

*Department of the  
Parliamentary Library*



INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 29 2000-01

Trade Practices Amendment (International Liner  
Cargo Shipping) Bill 2000

ISSN 1328-8091

© Copyright Commonwealth of Australia 2000

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

## Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:  
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2000

I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 29 2000-01

Trade Practices Amendment (International Liner Cargo  
Shipping) Bill 2000

Mark Tapley  
Law and Bills Digest Group  
21 September 2000

# Contents

Purpose . . . . .	1
Background . . . . .	1
Liner Shipping and Conferences . . . . .	1
Why have Conferences? . . . . .	2
What is Part X about? . . . . .	2
Productivity Commission Review . . . . .	3
The Government Response to the Productivity Commission Report . . . . .	4
Main Provisions . . . . .	4
Importer Protection . . . . .	5
Countervailing Power . . . . .	5
Minimum Standards . . . . .	6
Ministerial Exemption Power . . . . .	6
Scope of the Exemption for Conferences from the TPA . . . . .	7
Stevedoring Contracts . . . . .	8
Price discrimination . . . . .	8
Expanded Ministerial Powers . . . . .	9
Open and Closed Conferences . . . . .	11
Australian flag operators . . . . .	12
Undertakings . . . . .	12
Concluding Comments . . . . .	13
Endnotes . . . . .	13

# Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000

**Date Introduced:** 28 June 2000

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** Part 1 and Division 1 of Part 3 commence 28 days after Royal Assent. Part 2 and Division 2 of Part 3 commence at least 4 months but no more than 6 months after assent. The delay is to allow parties to make arrangements to comply with the new provisions concerning inward liner shipping conferences.

## Purpose

This Bill will amend Part X of the *Trade Practices Act 1974* (TPA) which regulates international liner cargo shipping. The principal amendments seek to:

- extend to Australian importers a similar level of protection to that enjoyed by Australian exporters in negotiating with liner conferences, and
- increase the power of the Minister to deal with concerns about activities of shipping conferences which may substantially lessen competition.

## Background

### Liner Shipping and Conferences

Liner ships mainly carry containerised cargo and account for around 48 per cent by value of Australia's seaborne exports and 74 per cent of seaborne imports. In 1997-98 Australia's liner exports totalled over 18 million tonnes valued at \$33.5 billion. In the same year, liner imports amounted to 12 million tonnes and were valued at over \$47 billion. Prominent liner exports include meat, aluminium and cereals while paper products, chemicals and machinery are major imports.<sup>1</sup>

Part X of the TPA provides for limited exemptions from the restrictive trade practices provisions (Part IV) for international liner cargo shipping conferences. A conference is defined by section 10.02 of the TPA as an 'unincorporated association of two or more

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

ocean carriers carrying on two or more businesses each of which includes the provision of liner cargo shipping services.’ Conferences are typically route specific. They may engage in joint price setting, capacity rationalisation, revenue and/or cost pooling arrangements, discriminatory pricing structures and forms of customer loyalty agreement. Conferences carry, by value, around 50 per cent of Australia’s liner exports by value and 60 per cent of liner imports.<sup>2</sup>

### Why have Conferences?

Along with major trading parties such as the United States, Japan, Korea, the European Union and New Zealand<sup>3</sup>, Australia provides liner conferences with exemptions from competition legislation. Exemptions are provided principally because countries have decided that it is in the interests of their exporters and importers (shippers) to allow conferences to operate. In its recent report, the Productivity Commission found that the shipper’s demand for liner shipping is diverse in terms of cargo size and type and that the cost of coordinating these diverse demands practically eliminates chartering as an efficient form of delivery. Conference members are able to pool their resources and provide regular scheduled liner services and thereby reduce transaction costs for shippers.

### What is Part X about?

Section 10.01 states that the principal objects of Part X are:

- to ensure that Australian exporters have continued access to outwards liner cargo shipping services of adequate frequency and reliability at freight rates that are internationally competitive
- to promote conditions in the international liner cargo shipping industry that encourage stable access to export markets for exporters in all States and Territories, and
- to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade.

These objects are to be achieved by the provision of safeguards against abuse of conference power, which include

- enacting additional restrictive trade practice provisions applying to ocean carriers
- requiring conference agreements to meet certain minimum standards
- making conference agreements generally publicly available
- permitting only partial and conditional exemption from restrictive trade practice prohibitions, and
- requiring conferences to take part in negotiations with representative shipper bodies.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Without the exemptions contained in Part X conference participants would be in danger of contravening section 45 of the TPA which prohibits contracts, arrangements or understandings that restrict dealings or affect competition and section 47 which prohibits exclusive dealing. Conference participants remain subject to the prohibitions on third line forcing in subsection 47(6)<sup>4</sup> the misuse of market power in section 46 and mergers and acquisitions which substantially lessen competition in section 50. In order to qualify for the exemptions, conference agreements must be registered with the Registrar of Liner Shipping in the Department of Workplace Relations and Small Business.

Part X also seeks to promote the interests of Australian exporters by a range of measures designed to improve their negotiating capacity. Amongst other matters Part X allows exporters<sup>5</sup> to form 'designated shipper bodies' and requires outward conferences (ie conferences that transport cargo to other countries) to negotiate with these groups. In relation to outwards conferences, agreements must provide for a minimum level of shipping services and must specify that any questions arising under the agreement must be determined in Australia according to Australian Law.

The Australian Competition and Consumer Commission (ACCC) is empowered to investigate possible breaches of Part X and the Minister may order the deregistration of a conference. The ACCC may also examine complaints about non-conference liners that have substantial market power.

### **Productivity Commission Review**

Part X has been the subject to four reviews since 1977.<sup>6</sup> The latest review performed by the Productivity Commission came about as a result of a reference by the Assistant Treasurer in March 1999. The review was necessitated by the Commonwealth's commitment in the 1995 Competition Principles Agreement with the States and Territories to review all legislation containing provisions restricting competition.

The Commission reported to the Government in September 1999. Its major recommendations and findings included that:

- Part X should be retained and re-examined in 2005
- the exemption from the TPA which allows conferences to set freight rates should be clarified. The Commission said the exemption should only apply to land-based charges that normally form part of the 'terminal-to-terminal'<sup>7</sup> shipping contract (that is, one that includes not only the 'blue water' component but also the sorting and stacking of containers within a container terminal). A related recommendation was that sections of the TPA<sup>8</sup> which allow the fixing of door-to-door freight rates by conferences for outward and inward liner shipping respectively should be deleted
- the existing practice of allowing members of shipping conferences to negotiate collectively with stevedores should be confirmed

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- section 10.05, which prohibits price discrimination in certain circumstances be repealed
- where the Minister is considering whether a conference or non-conference carrier with substantial market power is misusing market power in order to hinder an efficient Australian carrier there should be an explicit requirement to ensure that shippers' interests as taken into account
- the enforcement of undertakings should be made more effective and flexible by inserting a provision based on section 87C of the TPA
- importers should be allowed to form a collective to negotiate terminal handling charges if a cost effective mechanism can be devised but inward conferences should not be subject to the same obligations as outward shipping conferences because of jurisdictional difficulties
- discussion agreements (non-binding agreements which cover conference and non-conference carriers) should not be treated differently from other forms of cooperation among carriers, and
- sufficient competitive pressures exist to negate any potential monopoly power of closed conferences.

### **The Government Response to the Productivity Commission Report**

In December 1999 the Government announced<sup>9</sup> its response to the Commission's report. While the Government generally endorsed the thrust of the report it differed with the Commission over measures needed to protect Australian shippers and announced that amendments would be made in order to:

- ensure that the arrangements applying to outward conferences should also apply to inward conferences, and
- give the Minister for Transport and Regional Services, and the ACCC increased powers to deal with concerns that may arise from the operation of discussion agreements<sup>10</sup> and closed conferences.

### **Main Provisions**

Under subsection 29(1) of the TPA the Minister may give directions to the ACCC concerning the exercise of its functions and powers. Subsection 29(1A) however lists a range of provisions where the Minister cannot direct the ACCC. **Item 1** adds Part X to the list. The measure may be seen as increasing the independence of the ACCC in relation to the administration and enforcement of Part X.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



**Item 4** amends the objects of Part X to reflect the Government's decision to extend, as far as practicable, the protection given by the Part to Australian importers.

## Importer Protection

### Countervailing Power

As noted above, Part X of the TPA seeks to provide exporters with countervailing power to offset the market power of the conferences. One way this objective is promoted is through the registration of the designated shipper bodies. The Minister may designate such bodies under section 10.03. A designated peak body is given the right to negotiate with conferences on freight rates and service levels that apply under registered conference agreements.<sup>11</sup> Currently the Australian Peak Shippers Association (APSA) is the designated shipper body.

The Minister may also designate secondary shipper bodies where the Minister is of the opinion that an association represents the interests of shippers in relation to a particular trade or product or from a region. There are presently 12 secondary bodies registered. They do not have an automatic right to require conferences to negotiate with them however the right may be granted by the Registrar of Liner Shipper or APSA may delegate its negotiating rights.<sup>12</sup>

As the provision stands, such bodies may be designated only if they represent the interests of outward shippers (exporters). **Item 52** amends section 10.03 to permit the Minister to declare that an association is designated inwards peak shipper body or a designated inwards secondary shipper body. Such declarations will be disallowable instruments (**item 55**).

**Item 89** inserts **proposed subsection 10.29(1)** which will require parties to a provisionally registered inwards conference agreement to negotiate with designated inwards peak shipper bodies about the minimum level of inwards liner cargo services to be provided under the agreement.

Section 10.41 requires conference members to negotiate with a designated shipper body on 'negotiable shipping arrangements'. This term is defined by subsection 10.41(3) to include matters such as freight rates, frequency of sailings and ports of call. Only arrangements in relation to outwards liner cargo services are subject to the negotiation requirement. **Item 99** inserts amendments section 10.41 which expand the definition of negotiable shipping arrangements to include inwards liner cargo shipping services. Members of an inward conference agreement must negotiate matters such as freight rates, frequency of sailings, charges for inter-terminal transport services and ports of call.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

### Minimum Standards

Division 3 of the TPA provides minimum standards for conference agreements. In relation to outwards conferences, agreements must provide for a minimum level of shipping services and must specify that any questions arising under the agreement must be determined in Australia according to Australian Law.<sup>13</sup> It also provides that a conference agreement may only include an exclusionary provision<sup>14</sup> or a provision that has the purpose or likely effect of lessening competition if, among other matters<sup>15</sup>, it is necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

The Bill recognises the possibility that the application of these provisions to inward conference agreements could create jurisdictional problems. As a consequence there is no attempt to require that disputes involving inward conferences agreements must be determined in Australia according to Australian Law. **Item 59** however inserts proposed **subsection 10.07(2)** which states that an inwards conference agreement must contain provisions specifying the minimum level of inward liner cargo shipping services to be provided under the agreement. **Item 60** amends section 10.08 to provide that an inwards conference agreement may only include an exclusionary provision or a provision that has the purpose or likely effect of lessening competition if among other matters, it is necessary for the effective operation of the agreement and of overall benefit to Australian importers.

Generally<sup>16</sup>, the Registrar must be satisfied that the agreement complies with section 10.07, 10.08 and 10.29 before it can be registered (**proposed paragraphs 10.33(1)(b) and 10.33(1)(c)**).

### Ministerial Exemption Power

The Productivity Commission recommended against imposing obligations on inwards conferences under Part X. Historically, Australian governments have been cautious about extending Part X provisions to inward trades because of potential jurisdictional conflict and practical difficulties. The Commission argued that extending Part X could impose additional costs on carriers and ultimately shippers. While the Commission stated that it is accepted convention that the exporting country regulates outwards conferences, it acknowledged that Europe and the US assert jurisdiction over both inwards and outwards conferences.<sup>17</sup>

In recognition of the fact that jurisdictional conflicts may arise, the Bill inserts a new **Division 12A**. Under **proposed section 10.72A** the Minister make an order exempting specified conference agreements, inwards liner cargo shipping services or conduct from various requirements of the Part including new section 10.07(2).

**Proposed section 10.72B** states the Minister may only make such an order if he or she is of the opinion that it is in the national interest. In determining the national interest the Minister must have regard to:

- Australia's international relations

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- Australia's international obligations
- any relevant principle of international law or practice
- the interests of Australian exporters
- the interests of Australian importers, and
- any other relevant matter.

Such orders may be disallowable by either House of the Commonwealth Parliament.

### Scope of the Exemption for Conferences from the TPA

Sections 10.14 and 10.22 deal with exemptions relating to conference agreements. The following activities are covered by the exemption:

- the transport of cargo by sea
- other activities that take place outside Australia, and
- the fixing of door-to-door rates provided freight rates are also set for shippers that want to use only the following components of the service:
  - the transport of cargo by sea
  - activities that take place in Australia within the limits of a wharf, and
  - activities that take place outside Australia at a wharf or adjacent terminal facilities.

In summary, Part X allows conferences<sup>18</sup> to set door-to-door rates (intermodal rates) provided that they offer shippers a rate that excludes the pre or post-terminal land based component.<sup>19</sup> The Commission concluded that while individual carriers should be able to offer a door-to-door rate, conferences should not. The Commission did however recommend ensuring that the exemption cover terminal handling because of the technical efficiencies that can be gained in container handling.<sup>20</sup>

It is unclear whether the Part X exemptions extend to the collective negotiation of stevedoring contracts by conferences. The Department of Transport and Regional Services noted that collective negotiation of stevedoring contracts has been the customary practice.<sup>21</sup> The Commission concluded that it would be inefficient to require lines to negotiate individually with a stevedore.

**Item 67** inserts a **new section 10.14**.<sup>22</sup> The new provision applies to both outward and inward liner shipping arrangements<sup>23</sup>. The exemptions from the restrictive trade practices provisions apply in relation to:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the parts of the service that consist of transport of the cargo by sea
- stevedoring services<sup>24</sup>
- activities that take place outside Australia
- charges for an inter-terminal transport service, and
- fixing of and the determination of terms and conditions for bills of lading.<sup>25</sup>

A definition of inter-terminal transport services is inserted by **item 26**. The term refers to a service for the transport of various types of cargo from an inland terminal to a port terminal and vice versa and between port terminals. This will allow conferences to make greater use of facilities beyond traditional wharf location.<sup>26</sup>

The exemptions do not cover dealings between parties to a conference agreement and a person who provides ancillary services on behalf of a scheduled cargo shipping services. The term 'ancillary service' is defined in **proposed subsection 10.02(1)** and includes an inter-terminal transport service or stevedoring services.

### Stevedoring Contracts

**Proposed section 10.24A** provides that section 45 and 47 do not apply to stevedoring contracts. According to the Explanatory Memorandum the amendment reflects the fact stevedoring arrangements are part of the normal terminal-to-terminal services provided by conference lines. Conference lines negotiating with stevedores are able to offer large volumes of cargo which can secure lower rates.<sup>27</sup>

### Price discrimination

Existing section 10.05 prohibits an ocean carrier from discriminating between shippers requiring similar services if such discrimination is likely to cause substantial lessening of competition in a market. Carriers have a range of defences available to them including that the discrimination made only reasonable allowance for differences due to the:

- different origins and destinations origins
- different quantities and kinds of cargo, and
- capacity of the ocean carrier.

The Productivity Commission found this provision has not been used to date and may have little practical effect. It also noted that section 10.05 is based on section 49 of the TPA which was repealed in the *Competition Policy Reform Act 1995* in part because of enforcement problems. Most significantly, the Commission found that the discrimination provisions may lessen economic efficiency by reducing the pricing flexibility of carriers.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

It is not clear that carrier's are presently entitled to reduce prices to some shippers in order to reduce excess capacity. In the Commission's view this may potentially reduce the level of Australia's exports or imports.<sup>28</sup>

While some shippers argue that section 10.05 provides some countervailing market power to shippers, the Commission stated that any lessening of competition brought about by discrimination could be dealt with by section 46 of the TPA which deals with the misuse of market power. The Government accepted this analysis and consequently **item 56** repeals section 10.05.

### Expanded Ministerial Powers

Section 10.47 provides that the Minister may ask the ACCC to investigate whether a conference agreement contravenes the registration requirements and other provisions of Part X. Under section 10.48 a person affected by the operation of a conference agreement such as a designated shipper body may also request the ACCC to hold an investigation. The ACCC is only required to conduct an investigation at the request of the Minister.

If the Minister is satisfied that the conference agreement has breached its obligations under Part X (these obligations are specified in section 10.45), the Minister may direct the Registrar to partially or totally deregister a conference. The consequence of deregistration is that conference members become exposed to sections 45 and 47 of the TPA.

Division 8 is amended to give the Minister additional enforcement powers.

**Item 102** amends **section 10.44** to provide for greater transparency where the Minister has decided that the registration of a conference agreement should be cancelled. The new disclosure requirements apply where the Minister has received a report from the ACCC in relation to an agreement that substantially lessens competition or an agreement that unreasonably prevents a new shipping line from joining a conference and the Minister has decided to cancel the registration. **Item 108** strengthens the Minister's powers in relation to registered conference agreements. Currently, the Minister may only give a direction to cancel the registration in (whole or part) under section 10.44 if satisfied as to one of a range of matters listed in section 10.45. **Item 108** expands this list of matters. Under **proposed subsection 10.45(3)** the Minister may give a direction to cancel if:

- an agreement includes a provision which has the purpose or likely effect of substantially lessening competition
- the parties to the agreement have engaged in conduct, or propose to engage in conduct, that would apply that provision
- that conduct or proposed conduct has not resulted in, or is unlikely to result in, a net public benefit, and

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- there are exceptional circumstances that warrant the giving of a direction to cancel a registration.

In his second reading speech to the Bill the Minister stated that examples of ‘exceptional circumstances’ include where:

- an agreement has the effect of giving its parties a substantial degree of market power
- the conduct of the parties to the agreement has led to, or is likely to lead to, an unreasonable increase in freight rates or an unreasonable reduction in services, and
- the anti-competitive detriment of the agreement outweighs the benefit to shippers flowing from the agreement.

Exceptional circumstances will also be taken to apply where the agreement in question is substantially similar to one that has previously been deregistered pursuant to section 10.44 of Part X.<sup>29</sup>

These amendments are in large measure designed to deal with discussion agreements.<sup>30</sup> That is, agreements between conference and non-conference lines to reach a non-binding consensus over, for example the charging of common freight rates and a variety of service.<sup>31</sup> The definition of a conference is broad and carriers have registered non-binding ‘discussion agreements’.

In submissions to the Commission, carriers argued that such agreements contribute to trade stability.<sup>32</sup> However shippers have submitted that discussion agreements operate to lessen competition. According to the Australian Peak Shippers’ Association (APSA)

For conference and non-conference lines to compare rates is immoral...(as they) seek to ensure that conference and non-conference operators are not disadvantaged in trades where they compete for the same cargoes.<sup>33</sup>

The Treasury also agreed that discussion agreements ‘seem to be inhibitors of competition’ and argued that they should be made subject to the standard authorisation procedures in Part VII of the TPA.<sup>34</sup>

The Commission rejected these contentions. It argued that discussion agreements are a less restrictive form of cooperation and that their prohibition may drive independent operators into formal conferences. The Commission stated that existing powers could adequately address any anti-competitive impact of such agreements.<sup>35</sup>

The Government did not accept this finding by the Commission. While the Bill does not prohibit discussion agreements it does take up the recommendation of the 1993 Brazil Report that additional Ministerial powers are needed to protect shipper interests. The Government also indicated that it was particularly influenced by submissions from exporters on this issue.<sup>36</sup>

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Open and Closed Conferences

The Commission reported that most conferences operating on Australia's outward trading routes were closed. This means that the admission of a carrier to the conference requires the consent of all or a majority of conference members. In contrast, open conferences permit entry so long as a carrier agrees to abide by a set of rules.

US Law does not permit closed conferences. In submissions to the Commission shippers argued in favour of open conferences arguing that they increase competitive pressures within a shipping grouping. The Department of Transport and Regional Services said that closed conferences 'may facilitate a greater capability to provide adequate economic and efficient shipping services.' The Commission concluded that 'closed conferences are more likely to generate costs-savings thorough cooperation, but may exhibit less internal competition in practice.'<sup>37</sup>

While the Government accepted that carriers should continue to be able to form closed conferences it was not convinced by the Commission's view that sufficient competitive pressures exist through the operation of non-conference carriers, the threat of entry, the operation of transshipment carriers, and the countervailing power of shippers to negate any potential monopoly power of closed conferences.

The Bill gives the Minister additional power to deal with closed conferences which are contrary to the interests of Australian shippers. The effect of **proposed subsection 10.45(4)** is that the Minister may direct the registrar to cancel a conference registration if:

- the parties to the agreement have prevented, or are proposing to prevent, the entry of a prospective party to the agreement
- the prevention or proposed prevention is unreasonable, and
- the prevention or proposed prevention is contrary to the interests of any or all of the following:
  - (i) Australian shippers generally
  - (ii) Australian shippers in a particular trade
  - (iii) Australian shippers of particular kinds of goods
  - (iv) shippers in a particular part of Australia, and
  - (v) in the case of an outwards conference agreement—producers of goods of a kind exported, or proposed to be exported, from Australia.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Australian flag operators

An 'Australian flag shipping operator' is defined in section 10.02 as a person who is an Australian citizen or body corporate incorporated by or under a law of the Commonwealth, a State or a Territory who provides or proposed to provide shipping services using a ship that is registered in Australia. As noted above it is an object of Part X to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade. Under section 10.44 and 10.45 the Minister may direct the Registrar to cancel the registration of a conference agreement if the agreement applies or will apply to hinder an Australian flag operator from providing outward liner cargo service to an extent that is reasonable. Section 10.53 states that non-conference carriers with substantial market power are prohibited from hindering Australian flag operators from providing outward liner cargo service to an extent that is reasonable.

The Commission recommended that the interests of shippers be considered explicitly. The amendments contained in the Bill seek to clarify what is 'reasonable'.

**Item 108** inserts **new subsection 10.45(2)** which states that in determining what is reasonable regard is to be had to the national interest and to the interest of

- Australian shippers (generally)
- Australian shippers in a particular trade
- Australian shippers of particular kinds of goods
- shippers in particular parts of Australia, and
- any other relevant matters.

An identical amendment is also inserted into section 10.53 by **item 132**.

## Undertakings

Section 10.49 allows parties to a registered conference agreement to give an undertaking to the Minister. The Bill seeks to improve the enforcement of such undertakings which may be given in return for not cancelling a conference's registration. **Proposed section 10.49A** provides that if an undertaking is breached Part VI of the Act applies as if the carrier breached Part IV.

Carriers could therefore be liable for pecuniary penalties of \$10 million. Proceedings to recover this amount may be brought by the ACCC. In addition a person who suffers loss or damage as a result of a person breaching an undertaking may bring an action seeking damages under section 82 of the Act.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



## Concluding Comments

In most respects this Bill implements the recommendations of the Productivity Commission. The Bill however reflects a less sanguine view about the potential impact of conferences on Australian shippers. In giving the ACCC and the Minister additional power to deal with agreements that lessen competition and with closed conferences the Bill should not jeopardise the benefits that can be gained from conference arrangements. It may however provide additional insurance against monopolistic behaviour by conferences.

Perhaps the most significant change to Part X effected by the Bill is the decision to extend (where practical) to Australian importers a similar level of protection to that enjoyed by Australian exporters in negotiating with liner conferences. The Commission argued that such regulation could pose significant jurisdictional problems for little benefit. However given that the USA and European Union excise jurisdiction over inwards conferences it may be argued that these jurisdictional difficulties should be manageable.

## Endnotes

---

- 1 Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, *Inquiry Report*, 15 September 1999, p. XX, Appendix C.  
<http://www.Commission.gov.au/inquiry/shipping/finalreport/index.html>
- 2 *ibid.*
- 3 Details of exemption arrangements in other countries are contained in Chapter 4 of the Productivity Commission's Report.
- 4 An example of third line forcing is where a person supplies goods or services at a particular price on the condition that the purchaser acquire or agrees to acquire other goods or services from another person.
- 5 Importers do not currently have the benefit of such provisions.
- 6 A summary of the reviews in 1977, 1984 and 1993 is contained in the Productivity Commission's Report p. 42–43.
- 7 The Commission advocated widening the definition of terminal from the present, 'within the limits of a wharf' to include terminals located within the metropolitan area of port cities.
- 8 Sub-sections 10.14(2) and 10. 22(2)
- 9 The Hon. John Anderson MP and Senator the Hon. Rod Kemp, 'Part X of the Trade Practices Act to be retained', *Media Release*, 23 December 1999.  
[http://www.dotrs.gov.au/media/anders/archive/1999/dec\\_99/a207\\_99.htm](http://www.dotrs.gov.au/media/anders/archive/1999/dec_99/a207_99.htm)

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 10 These are non-binding agreements between conference and non-conference lines to reach a consensus over, for example, the charging of common freight rates.
- 11 See sections 10.29 and 10.41.
- 12 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, p. 46.
- 13 See sections 10.06 and 10.07.
- 14 This term is defined in section 4D.
- 15 The restrictive trade practices provisions must deal only with either: the fixing or regulation of freight rates; the pooling or apportionment of earnings, losses or traffic; the restriction or other regulation of the quantity or kind of cargo to be carried by parties to the agreement or the restriction or other regulation of entry of new parties to the agreement. See section 10.08.
- 16 Subject to a Ministerial exemption order.
- 17 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, pp. 152–155.
- 18 Including inward conferences under section 10.22.
- 19 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, p. 150.
- 20 *ibid*, p. 149, 152.
- 21 *ibid*, p. 148.
- 22 Section 10.22 is repealed by **item 153**.
- 23 These terms are defined in proposed subsection 10.02(1). See items 28 and 35.
- 24 This term is defined by item 42 as referring to the loading and unloading of cargo into or from a ship or the handling of cargo within a port terminal.
- 25 As the Explanatory Memorandum notes bills of lading are evidence of a contract of carriage by sea, p. 23.
- 26 *ibid*, p. 23.
- 27 *ibid*, p. 25.
- 28 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, p. 162–164.
- 29 Second Reading Speech, House of Representatives, *Hansard* 28 June 2000, p. 18395.
- 30 The Hon. John Anderson MP and Senator the Hon. Rod Kemp, ‘Part X of the Trade Practices Act to be retained’, *Media Release*, 23 December 1999, p. 5.
- 31 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, p. xvi.
- 32 *ibid*, p. 156/158.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 33 *ibid* p. 158.
- 34 *ibid*.
- 35 *ibid*.
- 36 The Hon. John Anderson MP and Senator the Hon. Rod Kemp, 'Part X of the Trade Practices Act to be retained', *Media Release*, 23 December 1999, p. 5.
- 37 Productivity Commission, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report*, 15 September 1999, p. 159/161.

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*