TRADE PRACTICES LEGISLATION - EFFECT ON SHIPPING SERVICES

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Introduction

Many people find it strange that in a significant number of countries international shipping is treated differently in trade practices' legislation from other forms of business. If it was just Australia which did this, people would be even more mystified. However, whilst Australia might deal with shipping and trade practices differently than other countries, it is a reasonably common national phenomenon for countries to have in place some kind of legislation to provide a framework for the orderly control of shipping services.(1)

Some countries go much further than this (2), but the growth of this type of legislation has arisen in those countries which adopt a relatively free market philosophy through the desire to provide exporters with the means of selling their products on the international markets in a reasonably competitive manner.

Trade practices' legislation and the policy of providing some form of exclusion to international shipping from the full force and effect of trade practices' breaches is something which is of twentieth century origin.

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The views expressed in this paper are those of the author and not those of the Australian National Line.

(1) New Zealand's Commerce Act 1986 draws strongly on Australia's Trade Practices Act 1974 insofar as anti-competitive conduct is concerned. Shipping conferences are not exempted but current N.Z. policy (Shipping Bill 1986) indicates exemption to outwards shipping from application of anti-competitive provisions of the Commerce Act.

(2) For example, those countries which have adopted in its entirety the United Nations Convention on a Code of Conduct for Liner Conferences, incorporating the cargo reservation provisions -the so-called 40/40/20 rule.

Trade has been around for a long time and presumably so has "unfair competition". However the governments of the world did not start to address the issues of international trade, shipping and unfair competition until the palls of smoke from the chimneys of the industrial revolution had created the steam ship and countries became awash with modern manufactured products which required world markets to assure the prosperity of their manufacturers.

The factories provided the product and the steam ship provided the means to shippers to sell, on a regular basis, their products to those international markets. No longer was the tide or the breeze necessary to determine the arrival or departure of the ship from the wharf.

Trade expanded enormously and so did the number of vessels. Those of you who follow international shipping will recognise that this trend continues today - only there is a decline in trade which has resulted in overtonnaging, that is there are more ships than there is cargo. The shipowner's answer in the early days as it is now, is-

- to drop freight rates so that he can attract more cargo,
- sell some or all of his ships, or
- get together with other shipowners and agree common rates, schedules, destinations etc.

so that competitors will either co-operate or leave the industry causing reasonable stability to prevail and enabling reasonable profits to be earned.

This is where the shipper or, - the consumer of shipping services, - has a concerned interest. He is looking to sell his product on the national or international market which generally is fiercely price sensitive. He is therefore concerned to see that the means of getting his product to that international market are also competitive and that he is free to ship it at the fairest (lowest) possible rate by the best possible means.

Whilst I do not propose to engage in a detailed history of the development of Australia's liner shipping policy, it is, I believe, necessary to highlight some important milestones which indicate-

- why international shipping is treated differently from other industries in the context of trade practices legislation;
- whether this treatment affects "shipping services";
- what aspects of shipping services remain subject to the rigours of existing trade practices legislation; and
- whether it makes any sense to regulate

in the hope that some logic and rationale emerge from it and that proposals for the future might be seen in a fairer light.

Background

To cure the problem of over-tonnaging, shipowners developed either monopolistic or at the very least, oligopolistic cartels known as "conferences"(3).

This trend grew very rapidly in the major trade routes of the world and started to alarm both governments and shippers. The concern came from the power which these large cartels developed and, international trade being of such economic and strategic importance to the prosperity and defence of nations, the issue was one that governments could not ignore. The issue first affected Australia in 1876 when a group of shipowners and brokers established a combination in the UK/Australia trade.

It appears however that governments did not take any action until early in the twentieth century. Shippers and shipowners took their own earlier independent action. Shippers who found themselves having to pay a common freight rate without the usual discount, turned to non-conference

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(3) "A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services." Definition of "Liner conference" or "conference" in the UNCTAD Code of Conduct for Liner Conferences.

operators. To meet this challenge, conference operators offered a discount in consideration for shipping all the shipper's cargo - the loyalty agreement.

Shipowners, not members of the cartel, challenged the conference in the courts on the basis that the conference was a conspiracy to prevent the non-members from obtaining cargoes. In the celebrated case of the Mogul Steamship Company Ltd. v. McGregor & Others(4), the House of Lords in 1892 decided that the "conspiracy" between ship operators to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs was not illegal even if a rival was driven out of business so long as unlawful means were not employed.

It did not take long in the United Kingdom for the Government then to address the issue of the power of conferences and the protection of shippers. In 1906 the Royal Commission into Shipping Rings was appointed by the Board of Trade and three years later reported in a divided report that whilst liner conferences were on balance in the interest of shippers, there was disagreement over the way in which conference power should be handled. The minority recommended the publication of tariffs and the provision for collective bargaining with recognised shipper associations, whilst the majority favoured stricter scrutiny by the Board of Trade and Parliament.

The United States also took up the cudgels and arising out of the 1914 Alexander Committee Report, the 1916 Shipping Act was passed, regulating conferences by requiring their agreements to be filed, outlawing deferred rebates and other forms of discrimination including "fighting ships",(5) and empowering the regulatory authority to investigate complaints and institute proceedings.

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(4) (1982) AC 25

(5) "Fighting ship" means a vessel used in a particular trade by a carrier for the purpose of excluding, preventing or reducing competition by driving another carrier out of that trade.

The abuse of power - the balancing act

From the above brief review of the early development of international liner shipping it can be seen that the United States and the United Kingdom Governments (then the major international trading nations of the developed world) were sufficiently concerned with the growth of conference power to the extent that some action was necessary to ensure that the power would not be abused. The U.K. did little to change the conference system and the U.S. enforced the free competition approach having it enshrined in the Sherman Act of 1890, Section 1 of which stated that

> "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal".

However the U.S. recognised the importance of the conference system to U.S. foreign trade, and provided conferences acted fairly i.e. in accordance with the provisions of the Shipping Act 1916(6), then their conduct would be condoned.

The issue therefore emerged as, and remains, one of **balance;** the balance of allowing an activity prima facie in restraint of trade to operate in a competitive environment and according to laws which encapsulated the philosophy of protection of competition.

I do not wish to, nor do I need to in this paper, address the issue of whether the conference system is good, bad or indifferent. Historically the system is with us, it is unlikely to disappear overnight and even if a government unilaterally legislated against it, it is unlikely to have a major impact on world trade unless similar action was taken by a number of major trading countries.

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(6) Now the U.S. Shipping Act 1984.

Trade Practices in the Australian context and shipping - early days

With the birth of the Commonwealth in 1901, the Australian Constitution provided the Commonwealth Government with the power over interstate and overseas shipping(7). The Commonwealth focused on shipping early in its development. Two Royal Commissions reported in 1906: one on the question of an Australian owned mail line to the U.K. (the Royal Commission on Ocean Shipping), and the other on the question of reserving the coastal trade for ships manned by Australian crews (the Royal Commission on the Navigation Act). Apart from the outcome of coastal shipping reservation which I shall mention later, the conference system was regarded as necessary but the practice of deferred rebates was not.

The Commonwealth then ventured into the legislative field of "trade practices" by enacting the Australian Industries Preservation Act 1906. The model for this was the U.S. Sherman Act referred to above. Combinations in restraint of trade were illegal as was monopolisation or attempts to monopolise but, unlike the Sherman Act, the Australian Act allowed the defence of 'public interest'. Whilst certain aspects of the Act were found to be unconstitutional(8), it contained enforceable provisions which prohibited shipowners in outwards trades from giving rebates, refunds, discounts or other concessions deemed to be monopolistic or restrictive, contrary to public interest.

This aspect became one of great concern to the Australian Government which had ventured into international shipping by forming a Commonwealth Shipping Line. Australian trade was primarily U.K. based, and because of the anti-rebate provisions in the Industries Preservation Act, the Australian operator (the Government) in this vital major international

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(7) Section 51 - The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-
(i) Trade and commerce with other countries, and among the States
Section 98 - The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

(8) Huddart Parker & Co. Pty. Ltd. v Moorehead (1909) 8CLR 330

market found itself disadvantaged vis-a-vis its competitors who could, and did, give rebates. As a result the Commonwealth was forced to quote lower than conference tariff rates. This action caused concern amongst the conference operators who saw it as a threat to stability in the trade; the threat being magnified by the fact that the Commonwealth Line was the highest cost, least efficient operator.

The Imperial Shipping Committee, to whom the Australian Government complained, found "that the conference system must be accepted as a necessary concomitant of modern commerce"(9) and did not accept the Australian Government's contention that the deferred rebate should be prohibited by the Conference operators.

The birth of "rationalisation"

After selling off the Commonwealth Line the Government in 1929 directly intervened when it became apparent that the Conference intended to increase freight rates to the U.K. There is evidence to suggest that the shipowners were sustaining heavy losses in this trade and at meetings held between shipowners and shippers it was stressed that shipowners and shippers should work collectively in pursuit of economy and efficiency ("rationalisation").

It is in this light that successive Australian Governments have faced the issues of international liner shipping in the context of Australian trade practices legislation since the 1930s. The 1929 incident throws up the real issues which concern shipping, trade practices and shipping services. It recognises the historical and economic basis of the shipping industry and it also recognises that the concerns of the shipper need to be balanced against the provision of a reasonable return to the shipowner subject to the shipowner providing an economic and efficient service.

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(9) Final Report of the Imperial Shipping Committee on the Deferred Rebate System.

The 1930s

The 1929 freight crisis also led to the establishment of a shipper body to negotiate with shipowners on freight rates and other matters concerning service. In 1930 the Government amended the Industries Preservation Act to exempt from the operation of the Act, agreements made by a body known as the Australian Oversea Transport Association which represented both shipper and shipowner in freight and conference negotiations. Deferred rebates and exclusive patronage contracts were now legal.

The 1960s and 70s

This era saw the development of major events which changed the face of the shipping industry both in the type of service offered and the policy decisions with which the Australian Government was concerned. These were-

- the development of containerisation
- the growth in Australian international markets
- the growing demand of developing countries to exert greater control over shipping and to obtain a bigger share of the business for their own merchant fleets, and
- the promulgation of new "trade practices" legislation.

The philosophy and mechanics of Trade Practices legislation in Australia

The broad policy aim of the legislation is the promotion, maintenance and protection of competition. It primarily attacks conduct which distorts competition. It is not the function of this paper to explore and explain the legislation in any detail, however the concepts of competition and market are at the core of it. For the purposes of relating the trade practices legislation[10] and its effect on shipping services, the following are the essential provisions:-

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(10) Trade Practices Act 1974 (Commonwealth).

Part IV - Restrictive trade practices

- anticompetitive agreements, including primary or secondary boycotts that cause a substantial lessening of competition or substantial damage (Sections 45, 45A, 45D, 45E).
- misuse of market power (Section 46).
- anticompetitive exclusive dealing (Section 47).
- resale price maintenance (Section 48).
- anticompetitive price discrimination (Section 49).
- mergers that result in market dominance or an enhancement of market dominance (Section 50).

Anticompetitive agreements are generally those agreements in business which have the purpose or effect of substantially lessening competition in the relevant market. Two types of conduct are illegal per se:-

- agreements between competitors which contain an exclusionary provision i.e. one which has the purpose of preventing, restricting or limiting the supply of goods or services to or from particular persons or in particular circumstances or on particular conditions.(11)
- fixing prices (except for certain kinds of joint ventures or collective buying groups).

Part V - Consumer protection.

This Part contains a range of provisions aimed at providing protection for consumers and business.

Application of trade practices to shipping

It will be noted that the activities of conference operators referred to above fall squarely within the anticompetitive provisions of Part IV of the Trade Practices Act (the "Act"). The nature of the penalties which the Act provides makes it unattractive to flaunt the Act(12), and even

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(11) Section 4(D) defines "Exclusionary provisions".

(12) Penalties for breach of Part IV are fines of up to $50,000 for individuals and $250,000 for corporations (Section 76).

though authorisation[13] is available from the Trade Practices Commission, ship operators would not see this as a mechanism which could be regarded as satisfactory. From the beginning, shipping was treated differently and Part X, entitled "Overseas Cargo Shipping", was introduced to exclude the operation of Part IV "in relation to overseas cargo shipping[14] engaged in by a shipowner in pursuance of a conference agreement, including a disapproved agreement."[15].

The Trade Practices Act 1974 re-enacted without change the overseas cargo provisions of the Restrictive Trade Practices Act 1971 which were originally introduced into the Trade Practices Act 1965 by an amending Act in 1966. These provisions remain unchanged as at the date of writing this paper.

Part X is a little known part of the Act. Text book writers have by and large neglected or ignored it and the Courts have not had a rush of matters before them arising from it[16]. In terms of Government policy it shows the following:-

- conference agreements with respect to outwards shipping (i.e. from Australia) are exempt from Part IV.
- agreements need only be filed.
- the terms of these agreements are secret and do not require prior approval.
- conference members and individual shipowners are required to take part in freight rate discussions with the designated shipper body

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(13) The power to grant authorizations is dealt with in Section 88 and the procedure in Section 89. These provisions enable the TPC to approve certain agreements that are prima facie anti-competitive where it is satisfied that there is a benefit to the public.

(14) "Overseas cargo shipping" means the carriage of goods wholly or partly by sea from a place in Australia to a place outside Australia or from a place outside Australia to a place in Australia - Section 111(1).

(15) Section 112.

(16) Refrigerated Express Lines A/Asia Pty. Ltd. v. Australian Meat & Livestock Corporation (1980) 44 F.L.R. 455 is the only reported case.

(the Australian Shippers' Council) on matters relating to arrangements for and the terms and conditions that are to be applicable to, outwards cargo shipping to which the conference agreement relates (this primarily relates to freight rate negotiations).

. agreements may be disapproved if the Governor-General is satisfied after considering a Tribunal report that the manner in which the conference agreement is being interpreted or applied does not have due regard to the need for services by way of overseas cargo shipping to be efficient, economical and adequate, or is hindering a person from engaging efficiently, to an extent that is reasonable, in overseas cargo shipping in relation to which he is an Australian flag shipping operator. (Sections 123(c)(ii) and (iii)).

The difficulties encountered by Section 123(c)(ii) were explored by the Trade Practices Tribunal in the Bulkfridge enquiry (17). In this matter the Australian Minister for Transport was concerned with overtonnaging in the trade between Australia and the east coast of the United States. The Minister considered that the entry of new operator (Bulkfridge) to the trade would not be in the best interests of Australian shippers and would derogate from the efficiency, economy and adequacy of the overseas cargo shipping service concerned. The Minister objected "not to Bulkfridge Pty. Limited or to any other potential entrant as such, but to potential increase in costs to shippers resulting from further tonnaging". (18)

After an extensive review of costs, competition and the trade, the Tribunal made some broad findings which indicated that whilst there was overtonnaging it was not clear that it had a direct result on freight rates, that freight rates were not unfairly high and that

> "12.8 The only alternative, which on present evidence, is likely to lead to better results by way of efficiency, economy and adequacy, is the rationalisation of the present Conference arrangements to eliminate wasteful duplication.

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(17) In re Australia/Eastern U.S.A. Shipping Conference (1975) ATPR 40-011.

(18) Minister for Transport's introductory written submission to the Tribunal.

12.9 The members of the Conference are at present pursuing such a course in a way which seems best to them. They should be given encouragement and assistance to achieve this goal and then all concerned should see to it that shippers have the benefits of rationalisation reflected in freight rates"(19).

In other words the Tribunal supported rationalisation by the Conference itself and that shippers should receive any benefits flowing from such rationalisation.

1977 Government Review (the Grigor Report)

In 1977 the Government established a Committee to review Australia's overseas cargo shipping. This committee found major deficiencies in Part X and made a number of recommendations to amend it which were embodied in the Trade Practices Amendment Bill 1980. The Bill (which established Government policy on these issues) provided for:-

- protection for shippers in negotiating loyalty contracts.
- the Governor-General to disapprove a Conference agreement or declare an individual shipowner without a prior Tribunal report.
- compulsory consultations between the Minister and relevant parties on matters affecting the "efficiency" (not the efficiency, adequacy or economy) of shipping services.
- stronger role for the Australian Shippers Council.
- outlawing use of "fighting ships" as a predatory tactic against non-conference competition .
- exemption from Part IV to apply to inwards as well as outwards shipping.
- empowering Government intervention where the significant expansion of a line was not based on sound commercial practices.

The Bill was not proceeded with primarily because of dissatisfaction from both shipowners and shippers.

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(19) Paragraphs 12.8 and 12.9 of the Tribunal's decision.

1984 Task Force Review

Another review took place in 1984[20]. The Task Force reviewed shipping and shipping services against the following background:-

> "Not for half a century have such competitive pressures existed in world liner shipping. Australian users generally are benefitting from this wider market situation through both favourable freight rates and a wider choice of carriers. Overtonnaging in world liner trades is expected to remain for several years, and the competitiveness of the market may be expected to persist and perhaps intensify.
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> Given liner shipping has become so competitive, the basic question the Task Force addressed was whether Australia's needs for liner shipping services would best be served by deregulation".[21]

The Task Force promoted the view that:-

> "... Australia's overall interests would best be served by regulation that is directed to the promotion of a fair competitive environment which ensures access to the market of all shipping lines on equal terms and which penalises and eliminates transparent abuses of the system and anticompetitive practices."[22]

It favoured taking Part X out of the Act and establishing a new Shipping Act which would provide "pro-competitive safeguards governing the operation of collusive agreements between shipowners or between shippers, the prohibition of predatory and discriminatory practices, arrangements for speedy resolution of disputes and provision of a reserve power for Government intervention to correct problems of foreign sourced distortion of the market which affect either shipper or shipowner."(23)

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(20) 1984 - An Industry Task Force Review of Australia's Overseas Liner Shipping Legislation (the Task Force).
(21) Task Force Report - Executive Summary page 1.
(22) Ibid. Page 1.
(23) Ibid. Page 2.

The Task Force also dealt with the safeguarding of Australian flag shipping, cargo reservation, the UNCTAD Liner Code and the needs of States. It is likely that the Government will monitor these findings closely.

Following the release of the Review both shipowners and shippers made further comments, and in a spirit of co-operation proposed a Code of self-regulation which it was hoped would meet the concerns of all parties, including the Government. It is unlikely, in my opinion, that this Code will be acceptable to the Government and at the time of writing the Government has not proposed its solution. The Government's preferred view is likely to be however some form of increased regulatory control remaining within the Trade Practices Act.

If this is so, international cargo shipping services will continue to be regulated within the context of competition law but will not suffer the full force and effect of the penalties proclaimed for breaches of Part IV. Whether this is in the best interest of shippers and promotes the most efficient shipping services is of course debatable, but in this highly regulatory world with national policy considerations paramount it is obviously an issue that will remain with us.

Other trade practices' provisions affecting shipping services

1. Section 45D

Action taken by unions against shipowners or shippers for other than 'legitimate' industrial reasons with the deliberate intent of substantially lessening competition or substantially damaging their business is now covered by Section 45D. The tortious remedies (intimidation, conspiracy and intentional interference with contract) have significant technicalities to be overcome in order for an aggrieved party to claim protection. Section 45D, or at the very least the threat of the use of it, provides an effective and speedy

remedy to the shipping industry, where unjustified and unreasonable union conduct is taken for other than legitimate reasons[24].

You will no doubt be aware that it was the current Government's intention to remove these provisions from the Act and to water them down. It would appear however that for the time-being at least, the Section will remain in the Act and that this important and useful weapon will remain available as a remedy where deliberate action is taken in a manner which is clearly intended to affect the trading interests of a business.

2. **Section 51(2)(g)**

This section exempts from the operation of Part IV any provision of a contract that relates **exclusively** to the export of goods from Australia or to the supply of services outside Australia, provided full particulars (except price) are filed with the Trade Practices Commission within 14 days of the contract being made.[25]

3. **Part V - Consumer Protection**

This Part of the Act is broadly entitled "Consumer Protection" and can impact on the quality and standard that certain users might expect from a shipping service.

Shipowners are not protected from activities engaged in by them either in overseas or interstate trade, which infringe the provisions of Part V of the Act unless specific exemption applies to transportation contracts. Accordingly, certain Part V provisions can have a bearing on the quality and standard of shipping services. Most of Australia's outwards cargo is however carried under Bills of Lading which incorporate the Sea Carriage of Goods Act 1924

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(24) (a) Mary Kathleen Uranium Ltd. v. Seamen's Union of Australasia Ltd. (1981) ATPR 40-249.
(b) Chevron Transport Corporation v Seamen's Union & Others (1983)

(25) S166(3) protects the contract from inspection by interested parties.

provisions which provide, in a relatively clear and concise way, the the rights and liabilities of the shipper and the carrier. These are not subject to the Trade Practices Act. Part V does not therefore apply to the carriage of these goods. However there are some specific provisions which may apply to conduct engaged in by a shipowner prior to the conclusion of the agreement to carry and also to the contract if it is a contract for the carriage of goods between Australian states.

Section 52(1) provides that "a corporation shall not, in trade and commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive." Whilst the Section falls within the "Consumer Protection" provisions and hence purports to apply only to "consumers", it has been held by the High Court(26) to extend to traders who have successfully used the Section against other rival traders, particularly in passing-off actions. The reason for this is that "Section 52 is concerned with conduct which is deceptive of members of the public in their capacity as consumers of goods and services."(27) In this context "consumers" are not limited to the persons defined in Section 4(3) of the Act. Rival shipowners could therefore use the section.

The definition of "consumers"(28) provides that a person shall be taken to have acquired particular (shipping) services as a consumer if, and only if:-

(i) the price did not exceed $40,000; or

(ii) where it exceeds $40,000 - the services were of a kind ordinarily acquired for personal, domestic or household consumption.

A shipper can therefore resort to action against a shipowner where the shipper falls within the category mentioned above. Such activity can embrace the following:-

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(26) Hornsby Building Information Centre Pty. Ltd. & Anor. v. Sydney Building Information Centre Pty. Ltd. (1978) 18 ALR 639.
(27) Ibid 641 (Barwick C.J.)
(28) Definition of "Consumer" - Section 4B.

- representation of performance characteristics, uses or benefits of shipping services they do not have (s53(c)).
- false or misleading representation of the price of services i.e. less than a competitors price (s53(e)).
- false or misleading representation concerning the need for services (s53(f)).
- future representations without reasonable grounds (s51A).

Section 52A (Unconscionable conduct) introduces a general duty for a corporation in trade and commerce to trade fairly in relation to consumers by prescribing conduct which is unconscionable (e.g. the relative bargaining positions of the corporation and the consumer). There is no exclusion for the application of the provision of shipping services. However, in this section the conduct can only be related to the supply of shipping services used for personal, domestic or household use and not for business reasons.

Section 68A provides that a term of a contract for the supply by a corporation of (shipping) services (except where it relates to personal, domestic, or household use) is not void where it limits the corporation's liability to supplying the services again or the payment of supplying the services again. Otherwise under Section 68 any term of a contract which excludes, restricts or modifies all or any of the provisions of Part V, is void.

Warranties

Section 74 of the Act does however provide specific exemption to its application to transportation of goods and storage contracts.

This Section implies a warranty into contracts of services **to consumers** that the services will be rendered with due care and skill and that any materials supplied in connexion with those services (e.g. containers) will be reasonably fit for the purpose for which they are supplied.

This exemption is no doubt important to shipowners in coastal trades but will continue to be of concern to shippers who would argue that this type of warranty should be a minimum requirement for any service provided.

Penalties and Remedies

Broadly, for breaches of most of Part V the Court may order a fine not exceeding $20,000 for a person or $100,000 for a corporation. In addition parties bringing actions can seek injunctions and recover damages. In other cases e.g. Section 52 and 52A the Court has power to award remedial orders.

Coastal Trade and Trade Practices

Shipping services provided in a coastal trade environment i.e. between Australian States or intrastate, are not subject to the protection of Part X. Just as road and rail have no special protection it follows that neither should shipping.

The argument is often made that the Government is promoting a type of restrictive trade practice by only allowing ships to trade on the Australian coast if they have a licence(29) or unless they are exempted by the Minister(30). To be licensed, the ships must comply with the requirement that its crew be paid Australian rates of wages.

It is unlikely however that the Government will allow foreign interests to run our road, rail and air transportation systems on wages and conditions that are different from Australian conditions: and there is no reason to treat coastal shipping any differently. Most countries have some restriction in place.

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(29) Section 288 Navigation Act 1912.
(30) Section 286 Navigation Act 1912. The Minister for Transport issued 42 single-voyage permits for coastal shipping in 1985-86.

With respect to any conduct engaged in by coastal shipping operators which may be regarded as anticompetitive, that is in breach of any of the provisions of Part IV of the Act, the authorisation provisions of the Act are available to allow exemption where the Trade Practices Commission considers that the continuation of the activity is, or will result in, a benefit to the public.(30)

Bulk Trades

These are generally cargoes carried in single purpose ships (i.e. tankers) or the carriage of the cargo is dedicated to one vessel (i.e. the Japan iron ore trade). These generally do not involve the application of conference activity and to the extent that a conference agreement is made between competitors then Part X would apply as "overseas cargo shipping" embraces "goods" not just liner cargo howsoever carried.

Conclusion

The debate on shipping issues is likely to be a continuing one as it depends to a significant extent on the future of Australia's and the world's economy. In addition, any country which Australia regards as a major trading partner is likely to influence Australian shipping policy and Australia is also likely to take into account shipping policies that are proclaimed in international forums from time to time.

However, national shipping policy is likely to vacillate between regulatory and non-regulatory, and to be compliant with, or exempt from, the rigours of trade practices legislation.

Some countries have let the shipping industry remain largely unregulated, whereas Australia has found it necessary, for overseas cargo shipping purposes, to provide some kind of regulation which allows anti-competitive

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(30) ANL and TNT currently have an application for authorisation before the TPC seeking approval of a joint venture agreement concerning coastal shipping and stevedoring.

conduct to exist provided it is directed towards being efficient, economical and adequate (these terms being undefined).(31)

The last few years have seen the increase of significant overtonnaging in all trades and considerable improvement in the services provided by non-conference operators. In this climate, shipping services are extremely competitive and it would be fair to state that shippers are enjoying a "bonanza" of competition - perhaps under Indian summer conditions. When the bubble bursts with the monsoon rains, and the ship operator is not able to provide the shipper with the service he requires or the rate is offensive and there is little or no competition, then the whole objective is at risk - that of providing and maintaining competitive and reliable shipping services.

It is against this backdrop that new policy will be promulgated either within a legislative framework or outside it. If it is to be a legislative framework, which in Australia is more likely, then there is much to be commended in setting out in the legislation the broad objectives of shipping policy. The New Zealand Shipping Bill 1986(32) does this as does the Australian Liner Shipping Task Force Report(33).

Shipping services in countries such as Australia and New Zealand are, and will continue to be, of paramount importance to their economic health and those governments are likely to watch with close concern the fair trading aspects of shipping lines involved. However, whilst self-regulation is

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(31) (1) Section 123(1)(ii) Trade Practices Act. Under this section the Governor-General may disapprove a conference agreement if it is found not to have due regard to the need for services by way of overseas cargo shipping to be efficient, economical or adequate. The effect of disapproval is that under S124 the agreement becomes unenforceable and parties to it shall not (inter alia) enter into another conference agreement to which the disapproved agreement related.

(2) Individual shipowners may also be "declared" under S129(1) for the same test as in Section 123(1)(ii).

(32) Clause 3.

(33) Task Force Report: paragraph 3.14

the desired objective it is unlikely that the Australian Government will be convinced that this will give the protection that shippers require or indeed enable the government to lend its guiding hand to the industry.

In these circumstances it is likely that shipping services that are provided for international trade will not face the full rigours of Part IV of the Trade Practices Act, but the reality will be that life will be tougher for shipowners in the context of trade practices legislation.