Australian
Competition &
Consumer
Commission

Investigation into alleged breach of Part X section 10.41 by the Australia to Europe Liner Association

Draft Report

December 2005

Purpose

The purpose of this Draft Report is to seek comment from interested parties on the Australian Competition and Consumer Commission's (ACCC) draft view on whether grounds exist for the Minister for Transport and Regional Services (the Minister) to be satisfied that the Australia to Europe Liner Association (AELA) breached s. 10.41 of Part X of the *Trade Practices Act 1974 (the Act)* in negotiations with the Australian Peak Shippers Association (APSA) on outward terminal handling charges (OTHCs).

The ACCC will consider any comments it receives in the preparation of its final view to the Minister.

Background

On 11 August 2005, APSA lodged a complaint with the ACCC alleging that AELA had contravened s. 10.41 of Part X of the Act in negotiations on a proposed increase in OTHCs. APSA alleges that AELA breached s. 10.41 by refusing to allow it to sight contracts between AELA and the provider to AELA member lines of stevedoring services, P&O Ports, during the negotiations.

Among other things, s. 10.41 requires liner cargo shipping conferences to provide peak shipper bodies with "reasonably necessary" information, upon request, for the purposes of negotiation on "negotiable shipping arrangements".

After preliminary inquiries, the ACCC decided on 21 October 2005 to hold an investigation into the complaint under s. 10.48(1) of Part X of the Act.

The Australian Peak Shippers Association (APSA) is a designated peak shipper body for exporters registered under Part X of the Act. Its role is to negotiate (on behalf of exporters) on "negotiable shipping arrangements" with shipping lines that are parties to agreements under Part X. These arrangements include, for example, the level of terminal handling charges, general tariffs covering contracts negotiated in Australia and minimum service levels for trades that the parties provide.

AELA is a conference agreement registered under Part X. Member lines at 1 December 2005 were Compagnie Maritime Marfret, Consortium Hispania Lines, Contship Container Lines, Hamburg Suedamerikanischer Dampfschifffahrts Gesellschaft KG and Hapag-Lloyd Container Line. The lines covered by the AELA agreement service the outbound trade from Australia and New Zealand to Europe and the Middle East and North Africa.

OTHCs are fees levied by lines on shippers (exporters) to recover the costs of stevedoring services provided by container terminal operators. They are levied on a per container basis and are separate to the freight rates charged to shippers.

Legislative Framework

Part X sets up a system for regulating international liner cargo shipping services. The main components of that system are:

- registration of conference agreements;
- regulation of non-conference ocean carriers with substantial market power;
- regulation of unfair pricing practices; and
- registration of agents of ocean carriers.

Parties to a conference agreement relating to international liner cargo shipping services may apply for the registration of the agreement. If the conference agreement is registered, the parties will be given partial and conditional exemptions from s. 45 (contracts, arrangements and understandings that restrict dealings or affect competition) and s. 47 (exclusive dealing).

Parties to a registered conference agreement are required to negotiate with, and provide information to, representative shipper bodies.

The ACCC notes that the future of Part X is under review. In February 2005, the Productivity Commission released a review of Part X of the Act[1] which recommended the removal of Part X. If Part X were repealed, liner conference agreements would be fully subject to the normal competition provisions of the Act, unless authorised under Part VII. The ACCC understands that the Government is assessing the Productivity Commission's recommendations before responding.

Role of the ACCC under Part X

The ACCC has a role in investigating potential breaches of Part X and reporting to the Minister on the results of its investigations. The ACCC may investigate whether grounds exist for the Minister to be satisfied as to any of the matters listed in s. 10.45(1)(a) of the Act. The relevant matter in this investigation is whether the parties to the registered conference agreement have contravened, or proposed to contravene, s. 10.41.

The ACCC can hold an investigation under Part X on its own initiative (s. 10.48 (2A)), at the request of the Minister (s. 10.47(1)), or at the request of an organisation affected by the operation of a registered conference agreement (s. 10.48(1)).

Section 10.41

To off-set some of the potential power provided to shipping lines from being permitted to collectively determine freight rates, terms and conditions under registered conference agreements, Part X facilitates negotiations between shipper bodies and liner conferences. In this regard, s. 10.41 sets out the obligations of liner conferences in relation to negotiations with shipper bodies on negotiable shipping arrangements. Section 10.41 states that:

[1] Australian Government Productivity Commission, *Review of Part X of the Trade Practices Act 1974*, 23 February 2005.

"(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 where *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 a registered conference agreement) 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."

While Part X does not specify what requests would be considered reasonable or unreasonable, parties to a conference agreement are obligated to consider the matters raised, and representations made, by the relevant designated shipper body. The value of the negotiation process in Part X is that shipping lines are required to give genuine consideration to the views of shipper bodies. However, parties to a registered agreement are not obligated to accept the views of a shipper body or any proposals put forward by a shipper body in negotiations.

The ACCC has previously expressed the view that the information requirements of s. 10.41 appear to envisage a *quid pro quo* exchange of information between shippers and parties to an agreement in the context of negotiations. The ACCC expressed this view in its two most recent investigations: the 2000 report into the Trade Facilitation Agreement for South East Asia and the 2004 report on the Asia-Australia Discussion Agreement.

In recent years, the Productivity Commission and the Department of Transport and Regional Services (DOTARS) have expressed the view that the objective of s. 10.41 is to provide some countervailing power to Australian shippers in their dealings with the members of conference agreements. The Productivity Commission expressed this view in its February 2005 Report on Part X while DOTARS's view was set out in its submission to the Productivity Commission's Inquiry into Part X.[2] DOTARS made the following statement in its submission to the Productivity Commission's 2005 inquiry into Part X:

> "Part X is probably unique among liner regimes in that it places certain obligations on conference members towards shipper bodies that have been designated by the Minister to exercise countervailing powers on behalf of shippers."[3]

[2] Ibid., overview p. xxxvii
[3] Ibid., p. 145.

Role of the Minister for Transport and Regional Services

Under s. 10.48(2), if the ACCC decides to hold an investigation into the question of whether grounds exist for the Minister to be satisfied in relation to the agreement of one or more specified matters referred to in paragraph 10.45(1)(a), it is required to inform the Minister of its decision and to report to the Minister.

If the Minister is satisfied that a contravention has occurred, the Minister may exercise the powers set out in s. 10.44. Pursuant to s. 10.44, the Minister may direct the Registrar of Liner Shipping to cancel the registration of a registered conference agreement or to 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.

Assessment of Issues

To assist it in its assessment of whether or not the refusal by AELA to allow APSA to sight its contracts with stevedoring company, P&O Ports, constituted a breach of s. 10.41, the ACCC first formed a view on the following two issues:

- what is meant by "reasonably necessary" information for the purposes of negotiation; and

- the implications of claims of confidentiality on the application of s. 10.41.

Reasonably Necessary Information

In applying s. 10.41(1)(b) to the current investigation, three facts are clear: firstly, that APSA requested AELA to allow it to sight the contracts between AELA and its stevedoring company, P&O Ports; secondly that this request was refused by AELA; and thirdly that AELA provided APSA with particulars of stevedoring tariffs charged by P&O Ports by facsimile dated 15 August 2005. Therefore, the key question is whether the information requested, in the circumstances, was "reasonably necessary" for the purposes of the negotiations. If the information was "reasonably necessary" for the purposes of the negotiations then AELA's refusal to allow APSA to sight the contracts would result in the ACCC forming the view that grounds exist for the Minister to be satisfied in relation to the agreement of one or more of the specified matters referred to in s. 10.45(1)(a).

In assessing whether AELA breached s. 10.41, the ACCC applied the facts of the matter to the following questions to guide the ACCC in its investigation:

- whether the information requested would be likely to enhance APSA's ability to exercise countervailing power;
- whether by not providing the information requested by APSA, AELA would be likely to derive some benefit from the negotiations it could not otherwise sustain; and
- whether the absence of disclosure compromises effective negotiation.

APSA's ability to exercise countervailing power

The objective of s. 10.41 is to provide shippers with some countervailing power to offset the potential power provided to shipping lines from exemption from competition provisions pursuant to registration of the conference agreement. As such, the ACCC considers 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 upon request.

In relation to the negotiations that are the subject of this investigation, the ACCC understands that both AELA and APSA accept the principle that OTHCs charged by lines to shippers are intended to cover charges levied by the stevedore to the shipping lines. However, the ACCC considers that there may be circumstances where competitive forces may result in liner conferences charging shippers OTHCs that are lower than the charges charged to them by the stevedore.

Given that AELA passes through to APSA, in the form of OTHCs, charges made by P&O Ports, any contracts between AELA and P&O Ports that set out the charges covered by OTHCs would be relevant to the negotiation. Sighting the contracts between AELA and P&O Ports would have allowed APSA to check that AELA's proposed increases in OTHCs were justified by the level of increases in charges by P&O Ports. Sighting the contracts would also have allowed APSA to inform itself on whether or not discounts, rebates, bonuses or penalties applied to the charges imposed by the stevedore.

The ACCC considers that whether or not the contracts actually contain any such information in addition to the charges causing the lines to levy OTHCs on shippers is a secondary issue. Knowledge of the existence or otherwise of such additional information in the contracts would, in itself, have been of value to APSA in the negotiations. Without sighting the contracts, APSA was unable to form an understanding of the actual OTHCs that AELA would incur and consequently it was unable to properly form a judgement on the reasonableness of the proposed OTHCs being passed on to it.

AELA also argues that the contracts should not be sighted by APSA or any other third party because potential competitors could use the information in the contracts to gain a competitive advantage. The ACCC considers that if competition concerns exist, parties may seek to protect their position through the use of confidentiality agreements or other arrangements (see discussion below).

In summary, the ACCC considers that sighting the contracts between P&O Ports and AELA would have allowed APSA to inform itself about the actual OTHCs paid by AELA to P&O Ports. The ACCC considers that this information is directly relevant to the negotiations in question and that disclosure would have enhanced APSA's ability to exercise countervailing power.

Benefits to AELA

The second guideline question is whether AELA would benefit from not providing APSA with the information requested. Conceivably, if the pricing arrangements implemented by the stevedoring company with shipping lines included a system of discounts, rebates and bonuses

and APSA was not aware of such arrangements, it would be possible for AELA to pass on to APSA members a larger OTHC fee than AELA lines were being charged by the stevedoring company, if its disclosure were limited to nominal prices. Such an outcome would appear to be against the interests of shippers represented by APSA and against the broader public interest.

Effective negotiation

The ACCC considers that in the absence of this information APSA would be compromised in its ability to effectively engage in negotiation of prices, terms and conditions of service. The ACCC considers that such a degree of information asymmetry may unduly compromise the effectiveness of negotiations.

Confidentiality

As previously noted, one of the main objectives of Part X and s. 10.41 in particular is to create scope for shippers to exercise countervailing power as a way of redressing the advantages available to lines under the immunities from several of the competition provisions of the Act. Recognising that information asymmetries between lines and shippers can be significant and that this can alter the balance of negotiating power in favour of lines, s. 10.41 provides for sharing of information by shippers and lines.

However, in promoting countervailing power, Part X can create tension between the lines' rights to protect their commercial interests and the shipper body's right to access "reasonably necessary" information.

AELA refused APSA the opportunity to sight its contracts with P&O Ports on the grounds that the contents of the contracts were confidential. APSA argues that this effectively prevented it from entering into meaningful negotiations on the new OTHCs because, without sighting the contracts, it was not possible for APSA to assess whether any rebates, discounts or bonuses were offered by P&O Ports to the AELA lines.

At a practical level, this investigation has shown that the issue of confidentiality can impact on the effectiveness of the Part X regime. Given the *quid pro quo* exchange of information that characterises s. 10.41, the question that arises is whether there is a risk that the basis on which the "give-and-take" nature of the negotiation framework of Part X is designed may be frustrated if requests for information are refused on the grounds of confidentiality.

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 while ensuring that Part X remains functional.

Part X does not set out a defence for withholding information based on the relevant information being commercially sensitive or confidential. That said, common law does protect the unauthorised publication of confidential information in circumstances where an obligation of confidence is imposed. Such an obligation generally relates to information that if disclosed could cause harm or detriment. Accordingly, a person may in some circumstances seek to assert confidentiality over commercially sensitive information. For example, if a stevedoring company has sought to assert confidentiality over the details of a

contract, a conference might argue that it is under an obligation not to disclose the information. Any such claims should be capable of being substantiated. In this regard, the ACCC notes that the tariff information already provided by AELA to APSA during the negotiations appears to be among the most sensitive information contained in the contracts between AELA and P&O Ports. The ACCC therefore questions the need for these contracts to be regarded as confidential in their entirety.

In considering confidentiality claims the courts tend to ask whether justice could be done by requiring disclosure for a useful purpose while imposing limits on the scope and extent of disclosure, and the use to which that information may be used. For example, some form of limited disclosure may be appropriate in some cases. There are a number of ways in which confidentiality concerns can be dealt with. Confidentiality undertakings that limit disclosure to certain named persons are one option. The ACCC understands that this possibility was not canvassed by APSA or AELA during their negotiations over OTHCs.

On balance, the objectives of Part X call for a practical solution to the issue of confidentiality. Accordingly, the ACCC considers that parties should at least explore options for dealing with any confidentiality concerns. Confidentiality agreements may be an appropriate means of dealing with concerns about the use of confidential information during negotiations under Part X. Other possible options may include the use of the authorised officer as a go-between or the use of independent audits of reports.

Draft View

It is the ACCC's draft view that the information requested by APSA in its negotiations with AELA was "reasonably necessary" for the purposes of the negotiations. Sighting the contracts between AELA and P&O Ports would have improved its understanding of the charges being passed on to it and would have enhanced APSA's countervailing power. The ACCC considers that not allowing APSA to sight the contracts compromised its ability to effectively engage in negotiation of prices, terms and conditions of service.

The contracts with the stevedoring companies would seem to be an appropriate source of information on discounts, rebates and bonuses surrounding OTHCs. It is the ACCC's draft view that APSA should have been allowed to sight the contracts in order to satisfy itself that the fees passed to it reflect the real charges that would be incurred by AELA, or appropriate alternative arrangements made.

In relation to the question of confidentiality, the ACCC considers that a claim of confidentiality in any individual case will not necessarily represent reasonable grounds for refusing to provide 'reasonably necessary' information. Claims of confidentiality can potentially nullify the effectiveness of the negotiation framework in Part X.

The ACCC considers that parties concerned about the disclosure of sensitive information should explore options for dealing with such concerns, for example by using confidentiality agreements. The ACCC's assessment of confidentiality in relation to this matter is specific to this Part X investigation. The reasonableness of confidentiality claims and of the measures designed to deal with them will be assessed on a case by case basis.

In summary, it is the ACCC's draft view that grounds exist for the Minister to be satisfied that AELA contravened s. 10.41 by not allowing APSA to sight its contracts with P&O Ports.

Draft Recommendation

The ACCC notes that in response to a breach of s. 10.41 the Minister may exercise the powers set out in s. 10.44. Section 10.44 provides for the Minister to cancel the registration of a registered conference agreement or to 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 ACCC notes that this is the first investigation into an alleged contravention of s. 10.41 of Part X since a report by its predecessor, the Trade Practices Commission, 13 years ago and that there was little guidance to parties on what is meant by "reasonably necessary" information for the purposes of negotiations.[4]

The ACCC also notes that under s. 10.49, parties to a registered conference agreement may, at any time, offer to give an undertaking to the Minister to do, or not to do, a specified act or thing. The Minister can take this factor into account when deciding whether (or how) to exercise his powers.

Submissions

Comments on the Draft Report must be provided by close of business on Friday 10 February 2006 and can be sent by e-mail to david.salisbury@accc.gov.au and/or by post to:

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