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**Australian
Competition &
Consumer
Commission**

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Our ref: M2005/307

Mr Martin Orchard
Manager
Australia to Europe Liner Association
Level 6, 131 York Street
SYDNEY NSW 2000

GPO Box 520
Melbourne VIC 3001

Level 35 The Tower
360 Elizabeth Street
Melbourne VIC 3000

ph (03) 9290 1800
fax (03) 9663 3699

www.accc.gov.au

By fax: (02) 9268 0230

Dear Mr Orchard

I refer to your letter dated 18 November 2005, previously acknowledged, in which you provided comments and documents to assist in the ACCC's investigation of a complaint by the Australian Peak Shippers Association (APSA).

APSA's complaint was that the members of the Australia to Europe Liner Association (in this letter and Annexures, 'AELA') had contravened section 10.41 of the Trade Practices Act 1974 (the Act) in relation to negotiations on the increase in outward Origin Terminal Handling Charges (OTHCs) that took effect on 28 July 2005. You indicated in your letter that it was AELA's understanding that the ACCC is making particular reference in its investigation to s 10.41(1)(b) of the Act.

The ACCC has been reviewing the terms of APSA's letter of complaint, the information provided with your letters of 18 November 2005 and 30 November 2005, and copies of correspondence between AELA and APSA provided to the ACCC by APSA. The ACCC has identified a number of issues on which it seeks clarification to assist it in preparing its final report of the investigation.

It appears to the ACCC that some of those issues in relation to OTHCs may fall for consideration under one or more provisions of s 10.41, that is, under ss 10.41(1)(a), 10.41(1)(b) or 10.41(2) of the Act. In the interests of providing to the Minister a final report that addresses all issues in dispute between APSA and AELA in relation to OTHCs, the ACCC is minded to deal in its final report with issues, not already dealt with in the draft report, arising from its review of correspondence, inquiries in the investigation and forthcoming submissions.

The ACCC invites your comments and invites you to respond to the issues and numbered questions set out in Annexure 1 to this letter, either as part of AELA's submission in response



to the draft report or separately. If responding separately, your reply by Monday, 13 February 2006 would be appreciated.

The ACCC received from a media service a copy of the *Lloyds List Daily Commercial News* article dated 6 January 2006 and a Shipping Australia Limited media release dated 10 January 2006, both of which indicated that the AELA conference agreement was to be dissolved with effect from 14 March 2006.

To assist the Minister to make a fully-informed decision as to whether or not the Minister should give a direction under s 10.44(1) of the Act, the ACCC is minded to address in its final report the dissolution of the conference agreement and any implications that that may have for the Minister's decision. You will find set out in Annexure 2 to this letter some additional numbered questions to confirm the accuracy of the above media reports, and to assist the ACCC to identify the agreement(s) that is relevant to AELA's negotiations with APSA in 2005 in relation to OTHCs. I invite you to reply in conjunction with your response to the ACCC's draft report or by Monday, 13 February 2006.

Public register and confidentiality of information provided by AELA

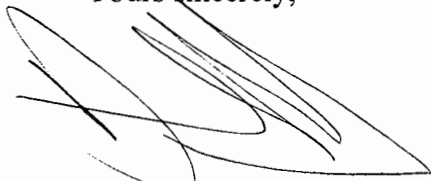
In your letter dated 18 November 2005, confirmed by your letter of 30 November 2005, you requested that the terminal services contracts dated 1 January 2003 and 1 January 2005 be kept strictly confidential. Subject to its obligations at law, the ACCC is committed to preserving the confidentiality of information imparted to it in confidence.

Would you please identify any parts of AELA's correspondence with the ACCC to date that AELA requests the ACCC, pursuant to s 10.88 of the Act, to exclude from the public register of the investigation required by s 10.13 of the Act. In your reply, please address the criteria in s 10.88(2) of the Act.

The ACCC also seeks AELA's agreement to identify in its final report the parties to the 2005 and 2003 contracts and the commencement and termination dates of those contracts; and to state that the 2005 contract provides for the members of the ANZ Alliance Service to coordinate such matters as the Berthing Window Plan, provision of sailing schedules and arranging for the delivery of cargo to the Berth, if those matters still appear to the ACCC to be relevant to the investigation following consideration by the ACCC of further information in the investigation.

The ACCC will provide to AELA for any response, before the ACCC's final report is completed, copies of documents from other sources as they are placed on the ACCC's public register of the investigation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Salisbury', written over a horizontal line.

David Salisbury
Director – Rail and Waterfront
Transport and Prices Oversight
Australian Competition and Consumer Commission

Annexure 1 to letter dated 31 January 2006 from ACCC to AELA

Consideration of matters raised by shipper body in negotiations and notification of change in negotiable shipping arrangements

Paragraph 10.41(1)(a) of the Act obliges the parties to a registered conference agreement to 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 to consider the matters raised, and representations made, by the shipper body.

Sub-section 10.41(2) of the Act obliges the parties to a registered conference agreement to 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.

1. When did AELA's negotiations with APSA on the increase in OTHCs that came into effect on 28 July 2005 start?
2. When did the negotiations terminate?
3. When did AELA first give APSA notice of the change in OTHCs that was to come into effect on 28 July 2005?
4. At the time AELA notified APSA of the change in OTHCs that was to come into effect on 28 July 2005, had APSA agreed with the member lines of AELA to a lesser period of notice for a change in negotiable shipping arrangements including OTHCs than the minimum period of 30 days provided by s 10.41(2)?
5. When did APSA first notify AELA that it wished to negotiate on the change in OTHCs?
6. Did the members of AELA consider APSA's request, in its fax of 14 July 2005, to sight the then current and previous stevedoring contracts of the members of AELA, before the increases in OTHCs notified to APSA came into effect? Please provide particulars of the lines' consideration of APSA's request.
7. Were the terms of AELA's faxed reply to APSA dated 22 July 2005, which, amongst other things, declined to permit APSA to sight the stevedoring contracts on grounds of commercial confidentiality:
 - (a) approved by the member lines of AELA before it was sent; or
 - (b) consistent with instructions of the AELA member lines?

8. Did the AELA member lines consider APSA's request of 14 July 2005 to sight the stevedoring contracts on any other occasions?
9. From the copy of the Agreement for Provision of Terminal Services at Brisbane, Sydney, Melbourne and Fremantle dated 1 January 2005, forwarded with your letter dated 18 November 2005 (the '2005 Terminal Services Agreement'), it appears to the ACCC that Consortium Hispania Lines is not a party to that agreement.

What consideration did Consortium Hispania Lines give to providing APSA with particulars of:

- (a) its own terminal services arrangements in Australia; and
- (b) the terminal services arrangements of the members of the ANZ Alliance Service?

Availability of 'reasonably necessary' information

Paragraph 10.41(1)(b) of the Act obliges the parties to a registered conference agreement, if the shipper body requests the parties to make available for the purposes of the negotiations and itself makes available for those purposes any such information requested by the parties – to make the information available to the shipper body.

14. The Shipping Australia Limited media release dated 10 January 2006 states in part:

The ACCC does point out that one of the challenges for the industry is to find ways of dealing with the possible effects of sharing information which is commercial in confidence whilst ensuring that Part X remains functional and members of AELA are happy to pursue that course in the future but that does not support a conclusion that Section 10.41 has been breached to date.

The media release also states:

They [the members of the AELA] accept the point made by the ACCC that the use of confidentiality agreements between members and APSA could be a way forward for the future.

In the light of the foreshadowed termination of the conference Agreement referred to in the Shipping Australia media release, through what avenues would members of the AELA pursue the use of confidentiality agreements with relevant designated shipper bodies in the negotiation of negotiable shipping arrangements?

15. AELA's extracts from the notes of the meeting with APSA dated 15 September 2005 include the following point:

APSA went on to inform AELA that some shippers were to meet with a stevedore the following week to explore the possibility of negotiating their own terminal charges direct with stevedores, thus avoiding the OTHCs applied by lines.

In a submission dated 12 January 2006 on the ACCC's public register in relation to another matter [application No 30242 for authorisation by the Container Logistics Action Group (CLAG)], APSA referred to CLAG's proposal to negotiate with P&O Ports and Patrick Stevedores at Port Botany. APSA also referred to APSA's Part X complaint that AELA had stated that it was unable to provide details of its stevedoring agreement with P&O Ports because of confidentiality. APSA stated:

APSA is also considering applying for authorisation so that it can deal with P&O Ports and Patrick Stevedoring in Melbourne.

The ACCC invites AELA to put its views as to whether and how confidentiality agreements for the purposes of s 10.41 negotiations might accommodate direct negotiations by shipper representatives with stevedores of the kind signalled by APSA.