 000 was quoted by AHC as a suitable figure. This was similar to an amount of A$123 794 that AHC had previously calculated as being suitable compensation for container shipments that were subject to the disputed THCs. NACON claimed it was unable to accept the proposal, saying that any direct payments to AHC would contravene FMC prohibitions on the rebate, refund or remittance of rates.

The offers to the shippers were not made severable by the lines as non acceptance by any one of the parties would still keep the dispute alive.

(AHC made the point in a letter to NACON of 4 May 1992 that a 10% reduction in rates offered by NACON in the process of 1992 rate negotiations was in their view prompted by the offer of competitive rates from Cool Carriers at the time and was not to be seen as a way of settling the dispute arising from the 1991 imposition of a THC).

11 August 1992

- Referral of APSA's complaint to the Commission pursuant to s. 10.47 of the Act.

21 September 1992

- Advice by NACON to APSA that amendments to the Tariff Rules filed with the FMC concerning 'application of rates' and 'terminal handling charge' were being proposed. The amendments varied the terminology describing the boundaries of base ocean rates and the boundaries of terminal handling charges. (See Appendix L). The boundary of terminal handling charges now read from ship's tackle to the terminal gate.

5.4 Adequacy of negotiations

The Commission is of the opinion that THCs fall within the definition of 'negotiable shipping arrangements' pursuant to s. 10.41 of Part X and that their introduction falls within the various obligations of conference members under Part X. The charges were the subject of discussions and agreement in the context of three conference agreements (the two NACON agreements and the AUSDA agreement). Negotiations on the THC were entered into by NACON and ANZDL when requested by APSA. Information to justify the THC as a valid charge under the conference agreement was presented by the conference members during the course of negotiations.

This section examines the four requirements found in s. 10.41 relating to the negotiation obligations.

- Sub-section 10.41(1)(a) -- Take part in negotiations whenever reasonably requested and consider matters raised.

From the information provided by the parties, it is clear to the Commission that the NACON lines and ANZDL (in separate negotiations pursuant to AUSDA) did take part in negotiations with APSA (the relevant designated shipper body) whenever reasonably requested. There is no basis to find that the NACON lines or ANZDL refused to negotiate or that they had impeded the holding of meetings with shippers to the extent that there was a contravention of the provision.

There was no information provided on the detail of negotiations between APSA and ANZDL. APSA's main concern, as far as ANZDL was concerned, appeared to be that there was no notification of the charge and that it had introduced the THC at the same time and at the same rate as NACON, thereby depriving shippers of competition in this area.

At the 7 August 1991 meeting (between Columbus, ACTA(A), NACON Secretariat, APSA, MAMSAAL and DOTAC) APSA noted its displeasure at a condition that had been placed on restricting attendance to only those persons who had been to the previous meeting. The NACON Secretariat Chairman (according to a record of the meeting made by DOTAC and examined by the Commission, and according to comments made by APSA and some of its

members) stated that as confidential costs were to be discussed, only those persons who had been at the previous meeting could attend. Wool and horticulture interests were not represented because of prior commitments.

The Commission does not consider that the NACON lines breached the provision as they did in fact enter into negotiations with APSA. However, the restriction on attendance seems to the Commission to have been an unnecessary limitation on the carriage of the negotiations. Any officer of a designated shipper body suitably authorised should be allowed to attend negotiation meetings. It should be noted that the horticultural interests at the negotiation meetings were represented by staff from the AHC which is not a registered designated shipper body nor a member of the designated shipper body -- the Australian Horticultural Exporters Association. The NACON lines did not use this point to frustrate or impede the carriage of meetings.

There is also no indication that the NACON lines did not consider matters raised in the meetings. There was delay in considering the APSA complaint in the earlier stages of negotiation. NACON's explanation is that it was occasioned by the MICA action before the FMC. However there was ample consideration of the complaint particularly in the latter stages after Blue Star Line purchased ACTA and the Managing Directors of Blue Star and Columbus became personally involved in the negotiations and made offers to settle the dispute.

- Sub-section 10.41(1)(b) -- Make information available to shipper bodies reasonably necessary for the purposes of negotiation.

In its submission of 28 October 1992 APSA claimed that NACON did provide information 'although of insufficient transparency to be of any real use'. It also claimed that the confidential figures attached to the NACON letter of 23 July 1991 were in fact quite meaningless because APSA could not establish whether they covered both import and export containers or whether in fact they covered the operations of other conference vessels.

ADC claimed that the information provided to APSA on a confidential basis was not meaningful and appeared to take no account of variations in port charges at different ports.

AHC and WISG relied on APSA's assessment of the information provided as they were precluded from obtaining some it by conditions allegedly set by NACON's Chairman at the 7 August 1991 negotiation meeting.

The Commission was given a full copy of the confidential information that was provided by NACON during the negotiations. A copy of some of that material appears on the public register (and is attached at Appendices J&K) minus the information and documentation that has been excluded for confidentiality reasons.

The information comprised:

- NACON letter of 23 July 1991 with attachment detailing total costs of THC components for all US ports divided by the total number of containers moved in 1990 (plus a cost factor) and the stated cost per TEU (shown as more than the US$290 charged).

- Reply by APSA querying the cost items and requesting the source or authority of the costs as otherwise 'they are seen to be plucked out of the air'; and total figures for all terminals 'i.e. total annual running costs and total annual throughput. In this way we can establish whether the allocation of costs to the Australian THC charge is proportional or otherwise.'

- NACON's response of 2 August 1991 commenting on each cost item and advising that the source of the data was the lines' own internal management information systems. Total throughput figures for all terminals including annual running costs was not provided as it was said to be proprietary information and as such not made available to the lines.

- Documents given by NACON lines to APSA under confidentiality at meeting on 24 February 1992 (attached at Appendix J) convened by DOTAC as a 'consultation meeting' pursuant to s. 10.45 (b) of the Act.

These last documents were a summary of average terminal handling charge costs for 1990 compared to the costs incurred in a voyage (used as a sample) of the 'Columbus Australia' in May/June 1991 from Melbourne, Sydney, Brisbane

and Wellington to East Coast USA. The documents included invoices from various US East Coast Port service providers (e.g. wharfage, chassis leasing, maintenance), and computer printouts from the lines' internal information management systems. A number of the computer printouts were in German.

As stated in para 5.1, the Commission understands that the information needs of shippers in the negotiation process centre on the relationship between aspects of the quality of service and the costs. Inadequate provision of information by the lines would therefore be shown in two ways: first, through the lines either withholding information in their possession that would assist in shippers' understanding of the THC cost components; second, by obfuscation in the provision of that information.

Notwithstanding the above, a question exists as to whether the information required by the shippers is the same as the information required by the lines to decide on a particular figure for the THC. This in turn raises the question of whether the THC was or should be set on a cost recovery basis or set with an eye to the competitive position of the lines in the market. In other words, the information used to decide on a level of charge would encompass more than just cost.

The lines have stated that the actual figures arrived at (e.g. US$290 for a TEU) are below cost. The assumption therefore is that the figures were set using some market pricing principle. NACON's explanation (in its submission of 24 December 1992), was that:

> '... as a THC of US$290 was already at that time established in the southbound trades, it was thought appropriate by ACT(A) and Columbus that the level should be no higher for northbound cargo. It was considered that to charge full cost recovery in one application would be too much too soon, and so partial cost recovery was introduced.'

Whether the amounts charged were above or below cost is debatable. The complainants refute the claim, pointing to the lack of transparency which would produce evidence one way or the other. The Commission has examined the information provided to APSA and it has similar difficulties in accepting the information as justifying the quantum of the charge.

However, requiring the lines to provide full cost justification of their THC figure could in effect be suggesting that they charge the full cost of providing that service. The Commission does not believe that such a discipline should be placed on the lines as it would destroy any flexibility achieved through the application of market pricing where non-conference competition is an effective constraint.

It follows that an equally important information need on the part of shippers (apart from knowledge of costs), is knowledge of available competition. In the final analysis, the figure set on any negotiable shipping arrangement (such as a THC) should be a function of the competition in the market.

With regard to this particular matter there may not have been the level of transparency desired by some shippers. However, the obverse of this is to query whether the shippers require information to justify a cost based pricing mechanism for liner services (including charges such as the THC) or is it that they require only enough information to carry out negotiations on a change to a negotiable shipping arrangement. In this matter the Commission feels that for the lines to fulfil their obligations they needed only to provide sufficient information to enable informed negotiations to continue. The record of negotiations maintained by DOTAC indicates that at the consultation meeting held on 24 February 1992, for example, APSA noted that despite the inadequacy of the figures on THC costs, they did achieve one thing. That was the identification of an allowance made for terminal handling charges in the 1990 freight rates. This confirmed APSA's belief that the 1991 rates should have been reduced proportionately.

Accordingly, the Commission believes that the information provided by NACON during the Part X negotiation period met the general criteria required.

- 'Sub-section 10.41(1)(c) -- Provide an authorised officer with information as required, notify as to meetings, and permit attendance.'

An authorised officer is defined in subsection 10.02(1) of Part X as 'an officer of the Department who is authorised in writing, by the Minister for the purposes of this Part.'

The Minister of State for Shipping and Aviation Support appointed an officer in November 1991 for the purposes of carrying on consultations with the parties to this dispute pursuant to subsection 10.45(b). There has been no indication that NACON did not provide the authorised officer with the information required under subsection 10.41(1)(c).

- Subsection 10.41(2) -- Give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

A 'relevant designated shipper body' is defined in sub-section 10.41(3) to mean:

(a) a designated peak shipper body; or

(b) a designated secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section.

APSA was declared a designated peak shipper body on 27 November 1990 and the entry in the Register of Designated Shipper Bodies maintained by DOTAC notes that APSA is empowered to negotiate with all conference agreements pursuant to the section.

The entries for designated secondary shipper bodies, including those representing wool, horticulture, dairy and metals shippers, record that there are no nominations empowering them (or for that matter any of the other designated secondary shipper bodies in the Register) to negotiate pursuant to the section.

Accordingly, it would appear that for either of the conferences (NACON or AUSDA) to comply with the 30 day notification requirement they had only to give APSA the required notice. ANZDL, being a party to AUSDA, stated that it only gave notice of the impending change (discussed under that agreement) to the AMEFC. Its records were unclear but believed notice was given in mid November.

The NACON lines claimed that on 11 December 1990 the NACON Conference Secretariat wrote to APSA welcoming the formation of the Association and

claimed that it provided APSA with copies of all registered conference agreements and tariffs. A copy of the letter is at Appendix F. NACON stated that the tariffs attached to the letter included the THC changes filed with the FMC on 15 November 1990. The letter does not specifically note the proposed introduction of THCs but states that it is NACON's intention to provide amended tariff pages as they are issued and also makes a commitment to giving shippers a minimum 30 days notice of any upward adjustments in rates and charges.

NACON also provided copies of letters sent to the meat and wool shipper bodies (Appendix D and E). In contrast to the letter to APSA both these letters specifically noted the proposed introduction of THCs and the level of charges. (There is a hand written note on the copy of the letter at Appendix F which refers to the THC rules; however this was written after the letter had been sent to APSA).

Subsection 10.41(2) requires that 30 days notice of any **change** be given. A question therefore arises as to whether (in this case) the change relates to the day on which the THC became effective (1 January 1991) or the day on which the change was filed by the conference lines with the FMC.

The Commission's understanding of the 30 days notice requirement is that it is intended to forewarn shippers of a change, provide ample time for them to consider their shipping decisions under the revised arrangements, and negotiate on the proposed change. If the **effective** date for introduction of the THC (i.e. 1 January 1991) is considered to be the day from which to measure the 30 day period, the conference lines (i.e. the NACON lines and ANZDL) would need to have given notice by 1 December 1990. The Commission's interpretation of the requirement is that the effective date (i.e. 1 January 1991) is the date of change from which to measure the 30 day notice period.

APSA was not declared a designated peak shipper body until 27 November 1990 and a press release on its existence was not issued until 29 November 1990. In these circumstances the Commission would accept that giving 30 days notice of the change in shipping arrangements (effective 1 January 1991) would have been difficult to achieve. In these circumstances the earliest possible notice of a change would have to be accepted. NACON has claimed that its letter of 11 December 1990 served as the earliest possible notice of change.

In its submissions to the Commission, APSA has not accepted that it received notice of the change regardless of NACON's letter of welcome of 11 December 1990. The Commission has similar difficulties in accepting that a 'letter of welcome' (with no specific mention of a new charge) can be characterised as a notice of change to a negotiable shipping arrangement that has serious implications for the cost of exporting Australian products.

The Commission considers that notwithstanding the difficulties in giving notice by the required 30 day time period, NACON (and ANZDL) made a serious error of probity in not directly informing APSA of the impending introduction of THCs. It also demonstrated a lack of concern for individual shipper groups (apart from meat and wool), which had entered into freight rate negotiations in the latter months of 1990 (or were still in the process of negotiation) by not informing them.

NACON provided copies of letters that were sent to the meat and wool exporter bodies informing them of the proposed THC. The letters, in contrast to APSA's, specifically mentioned the THC. The Commission can only assume that NACON did not consider APSA's other shipper members (the horticulture, dairy, minerals and possibly other exporters) important enough to contact, in view of their small share of conference liftings. The argument put forward (that there was no need to inform them of the charge because it was directed at US consignees) is not accepted by the Commission. The conference parties would have been aware of the importance to Australian shippers of the THC, otherwise they would not have specifically informed the meat and wool exporters. NACON's letter to the meat exporters (AMEFC) specifically stated that the proposed changes were being provided for their 'information and guidance'.

Moreover, the AMEFC, (being NACON's largest customer) informed the Commission that, following receipt of the NACON letter foreshadowing the charge, it held discussions with NACON and obtained a deferment for refrigerated meat shipments until 10 February 1991. This enabled AMEFC to adjust its marketing program.

The fact that a higher THC (on the US West Coast) and a new THC (on the US East Coast) was being introduced, was an important consideration for Australian

exporters due to the influence it would have on the landed cost of their products. The conference parties would have recognised that this was important information and the Commission considers that the intention behind the notification requirements in subsection 10.41(2) was to provide for this transmission of information.

Subsection 10.41(2) legally obliges parties to the conference agreement only to give notice to the 'relevant designated shipper body' and APSA is that body (in accordance with the definition in subsection 10.41(3)). However the Commission cannot accept that the letter of 11 December 1990 from NACON to APSA constituted 'notice of a change' by parties to the NACON and AUSDA agreements, in relation to terms and conditions applicable to outwards liner cargo shipping services provided under those conference agreements.

In addition, the Commission considers that the manner in which the THCs in question were introduced by the conferences (NACON and AUSDA), in January 1991, did not promote conditions that encouraged stable access to Australian export markets -- one of the principal objects of the provisions in Part X of the TPA (subsection 10.01(1)(b)). On the contrary, the absence of any meaningful dialogue with shippers in late 1990 leading up to the introduction of the THCs led to confusion and disarray and ultimately caused an increase in costs for some Australian exporters.

6. Efficient and economical services

6.1 Terms of reference

APSA has also alleged a breach of the obligation under subsection 10.45 (a) (iv) (A) of Part X, requiring parties to a conference agreement (in giving effect to or applying a conference agreement) to have due regard to the need for services provided under an agreement to be 'efficient and economical'.

APSA alleged in its letter of complaint to the Minister that the introduction of THCs undermined and destroyed economies previously gained, in that they 'clawed-back' freight rates reduced by competition. There has also been an allegation of what APSA termed 'double dipping'. The essence of APSA's allegation is that rates that had previously been negotiated were acceptable (inasmuch as any party to negotiations on rates would be totally satisfied), but that the manner in which the THC had been introduced had now reduced whatever gains in terms of efficiency and economy had been achieved in the past.

Bearing in mind the wording of subsection 10.45 (a) (iv) (A), the Commission therefore views its task in this particular investigation to be to examine whether the parties to the North American conference agreements (NACON and AUSDA), have given effect to or applied the agreements, in relation to the introduction of THCs, without due regard to the need for outwards liner cargo shipping services provided under the agreements to be efficient and economical.

The other element attached to subsection 10.45 (a) (iv) (A) relates to capacity and frequency of shipping services (i.e. 10.45 (a) (iv) B). This element is not concerned with the introduction of THCs. The Commission did seek comments on the element in its issues paper but the issue did not attract any adverse comments and was not linked in any way to the primary issue of THCs.

In addition to the complaint relating to the introduction of THCs in 1991, some shippers have also complained that the tariffs offered by NACON (regardless of the THC) are not internationally competitive and are among the highest in the world. ADC, for example, provided correspondence concerning a dispute with

NACON over the high rates offered to Australian dairy exporters compared to New Zealand exporters. Other shippers made general comments on the intractability of the conference in its tariff pricing structure.

The Commission notes the shippers' complaints concerning rates in general. However for the purposes of this report (bearing in mind the Minister's terms of reference), it proposes to look only at the effect which the introduction of THCs has had on the economy and efficiency of services provided under the conference agreements. The basis for the Commission's present investigation under Part X of the Act relates specifically to the introduction of THCs, not a dissatisfaction with tariffs.

6.2 Definition of efficiency and economy

The terms efficiency and economy in the context of international liner shipping were considered by the Trade Practices Tribunal in *Re Australia/Eastern USA Shipping Conference (1975) ATPR 40-011.*

With regard to efficiency, the Tribunal stated at para 2.28:

> 'In one sense it is a general term which comprehends both the adequacy of the service and the extent to which it can be said to be economical, and relates these two factors to each other. In another sense it may refer particularly to the need for technical efficiency in the design, construction and operation of Conference vessels, to the need for efficiency in cargo loading, stowage and discharging, and for managerial and marketing efficiency in the Conference lines.'

As stated above, the Commission does not consider the issue of adequacy of service and considerations of technical efficiency to be at issue in this investigation due to the absence of adverse comments. Accordingly, it will concern itself with answering whether the introduction of THCs had due regard to their being economical.

The term economical was also considered by the Tribunal in the above-mentioned case at para 2.6. With regard to economy of service the Tribunal stated:

'In order to determine whether a shipping service is 'economical', one must first know what type of service is regarded by shippers as being adequate to their requirements. When an 'adequate' service has been specified, the object should be to ensure that that service is provided at minimum cost. An economical service will operate at or close to this minimum cost level.'

6.3 Minimum cost levels

APSA has stated on a number of occasions that it does not object to the THC per se. Rather, the argument has been on the manner in which the THC was introduced and the quantum of the costs. The Commission considers that this dissatisfaction with the quantum of costs would focus on the period when THCs were first introduced in 1991. Presumably, any subsequent renegotiation of rates would have been conducted in the full knowledge of THCs and would have been factored into the price at which exporters could market their products in North America. As stated previously, there is little difference in who actually pays for THCs; they are but one of the many factors in determining the competitiveness of Australian products shipped to North America. APSA's concern in this complaint is that part of the costs calculated within the US$290 THC were already reflected in the tariffs negotiated in 1990 for the subsequent year and that lack of adequate notice of the introduction of THCs resulted in financial loss to some shippers.

The Commission does not consider its task to be one of deciding whether the use of THCs is justified, for example in terms of simplifying the pricing process. Neither does it consider its task to be one of deciding whether the actual costs that NACON have allocated to the THC components (provided in confidence) is justified. The negotiation process detailed under Part X provides for informed discussion on the part of shippers and the carriers and the question of whether particular costs can be justified is a function of that process. The Commission does consider that it can comment on whether there was adequate information provided upon which the shippers could make an informed decision within the negotiation process and it has done so in Section 5.4.

However, in addition to adequate costing information and the degree of carrier competition for shippers' products, the bottom-line for acceptable rates will also be established in the context of:

- the fact that the viability of carriers in the trade rests largely on the need for shippers' products to remain competitive in North American markets; and

- the fact that shippers' interests are served by an efficient and profitable liner service which guarantees access to markets.

These considerations (along with adequate costing information for the shippers' perusal) should ensure that an efficient (and minimum) cost level acceptable to both parties is achieved. APSA's complaint is that the optimal minimum cost level was not reached for some shippers (the APSA complainants) because, at the time that their containers were reaching North American markets in early 1991, an added cost for marketing their products (the THC), was being applied by conference and non conference lines to that which was previously understood.

NACON provided details on the cost of THCs that listed a number of components, all of which would have been known in 1990 at the time of tariff negotiations between it and shippers. The cost of these components (detailed in Chapter 2 of this report), would have played some part in NACON's calculations when agreeing on tariffs which were negotiated at the time. NACON stated a number of times that the lines had for some time been absorbing the costs and had in 1990 decided to incorporate them (following other trades) in a separate THC for the East Coast, and increase the existing West Coast THC.

APSA points to the tariff definitions in use at the time which stated that rates apply from and to terminal/terminal depot. APSA's contention is that the costs were being absorbed in the shore based component of the tariff which covered those costs for moving containers from the ship's tackle to the terminal stack, i.e. their interpretation of the terminal depot at the port of discharge.

APSA's argument therefore (as the Commission understands it) is that in order to satisfy the proposition that the price (including THCs) for shipping containers

was at a minimum cost level to shippers, the tariff rates would need to reflect the difference between the cost components that were transferred to the separate THC charge and the cost components of the blue water part of the service. If there was no reduction in the tariffs the conference lines could justifiably be accused of overlapping their cost structure to produce an excess of returns over those that were implied when the tariffs were negotiated in 1990 and of 'clawing back' rates that APSA claimed had been reduced by competition.

The conference lines have not demonstrated through a detailed analysis of the 1990 tariffs that there was a comparable reduction in rates because of the introduction of the THC or that the shore based costs (now in the THC) were not part of the calculations in arriving at a tariff rate in late 1990. Information of that nature would assist in settling the issue of whether the rates for shipping cargo were at minimum cost in that no overlapping or excess of returns has occurred. However, as stated previously, neither freight rates nor THCs have been set on a purely cost recovery basis.

In determining whether a minimum cost level was reached, the Commission is left to consider not only the construction of THCs, but the circumstances of how THCs were introduced and the manner in which tariffs were negotiated in 1990. It is the combination of all these factors that determines whether the services provided under the conference agreements were efficient and economical.

It appears that the understanding by APSA that an overlapping of cost recovery occurred, was brought about by

- the lack of adequate notice and information to shippers in the tariff negotiation stages in late 1990; and
- the confusion in terminology to describe the range of services covered by the tariff and the THC.

In the first instance, there was no foreshadowing to shippers of changes to existing THCs or the introduction of a new THC in the tariff negotiations in late 1990. The lines have not provided any information on when they were first instructed by their overseas principals to file the THCs in November 1990. Presumably the decision to file would have been made before or at the time the 1990 tariff negotiations were undertaken.

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During a Commission interview with the NACON lines, Blue Star made comments suggesting that shippers would have known that at the least a THC was imminent for the East Coast USA. It was stated that the conference lines work closely with shippers and have representatives in the field assisting with technical requirements and co-ordinating cargo movement. Because a THC existed on the West Coast USA and in other trades, it was suggested that shippers would have known it was only a matter of time before a THC would be introduced on the East Coast USA.

In the absence of any clear evidence that shippers were informed of the decision, the Commission has to presume they did not know. Accordingly, any contracts arranged between Australian exporters and US consignees are presumed to have been agreed upon in the belief that only existing THCs or wharfage and handling charges applied.

The terminology used by the lines in describing their tariffs also led to the dispute between Australian shippers and the lines as to what services were covered.

In its submission of 28 October 1992 APSA stated:

> 'Up until January 1991 containerised freight rates had always been negotiated on a Terminal/Terminal Depot basis as set out in the Tariffs. All costs to move containers from point of receival in Australian ports to point of delivery at US ports were included in the Terminal/Terminal Depot rates. This was the custom up until January 1991 and accepted by NACON since, APSA believes, from the introduction of containerisation in the early 1970s.
>
> Non containerised or break bulk cargoes carried on conventional vessels paid rates on a wharf to wharf basis - a subtle difference.'

NACON disagrees, its understanding being that the freight rates cover only those services up to ship's tackle at the port of discharge. If on-shore services were included in the pre 1 January 1991 tariffs APSA members would be correct in assuming that, in the absence of notice to the contrary, the rates negotiated in 1990 would cover the on-shore services from the ship's side to the terminal stack. They would then be excused for presuming that when they or the US

consignees were required to pay a THC for services from the ship's tackle to the terminal gate, the lines that had terminal/terminal depot rates were engaging in double cost recovery.

On 8 October 1992 NACON wrote to APSA informing it that amendments to terminology in relevant tariff rules would be filed for effectiveness on 21 October 1992. A copy of the letter is at Appendix M.

The letter specifically relates the wording of 'Rule 2. Application of Rates' as it currently existed, and how it would read subsequent to the filing. The two rules are as follows.

Rule until 20 October 1992

(a) Rates named herein apply from and to Terminal/Terminal Depot. In the case of conventional vessel, rates apply from and to alongside vessel.

...

(b) Cargo will be assessed at the rates specified in this tariff and will be subject to all rules and regulations contained herein. The rates exclude any charges which are customarily for account of the cargo incurred prior to the Carrier receiving cargo at Terminals or Terminal Depots in Australia and beyond the point of delivery of cargo from Terminals or Terminal Depots in the United States.

Wharfage, handling and any other charges customarily for account of the cargo shall be paid by the Merchant.

Rule from 21 October 1992

(a) Rates specified herein, unless otherwise specifically provided, are base ocean rates or freight and are subject to all rules and regulations contained herein and apply:

(i) From point of receival of cargo at ship's loading terminal/terminal depot.

(ii) To alongside ship under ship's tackle on ship's discharge terminal

Australian Port Charge Additionals and any other charges customarily for account of the cargo shall be for account of the merchant.

When the two rules are compared it is apparent that NACON has introduced a markedly different definition for the point up to which tariff rates are to be applied at the port of discharge, i.e. the point at which payment for the THC or other handling charge is to begin. Whereas the previous rule applied the tariff rate up to the terminal/terminal depot, the amended version changes the cut off point so as to apply the tariff rate only up to the ship's tackle.

Whether this marked change in tariff definition was made to clear up any misunderstanding on rates, or whether it was made to reflect a change in costing methodology is not the only factor in determining whether APSA's complaint is justified. An important factor to be taken into account is that no effort was made by the conference lines in giving shippers an opportunity to question any perceived misunderstanding on definitions. Had adequate notice been given, shippers would no doubt have questioned the rate definition and any misunderstanding on overlapping cost recovery would presumably have been resolved before the charge was introduced.

When all the above circumstances are taken into account, the Commission tends to accept APSA's understanding of the cut off point for the rates that were negotiated in late 1990. It also accepts that in the above circumstances APSA was justified in believing that the conferences were overlapping in cost recovery. Accordingly, the Commission agrees with APSA's complaint that the services provided under the relevant conference agreements were not at minimal cost to Australian shippers and therefore the parties to the relevant conference agreements have given effect to the agreements without due regard to the need for services provided under the agreements to be efficient and economical.

7. Non conference terminal handling charges

7.1 Introduction of THCs

APSA, in its letter of complaint to the Minister and in its submission to the Commission, raised the issue of non conference carriers to the US introducing a THC at the same time as conference lines.

APSA stated that it had no knowledge or record of discussions on THCs between conference and non-conference lines except that, as ANZDL is party to the AUSDA discussion agreement, it could be presumed that ANZDL would have been privy to the decision by the NACON lines to introduce THCs. This was also raised by the separate APSA complainants. The NSWSA specifically raised the matter of ABC Containerline's involvement in the uniform introduction of THCs in January 1991.

NACON in its submission of 24 December 1992 stated that ACT(A) and Columbus did have discussions with ANZDL in relation to the introduction of the THCs. It stated that the discussions took place under AUSDA which permits the parties to meet, exchange information and data and reach non-binding consensus on a number of matters including rates, charges, terms and conditions. NACON specifically rejected allegations of collusion with ABC Containerline or that it sought to induce any non conference line to introduce the THCs.

With regard to ANZDL, its involvement in this matter does not constitute conduct by a non conference line because it was a member of AUSDA at the time and its decision to introduce a THC was giving effect to a matter discussed under the agreement. Its involvement in introducing the THC is therefore a matter that requires testing under the Part X provisions which impose certain obligations on it as a member of a registered conference agreement. As such, the preceding findings concerning the failure to adequately notify a change to arrangements, and the finding on the economy and efficiency of services provided under a conference agreement, also apply to ANZDL. The alleged involvement of non

1347 conference lines in jointly introducing the THCs complained of relates only to lines that were not parties to the relevant (NACON and AUSDA) registered agreements.

As stated earlier, the Commission interviewed a number of non conference lines offering a North American container service concerning this matter. One of those lines was ABC Containerline, which was the subject of a direct complaint by the NSWSA alleging that the parallel filing of the THC in November 1990 by ABC Containerline and others raised issues under the TPA. ABC Containerline (which provides only an East Coast USA service) is one of the major competitors, along with the NACON lines and ANZDL, in the Australia-USA trade.

ABC Container Line's agent in Australia, Combined Shipping Services Pty Ltd (CSS) informed the Commission at interview that it was instructed by its principal in Antwerp on 21 November 1990 to file a THC for East Coast USA with an effective date of 1 January 1991. Instructions to file the THC were subsequently given by CSS to their filing agent in the US on 27 November 1990.

CSS stated that, along with other lines, ABC Containerline monitor filings with the FMC and accordingly it would have become aware of any competitors' THC filings (for example by NACON) not long after they were filed. NACON filed its THC on 15 November 1990. CSS stated that it had no contact with other lines in Australia on the THC and was not aware of any pressure placed on the line to introduce the charge. CSS stated that ABC Containerline was at the time a party with ACT(A) and Columbus to a Discussion Agreement registered with the FMC in relation to the New Zealand US trade. CSS presumed that the instructions it received, which resulted in the parallel filing of THCs, could also have resulted from discussion under that agreement.

Nedlloyd Lines, which is a party to the current variation of AUSDA, entered the Australia-US trade in 1990 and provides only a West Coast service. Nedlloyd was not the subject of a direct complaint. It markets its container service attached to a bulk service provided by BHP and has only a minor share of the container liftings in the trade. (See section 4.2). At the time of entering the trade it decided to follow the practice of its competitors in breaking up the service between the freight rate component and on-shore service costs in the form of a

THC. Nedlloyd decided on this practice, and charged the same amount (US$240) even though its container handling costs would have been greater due to the fact that its ships berth at bulk terminals and not at container terminals. It claimed to have decided on this practice for the sake of convenience, i.e to make a comparison with its competitors' rates easier to calculate. Nedlloyd subsequently increased its THC to US$290 effective 1 January 1991 in line with other operators.

Nedlloyd were not a party to the AUSDA agreement that was in force at the time discussions occurred in 1990 concerning the proposed introduction of THCs. It joined the agreement in February 1991. Nedlloyd's representative in Australia informed the Commission at interview that the decision to increase the existing THC and the filing with the FMC was made in the USA. The representative claimed that no discussions between the Australian branch of the line and other container lines occurred in Australia at the time. It was presumed that the line (in the US) was made aware of the proposed increase to West Coast THCs via Nedlloyd's own FMC filing monitoring arrangements. Nedlloyd's records concerning the exact filing dates were not readily available and the representative was not aware of any discussions that may have occurred in the USA between Nedlloyd and other lines.

The involvement of non conference lines in the joint introduction of THCs is a matter that raises concerns under the general provisions of the TPA regarding collusive conduct. However, there is insufficient information obtained to date for the Commission to proceed with the action requested by some complainants in this matter (see Chapter 1.4). The Commission is prepared to reconsider its options should any further information come to hand.

7.2 Australian United States Discussion Agreement (AUSDA)

Notwithstanding the fact that AUSDA is a conference agreement, it is apparent from APSA's complaint that it views the AUSDA conference agreement as different to the NACON agreements, and that the involvement of ANZDL in the joint introduction of THCs was that of a 'non conference' line. This is because the latter agreements create one competitive entity for shippers to negotiate with (i.e. NACON) whilst AUSDA creates a forum for different competitive entities (i.e. NACON, ANZDL, Nedlloyd and any other line wishing to join) to discuss matters

which would ordinarily be left to unilateral consideration. APSA in its submission of 4 December 1992 to the Commission described discussion agreements between conferences and independent lines as abhorrent.

AUSDA is an agreement currently between Columbus, Blue Star, ANZDL and Nedlloyd Lines registered pursuant to s. 10.33 of Part X of the TPA, on 3 October 1991. This agreement is a variation of an agreement first provisionally registered on 4 April 1990. At that time the parties to the agreement were Columbus Line, ACT(A) and ANZDL.

The purpose of AUSDA (as stated in the agreement) is as follows:

> '.... to promote service, stability and efficiency in the outwards liner cargo shipping trade from Australia to the United States '(the trade') by:
>
> (a) authorising the parties to discuss and exchange information with regard to matters of mutual interest and concern in the trade, with a view, inter alia, to reaching a non-binding consensus upon rates, rules, terms and conditions of common carrier service in the trade;
>
> (b) further authorising the parties to give effect to any consensus arrived at under paragraph (a); and
>
> (c) authorising the parties to agree upon a common position with respect to the matters referred to in paragraph (a) to present to various statutory corporations, boards and shipper bodies in connection with the negotiation of minimum levels of service, the negotiation and award of carrier designations to carry cargoes in the trade, and related matters.'

NACON informed the Commission (at interview) that, at the time THCs were introduced and amended in 1990 and 1991, AUSDA was essentially a forum for discussions between the NACON lines and ANZDL. The terms of the agreement provide for two types of discussion. First, there is discussion between the lines with no involvement by shippers, as was the case with the introduction of THCs. Second, there is discussion between the lines and shippers concerning the services on offer by each competitive entity. NACON stated that the former type of discussion predominated in 1990 and 1991 and that shippers rarely seek

discussions under the agreement, preferring to deal with the members of AUSDA separately.

Efficiencies in international line shipping through technical co-operation, through addressing rate instability and in managing capacity, may be brought about through discussion agreements in much the same way as through conference agreements of the kind operated by NACON.

The anti-competitive effects of discussion agreements may be seen as diminished because, unlike conference agreements, they are informal arrangements, voluntary (with little if any capital investment), and can be easily abandoned. They are also made public through statutory filing requirements in both countries. In the US under the Shipping Act 1984 they can be reviewed, as is the case in Australia, through the process which the Commission is following in this report. The fact that they are known to exist and are under close scrutiny could also be seen to diminish the possible anticompetitive detriments usually associated with agreements between competitors.

On the other hand, discussion agreements can be seen as having a greater anti-competitive effect than conference agreements. This is particularly the case where they cover a wide range of matters that can be discussed and where they include lines with a large share of the overall market (or of specific commodity markets) in the trade. They can also act as an impediment to innovation, tending toward achieving consensus on matters that might otherwise be treated independently.

The introduction of THCs in the Australia to North America trade is a good example. It was largely the operation of discussion agreements in Australia or overseas that brought about the introduction by the major container lines in the Australia to North America trade of a uniform charge and a uniform costing mechanism (with a higher emphasis on cost plus pricing).

Whether the particular charge and costing mechanism that resulted in the present THC is the most efficient and economical is open to debate. One thing is certain and that is that competition between the lines played no part in this aspect of the service to Australian shippers.

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In a recently reported speech[4] the EC Competition Policy Commissioner, Sir Leon Brittan, signalled a more critical approach to exemptions for conferences operating in the European Economic Community. He especially questioned the appropriateness of exempting 'talking agreements' (i.e. discussion agreements) between conferences and non-conference lines from the competition rules governing collusive behaviour. The Commission has similar concerns.

As already stated, the Commission believes that the extent of competition available between lines and the possibility of shippers being able to direct custom between competitors to achieve the best possible result are of equal importance to shippers being fully informed of other matters such as the exact costs of providing a service.

On the information obtained through this investigation, the Commission is of the opinion that discussion agreements such as AUSDA do nothing to maximise the competitive environment. They seem to be more concerned with issues of uniformity and implied efficiency. The end result, as this APSA complaint demonstrates, can be shipper dissatisfaction, suspicion and disruption of what should be a competitive and efficient service.

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[4] 'International Transport Journal' No 45 November 6, 1992

8. Summary of findings

8.1 The competitive environment

As stated above, the environment in which a conference operates is an important factor in determining whether its conduct may be in conflict with the objectives of Part X. It is only within a competitive environment that a basis for fair and reasonable negotiation on freight rates can be ensured.

Moreover, efficient and economical freight rates as part of a conference's services can be expected to reach optimum levels only when they are set to a large degree by market conditions (where sufficient non conference competition exists) rather than on a purely cost plus basis.

With regard to the competitive environment, the evidence obtained from the Commission's investigation indicates that:

- NACON (and other lines) have moved to recover some of their costs in providing a service through partially introducing a cost plus mechanism. In the process of doing this they have apparently extended the range of on-shore costs (from the terminal gate to the ship's tackle), some of which were previously in the ocean freight rate.

- The regulatory processes governing the operation of conferences in Australia and the US encourages parallel marketing, in terms of both price and service. The FMC tariff filing requirements provide a mechanism allowing competitors to view each other's tariffs. Discussion agreements registered in Australia under Part X of the TPA and registered elsewhere allow competing lines to discuss and exchange information on rates, rules, terms and conditions of common carrier service. Discussion agreements, being registered conference agreements, have the same exemption status as joint venture agreements such as the NACON agreements. It is this overall environment which has enabled conference and non-conference lines to introduce a uniform THC to the trade with immunity from the general provisions of the TPA governing collusive behaviour.

- Notwithstanding the above, smaller shippers are in some circumstances able to achieve reductions in their rates through obtaining competitive quotations from lines operating in the trade. There is, however, a general dissatisfaction with tariff levels in the North American trade compared to other trades. Some of the smaller shippers have little bargaining power and receive only cursory attention compared to that given to larger shippers.

8.2 The obligation to negotiate

The evidence obtained indicates that parties to the relevant conference agreements (NACON and AUSDA) did not adequately inform APSA or the bodies representing the interests of dairy, horticulture and metals shippers of the impending introduction of THCs to the trade in 1991. NACON did inform the bodies representing wool and meat shippers. The latter represent some 80% of NACON's capacity in the trade and were able to obtain a deferment of the charge. Notwithstanding the notification to wool shippers, they were also disadvantaged through not being made aware of the impending THCs at the time they were considering their marketing options in the US. In terms of bargaining power they appeared to be treated with the same indifference as other small shippers.

Even though disruption and economic loss occurred, the negotiation process under s. 10.41 was largely followed, apart from the conference parties not giving APSA adequate notice of a change to services. However, even if APSA had been given adequate notice and it had challenged the change to services, there is no reason to expect that NACON, ANZDL or any of the other lines that uniformly introduced the charge would have deferred the charge or come to a satisfactory arrangement. The fact that all the major carriers had introduced the charge diminished an important factor in any negotiation process. That factor is the presence of other competing lines acting unilaterally.

8.3 Efficient and economical service

The manner in which rates were negotiated in 1990 and the THC was introduced in 1991 created an environment which led APSA to believe that an overlapping of costs retrieval had occurred. The Commission accepts APSA's understanding

of the matter. Had Australian shippers been directly made aware that US importers were to be levied new charges for clearance of TEU containers through the terminal gate (rather than the rates of which they were commonly aware), shippers would have sought either a reduction in tariffs or explanation of increased US shore based charges or costs to justify the increase. Some preliminary clarification of terminology would also have most likely occurred. Because of the manner in which the THC was introduced and the terminology used at the time to describe tariff rates, it is presumed that an overlapping of costs occurred and the conference lines were retrieving those costs (either in part or in whole) from both the shippers and the US importers.

In the light of this, and the fact that some Australian shippers were financially disadvantaged through the confusion that resulted, it cannot be accepted that the parties to the relevant conference agreements have given effect to the agreements with due regard to the need for services provided under the agreements to be efficient and economical.

9. Conclusions

9.1 Remedies under Part X of the Trade Practices Act

Section 10.44 empowers the Minister to:

- cancel the registration of a registered conference agreement; or
- cancel the registration of a registered conference agreement so far as it relates to:
  - a particular provision of the agreement;
  - a particular party to the agreement; or
  - particular conduct.

The Minister may exercise this power only if he is satisfied that the conference agreement has not complied with (among others) the provisions of subsections 10.45 (a) (ii) (A) and 10.45 (a) (iv) (A).

The remedies available elsewhere under the Act are not relevant unless the conduct, contract, arrangement or understanding in question falls outside the exemptions provided for under Part X.

There is insufficient evidence at this stage to support an action concerning non-exempt conduct.

9.2 Cancellation of Conference Agreements

The cancellation of a registered conference agreement (or a substantial modification of an agreement) should not be undertaken without an informed appreciation of the effects that the conference has on competition in the trade in question.

The Commission believes that the remedies set out in Part X are designed to have a corrective effect on competition and are not to be viewed as solely punitive. This is not to say that they should not be used in that manner. In the absence of any Ministerial power to make orders (along the lines of those

provided for in s. 80 of the TPA), the threat of de-registration could be used as a means of forcing a conference to comply with certain conditions, or enter into undertakings -- for example on compensation for any monetary loss arising from the failure to observe obligations under Part X.

The corollary to this is that de-registration of a conference would not disadvantage the trade by denying shippers the benefits brought about through the joint venture. However, if de-registration would not result in any detriments to the trade, the very need for the conference to exist in the first place is called into question.

In mid 1992 the NACON lines informed DOTAC that they had reached a satisfactory agreement with three of the four commodity groups (metal, dairy and wool), to settle their dispute on the THC, by offering a reduction in rates for one year. The Managing Director of Blue Star, who was instrumental in the attempts to settle the dispute, informed the Commission at interview that the offers were not to be considered as compensation for any wrong doing on NACON's part but were an offering of goodwill.

The Commission notes that Blue Star was not a party to NACON at the time when the confusion and disarray on THCs occurred in late 1990 and early 1991. It also notes that, from the record of negotiations, it appears that meaningful dialogue took place only when the Managing Directors of Blue Star and Columbus became personally involved in the negotiation and consultation process in late 1991 and 1992.

The offers of reduced rates appear to the Commission to have been a realistic attempt at settling the dispute. If the horticulture growers had accepted the offer made by NACON (see Chapter 5.3) and not insisted on a monetary payment of around A$124 000 this dispute presumably would have been settled without the need for the Commission to become involved.

Through involving the Commission and the investigation process (with associated remedies) under Part X, APSA has sought an alternative means of settling this dispute. This alternative to the commercial settlement offered by NACON could result in the deregistration of a conference agreement (i.e. the NACON agreements or AUSDA). This would not automatically result in any

financial benefit to shippers which would have been the case if the commercial settlement offer had been accepted. However, this does suggest that an option open to the Minister could be to threaten de-registration of one of the relevant conference agreements unless an expanded offer is made that would satisfy the horticulture growers.

The complainants have given some details on the monetary loss they claim to have suffered. However, even if the Commission were to accept that the figures representing the loss are appropriate and should be paid to the shippers as compensation for failure to observe the provisions of Part X, the NACON lines claim they are precluded from making any payments by virtue of the anti-rebate provisions of the US Shipping Act 1984. Blue Star and Columbus informed the Commission at interview that in the event of a demand to pay monetary compensation as a condition of maintaining a conference agreement, they would be forced to disband the conference rather than pay.

However, even if the lines were not precluded by US law from paying monetary compensation, the Minister would need to bear in mind (if considering making such demands on parties to a conference agreement) that the total amount calculated by the complainants as compensation might be such that the parties could decide on commercial grounds that the cost of placating the complainants, and keeping the conference together, outweighs the benefits in maintaining the conference agreement.

The above raises the question of whether the Minister should be involved in achieving a better financial result (through some sort of bargaining process) than was initially achieved under the consultation process followed by the Ministerial Delegate in early 1992. Again this raises the question of the intrinsic value of the conference agreements and whether they can and should be used as a bargaining tool to achieve a better settlement or compensation for any wrong doing by conference parties. It does not appear to the Commission that the provisions of Part X offer any clear indication that this is the case.

The Commission believes that the Part X remedies, in the circumstances of a Commission investigation, have been structured to correct any anti competitive detriments resulting from a conference agreement, rather than to act as purely

punitive measures that can be used to extend the negotiation and consultation processes under Part X.

Accordingly, for the reasons outlined above, the Commission would not recommend that an attempt to get a better commercial settlement than has already been offered should be tied to a threat to de-register a conference agreement.

That leaves the question of whether any of the conference agreements in the trade should be deregistered on corrective grounds, i.e. eliminating any anticompetitive detriment. The conference agreements to be considered in these terms are:

- the NACON agreements -- i.e., the Australia Pacific Coast Rate Agreement and the Australia-Eastern USA Shipping Conference Agreement; and
- the Australia/US Discussion Agreement (AUSDA).

9.3 NACON conference agreements

Chapter 4 of this report discusses the competitive environment in which the NACON conference agreements operate. From that information, the following observations can be made:

- The NACON overall market share for the North American trade is around 50%. Its market share by commodity groups fluctuates markedly -- dairy (77%), horticulture (almost 100%), meat (around 60%), wool (24%) and metals (less than 10%).
- NACON does therefore appear to encounter strong competition in the major lifting of meat and the lesser value cargoes of wool and metals.
- NACON does, however, apparently enjoy a high degree of market power in the trade for dairy and particularly horticulture cargo. (Together these cargoes represent a total of approximately 1% of the total value of exports to North America).

Comments from the complainants indicate that NACON does encounter some competition from other lines. However, the extent to which this has a downward influence on rates is not clear. While the meat trade is apparently able to negotiate rates downward, the horticulture (and particularly) dairy shippers are concerned at their inability to obtain rates at levels similar to trades with other geographic location, for example the ADC's complaint about disparity in rates to North America compared with New Zealand.

It appears to the Commission that the difficulties which the shippers face, both in terms of the introduction of the THC, and dissatisfaction with rate levels, arise from the collusive nature of the trade in total, rather than the collusive relationship between the NACON lines in their joint venture.

The Commission does not consider that deregistration of the NACON agreements will solve the shippers' problems concerning the introduction of THCs. De-registering the NACON agreements might well have a disruptive effect in the trade, for example on the capacity and frequency of port calls.

9.4 Australia – US Discussion Agreement (AUSDA)

AUSDA on the other hand does raise concerns for the Commission. It is difficult to understand why such a broad agreement needs to be in place. There is no indication that it produces a level of benefits that offset the implied detriments to competition, brought about through major competitors discussing a wide range of matters, that in other sectors of the economy would be left to open competition. There may be some benefits that arise through allowing the lines to discuss technical and safety issues. However, this agreement goes much further than those two issues.

When considered in the context of this complaint the agreement is even more open to criticism as the consensus that was reached under it (and the related discussion agreement registered in relation to the New Zealand / US trade) contributed to the confusion and disarray brought about through the uniform introduction of THCs. It is acknowledged that the AUSDA agreement is also registered under US law and that any action taken on the registration of the agreement in Australia may have limited impact. However, the Commission

believes that this should not prevent the Minister from taking action that is considered appropriate for Australia.

9.5 Recommendation

In view of the information outlined in this report, the Commission recommends that pursuant to sub-section 10.44(1)(a), the Minister direct the Registrar to cancel the registration of the AUSDA conference agreement registered as Australia-US Discussion Agreement Variation No 2 on 3 October 1991.

The Commission believes that sufficient information has been obtained through this investigation to indicate that grounds exist for the Minister to be satisfied that the parties to the AUSDA agreement have

- given effect to the agreement without due regard to the need for outward liner cargo shipping services provided under the agreement to be efficient and economical; and
- not given adequate and timely notice of a change to negotiable shipping arrangements provided for under the conference agreement.

Appendixes

APPENDIX A

MINISTER FOR SHIPPING AND AVIATION SUPPORT

PARLIAMENT HOUSE
CANBERRA ACT 2600

11 AUG 1992

Professor A H M Fels
Chairman
Trade Practices Commission
PO Box 19
BELCONNEN ACT 2616

Dear Professor Fels Allan,

I am writing to you about a complaint which has been made under Part X of the Trade Practices Act 1974.

The attached letter from the Australian Peak Shippers Association alleges that member Lines of the Australia-Pacific Coast Rate Agreement and the Australia-East Coast North America Shipping Conference (collectively known as the North American Conferences) have breached certain provisions of Part X. The matter relates to the imposition on Australian exporters of a Terminal Handling Charge for the movement of export containers through shipping terminals in the United States of America.

Despite extensive negotiations under Section 10.41 of the Act, consultations under Section 10.45 (b) and commercial discussions between the parties, the matter has not been able to be resolved in a satisfactory manner. On the basis of advice provided to me by officers of the Department of Transport and Communications I consider that the complaint warrants an investigation by the Commission under Part X.

Therefore, pursuant to Section 10.47 of the Act I refer the complaint made by the Australian Peak Shippers Association against the North American Conferences for investigation and report by the Commission in a timely manner. I have not specified any particular date by which the report should be completed as I understand that this will be the first such investigation to be carried out by the Commission and there may be procedural and legal issues to be resolved.

MINISTER FOR INDUSTRIAL RELATIONS
MINISTER ASSISTING THE PRIME MINISTER FOR PUBLIC SERVICE MATTERS

1331

Officers of the Department of Transport and Communications are available to assist the Commission during the investigation. In the first instance, contact should be made with Mr Danny Scorpecci, Assistant Secretary, International and Commercial Shipping Policy Branch, on telephone 274 7611.

Yours sincerely

Peter Cook

1330

AUSTRALIAN PEAK SHIPPERS ASSOCIATION

LEVEL 3/380 ST KILDA RD
MELBOURNE 3004

GPO Box 1469N
MELBOURNE 3001

Phone: (03) 698 4272
Fax: (03) 699 1729

28th October 1991

Senator Bob Collins
Minister for Shipping and Aviation Support,
Parliament House,
CANBERRA. ACT. 2600.

Dear Minister,

TERMINAL HANDLING CHARGES - US PORTS

The purpose of this letter is to draw your attention to the conduct of the North American Shipping Conferences (NACON) in relation to Terminal Handling Charges (THC's) and to seek an investigation into the conduct of NACON members and non-conference carriers related to the introduction of these THC's.

BACKGROUND

APSA is the Designated Peak Shipper Body specified under subsection 10.03 (1) of the Trade Practices Act and represents the interests of Australian Shippers in relation to outwards liner cargo shipping services.

In early 1991 THC's were introduced by both:

. NACON members; and

. Non-conference carriers;

and are now levied on Australian cargo shipped to US Ports.

APSA entered into negotiations under Part X of the Act with NACON on behalf of Australian Shippers in about July 1991 requesting information about the elements constituting THC's.

Some information was subsequently provided by NACON to APSA on a strictly confidential basis and only upon APSA's written undertaking that the information would not be provided to any third party, and for that reason we are unable to disclose the contents of their letter dated 23 July 1991 without their authority.

We have been advised that the NACON request for confidentiality arises from the current complaint by the Meat Importers Council of America (MICA) about THC's levied in US Ports which has resulted in proceedings before the US Federal Maritime Commission (US FMC).

THE APSA COMPLAINT

APSA is concerned about the recent and collective introduction of THC's by all Conference and non-conference carriers to US Ports:

- THC's are a newly introduced levy which appears to have been imposed on shipments from Australian Ports to US Ports to obtain freight "claw-back" in the face of freight rates reduced as a result of competition. For example, a THC of US$290 was introduced by carriers shipping to Charleston during 1991 in the absence of any fresh charges by authorities at that Port;

- NACON has provided certain confidential figures to APSA which purport to justify the recently introduced THC's, but in APSA's opinion the figures appear to bear little relationship to what APSA understands to constitute THC's, and are not transparent. In addition some of the elements of THC's appear to relate to stevedore services and equipment (Carrier owned or related subsidiaries?) operating at US Ports;

- THC's have been recently imposed by NACON and non-conference carriers in relation to shipping services which have not previously been to the account of shippers or merchants, or the subject of a separate levy.

  For example, the US FMC Registered Tariff No 14 which applies from Australian Ports to US Atlantic and Gulf Ports (amongst others) sets out the "Application of Rates" in Rule 2 which became effective from 21 May 1990 and states:

  "(a) Rates named herein apply from and to Terminal/Terminal Depot ...

  (b) ... The rates exclude any charges which are customarily for account of the cargo incurred prior to the Carrier receiving cargo at Terminals or Terminal Depots in Australia and beyond the point of delivery of cargo from Terminals or Terminal Depots in the United States.

  Wharfage, handling and any other charges customarily for account of the cargo shall be paid by the Merchant".

  Our (linear) interpretation of Rule 2 follows:

  IT_>TG_>T_>W> _____ (Sea Carriage) _____ >W>T_>*_TG>_IT

Legend

* : Appears to be the stage at which THC's are imposed, between Terminal and Terminal Gate.
IT: Inland Transport. FMC 14 does not include charges incurred in Australia prior to T, and beyond the point of delivery from T.
TG: Terminal Gate.
T : Terminal
W : Wharf

- In APSA's opinion, the interpretation of Tariff No. 14, Rule 2 (above) does not justify the imposition of THC's by NACON and non-conference carriers either under US law, and certainly not under the Trade Practices Act;

- Carriers have refused to release cargo at US Ports until the THC on individual shipments has been paid. For example, the Australian Wool Corporation has been faced with this dilemma and has been forced to pay THC's albeit under protest to secure release of containers at US Ports;

DIRECTIONS UNDER PART X

Section 10.45 sets out the grounds on which the Minister may give a direction pursuant to section 10.44, including;

- Sub-section 10.45 (a) (ii) (A) which requires NACON to negotiate the introduction and extent of THC's with APSA pursuant to section 10.41 (1), which in APSA's opinion, they have failed to do in good faith as NACON has presented THC's as a fait accompli;

- Sub-section 10.45 (a) (iv) (A) as NACON members (and non-conference carriers) have given effect to, or propose to give effect to or apply the registered agreement without due regard to the need for outwards liner cargo shipping services to be efficient and economical, namely, by the introduction of THC's which undermines and destroys the economies previously gained prior to the introduction of THCS;

EXAMPLES

1. Western Mining Corporation has advised that its nickel sales to East Coast USA are in jeopardy due to the imposition of the Terminal Handling Charge and have been forced to investigate a charter operation in order to be able to continue to compete with Canadian Suppliers.

2. The Australian Horticultural Corporation has advised that the imposition of the Terminal Handling Charge has considerably reduced the viability of the North American market. Although 'locked in' for 1991, 1992 may see a considerable reduction in the quantities of horticultural products exported to the USA.

3. The Australian Dairy Corporation, already paying very high freight rates, are considering reducing the number of products currently being exported to the United States due to the imposition of the Terminal Handling Charge.

In all three of the above cases the Australian exporter has been forced to pay the Terminal Handling Charge to allow exports to move off the wharves at U.S. ports.

Action

Due to the considerable concern by Australian exporters for the future of exports to the North American market, APSA requests that the subject of Terminal Handling Charges be referred to the Trade Practices Commission for investigation.

J.F. BEAUFORT
PRESIDENT

CC Trade Practices Commission

Circumstances in which Minister may exercise powers in relation to registered conference agreements

10.45. The Minister shall not give a direction under subsection 10.44 (1) in relation to a registered conference agreement unless:

(a) the Minister is satisfied of one or more of the following matters:

(i) that the agreement does not comply with one or more of the following provisions:

(A) section 10.06 (application of Australian law to conference agreements and withdrawal from agreements);

(B) section 10.07 (minimum levels of shipping services to be specified in conference agreements);

(C) section 10.08 (conference agreements may include only certain restrictive trade practice provisions);

(ii) that parties to the agreement have contravened, or propose to contravene, either or both of the following provisions:

(A) section 10.41 (parties to registered conference agreement to negotiate with certain designated shipper bodies etc.);

(B) subsection 10.43 (1) (parties to registered conference agreement to notify happening of affecting events etc.);

(iii) that section 10.42 (application to be made for registration of varying conference agreements) has not been complied with in relation to a conference agreement that varies or otherwise affects the agreement;

(iv) that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement without due regard to the need for outwards liner cargo shipping services provided under the agreement to be:

(A) efficient and economical; and

(B) provided at the capacity and frequency reasonably required to meet the needs of shippers who use, and shippers who may reasonably be expected to need to use, the services;

(v) that parties to the agreement have given effect to or applied, or propose to give effect to or apply, the agreement in a manner that prevents or hinders an Australian flag shipping operator from engaging efficiently in the provision of outwards liner cargo shipping services to an extent that is reasonable;

(vi) that provisional or final registration of the agreement was granted on the basis of a statement or information that was false or misleading in a material particular;

(vii) that parties to the agreement have breached an undertaking given by the parties to the agreement under section 10.49;

Trade
Practices
Commission

Telephone (06) 264 1166
Fax (06) 264 2803
(06) 251 5093

In reply please quote

Trade Practices Act 1974, Part X, s.10.47(1) Ministerial Referral of Complaint for Investigation by Trade Practices Commission

The Minister for Shipping and Aviation Support has referred a complaint by the Australian Peak Shippers Association (APSA) to the Commission to investigate and report back to the Minister. The Commission has been asked to prepare that report in a timely manner.

A copy of the referral and complaint, which concerns the introduction of Terminal Handling Charges (THCs) by members of the North American Conferences (NACON), forms **Attachment 1**.

The Commission (in this case sitting as a Division comprising Mr Allan Asher and Mr Hank Spier) seeks the co-operation of interested parties in identifying relevant issues and in providing information that will assist the Commission to decide whether or not the grounds of complaint are substantiated.

The issues on which the Commission seeks information are set out for response by the interested parties. In addition, interested parties are invited to identify and provide information in relation to any other issues relevant to the referral that they wish the Commission to take into account. Should parties wish to discuss any matters, they are invited to telephone the officers whose names appear below.

Information should reach the Commission at the following address by 30 October 1992.

File ref CL92/1
NACON referral

Senior Assistant Commissioner
Enforcement Branch
Trade Practices Commission
P O Box 19
BELCONNEN ACT 2616

Tel: (06) 264 1166 – Mr Ron Cameron or Mr Peter Le Mesurier
Fax: (06) 264 2803 or (06) 251 5093

Please note that the Commission's report to the Minister will be published. Documents given by interested parties or oral submissions made to the Commission will be placed on a public register unless a claim for confidentiality is made and granted under subsection 10.88(2). (Persons may request to have confidential documents returned if an application for confidentiality is refused.)

In addition, the powers conferred on the Commission under Section 155 of the Trade Practices Act to obtain information, documents and evidence, for example by issuing a written notice or requiring appearance before the Commission, apply to this investigation if required.

Terms of Reference

Under the Trade Practices Act 1974 Part X, subsection 10.47(1), the Commission is to report to the Minister:

> ... whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of one or more specified matters referred to in paragraph 10.45(a).

A copy of paragraph 10.45(a) of the Act forms **Attachment 2**.

The registered conference agreements to which the complaint directly relates are as follows.

- Australia – Pacific Coast Rate Agreement
- Australia – Eastern USA Shipping Conference
- The operational agreement of the NACON lines, registered as 'Columbus/PACE Space Charter and Sailing Agreement.

Issue No 1

APSA has alleged that members of NACON have not satisfied the obligation to negotiate with a designated shipper body in accordance with Section.10.41 in relation to terms and conditions of service.

- Section 10.41 requires the shipping lines to give at least thirty days' notice of any change of negotiable shipping arrangements to the peak shipper body and obliges the carriers to make available any information reasonably necessary for the negotiations, There is a reciprocal obligation on the shipper body.

APSA alleged that the THCs were presented as a fait accompli, enforced by the lines refusing to release cargo at US ports until THCs were paid.

In relation to this issue, the Commission asks the interested parties to address the following points and to provide documentation wherever possible:

- When and why were THCs introduced?
- What notice was given to the peak shipper body and to shipper customers?
- How was a THC defined by industry custom, FMC tariff rules and by the interested parties at the time the charges were introduced?

- What definition was arrived at in negotiations?
- Did the definitions include elements to the capital account of stevedores and were those elements actually a part of the THCs charged to shippers?
- Did the shipping lines provide information reasonably necessary for shippers to establish whether the charges levied were in accordance with the agreed definition of THCs and any other relevant definitions?
- To which ports (and countries) did the charges apply? There was a concern that THCs did not reflect actual charges in ports to which they applied.
- Did the shipping lines provide information that was reasonably necessary for the shippers to establish the amounts of the charges and the ports to which they applied and the reasons?

In assessing the above the Commission proposes to study a representative sample of shipments and the record of negotiations.

Issue No 2

APSA have also alleged that NACON members have not satisfied the obligation under subsection 10.45(a)(iv)A, to have due regard to the need for services to be 'efficient and economical' in giving effect to or applying a conference agreement.

APSA alleged that the introduction of THCs undermined and destroyed economies previously gained,in that they 'clawed–back' freight rates reduced by competition.

APSA was also concerned that the THCs were introduced collectively with non–conference lines.

The Commission will accordingly be seeking information on the following:

- What level of service has been provided by NACON to each port served over the past five years? Comment as to reliability of service.
- Does that level of service and the range of ports served meet the needs of exporters?
- What economies had shippers gained before the introduction of THCs?
- Identify the source, extent and impact of competition to NACON over the five–year period under discussion.
- To what extent did THCs 'claw back' freight rates?
- What discussion or consultation occurred between NACON lines and non–conference lines (i e, non–members of NACON) in relation to the introduction of THCs?

- What discussion or consultation has occurred between NACON lines and non–conference lines (i e, non–members of NACON) in relation to freight rates, levels of service and terms and conditions of service over the five–year period under discussion?

- To what extent are other conference and discussion agreements in the region (in which NACON members are involved) relevant to assessing the economy and efficiency of the service provided by NACON? Such agreements are registered in respect of Canada, Mexico and the Caribbean and the Commission understands that there are agreements in relation to trade between the USA and New Zealand. An important point in addressing this question is the impact of these agreements on the international competitiveness of freight rates to the region.

- What comparisons between freight rates in the trade and other international freight rates can be made in arriving at a conclusion as to whether or not NACON freight rates and terms and conditions of service are internationally competitive?

- Are there any other comments relevant to the economy and efficiency with which the NACON service is provided; for instance in relation to capacity? What international comparisons can be made?

Issue No 3

Are there any other matters the Commission should take into account?

The primary purpose of this investigation is to fulfil the obligations of the Ministerial direction to investigate. However, the Commission is not precluded from enquiring into other matters that in the course of the investigation might raise issues under the Trade Practices Act not directly related to the complaint by APSA.

7 October 1992

APPENDIX D

APCRA Australia-Pacific Coast Rate Agreement
AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

(BY FACSIMILE)

EV:mp
December 5, 1990

Mr. R.O. Newman
Executive Director
Australian Council of Wool Exporters
Level 11
1 York Street
SYDNEY NSW 2000

Dear Mr. Newman,

Re: Terminal Handling Charges at North American Ports

As a subscriber to our tariffs you will have noted the tariff amendments in respect of the above charges. However, for the sake of order we wish to confirm the changes to the structure of the variety of charges which importers variously pay on cargo upon arrival in North America. These charges whilst applying in a variety of forms and at different destinations, can generally be referenced as wharfage and handling and/or terminal charges. This created an unruly situation, and the decision was therefore taken to bring these various charges together and replace with a single Terminal Handling Charge.

Effective from 1st January 1991 the following Terminal Handling Charges will apply for payment by importers:-

EAST COAST USA	US$290/20ft	Container
	US$580/40ft	"
EAST COAST CANADA	US$240/20ft	"
	US$480/40ft	"
WEST COAST USA & CANADA	US$290/20ft	"
	US$580/40ft	"

The above charges are not subject to CAF/BSC.

With best regards,

Eilif Vibe
Chairman

APCRA Australia-Pacific Coast Rate Agreement

AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

1320

(BY FACSIMILE)

RFH:mp
November 15, 1990

COPY

Mr. Richard Crouch
Australian Meat Exporters Federal Council
Suite 905
Aetna Life Tower
Cnr. Elizabeth & Bathurst Streets
SYDNEY NSW 2000

Dear Mr. Crouch,

I write on behalf of the Members of the Australia-North America Shipping Conferences in connection with proposed changes to various charges applicable to shipments of Refrigerated Meat to East and West Coast North America.

The first matter concerns the introduction of arbitraries on shipments of meat consigned to certain United States out-ports which till now have been covered by the Lines' tariffed ocean rates of freight. You will be aware that the ports concerned have either never been direct call ports or there has been no direct calls in recent times.

The Member Lines now find that increasing across-the-board costs requires a review of the current freight structure to the ports concerned and I must advise you that effective from 1 January 1991, the Lines find it necessary to introduce arbitraries to shipments of Frozen Meat moving to the following US destinations:-

East Coast USA :	Baltimore	-	US$300 per container
	Jacksonville	-	US$435 " "
	Miami	-	US$100 " "
	Tampa	-	US$425 " "
	Savannah	-	US$225 " "
West Coast USA :	Portland	-	US$210 per container
	Sacramento	-	US$300 " "
	Stockton	-	US$300 " "
	San Diego	-	US$400 " "

The second matter the Lines wish to raise with you concerns changes to the structure of the variety of charges which importers variously pay on Meat upon arrival in North America. These charges whilst applying in a variety of forms and at different destinations, can generally be referenced as wharfage and handling and/or terminal charges.

..../2.

The purpose of this advice is to inform you of the decision to now bring these various charges together and replace them with a single terminal handling charge. For your information and guidance, the following terminal handling charges for payment by importers will be introduced effective from 1 January 1991:-

East Coast USA	- US$290/20ft container US$580/40ft container
East Coast Canada	- US$240/20ft container US$480/40ft container
West Coast USA & Canada	- US$290/20ft container US$580/40ft container

It would be appreciated if you will take note of the foregoing changes to existing arrangements and advise interested parties accordingly.

Many thanks,

Kind Regards.

R.F. Hobart

P.S. Since the preparation of this letter we have received your facsimile of 13 November to our Chairman, Mr. Eilif Vibe and you will see that the foregoing addresses in detail the matter you raise.

CRA Australia-Pacific Coast Rate Agreement

AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

RFH:mp
December 11, 1990

Mr. Alan Hore
Administrative Officer
The Australian Peak Shippers Association
G.P.O. Box 1469N
MELBOURNE VIC 3001

COPY

Dear Mr. Hore,

On behalf of the Member Lines (Columbus Line and Pace Line) of the Australia/North America Shipping Conferences I would like to welcome the recent formation of The Australian Peak Shippers Association.

It occurred to us that you would like to have on file the three relevant conference agreements as registered in Canberra, and we therefore enclose copies of same herewith.

Attaching to these agreements you will also find the respective "Minimum Levels of Service" undertakings as negotiated and agreed with your predecessor, the Australian Exporters Shipping Association.

We also enclose copies of our current freight tariffs,* and our intention is to furnish you with amended tariff pages (reflecting changes in rates, charges etc.) as they are issued.

As is customary, and indeed also required by U.S. shipping regulations, we are committed to giving shippers minimum 30 days notice of any upward adjustments in rates and charges. In this respect you will note that varying expiry dates are shown against most of the commodity rates listed in our tariffs, and having regard to the Lines' escalating operating costs it is our intention to seek a 7% increase in these current base rates as and when they are scheduled to expire.

With kind regards,

R.F. Hobart
Secretary.

* included THC Rules for effect 1 January 1991.

encls

P.S. The original of this fax together with attachments will be posted tonight.

Facsimile

1317
Ref. No : 7189.1

AUSTRALIAN HORTICULTURAL CORPORATION

Level 1
360 St Kilda Road
Melbourne Vic 3004
Australia

Telephone: (03) 521 [illegible]
Facsimile: (03) 521 [illegible]

Attention : BOB HOBART **Fax No :**

Company : A/NASC **Date :** 18 April 1991

From : KAREN FRANKCOM **No Pages :** 1

NORTH AMERICAN TERMINAL HANDLING CHARGE

In the last few days, the Corporation has been informed of a terminal handling charge of USD 290.00 per 20 ft container by importers in North America.

This is the first time that exporters and the Corporation have been advised of such a charge and not by the Conference which should have been the case. It is now too late to be incorporated into the prices quoted and accepted by importers who have advised they will not pay this charge. As most pears are sold on consignment such additional charges will be passed back to the exporter and grower to pay.

On checking back on all correspondence and meeting notes there is no mention of a Terminal Handling Charge for North America. Hence without advise before the season being given, exporters are not prepared to accept this charge particularly in view of the very high freight rates charged.

Exporters are not prepared to suffer the consequences of this breakdown in communication by the Conference and that this charge be absorbed by conference for apples and pears for this season.

We await your advise that this will be the case, as the first vessel for the East Coast is due to arrive in Philadelphia this weekend.

Regards

Karen Frankcom
MARKETING OFFICER

APCRA Australia-Pacific Coast Rate Agreement
AECNA Australia-East Coast North America Shipping Conferences
Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

1316

FACSIMILE TRANSMISSION

TO: Ms. Karen Frankcom
Marketing Officer
Australian Horticultural Corporation

FROM: Bob Hobart
North American Shipping Conference

DATE: 24 April 1991

A.H.C.
Apple and Pear Division
Date: 24-4-91
Doc. No: 7117
FILE INSTRUCTIONS:
Subject:
Orgn. Name:
Other:

PAGE 1 OF 2 PAGES

Re: Terminal Handling Charge

I refer to your facsimile dated 18 April concerning the matter of the Terminal Handling Charge (THC) applicable in North America.

The Member Lines' Principals have given careful consideration to all those points raised in your message and note your contention that apple and pear shipments be exempted from the application of the THC for this season. Unfortunately I must advise you that the Lines are unable to agree to any change to THC arrangements as presently tariffed.

At the outset we see it as important to stress that at the time of our across-the-table negotiations last year the details of the application of a THC were not known to the Lines and the northbound Conferences did not involve themselves directly in the subsequent assessment of a handling charge (beyond ship's tackle) for account of the cargo, at North American ports. These charges were regarded purely as a matter between North American importers and the Lines and should not therefore be construed to be forming part of the northbound ocean freight structure, much the same as Australian port charges do not form part of the negotiated base freight rates. Regarding the charge itself, the Lines have until now absorbed all costs within the terminal boundaries at U.S. ports despite the fact that costs beyond ship's tackle should, in the case of port to port freight rates, be for consignees' account. In the light of the overall cost structure, shipping lines engaged in the trades to North America could not afford to continue absorbing escalating terminal costs indefinitely hence the decision to follow the policy in other trades to North America of introducing a THC, uniformly applicable to all cargoes, upon discharge.

It should also be pointed out that a wharfage/terminal handling charge has applied for many years in the West Coast North America trade and the Eastern Canada trade. Those charges have never formed part of the northbound freight negotiations and importantly, they have never been raised as an issue or objected to, by importers in North America.

Notwithstanding all the foregoing, the practicalities of the present situation from a legal point of view, preclude the Lines from adopting any compensating action on the current freight rates. In this respect I refer to the regulations of the U.S. Federal Maritime Commission which prohibit any change to time/volume rates and provisions as we presently have in place, during the currency of the agreed period of validity. These regulatory restrictions similarly prohibit the exemption of the THC on apples and pears because it was a tariffed charge at the time the product was accepted for shipment and it is our understanding that for all intents and purpose, the export season is now finished.

Please be assured that in arriving at this position, the Lines and their Principals have given most careful consideration to the Corporation's requests however it is with regret that I must reaffirm their inability to offer any assistance in the matter, at this time.

Kind Regards.

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

Parties to registered conference agreement to negotiate with certain designated shipper bodies etc.

10.41. (1) The parties to a registered conference agreement shall:

(a) take part in negotiations with a relevant designated shipper body in relation to negotiable shipping arrangements (including any provisions of the agreement that affect those arrangements) whenever reasonably requested by the shipper body, and consider the matters raised, and representations made, by the shipper body;

(b) if the shipper body requests the parties to make available for the purposes of the negotiations any information reasonably necessary for those purposes and itself makes available for those purposes any such information requested by the parties—make the information available to the shipper body; and

(c) provide an authorised officer with such information as the officer requires relating to the negotiations, notify an authorised officer of meetings to be held in the course of the negotiations, permit an authorised officer to be present at the meetings, and consider suggestions made by an authorised officer.

(2) The parties to the agreement shall give each relevant designated shipper body at least 30 days notice of any change in negotiable shipping arrangements unless the shipper body agrees to a lesser period of notice for the change.

(3) In this section:

"negotiable shipping arrangements" means the arrangements for, or the terms and conditions applicable to, outwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, frequency of sailings and ports of call);

"relevant designated shipper body" means:

(a) a designated peak shipper body; or

(b) a designated secondary shipper body nominated by the Registrar (by written notice given to the parties to the agreement) for the purposes of the agreement for the purposes of this section.

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1313 APCRA Australia-Pacific Coast Rate Agreement

AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

FACSIMILE TRANSMISSION

TO: Mr. Frank Beaufort
President
Australian Peak Shippers Association
Fax No. (03) 607-1848

FROM: Eilif Vibe
Chairman
Australia/North American Shipping Conferences

DATE: 23 July 1991

PAGE 1 OF 5 PAGES

Re: Terminal Handling Charge

We refer to our facsimile of 19 July 1991 concerning the provision of information relative to the cost elements of the THC and your response of same date. Your co-operation in respect of the Lines' expressed concerns on the matter of strict confidentially of the information is acknowledged and appreciated.

While reaffirming all those arguments already stated in support of our position relative to the application of the THC, the Lines none-the-less are anxious to fulfil their obligations under Part X of the IPA regarding the provision of reasonably necessary information. To this end we provide, without prejudice, details of the elements of the THC and the individual costs of those elements. It should be again noted that in consideration of the MICA litigation presently before the US FMC the attached information is provided in accordance with APSA's written undertaking of strict confidentiality. We are of the view that the information now provided fully addresses the Lines' obligations under S.10.41(1)(b) of the Act. In now submitting this required information to APSA, we consider it important to emphasise several often repeated but none-the-less important points relative to the application of the THC and also, comment upon other issues which were raised at the 12 July meeting.

It is again stressed that while not separately applied in the ECUSA northbound trade, the THC is not a new charge and is common in the trades into and out of the US. The inbound trade from Australia was one of the very last to introduce a THC at US discharge ports. Indeed, the Australia to Eastern Canada and Australia to West Coast North America trades have had THCs (or equivalents) in place for many years and those charges have never formed part of, or have been referenced in,

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any negotiations of northbound freight rates from Australia. We have advised you that in the past the Lines have absorbed all costs at ECUS terminals and to a lesser extent at WCNA and Eastern Canada terminals, beyond ship's hook, principally for administrative and competitive reasons. However as a consequence of the gradual and continued erosion of freight rate returns on the one hand and increasing terminal costs on the other, the Lines could no longer continue to absorb these costs resulting in the decision to move towards a position of cost recovery and place terminal charges where they properly lie, in common with the custom and practice of practically all other US trades.

You will note from the attached data that actual terminal costs incurred by the Lines are in excess of the present US$290/TEU THC at US ports however at the time of introduction, this particular level of THC was already established in the US southbound trades and Lines' Principals considered the northbound charge should initially be no higher than that applying to southbound cargoes. Consequently it was agreed to introduce the THC on a partial cost recovery basis, however it would be the Lines' intention to move to a position of full cost recovery at some future time.

At the 12 July meeting, you queried the application of the same level of THC at all US ports and in response we made brief reference to certain provisions of the US Shipping Act of 1984 and upon which we can now elaborate. In respect of the imposition of a uniform THC at US ports, section 10(b)(10) of the US Shipping Act prohibits any common carrier either alone or in conjunction with any other person from demanding, charging or collecting any rate that is unjustly discriminatory between ports. In addition, section 205 of the US Merchant Marine Act of 1936 makes it unlawful for any conference to prohibit its members from charging the same rates at adjacent US ports. As a result of these provisions the imposition of different charges at US ports has been successfully challenged on legal grounds, ref: Far East Conference Amended Tariff Rule Regarding The Assessment of Wharfage and Other Accessorial Charges, 20 F.M.C. 772 (1978); Associated Latin American Freight Conferences and the Association Of West Coast Steamship Companies, Amended Tariff Rules Regarding Wharfage And Handling Charges, 15 F.M.C. 151 (1972). Under these circumstances it is the common practice for carriers to have uniform rates and charges at adjoining US ports and against that legal background the Member Lines of these Conferences follow this practice.

Also discussed at the 12th July meeting was the matter of the language of the Conferences' tariff rules concerning the applicability of ocean freight rates and charges quoted by the Lines. The Lines have recognised that the language accompanying the THC in their tariffs may not fully describe the services covered. Generally the Lines view their freight

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rates as "Hook to Hook". The THC is designed to cover costs incurred from the time the cargo was discharged from the vessel up to the time it was delivered to the receiver. We are currently reviewing the need and wisdom of revising the language of our tariff rules in regard to the THC with our legal counsel in the U.S.

We are of the view that not only does the attached information meet with APSA's stated requirements and attend to the Lines' obligations under S.10 (1)b) of the TPA but also, in conjunction with our explanatory comments, serves to facilitate full and meaningful negotiations with the designated shipper body.

Kind Regards,

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TERMINAL HANDLING CHARGES

Shoreside Cost Analysis (Not including Intermodal Costs) for submission to A.P.S.A.

1. Figures are those for the rationalised northbound Conference Services to the U.S., are extracted directly from Management Information systems and are PAN-US.

2. Actual costs are based on 1990 Financial year figures and have been increased by a factor of ☐ percent for Cost Increases expected in 1991.

1. TERMINALS (See Note 1)	US DOLLARS
1.1 Wharfage	
1.2 Stack/Wheels	
1.3 Gate Charges	
1.4 Royalties/Assessments	
1.5 Equipment Rental	
1.6 Miscellaneous Terminal Assessments	
1.7 SUB TOTAL	
2. CHASSIS LEASING	
3. CHASSIS M and R and REFURBISHMENT	
4. OWNED CHASSIS PROVISION	
5. CUSTOMS AND INSPECTION CHARGES	
6. ADMINISTRATION (LOCAL)	
7. GRAND TOTAL (NOT INCLUDING REEFER COSTS)	
8. NORTHBOUND FULL THROUGHPUT (ALL CARGO)	
9. COST PER TEU (ALL CARGO) =	

The above figures do not include any refrigeration costs. Reefer cargo attracts further costs over and above those total costs shown under item 7.

1303

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ADDITIONAL REEFER COSTS ARE:

10. POLARSTREAM/HANDLING

11. L.N.2. SUPPLY

12. ELECTRICITY

13. EMERGENCY L.N.2.

14. LEASING REFRIGERATION EQUIPMENT

15. TOTAL REFRIGERATION COSTS

16. NORTHBOUND FULL THROUGHPUT (REEFER)

17. ADDITIONAL COST PER TEU (REEFER)

CONCLUSION

A. COST PER TEU - GENERAL CARGO

B. COST PER TEU - REEFER CARGO

Note 1:

These terminal costs are all incurred after the cargo has left the hook on discharge from the vessel and are not associated with the actual discharging process.

1308

AUSTRALIAN PEAK SHIPPERS ASSOCIATION

LEVEL 3/380 ST KILDA RD
MELBOURNE 3004

GPO Box 1469N
MELBOURNE 3001

Phone: (03) 698 4272
Fax: (03) 699 1729

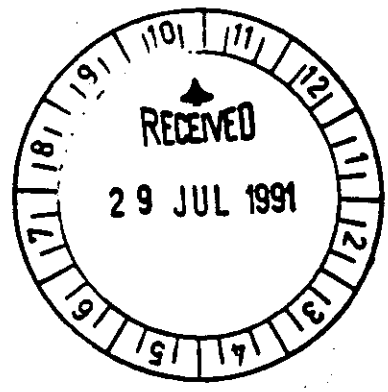
FAX TO: NORTH AMERICAN SHIPPING CONFERENCE
FAX NO: (02) 251 3865

ATTENTION: BOB HOBART/EILIF VIBE

FROM: FRANK BEAUFORT

DATE: 29 July 1991

RE: TERMINAL HANDLING CHARGES



Pages to be faxed including this page: THREE

Further to my telephone discussion on Friday evening I confirm the points to be raised with your Principals in relation to your submission to APSA dated 23rd July 1991.

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1. As a general query we cannot understand why a PAN-USA basis is used when West Coast is obviously charged differently from East Coast.

2. In reference to the [redacted] increases expected in 1991 we would query the need for this on the basis that (a) prices for services in the US tend to be fixed for 2/3 years (b) increases may be valid for some labour costs but not other costs (c) NASC is not prepared to quote THC for a firm period.

1.1 Wharfage

Require explanation as to what this item exactly covers.

1.2 Stack/Wheels

Require explanation for this item.

1307

1.3 Gate Charges

As THC's are concerned with charges within terminals where do gate charges fit in.

1.4 Royalties/Assessments

Need full explanation of this item and its relevance to THC's.

1.5 Equipment rental

Need full explanation of what is incurred.

1.6 Miscellaneous Terminal Assessments

We need to know what this covers.

Chassis Leasing

Need to have knowledge of leasing arrangements to know whether there is an accurate allocation of cost to the THC.

Chassis M and R and Refurbishment

Appears to be some duplication here, request further breakdown of costs. How much relates to leased equipment and how much relates to owned equipment.

Owned chassis provision

We question why owner should be endeavouring to recover this item from shippers in any THC.

Customs and inspection charges

We believe this should not be part of THC but a charge direct to importer. Customs charges would normally vary depending on the commodity and volume.

1306

Administration

Some justification required for this item but note no admin. charge for additional reefer costs which basis, are dry cargoes paying too high or does the additional reefer incur no admin. charges?

Northbound full throughput

Presume TEU figure covers conversion of FEU. How do they handle empty container charges. We would not accept that these costs are incorporated in THC.

Items 10-13

We can accept that these are likely charges but again we need to have some elaboration to understand the costs.

Item 14 - Leasing refrigeration equipment

This may well be related to item 1.5 and require further information. Our concerns related to our comments on Administration Costs. Shippers could be paying double.

We also need to know the source or authority of all these costs otherwise they are seen to be 'plucked out of their air'.

APSA's final comments are to request total figures for all terminals i.e. total annual running costs and total annual throughput. In this way we can establish whether the allocation of costs to the Australian THC charge is proportional or otherwise.

We would appreciate a response to these queries by Thursday 1st August latest.

Regards,

FRANK BEAUFORT

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APCRA Australia-Pacific Coast Rate Agreement

AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

FACSIMILE TRANSMISSION

TO: Mr. Frank Beaufort
President
Australian Peak Shippers Association

FROM: Eilif Vibe
Chairman
Australia/North America Shipping Conference

DATE: 2 August 1991

PAGE 1 OF 3 PAGES

Re: **Terminal Handling Charge**

We acknowledge receipt of your 29 July fax setting forth APSA's further queries in relation to the Conferences' 23 July THC cost elements submission.

In accordance with your request, APSA's questions were forwarded to Lines' Principals for comment and we are now in a position to respond, as follows:-

You have queried the Pan-US application of the THC and apart from the legal considerations referenced in our 23 July submission concerning discriminatory changes between US ports, it has been the Lines' experience that the trade served by the US Atlantic/Gulf and Pacific Coast trades have indicated preference for uniform application of terminal charges.

Further, it is the Lines' view that the competitive aspects and the relative benefits or otherwise, of moving cargo to final destination via either Coast of East Coast ports is best addressed on the basis of freight rates rather than entry port terminal changes. Also previously indicated to APSA and as a consequence of the Lines' policy in regard to Pan-US THCs, the present level of the charges applied results in an overall under-recovery of costs and Lines would intend to move to a position of full cost recovery at some future time.

As regards the [redacted] increase element built into our costs submission we can advise that this is representative of existing and anticipated calculation factors contained in present terminal agreements. In the circumstances, Lines consider this provision for known and anticipated cost increases is a fair and reasonable assessment.

Wharfage is the traditional assessment by the port authority against the cargo as a charge for the use of property and facilities provided by the authority.

Stack/Wheels - refers to the cost of lifting the container from the ground (from stack) onto the chassis to facilitate delivery to the receiver.

Gate Charges apply to all movements into and out of terminals and relate to costs associated with matters of safety, inspection, security and cargo/container control. As indicated in our submission, the THC covers costs incurred from the time the cargo is discharged from the ship to the time it is delivered to the receiver and gate charges are an inherent part of terminal costs incurred by the Lines.

Royalties/Assessments relate to levies paid by carriers to cover terminal employees' union welfare, medical expenses and pensions etc.

Miscellaneous Terminal Assessments cover subsidies paid by carriers to I.L.A. manned container freight stations.

Chassis Leasing, M & R and Refurbishment and Owned Chassis Provision all relate to costs associated with providing suitable equipment to facilitate efficient terminal movement and delivery of containers. The individual costs of these elements provided in our submission are determined through the Lines' Management Information Systems and are allocated against specific cost categories on a 'use-days' basis.

Customs and Inspection Charges represent the average cost of physically presenting cargo for customs inspection of bonded seals in order to allow movement from the terminal. The costs indicated in our submission are not associated with customs clearance or duty.

Administration is a pro-rated charge based on the various administrative functions carried out at terminal locations which are related to cargo delivery. Provision for Administrative costs involved in the care and maintenance of refrigerated cargo are included in the charges for refrigerated cargo in our submission.

Northbound Full Throughput charges are based on TEUs which covers conversion from FEUs and relates to load containers only.

Refrigeration Costs specified under items 10 - 14 of our submission reflect the Lines' actual costs incurred from Management Information Systems for holding refrigerated cargoes at terminals. These costs include liquid nitrogen together with supply tanks and also, labour costs associated with the handling, administering and monitoring of refrigerated cargoes.

As regards the Source of the actual cost information presented in our submission, this is provided by the Lines' own internal Management Information Systems.

1303

You have requested Total Throughput figures for all terminals including annual running costs however we must advise that is proprietary information and as such, is not made available to the Lines. Consequently we are unable to accede to this request.

As indicated in our 23 July submission, the Member Lines are anxious to fulfil their obligations under Part X of the TPA regarding the provision of information and we consider that all the foregoing meets with your 29 July requests and satisfactorily addresses shippers' concerns in this matter. However we note your proposal for a resumption of negotiations on Wednesday 7 August and we await your confirming advice in this regard.

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Regards.

Lesley Nibbs

BLUE STAR LINE (AUST.)
PTY. LIMITED
37-49 Pitt Street,
SYDNEY NSW 2000

COLUMBUS OVERSEAS SERVICES
PTY. LIMITED
333-339 George Street
SYDNEY NSW 2000

21 February, 1992

Mr. F. Beaufort,
Australian Peak Shippers Association,
380 St. Kilda Road,
MELBOURNE VIC. 3004

Dear Mr. Beaufort,

U.S. TERMINAL HANDLING CHARGES

The case put forward by APSA is being taken most seriously by Member Lines of the North American Conference and we look forward to resuming discussions with you on this subject.

On the question of the APSA case as outlined in your Fax 13/2, we make the following comments before addressing ourselves to the principal explanations required in your message:

a) There is no argument that the freight tariff reads terminal to terminal as outlined in Attachment 1 of your Fax 13/2. This was the position applicable prior to the announcement by Conference that a Terminal Handling Charge was being implemented in line with practices established over many years in North American trades.

Shippers and importers were however aware of the change by virtue of the implementation of the Terminal Handling Charge but Lines totally agree the tariff must be amended to reflect the changed circumstances.

We have only delayed the change to tariff conditions on legal advice because of the MICA proceedings which, as you know, argues the position of who should pay the THC rather than the quantum of the charge.

b) Shipping lines in a heavily competitive position are very like any other business and at times absorb charges that normally rest elsewhere and we acknowledge in the East Coast North America trade that Terminal Handling Charges have not been passed on to the consignees in the past despite a clear acceptance in North America of the Terminal Handling Charge concept.

1301

This does not mean that Lines are obliged to continue the practice indefinitely as they must be guided by economic and efficiency aspects.

c) & d)
We are pleased to receive confirmation that APSA has no problem with the concept of the Terminal Handling Charge.

Lines do not accept the charge of "double dipping". We have merely, for a time, absorbed a shore side cost that rightfully belongs elsewhere but there comes a time that such absorptions cannot continue if Lines are to remain efficient and economical.

It is simply not a fact of life that stevedoring and port charges are the major determining factor in setting freight rates in the trade. Freight rates are set by current market conditions through negotiations with individual shippers or their representative body in a highly competitive trading environment and we are quite happy to table some examples of export cargoes where freight rates in the North American trade have fallen well below the 1983 rates as set against CPI adjustment in the ensuing ten years. These include: beer, canned fruit, casein, dried fruit, meat, gluten, nickel, mineral water, pears and wool.

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In relation to your specific queries, we would comment as follows:

a) Why a Pan-U.S. THC

There are two primary reasons:

i) Legal

In respect of application of a uniform THC at U.S. ports, Section 10 (b) (10) of the U.S. Shipping Act prohibits any common carrier either alone or in conjunction with any other person from demanding, charging or collecting any rate that is unjustly discriminatory between shippers or ports. In addition, Section 205 of the U.S. Merchant Marine Act of 1936 makes it unlawful for any Conference to prohibit its members from charging the same rates at adjacent U.S. ports.

ii) Uniformity

In the first instance, the southbound THC, which was introduced some years prior to the northbound, was a Pan-U.S. rate and in part this was considered necessary in view of the competitive aspects at work. The relative benefits or otherwise of moving cargo to final destination via either the West or East Coasts is considered best addressed by freight rates rather than entry port charges. The very same principle applies for northbound cargo and it was considered logical that if we have a Pan U.S. southbound THC that we should also have a Pan U.S. northbound rate. Furthermore, prior to the THC application on the East Coast, the

northbound "trade" repeatedly indicated to the Conference their preference for a uniform application of terminal charges between coasts.

b) The [redacted] Percent Cost Increase

The THC was introduced in January 1991. Our assessment for the level of the charge was carried out late in 1990 and at that particular time carriers were negotiating a new agreement with ILA. At that time it was expected that the agreement reached would result in increased costs between [redacted] and [redacted] percent. In fact, the agreement finally reached raised labour costs by an average of [redacted]

It would have been imprudent in assessing our costs not to make adequate provisions for known and anticipated costs increases for a charge that would probably apply for at least a year and possibly longer. The THC application is now in the second year of application. Having said that, our cost assessment indicates that we under-recover. Even if we were to reduce our assessment of costs by the [redacted] percent being questioned, we would still under-recover based on the charge of $290/TEU.

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It will be recalled that even though our assessment showed justification for a higher application we did not however wish to charge a higher THC northbound than was already in place at the level of US$ 290 southbound.

c) Wharfage

We have previously explained that wharfage is the traditional assessment by the Port Authority against the cargo as a charge for the use of their property and facilities provided by the authority.

Port Authorities rarely, if ever, give further amplification of what this charge covers. It is a compulsory charge over which the lines have no jurisdiction. Equivalent charges apply in Australia and indeed in most ports throughout the world.

We acknowledge this description is brief but no amount of verbiage is going to be able to improve or better describe the charge other than our first paragraph.

d) Stack/Wheels

This is the cost of labour and machinery to mount containers from the ground on to chassis within the terminal.

Although this sounds simplistic it describes exactly the nature of the charge.

All terminals in the U.S. work on the basis that import containers are mounted and then parked on chassis prior to delivery. The containers are not loaded on chassis directly from discharge they ar first removed from the shipside to the storage

area, grounded and then mounted to chassis.

e) Gate Charges

All containers moving into and out of U.S. terminals are levied a gate charge which relates to costs associated with matters of safety inspection, security and cargo/container control. In fact the charge covers the cost of the terminal checkers who record the movements and inspect the containers when they move out of the custody of the terminal. These checkers make sure that all the paperwork is in order. They check the integrity of the container and ensure doors are locked and seals are in place.

These charges are an inherent part of the terminal costs carried by the lines.

f) Royalties and Assessments

As indicated previously these charges relate to levies paid by the carriers to cover terminal employees union welfare, medical expenses, pensions, etc. (fringe benefits). These charges are compulsory and have to be paid by law. Their level is part of the negotiated agreement between the employers and the ILA.

These charges are assessed on a container basis, whether they be for import or export. The costs indicated in our advice of 23rd July relate to costs associated with imported containers only.

g) Equipment Rental

During normal terminal activity it is sometimes necessary to hire additional or specialised machinery to facilitate the regular workload. The level of expense would be dictated by the nature of the cargo, the volume of that cargo and any time constraints that may have been imposed by the cargo interests.

h) Miscellaneous Terminal Assessments

As previously advised these costs cover subsidies paid by Carriers to ILA manned container freight stations. It would also cover costs of employing additional clerks and checkers within marine terminals if cargo interests so require.

i) Chassis Leasing - Maintenance and Repair, Refurbishment and Owned Chassis Provision

As referred to in paragraph (d) above, the Custom and Practice for U.S. Terminals is that all import and indeed export, containers are mounted on chassis prior to delivery.. The practice facilitates delivery from the terminal to the consignee. If there were no chassis maintained with the terminal then consignees would be required to supply a chassis when sending in their hauler to pick up their container. In addition, the hauler would be required to stand by while the container was mounted. All this would lead to additional cost to the Cargo. The container lines provide these chassis fleets and for the sake of economics and flexibility they maintain a judicial mix of owned and leased equipment.

The leased chassis incur a leasing cost and this is covered in our assessment of chassis leasing. The owned chassis do not incur leasing costs as such but there is a significant capital cost incurred in their provision and if we did not own them they would have to be leased. For the sake of our assessment we calculated the cost of owned chassis provision (per chassis) at [redacted] percent of what a leased chassis would cost on the open market.

Maintenance and Repair is the day-to-day cost of maintaining the chassis in safe and legal working order. One of the highest costs falling in this category is tyre replacement.

Refurbishment costs are separate from M & R costs in that they are a capital cost incurred in modifying updating or rerating owned chassis. For example, two years ago it was required by law that all chassis be fitted with "spray suppressors". This required remodifying all the owned chassis in the fleet and fitting them with the suppressor unit. This cost would be categorised as a refurbishment cost.

As can be established from the above, there is no duplication of costs.

Chassis are, of course, also used for export cargo and in our assessment of THC costs we apportioned the cost associated with chassis between import and export loads.

j) Administration (Local)

Although the figure of [redacted] appears high, the lines would maintain that in the context of very high U.S. costs the assessment is reasonable and indeed is an under recovery on our average administrative cost per TEU in the U.S.

Having said that, even if the charge were to be removed from the THC assessment the lines would still be under recovering. The administrative charge was applied to all containers to establish a cost per TEU (all cargo), to have applied a further administrative charge to reefer cargo would be "double dipping".

k) The Relationship between TEUs and FEUs

It is probably correct to say that in most instances the cost of an FEU is not twice a TEU. However, the lines costs and throughput are measured entirely in the context of TEUs so we could not differentiate FEUs and assess these separately. However, if we were able to and if indeed FEUs are not twice as expensive as a TEU, then the overall costs in our assessment would not change. What would change is that the cost of a TEU would increase while the cost of an FEU would decrease.

On balance we hold the view that it was logical to maintain the custom and practice already established in the southbound trade where the cost of an FEU is twice the cost of a TEU.

We trust the foregoing will go some way to further explaining our position and look forward to further discussions with you on Monday.

Yours sincerely,

CONFIDENTIAL

L.G. Lightfoot
Managing Director
BLUE STAR LINE (AUST)
PTY. LIMITED

A. Drescher
Managing Director
COLUMBUS OVERSEAS SERVICES
PTY. LIMITED

TPC: A P S A C O M P L A I N T

DOCUMENTS GIVEN BY THE NACON LINES TO APSA UNDER CONFIDENTIALITY AT MEETING ON 24 FEBRUARY 1992.

ANALYSIS PREPARED BY COLUMBUS LINE (BUT APPLICABLE ALSO TO BLUE STAR PACE) SHOWING COSTS MAKING UP THE THC.

APSA AGREED AT THIS MEETING THAT IT WOULD GO THROUGH THIS COSTING ANALYSIS AND WOULD RAISE ALL NECESSARY QUERIES WITH THE NACON LINES, WHICH WOULD THEN RESPOND

APSA DID NOT REVERT TO THE LINES

THC/COST-SPECIFICATION

(all figures in US$ per Teu) EASTCOAST

1295

		Total 1990	Total Caust 96	Caust 96 Phila*
x 1)	Wharfage			
x 2)	Stack/Wheel			
x 3)	Gate Charge			
x 4)	Royalties			
x 5)	Equipment Rental			
x 6)	Miscellaneous			
1)-6)	Sub-Total			
7)	Chassis Lease			
8)	Chassis M&R			
9)	Owned Ch. Prov.			
x 10)	Customs			
11)	Admi.-local			
1)-11)	All boxes			
x 12)	Polarstream			
x 13)	LN 2 Supply			
14)	Leasing Reefer			
12)-14)	Reefer-Additional			

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* Attached please find the details

x Direct Costs

SUMMARY (all figures in US$)

Teu's
Dry
Reefer
Total
(see attached breakdown)

CAUST 96 NB PORT: PHILADELPHIA

		Total	Average per TEU (dry/reefer)
1)	Wharfage Dry Reefer		
2)	Stack/Wheel Dry/Reefer		
3)	Gate Charge Dry/Reefer		
4)	Royalties Dry Reefer Dry/Reefer		

1293

SUMMARY (all figures in US$)

Teu's
Dry
Reefer
Total
(see attached breakdown)

CAUST 96 NB PORT: PHILADELPHIA

		Total	Average per TEU (dry/reefer)
5)	Equipment Rental		
	Dry/Reefer		
6)	Miscellaneous		
	Mty's Dry/Reefer		
10)	Customs		
	Dry		

CONFIDENTIAL

		Total	Average per Reefer/TEU
12)	Polarstream		
	Reefer		
13)	LN2 Supply		
	Reefer		

TERMINAL HANDLING CHARGES

(all figures in US$ per Teu)

	US-Eastcoast	US-Gulf
7) **Chassis Leasing**		
ym		
Trade Capital Tax Insurance, Administration		
8) **Chassis M&R**		
ym		

Austral-Asia-Share:	**US-Eastcoast**	
	US-Gulf	

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SUMMARY (all figures in US$)

Total Teus SB+NB
Total NB - Teus
NB - Teus Dry
NB - Teus Reefer

		Total	US$ per Teu
7)	Chassis Leasing		
8)	Chassis M&R		
14)	Leasing Reefer (only NB-Reefer)		
a)	LN2/CO2 - M&R		
b)	Gen Sets/Generators		
c)	Reefer Protection		
d)	Fixed Costs Electr. Clip-on's		

TERMINAL HANDLING CHARGES
(all figures in US$)

US-Eastcoast [ ] US-Gulf [ ]

14) Leasing Reefer

a) LN2/CO2 - M&R [ ]

Depr. Interest, Tax
Insurance, Administration [ ]

b) Gen Sets/Generators
Fixed Costs/Hire [ ]

c) Reefer Protection
electr. Clip-on's
Gen sets [ ]

d) Fixed Costs Electr. Clip-on's

Austral-Asia-Share: US-Eastcoast 14a) b) c): d): [ ]

US-Gulf 14a)b)c)d):

FOLIOS

RESTRICTION OF PUBLICATION

— CLAIMED

— DECISION PENDING

granted 109 pages.

APCRA Australia-Pacific Coast Rate Agreement
AECNA Australia-East Coast North America Shipping Conferences
Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

1289

EV:kl

21 September 1992

COPY

Mr. F. Beaufort
President
Australian Peak Shippers Association
Level 7
380 St. Kilda Road
MELBOURNE VIC 3004

21/9/92

Dear Sir,

Re: Terminal Handling Charges - US Ports

I refer to the lengthy negotiations that have occurred pursuant to s.10.41 of the Trade Practices Act in relation to this matter.

You will recall that, on a number of occasions during the course of those negotiations it was acknowledged on behalf of the Conference Lines that the Tariff Rules of the relevant Conferences did not accurately describe the services relevant to the terminal handling charges, but that, because of legal advice, formal amendments to the Tariff Rules could not be made. As you know, there was litigation before the Federal Maritime Commission by reason of a Complaint brought by the Meat Importers Council of America Inc (docket No. 91-16).

On 14 September 1992 we received from our Washington lawyers advice that the time of judicial review of the MICA proceedings had expired and that, accordingly, the FMC's decision was final and the litigation in that matter was concluded. In those circumstances, our Washington lawyers confirmed that the relevant Tariffs could be formally amended in relation to the Rules dealing with terminal handling charges. We believe that we should promptly now bring the terms of the published Tariff Rules into line with the position that has prevailed and that has been made clear to shippers since mid 1991. The proposed changes to the Tariff Rules, which are titled "Application of Rates" and "Terminal Handling Charge" appear in the port to port tariffs and the intermodal tariffs of the respective conferences.

For your information, we attach copies of the subject Rules as presently published, as well as the changes that are now to be made to those Rules (new language underscored, deleted language overscored). The proposed changes have been approved by our Washington lawyers for the purposes of the FMC. Our legal advice is that it is not necessary to register or notify these Tariff changes under Part X of the Trade Practices Act. Nonetheless, we want to inform you of these textual changes in advance. If you wish to discuss the matter with us, please do so.

Yours faithfully,

Eilif Vibe
Chairman

Encls.

AUSTRALIA/EASTERN U.S.A. SHIPPING CONFERENCE FREIGHT TARIFF NO. 14 F.M.C. NO. 14		Orig./Rev. 4th	Pa 6
From: Australian Ports and ports in the Pacific Islands	To: US Atlantic & Gulf Ports and ports in Puerto Rico and the US Virgin Islands	Cancels 3rd	Pa 6
RULES AND REGULATIONS		Effective Da 30 August 19	
		Corr. No: 10	

RULE 2. APPLICATION OF RATES

(a) Rates named herein apply from and to Terminal/Terminal Depot. In the case of conventional vessels, rates apply from and to alongside vessel.

The rates of freight applicable to Frozen Meat apply from carrier's terminal/terminal depot at ports named in Rule 1(d)(ii), irrespective of whether served direct or not.

In the event that other ports than those named in Rule 1(d)(ii) are served by direct call vessels then the rates on Frozen Meat named herein will apply at carrier's option. The carrier reserves the right to decide on which vessel Frozen Meat is accepted.

(b) Cargo will be assessed at the rates specified in this tariff and will be subject to all rules and regulations contained herein. The rates exclude any charges which are customarily for account of the cargo incurred prior to the Carrier receiving cargo at Terminals or Terminal Depots in Australia and beyond the point of delivery of cargo from Terminals or Terminal Depots in the United States.

Wharfage, handling and any other charges customarily for account of the cargo shall be paid by the Merchant.

PORT/PORT

Rule 2. Application of Rates

(a) ~~Rates named herein apply from and to Terminal/Terminal Depot. In the case of conventional vessels, rates apply from and to alongside vessel.~~

(a) Rates specified herein, unless otherwise specifically provided, are base ocean rates of freight and apply from and to alongside vessel within reach of ship's tackle on carrier's loading/discharge terminals.

The base ocean rates of freight applicable to Frozen meat apply from ~~carrier's terminal/terminal depot at~~ ports named in Rule 1 (d) (ii), irrespective of whether served direct or not.

~~In the event that other ports than those named in Rule 1 (d) (ii) are served by direct call vessels then the rates on Frozen Meat named herein will apply at carrier's option. The carrier reserves the right to decide on which vessel Frozen Meat is accepted.~~

(b) ~~Cargo will be assessed at the rates specified in this tariff and will be subject to all rules and regulations contained herein. The rates exclude any charges which are customarily for account of the cargo incurred prior to the Carrier receiving cargo at Terminals or Terminal Depots in Australia and beyond the point of delivery of cargo from Terminals or Terminal Depots in the United States.~~

~~Wharfage, handling and any other charges customarily for account of the cargo shall be paid by the Merchant.~~

(b) Freight will be assessed at the base ocean rates specified in this tariff and unless otherwise specifically provided, will be subject to all rules and regulations contained herein. The rates are exclusive of any charges customarily for account of the merchant and incurred prior to loading and beyond ship's tackle at port of discharge.

AUSTRALIAN/EASTERN U.S.A. SHIPPING CONFERENCE		ORIG./REV.	PAGE
INTERMODAL FREIGHT TARIFF NO. 13 FMC NO. 13		5th	8
		CANCELS	PAGE
FROM: PORTS AND POINTS IN AUSTRALIA	To: PORTS AND POINTS IN THE UNITED STATES (SEE RULE 1)	4th	8
		EFFECTIVE DATE	
		5th February 1991	
RULES AND REGULATIONS		CORRECTION NO.	339

RULE 2. APPLICATION OF RATES

a. The rates and charges appearing in this tariff are applicable on commodities moving in the range listed in Rule 1.

b. Rates named herein are thru water-rail, water-motor, or water-rail-motor rates.

c. All rates and charges are stated in Australian Dollars unless otherwise stated.

d. The transportation of general commodities are subject to the minimum charges provided in Rule 6 when cargo moves in containers.

e. The thru rates published herein include all charges for switching, drayage, or other transfer services (including handling and wharfage) at intermediate interchange points. Any additional services, such as fumigation, unpacking and repacking goods for customs or any other Governmental agency inspection, any lifting operation or other miscellaneous services performed by the carrier at any time during transit due to some default or oversight by the shipper/consignee or holder of the Bill of Lading will be for account of the cargo without in any way affecting the liability of the carrier for the condition or quantity of the cargo.

INTERMODAL

Rule 2. Application of Rates

a. The rates and charges appearing in this tariff are applicable on commodities moving in the range listed in Rule 1.

b. Rates named herein are thru water-rail, water-motor, or water-rail-motor rates and unless otherwise provided apply from alongside vessel within reach of ship's tackle on carrier's loading terminal.

c. All rates and charges are stated in Australian Dollars unless otherwise stated.

d. The transportation of general commodities are subject to the minimum charges provided in Rule 6 when cargo moves in containers.

e. ~~The thru rates published herein include all charges for switching, drayage, or other transfer services (including handling and wharfage) at intermediate interchange points. Any additional services, such as fumigation, unpacking and repacking goods for customs or any other Governmental agency inspection, any lifting operation or other miscellaneous services performed by the carrier at any time during transit due to some default or oversight by the shipper/consignee or holder of the Bill of Lading will be for account of the cargo without in any way affecting the liability of the carrier for the condition or quantity of the cargo.~~

The through rates published herein are subject to Terminal Handling Charges as per Rule 29. Any additional services such as fumigation, unpacking and repacking goods for customs or any other Governmental agency inspection, any lifting operation or other miscellaneous services performed by the carrier at any time during transit due to some default or oversight by the shipper/consignee or holder of the Bill of Lading will be for account of the cargo without in any way affecting the liability of the carrier for the condition or quantity of the cargo.

AUSTRALIA/EASTERN USA SHIPPING CONFERENCE FREIGHT TARIFF NO.14 FMC NO.14		Orig./Rev. 6th	Page 43
FROM: Australian Ports and Ports in the Pacific Islands	TO: U.S. Atlantic & Gulf Ports and Ports in Puerto Rico and the US Virgin Islands	Cancels 5th	Page 43
RULES AND REGULATIONS		Effective Date 27 December 19	
		Corr. No: 121	

RULE 41. TERMINAL HANDLING CHARGE

1. Definition: The services performed in moving or conveying cargo from ship's tackle direct to place of rest on the terminal shall be known as "Terminal Handling Charge".

2. Application: Except as otherwise provided the following Terminal Handling Charges apply on all cargoes which are for final delivery at ports and points within the United States and in US protectorates:

   US$290 per 20ft container
   US$580 per 40ft container
   US$12.50 per 1000 kgs or cubic metre when freighted on weight or measurement basis.

   For LCL/Breakbulk cargoes, a minimum charge per Bill of Lading applies for any single shipment, of US$12.50 per 1000 kgs/cu. metre of cargo, whichever produces the greater revenue.

3. Terminal Handling Charges are not subject to CAF/BSC.

For Explanation of References See Page 3

RULE 41. TERMINAL HANDLING CHARGE

1. ~~Definition: The services performed in moving or conveying cargo from ship's tackle direct to place of rest on the terminal shall be known as "Terminal Handling Charge".~~

1. Definition: The cost of services performed in moving or conveying cargo from under ship's tackle alongside vessel on discharge terminal to exit of terminal gate shall be known as the Terminal Handling Charge.

2. Application: Except as otherwise provided the following Terminal Handling Charges apply on all cargoes which are for final delivery at ports and points within the United states and in US protectorates:

US$290 per 20ft container
US$580 per 40ft container
US$12.50 per 1000 kgs or cubic metre when freight on weight or measurement basis.

For LCL/Breakbulk cargoes, a minimum charge per Bill of Lading applies for any single shipment, of US$12.50 per 1000 kgs/cu. metre of cargo, whichever produces the greater revenue.

3. Terminal Handling charges are not subject to CAF/BAF.

APCRA Australia-Pacific Coast Rate Agreement

AECNA Australia-East Coast North America Shipping Conferences

Suite 33, 3rd Floor, 8-12 Bridge Street, Sydney 2000. Tel: (02) 247 3880. Fax: (02) 251 3865

EV:kl

8 October 1992

BY FACSIMILE

Mr. F. Beaufort
President
Australian Peak Shippers Association
Level 7
380 St. Kilda Road
MELBOURNE VIC 3004

Dear Mr. Beaufort,

Re: Amendments to Tariff Rules

(1) I refer to our letter of 21 September and our subsequent meeting with APSA on 28 September pursuant to Section 10.41 of the TPA to discuss our proposed amendments for the tariff rules.

(2) In our negotiations across the table we failed to obtain your approval of our view that base ocean rates of freight should apply from under ship's tackle at port of loading.

(3) However, with the view to reaching a resolve in the matter and in the interest of goodwill and co-operation, I am now pleased to advise that the Member Lines have agreed to accede to your contention that our relevant tariff rules should be amended to reflect applicability of the base ocean rates from "point of receival of cargo at ship's loading terminal/terminal depot."

(4) This agreement is now reflected in the attached amendments to the relevant tariff rules as presently published (new language underscored - deleted language overscored).

(5) These amendments together with the amended definition of the THC applicable in North American ports (as per our letter of 2 September), will now be filed for effectiveness 21 October 1992

Trusting the foregoing will now satisfy your requirements, we agai thank you for meeting with us on the 28th of last month.

With best regards.

E. Vibe

Encls.

13/10/92

1280

Sydney

8 October 1992

PORT/PORT TARIFFS (EAST & WEST COASTS)

RULE 2. APPLICATION OF RATES

(a) ~~Rates named herein apply from and to Terminal/Terminal Depot. In the case of conventional vessels, rates apply from and to alongside vessel.~~

~~The rates of freight applicable to Frozen Meat apply from carrier's terminal/terminal depot at ports named in Rule 1(d) (ii), irrespective of whether served direct or not.~~

~~In the event that other ports than those named in Rule 1(d)(ii) are served by direct call vessels than the rates on Frozen Meat named herein will apply at carrier's option. The carrier reserves the right to decide on which vessel Frozen Meat is accepted.~~

(a) Rates specified herein, unless otherwise specifically provided, are base ocean rates of freight and are subject to all rules and regulations contained herein and apply:

(i) From point of receival of cargo at ship's loading terminal/terminal depot.

(ii) To alongside ship under ship's tackle on ship's discharge terminal.

Australian Port Charge Additionals and any other charges customarily for account of the cargo shall be for account of the merchant.

(b) ~~Cargo will be assessed at the rates specified in this tariff and will be subject to all rules and regulations contained herein. The rates exclude any charges which are customarily for account of the cargo incurred prior to the Carrier receiving cargo at Terminals or Terminal Depots in Australia and beyond the point of delivery of cargo from Terminals or Terminal Depots in the United States.~~

~~Wharfage, handling and any other charges customarily for account of the cargo shall be paid by the Merchant.~~

(b) The base ocean rates of freight applicable to Frozen meat apply from ports named in Rule 1 (d)(ii), irrespective of whether served direct or not.

Sydney

8 October 1992

INTERMODAL TARIFFS (EAST AND WEST COASTS)

RULE 2. APPLICATION OF RATES

a. The rates and charges appearing in this tariff are applicable on commodities moving in the range listed in Rule 1.

b. Rates named herein are thru water-rail, water-motor, or water-rail-motor rates and, unless otherwise provided, apply from point of receival of cargo at ship's loading terminal/terminal depot.

c. Rates and charges are stated in Australian Dollars, except where otherwise indicated.

d. The transportation of general commodities are subject to the minimum charges provided in Rule 6 when cargo moves in containers.

e. ~~The through rates published herein include all charges for switching, drayage, or other transfer services (including handling and wharfage except at points in Washington, Oregon and California - see Rule 32) at intermediate interchange points. Any additional services, such as fumigation, unpacking and repacking goods for customs or any other Governmental agency inspection, any lifting operation or other miscellaneous services performed by the carrier at any time during transit due to some default or oversight by the shipper/consignee or holder of the Bill of Lading will be for account of the cargo without in any way affecting the liability of the carrier for the condition or quantity of the cargo.~~

e. The through rates published herein are subject to Terminal Handling Charges as per Rule 29. Any additional services such as fumigation, unpacking and repacking goods for customs or any other Governmental agency inspection, any lifting operation or other miscellaneous services performed by the carrier at any time during transit due to some default or oversight by the shipper/consignee or holder of the Bill of Lading will be for account of the cargo without in any way affecting the liability of the carrier for the condition or quantity of the cargo.

Sydney

8 October 1992

RULE 41. TERMINAL HANDLING CHARGE

1. ~~Definition: The services performed in moving or conveying cargo from ship's tackle direct to place of rest on the terminal shall be known as "Terminal Handling Charge".~~

1. Definition: The cost of services performed in moving or conveying cargo from under ship's tackle alongside vessel on discharge terminal to exit of terminal gate shall be known as the Terminal Handling Charge.

2. Application: Except as otherwise provided the following Terminal Handling Charges apply on all cargoes which are for final delivery at ports and points within the United states and in US protectorates:

   US$290 per 20ft container
   US$580 per 40ft container
   US$12.50 per 1000 kgs or cubic metre when freight on weight or measurement basis.

   For LCL/Breakbulk cargoes, a minimum charge per Bill of Lading applies for any single shipment, of US$12.50 per 1000 kgs/cu. metre of cargo, whichever produces the greater revenue.

3. Terminal Handling charges are not subject to CAF/BAF.