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Dear Mr Salisbury

Commission draft report into the alleged breach of Part X, Section 10.41 of the Trade Practices Act (1974) by the Australia to Europe Liner Association (AELA)

I acknowledge receipt of your letter dated 31 January asking AELA to respond to a number of questions raised by the Commission. AELA will provide a detailed response to those questions shortly. In the interim, however, AELA thought it would be helpful to provide some comments on the draft report released by the Commission in December last year.

Provision of information vs. verification of information

AELA is concerned that the Commission's draft report fails to distinguish between information necessary for the purposes of a negotiation, and the right to verify that information.

In the circumstances of the negotiation between AELA and APSA, the information reasonably necessary to equip APSA to negotiate with AELA was information in relation to the underlying increase in the costs to AELA. AELA provided this information to APSA as requested.

The request from APSA to sight a copy of the agreement with P&O Ports for provision of terminal services (the **P&O Agreement**) was not a request to obtain "information reasonably necessary" for APSA negotiations – APSA already had this information. Rather, APSA's request was directed at verifying the information with which it had already been provided.

We note that, elsewhere in the TPA, parliament has recognised a distinction between "information" and "documents". For example, the Commission will be familiar with the drafting of section 155 and the clear distinction consistently drawn there between these two concepts. The fact that the parliamentary draftsman has drawn such a clear distinction between "information" and "documents" elsewhere in the TPA, yet referred in section 10.41 only to "information" makes it clear that, in drafting section 10.41, parliament could not have been intending to grant the broad and right of access to confidential documents that the interpretation set out in the Commission's draft report would create.

AELA submits that the Commission should not, in the absence of clear statutory language, adopt an interpretation of section 10.41 that will require parties to a registered conference agreement to provide full copies of sensitive documents to shipper bodies to achieve an objective that could easily be achieved in a less intrusive or commercially damaging manner.

Other General Comments

If, notwithstanding the above, the Commission takes the view that section 10.41 not only creates an obligation to provide information, but also to provide a means of verifying that information, AELA believes the Commission should give greater weight in its draft report to the efforts that AELA made in this regard.

When APSA requested verification of the OTHC costs under the P&O Agreement, AELA voluntarily arranged for a letter to be provided by P&O Ports that confirmed the amount of the increase in OTHCs payable by AELA members. That letter also confirmed that P&O Ports regarded the terms of the P&O Agreement as confidential.

AELA submits that, by providing APSA with certification of the quantum of the increase in OTHCs from both the members and P&O Ports, AELA provided such certification as could be regarded as "reasonably necessary".

As a further comment, we feel that the Commission has not given adequate weight to AELA's submission that interpretation of what information is "reasonably necessary" should take into account the particular circumstances of each negotiation. For example, the information that would be reasonable in order to justify, say, a 20% increase in terminal charges, would be expected to be more extensive than would be reasonable to justify an increase of, say, 0.2%. AELA believes the increase currently in issue - an increase in OTHCs of just 2.6% after some 5 years since the last increase - clearly falls at the latter end of this spectrum.

There is no reference to the Commission's own monitoring of stevedoring revenues and prices which have indicated rises in recent years. Even on its own, AELA believes this publicly available information might reasonably be regarded as being sufficient to allow APSA to confirm that the imposition of a mere 2.6% increase in OTHCs after some 5 years without any other increases was unlikely to constitute a taking advantage of any perceived market power possessed by AELA.

As far as APSA is concerned, it was not noted in the report that when the OTHCs were introduced by AELA in a revenue neutral way in 2000, APSA did not request AELA to reveal their stevedoring contracts. It is our understanding that members of other similar agreements have not shown the entirety of the terms and conditions of stevedoring contracts to APSA although they have been requested to do so.

The interpretation of the words "information reasonably necessary for negotiations" requires an appreciation of the context within which the negotiations are conducted. The Commission will be aware that in a previous investigation of OTHCs conducted by the Commission outside of Part X, it was acknowledged that on one view, such charges are an itemisation of a freight invoice rather than as an add-on to the ocean freight rate. In other words, a comparison of competitive costing is reflected in the total amount of an invoiced amount based on the movement of a container/s from one terminal gate to another between different shipping lines; irrespective of the itemisation of any particular invoice. There are other arguments supporting transparency of these costs on an invoice but they do not detract or contradict the proposition that the total through transport costs are subject to strong competition between shipping lines in the market place.

The reason for drawing these arguments to the attention of the Commission in this case, is to suggest that what could be considered necessary supporting information for a particular negotiation should be viewed within the competitive environment within which those charges will be assessed in the market place.

Specific Comments

At the top of page 5, the role of the Minister for Transport and Regional Services, does not contain a description of the Minister being required to consult with parties to an agreement following such an investigation as this one, to determine if undertakings could be given that would render withdrawal of the exemption redundant although reference is made to that fact in the final paragraph of the draft report (page 9).

Under the heading "Reasonably Necessary Information" in the first paragraph, reference is made to the refusal of AELA to agree to the request from APSA to show it the stevedoring contracts. Yet no mention is made of the fact that the other party to those contracts P&O Ports, supplied a letter which said that they were commercially confidential. At the bottom of page 7, an example is even given of a stevedoring company positively asserting confidentiality over the details of a contract but again no reference is made to P&O Ports in this particular situation.

At the top of page 8, the ACCC notes that claims for confidentiality should be capable of being substantiated. The Commission notes that the tariff information was provided by AELA to APSA during the negotiations and this would appear to be amongst the most sensitive information contained in the contracts. AELA only finally agreed to provide that information given the continued insistence of APSA and it was provided quite separate from the contract which APSA indicated was simply not satisfactory and that AELA would have to provide it to the ACCC. In other words, commercially confidential contracts were not actually shown to APSA but an extract of the actual rates before and after the increase was shown to verify the claim by AELA that there had been a 2.6% increase over the period. This was in conformity with the action taken by parties to some other agreements in relation to changes to OTHCs.

Conclusion

The member lines of AELA believe they have fully complied with section 10.41 of the TPA by providing all information that was reasonably necessary to APSA for these negotiations.

The demand by APSA to be provided with the P&O Agreement in its entirety went beyond the provision of information that was "reasonably necessary". Rather, the request was aimed at enabling APSA to verify information with which it had already been provided. Such a broad right of audit is not supported by the language of section 10.41.

AELA agrees with the Commission's calls at page 8 of its draft report for practical solutions to issues of confidentiality. AELA also agrees with the inference implicit from the Commission's observations that, in dealing with confidentiality claims, parties should look to impose limits on the scope and extent of disclosure and ensure that disclosure is not used to achieve a purpose that could be achieved in a less intrusive way.

AELA would be receptive to proposals that could provide comfort to shipper bodies that information with which they have been provided is correct, whilst avoiding the need for carriers to hand over to shippers the entirety of potentially highly sensitive source documents. AELA notes that, in its negotiations with AELA, APSA did not offer nor indicate that it would accept any such proposals.

Far from encouraging practical solutions to confidentiality, AELA believes that a finding that AELA breached section 10.41 in the current circumstances would set a precedent that would encourage unreasonable and unnecessary demands to sensitive documents by shipper bodies.

AELA submits that this would be contrary to both the intention and the language of section 10.41.

Regards

Llew Russell
Chief Executive Officer
Shipping Australia Limited