Department of Transport and Regional Services

Comments on ACCC draft report regarding complaint by the Australian Peak Shippers Association of breach of Part X of the *Trade Practices Act 1974* by members of the Australia to Europe Liner Association (AELA)

February 2006

Background

Part X of the *Trade Practices Act 1974* (TPA) creates the legislative framework for Australian exporters and importers using international liner cargo shipping services to interact commercially with liner shipping conferences. Shipping conferences are collaborative/collusive arrangements between shipping lines. Part X exempts these, otherwise illegal, arrangements from Part IV of the TPA allowing international liner cargo shipping operators to provide joint shipping services and set common prices. These exemptions from the competition regime are conditional on registration of the conference agreements under Part X. The registration of conference agreements is performed by the Registrar of Liner Shipping, a statutory function performed by an officer of the Department of Transport and Regional Services (DOTARS). An agreement registered under Part X may be deregistered on direction by the Minister to the Registrar of Liner Shipping if, *inter alia*, the parties to the agreement have been found by the ACCC to have breached obligations towards Australia shippers that are imposed by Part X.

The exemptions granted to liner operators by Part X essentially allow them to collaborate to provide international shipping services. The ultimate object of Part X is that through these exemptions, Australian exporters and importers in all states and territories will have access to stable services of adequate frequency and reliability at freight rates that are internationally competitive. Part X aims to achieve these objectives by ensuring cooperation and negotiations between the shipping line operators and Australian shippers. In its 1999 review of Part X, the Productivity Commission found that the interests of Australian shippers were aligned with Australia's national interest.

Part X provides that authorised officers of DOTARS may attend negotiations held under its auspices. Authorised officers do not take an active part in negotiations, but observe proceedings and, if asked, provide advice as to the requirements of the legislation. Authorised officers may make suggestions aimed at resolving deadlocks, but although these must be considered by the parties, there is no requirement to adopt them.

Australia to Europe Liner Association (AELA)

A shipping conference in one form or another has had a presence in the northbound trade from Australia to Europe for around 120 years. The current structure of the AELA was registered in 1994.

AELA provides a weekly, fixed-day scheduled eastabout and westabout service including ports in Aden, Djibouti, Red Sea and Gulf of Akaba, Egypt and North Africa, the Mediterranean, Adriatic Sea, Aegean Sea, Turkish and Black Sea, France, Netherlands, Germany, Scandinavian and Baltic Sea, and the United Kingdom.[1]

1 http://www.shippingaustralia.com.au/DesktopDefault.aspx?tabid=81

On 22 December 2005 Shipping Australia Limited advised the Registrar of Liner Shipping that the AELA conference organisation would be dissolved effective from 14 March 2006. The dissolution of one of the parties to this dispute means that the outcomes and recommendations of this specific ACCC investigation will be of no consequence to this particular conference agreement and the current dispute.

Australian Peak Shippers Association (APSA)

APSA is the designated outwards peak shipper body under Part X and represents Australia's liner shipping exporters generally in negotiations with liner shipping conference agreement members.

APSA's Memorandum of Understanding states that its aims include the consolidation and communication of the views of its members to liner shipping operators, other industry groups, port authorities and governments and emphasises that its principal function is to coordinate direct representation from relevant exporters in all negotiations conducted in its role as a designated peak shipper body.

APSA was declared by the Minister as a Designated Peak Shipper Body on 27 November 1990. DOTARS is, on the basis of its role as a shipper to Australia's Indian Ocean Territories, a member of APSA. DOTARS also provides some financial support to APSA on the basis of facilitating Australian exporters access to internationally competitive, frequent and reliable shipping services.

The countervailing power model

In its submission to the 2005 Productivity Commission (PC) review of Part X, DOTARS noted that Part X creates a countervailing power for shippers. This counterbalances the ability of ocean carriers acting collectively and collaboratively under the auspices of Part X. This ability is considered necessary to provide adequate shipping services to Australian exporters who are a long way from their markets and off the world's major shipping lanes.

Part X creates a countervailing power for shippers to strengthen their ability to negotiate with line operators. Part X requires conference members (ie shipping companies acting collaboratively) to negotiate minimum levels of service with exporters and importers and to require them to provide shippers with the reasonably necessary information they need in order to negotiate effectively. This information-provision requirement acts as a countervailing power by, on the one hand, encouraging a cooperative approach to the collection and sharing of relevant information while on the other threatening de-registration of an agreement should the lines fail to provide the information.

The creation of a countervailing power model is unsurprising given that the legislative history of Part X and its predecessors. Generally the bargaining position of shippers as been progressively enhanced while the exemptions available to shipping operators have been limited. In 1965 for instance the introduction of the *Trade Practices Act 1966* provided for disapproval of a conference agreement if there was no due regard for the need for services to be efficient, economical and adequate. Similarly, when Part X was re-enacted in its current form it did not provide a complete exemption from Part IV of the TPA but only from sections 45 and 47.

The countervailing power granted to shippers is a feature unique to the Australian liner regime and is generally exercised by peak shipper bodies such as APSA or by designated secondary shipper bodies representing particular commodities or geographic regions. Designated secondary shipper bodies are delegated by APSA to member secondary bodies or through nomination by the Registrar of Liner Shipping.

This model is partly based on the acknowledgment of the information asymmetry between shippers and shipping operators. A 1993 review of Part X of the TPA[2] noted that one of the main problems facing shippers was information asymmetry caused in no small part by the complexity of the freight rate, cost and revenue structures of liner shipping and the confidential nature of most rates negotiated between particular shippers and conference or lines.

This finding is considered to hold true today as was made clear by the findings of a recent European survey which found that the terminal handling charges (THCs) were "often considered not as transparent and, from a multi-trade perspective, cargo interests do not understand the difference in THC's (sic) for the various lanes (sic)". In relation to currency and bunker adjustment factors (CAFs and BAFs respectively), the survey found that almost 50 per cent of shippers did not understand how these were calculated and that only about 20 per cent saw a correlation between these surcharges and currency and fuel price fluctuations[3].

These findings are pertinent to the current dispute between APSA and AELA in that, in relation to surcharges, shippers have felt the information asymmetry hardest. Shippers around the world commonly complain about the lack of understanding and information regarding the contribution of surcharges such as CAFs, BAFs and THCs to the cost of sea transport.

APSA's complaint in the present case was that the members of AELA would not allow it to see contracts between AELA and the providers to AELA of stevedoring services during the negotiations. AELA members argued that the contracts could not be shown or the rates revealed due to the existence of confidentiality clauses.

Section 10.41 and the legislative countervailing power framework under Part X

The countervailing power model is enshrined in section 10.41. This sets out an obligation on a liner conference to take part in negotiations with a relevant designated shipper body in relation to issues such as freight rates, inter-terminal transport costs and surcharges. The section also requires the parties to a conference agreement to make available, when requested by the shipper body, any information reasonably necessary for the purposes of such negotiations.

Section 10.41 reads as follows:

---

[2] Report of Part X Review Panel *Liner Shipping Cargoes and Conferences*, Patrick Brazil, AO, Chairman, Emeritus Professor H. M. Kolsen, Captain John Evans, AGPS, Canberra, 1993.

[3] *Survey on terminal handling charges and currency and bunker adjustment factors.* Erasmus University's Centre for Maritime Economics and Logistics, 2005.

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

(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:

eligible Australian contract means:

(a) a contract entered into in Australia; or

(b) a contract where questions arising under the contract are to be determined in accordance with Australian law.

freight rates includes base freight rates, surcharges, rebates and allowances.

negotiable shipping arrangements:

(a) in relation to an outwards conference agreement—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, charges for inter-terminal transport services, frequency of sailings and ports of call); or

(b) in relation to an inwards conference agreement—means:

(i) the arrangements for, or the terms and conditions applicable to, inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement (including, for example, freight rates, charges for inter-terminal transport services, frequency of sailings and ports of call), where those arrangements or those terms and conditions, as the case may be, are embodied in an eligible Australian contract; or

(ii) the arrangements for, or the terms and conditions applicable to, the parts of the inwards liner cargo shipping services provided, or proposed to be provided, under the conference agreement that consist of activities that take place on land in Australia (including, for example, terminal handling charges and charges for inter-terminal transport services).

relevant designated shipper body:

(a) in relation to an outwards conference agreement—means:
    (i) a designated outwards peak shipper body; or
    (ii) a designated outwards 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; or
(b) in relation to an inwards conference agreement—means:
    (i) a designated inwards peak shipper body; or
    (ii) a designated inwards 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.

The ACCC in its draft report refers to section 10.41 as envisaging a *quid pro quo* exchange of information between shippers and parties to an agreement in the context of Part X negotiations.

Section 10.41 does not oblige the parties to a conference agreement to disclose any and all information requested by shippers but it focuses on the exchange of information which is *reasonably necessary* for the purposes of the negotiations. Part X does not define what may amount to information reasonably necessary and it must therefore be determined on a case by case basis.

Procedures set out in the legislation

In the event that the ACCC makes a final finding that the Minister had grounds to be satisfied that AELA has breached or proposed to breach its obligations under section 10.41, the legislation prescribes certain processes that must be undertaken before the Minister could give a direction to the Registrar of Liner Shipping to deregister the agreement in whole or in part. As noted earlier, this would be a theoretical exercise given the notice of termination of AELA.

Undertakings

In circumstances where such a finding is made and there is no notice of termination, DOTARS, on behalf of the Minister, would have to attempt, as described in paragraph 10.45(1)(b), to obtain an undertaking or action by the parties to the conference agreement that would make such a direction unnecessary. The substance of any such undertaking or action would be determined in consultations with the parties to the agreement and the original complainant. The views of the complainant would inform the decision of the Minister as to whether any undertakings offered by the parties (or otherwise obtained by DOTARS) made a direction to the Registrar unnecessary.

DOTARS would make clear to the parties to the conference agreement that any undertakings given to avert a direction by the Minister to deregister are, under section 10.49, court-enforceable commitments. Undertakings can be given at any time to the Minister.

Obtaining undertaking in this type of situation is not uncommon. In its submission to the PC 2005 review of Part X, the ACCC indicated that out of five investigations undertaken since 1992 under Part X, undertaking offers had been made on two

occasions (of the other three, one investigation was discontinued and on the other two the ACCC recommended no deregistration).

Undertakings are aimed at ensuring a net public benefit by obtaining a prompt resolution to a shipper complaint while allowing the agreement that underpins a joint service to continue in operation. That is, they are aimed at addressing conduct under the agreement.

For the purposes of this particular investigation, it may not be possible to obtain undertakings from the parties given the forthcoming dissolution of AELA could mean that there are no parties at the relevant time. In general, it is clear that obtaining bona-fide and successful undertakings minimises the need for the Minister to use the more drastic enforcement powers available in the form of directing the Registrar to de-register a conference agreement.

Deregistration

The requirement in section 10.41 to negotiate is backed by the threat of deregistration of an agreement should the Minister be satisfied that, as is relevant in the present case, subparagraph 10.45(1)(a)(ii) has been fulfilled and there were no successful undertaking or actions offered.

The consequence of deregistration is the loss of exemptions under Part X and, effectively, the loss of the capacity to operate as a conference, making the parties subject to the full force of the competition regime under the TPA. The Minister may direct the Registrar of Liner Shipping to cancel the registration of an agreement in its totality or in part.

The present case

Authorised officers of DOTARS attended two meetings (on 16 May and 15 September) during 2005 at which negotiations were held between APSA and AELA regarding a variety of issues arising from a proposal by AELA to implement a substantial general rate increase in its tariff rates. These issues mostly concerned verification of data in a cost and revenue spreadsheet provided by AELA to APSA in support of the proposed increase, but also involved the question of profits made by the lines through hedging of their bunker expenses.

Most discussion centred on verification of increases in ship charter costs and bunker costs claimed by the lines. The issue of THCs was brought up by APSA intersessionally on 14 July 2005. APSA wished to verify the rationale for an increase sought in THCs levied by AELA arising from an increase in stevedoring charges to the lines. In response, AELA provided APSA with a copy of a letter from P&O Ports to the ANZ Alliance Consortium (of which AELA is a manifestation in the Europe trades) which confirmed a 2.6% increase in contract terms and conditions across all tariff items. When APSA renewed its request to sight stevedoring contracts, the lines stated that stevedoring contracts were covered by confidentiality clauses.

After inter-meeting exchanges had indicated that the information sought by APSA would not be provided and AELA had indicated that it considered that it had provided sufficient information, reasonably necessary for the negotiations, to APSA. Legal

advice indicates that while s10.41 is not a strong mechanism to compel provision of information that was confidential, failure to provide information reasonably necessary for negotiations could give grounds for a complaint by APSA to the ACCC. DOTARS, at the request of APSA, outlined the substance of that advice at the September meeting.

DOTARS understands that, as a result of this deadlock, APSA approached the ACCC regarding possible breach by the AELA parties of s10.41 in relation to the negotiations. Although the current investigation concerns only the question of a possible breach of s10.41 in respect of stevedoring contracts, the case has the potential to provide guidance more widely for shippers and carriers in relation to the obligations to exchange information reasonably necessary for negotiations under Part X.

AELA's dissolution will mean the recommendations emanating from this specific investigation may need to be modified to reflect this fact. However, DOTARS is of the view that findings by the ACCC on the issues of principle raised by APSA will be of benefit to the administration of Part X and for the understanding of what is expected of the parties during negotiations under Part X.

DOTARS' comments

In the current case DOTARS agrees with the ACCC statement that "information directly related to the negotiations in question that enhances APSA's ability to exercise countervailing power should generally be provided by the conference agreement to the shipper body". If the increase in stevedoring charges by P&O Ports to the AELA liner operators was to be passed on to shippers as THCs, prima facie it would appear that such information was relevant and necessary for the purposes of the negotiations. Any information relating to price is of the essence where two parties meet in a commercial negotiation. Without sighting the contracts or knowing their terms APSA was not in a position to determine their composition and the appropriateness of the proposed increases.

The essence of Part X is to provide a balanced framework for the interplay of liner exemptions and shippers' rights to negotiate. The information exchange provisions of Part X recognise the information asymmetry that exists between the information available to conference member shipping lines and what would be available to shipper bodies without such provisions. The information exchange provisions also recognise the importance of shipper bodies being able to verify, to a reasonable extent and degree of certainty, the basis for increases in freight rates and charges sought by shipping lines on a collective basis.

Part X sets up a strong framework for cooperation during negotiations but one seemingly not designed expressly to compel the disclosure of confidential information. This may be a recognition that, if the information exchange provisions of Part X were made too onerous for the lines, then the lines may be reluctant to register agreements in Australia and seek to operate their agreements from overseas jurisdictions with less demanding requirements.

However, given most contracts incorporate some kind of confidentiality clause which restricts the contents of that contract to the parties involved, allowing these clauses to bar access to that information and to halt the negotiation process would nullify the intent behind the countervailing powers in Part X.

That information may be covered by a confidentiality clause does not mean it is not information reasonably necessary for the purposes of Part X. This applies also to information that may be regarded by the lines as "commercial-in-confidence".

In these circumstances such confidential information should be made available on a confidential basis to designated shipper bodies for the purposes of the negotiations. Where confidential information is provided to a shipper body, there need to be mechanisms to protect the commercial interests of shipping lines in a manner that protects the confidential nature of the information.

Complete and unconditional disclosure of any confidential information by one party to a contract could expose that party to legal action from the other parties to the contract and such disclosure, not being within the purview of Part X, should not be required. Therefore, in situations where information reasonably necessary is regarded as being "commercial-in-confidence" or is covered by a confidentiality clause, DOTARS urges the parties explore ways of conveying that information to the relevant designated shipper body on a confidential or other basis so as to enable the negotiations to continue.

In this regard, DOTARS' submission to the 2005 PC review of Part X provided a set of voluntary guidelines to guide the participants in Part X negotiations that had been informally endorsed a few years before by the heads of both APSA and Shipping Australia Limited. DOTARS considers that the principles behind those guidelines are still valid and are relevant to the present case. The guidelines stressed the importance of the parties' bona fides when negotiating. The guidelines reminded the parties that "good faith implies both sides are prepared to move, if necessary, from their initial positions in order to move towards a compromise". The guidelines also emphasised goodwill over regulatory enforcement of the objects of the Act wherever possible.

One alternative to an unconditional data release which was put forward by DOTARS officials attending shipper/liner negotiations and which was also canvassed in the ACCC draft paper, is the use of formal confidentiality agreements between the parties to negotiations held under the auspices of Part X. Such agreements would ensure that information provided was used only for the purposes of the negotiations under Part X and that the shipper body concerned would not disclose such information to any third party.

These confidentiality agreements would need to be flexible to deal with, for instance, the circumstances, such as is common in bunker contracts, where each line party to a registered conference agreement would not be aware of the contents of the others' contract details. The confidentiality agreement would need to contain a mechanism whereby the information provided, either separately or via the trade manager for the agreement, is also kept confidential *between* individual lines. A formal confidentiality agreement between a shipper body and members of a registered conference agreement

would provide assurance to the lines' overseas principals that such information would not be misused or made generally available.

To reiterate, such information should only have to be provided to designated shipper bodies on a basis that the information provided under section 10.41 was only for the purposes of negotiations under Part X and would be treated as confidential by the shipper body to which it was provided. It may be appropriate, in many cases, for a nominated officer of a designated shipper body to sight the information requested, without any copying of information, rather than copies being provided to the shipper body.

All possible alternatives should be explored in cases where the information is regarded as "commercial-in-confidence" or covered by confidentiality clauses, in order that shipping lines can comply with both the spirit of Part X, as well as its legal requirements, to the fullest extent possible.