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Introduction

This paper is concerned with the Australian Law which relates to International Liner Cargo Shipping in Part X of the Trade Practices Act 1974 (Cth) ("the Act"), and which includes provisions balancing the competing interests of shippers and carriers in the export trade.

The provisions do not apply to imports into Australia which means that foreign markets receive the benefits of Part X, but there are no reciprocal benefits for Australian consumers.

The Act provides an interesting model for the conduct of shipper and carrier negotiations as it is unique in the protection it gives shippers, whilst balancing the interests of the community with a need for efficient and economic shipping services in the context of the commercial operations of international carriers conducting their business by use of restrictive trade practices which would be illegal, but for the exemptions granted in Part X of the Act.

These are problems which have troubled other jurisdictions, such as the European Community[1], the United States[2] and New Zealand[3] but which have not adopted measures which balance the rights of carriers with policy objectives promoting competition with benefits for shippers and the interests of the wider community[4].

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1 Treaty of Rome, Art 85 deals with conduct which may affect trade, and see ICI v EEC (1972) CMLR 557, and since then the 'maritime transport package' regulations 1986 and subsequent additions.

2 Shipping Act of 1984 giving exemptions from antitrust laws to filed agreements and activities within the scope of the Act. See also United States v Hamburg - Amerikonische Packetfahrt - Actienbesellschaft 200 Fed Rep 806 (1911), 239 US 466 (1916) in which the restrictive practices of a shipping conference were caught by US jurisdiction because although the contract was formed overseas, part of the contract was to be performed in the US, and that part could not be separated.

3 Shipping Act 1987 (NZ) grants exemption for outwards shipping from Parts II (Restrictive Trade Practices) and IV (Price Control) of the Commerce Act 1986 (NZ).

4 See Brazil Report, Appendix J: Comparative Table of Legislation Relation to Shipping Conferences.

Carriers are given limited exemptions from certain prohibitions on restraints of trade based on a competition test in the Act[5], namely, the effect of substantially lessening competition in a market for goods or services.

Part X has been in operation in its current form since 1989 and was reviewed in 1993 by the Brazil Inquiry[6] which recommended retention and enhancement. Since then, these issues have been under consideration by the Commonwealth Government which has indicated possible amendments. This paper also identifies the proposed amendments.

The Act, and the majority of the proposed amendments are supported by Australian Shippers. In addition, there has been considerable interest from foreign shipper groups who would benefit from the introduction of similar legislation to protect their rights.

It is in this context that Part X is examined as a prospective model law which could be implemented by other countries or negotiated as an international convention.

The central provisions[7] require conference carriers, and certain non-conference carriers to give 30 days notice, enter into negotiations with the peak designated shipper body[8] and provide reasonably necessary information.

The sections providing protection for shippers have been successfully used on a number of occasions and indicate the importance of the provisions in balancing the rights and obligations of shippers and carriers. A number of examples are set out later in this paper.

In 1993 during the Brazil Review there were a few calls for the abolition of Part X, which were not adopted and subsequently in October 1994 the Minister for Transport issued a Press Release confirming that the Australian Government

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5 See Part IV - Restrictive Trade Practices

6 Brazil Report, Liner Shipping Cargoes and Conferences, AGPS, Canberra, 1993.

7 ss 10.41 and 10.52

8 The Australian Peak Shippers' Association (APSA)

will amend Part X by providing penalties and civil remedies, subjecting the shipping accords and discussion agreements to greater scrutiny, and providing for mediation and conciliation.

Since then, disputes between shippers and carriers continue to show that the conduct of some carriers has clearly rebutted the argument that Part X is unnecessary and the industry should be self-regulated.

Shipper bodies throughout the ASEAN Region are interested in Part X as a model law for balancing the interests of shippers and carriers and it is in this context that this paper has been prepared.

Interestingly and perhaps as a testament to the drafting in Part X, there appear to be no Court decisions on Part X issues.

Finally, a word of caution as at the time of preparing this paper, the amendments foreshadowed in this paper have not yet become law.

The Policy Objectives

The principal objects[9] of Part X include:

1 Ensuring that exporters have access to outwards liner cargo shipping services with adequate frequency and reliability at internationally competitive freight rates ;

2 Promoting conditions in international liner cargo shipping that encourage stable access to export markets;

3 Ensuring that efficient national flag shipping is not unreasonably hindered from normal commercial participation in outwards liner cargo shipping.

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[9] s.10.01

Part X identifies[10] how these objectives are to be achieved by balancing competing interests:

1 Permitting conference operations while enhancing the competitive environment for outwards liner cargo shipping services through safeguards against abuse of conference power, by:

- 1.1 enacting additional restrictive trade practice provisions applying to ocean carriers;
- 1.2 requiring conference agreements to meet minimum standards;
- 1.3 making conference agreements publicly available;
- 1.4 permitting only partial and conditional exemption from restrictive trade practice prohibitions;
- 1.5 requiring conferences to take part in negotiations with shipper bodies;

2 Through increased reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters;

3 By the exercise of jurisdiction, consistent with international law:

- 3.1 over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services;
- 3.2 enforcement of remedies for contravention of Part X.

The Statutory Framework

The definitions in s.10.02 of the Act can be broadly grouped into subject matters:[11]

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[10] s.10.01

[11] The descriptions below paraphrase the definitions given, and reference should be made to the section for the precise wording.

1 Government

An "authorised officer" is defined as an officer of the Department who is authorised by the Minister for the purposes of Part X, and whose role is central to the key negotiation provisions[12].

2 Shippers

"Australian exporter" means a person who exports goods from Australia;

"designated peak shipper body" means an association under subsection 10.03(1)[13];

"designated secondary shipper body" means an association under subsection 10.03(2)[14];

Designated shipper body means either the peak or a secondary body, and s.10.03 sets out a procedure for establishment and registration.

3 Carriers

The definitions can be grouped by entities, services, and practices.

The entities include:

"Australian flag shipping operator" is an Australian entity providing shipping services with one or more ships registered in Australia[15];

"conference" is an unincorporated association of ocean carriers providing liner cargo shipping services;

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[12] ss 10.41 and 10.52

[13] The relevant body is the Australian Peak Shippers' Body (APSA).

[14] There are a number of secondary bodies and bodies forming negotiating sub-committees under APSA, see Appendix 1.

[15] Currently ANL Ltd trading as the Australian National Line, but which has recently been the subject of sale negotiations.

"conference agreement" is an agreement between conference members in relation to outwards liner cargo shipping services;

"ocean carrier" is an entity providing international liner cargo shipping services;

"registered agent", is the agent of the ocean carrier the specified in the register of ocean carrier agents.

"registered non-conference ocean carrier with substantial market power" means an ocean carrier specified in the register of non-conference ocean carriers with substantial market power[16];

The services include:

"international liner cargo shipping service" is a liner cargo shipping service for the sea transport of cargo between Australian and foreign ports;

"inwards liner cargo shipping service" is an international liner cargo shipping service commencing outside Australia;

"liner cargo shipping service" is a scheduled service for sea carriage of general cargo on particular routes, by container and at predetermined freight rates;

"outwards liner cargo shipping service" is an international liner cargo shipping service commencing in Australia;

The practices are defined:

in "pricing practice" as fixing, controlling or maintaining prices, or giving discounts, allowances, rebates or credits in relation to liner cargo shipping services.

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[16] There are currently no entries on the register.

4 Arrangements between shippers and carriers

The arrangements between shippers and carriers are set out in a number of definitions:

"agreement" means any contract, agreement, arrangement or understanding, made in or outside Australia[17];

"freight rate charges" are the parts of a conference agreement which specify freight rates (including base freight rates, surcharges, rebates and allowances) for outwards liner cargo shipping services;

"loyalty agreement" is an agreement between an ocean carrier or conference and a shipper or designated shipper body in relation to outwards liner cargo shipping services which has the purpose or effect of giving certain benefits to the shipper.

The minimum level of outwards liner cargo shipping services is defined as including a reference to the frequency of sailings, cargo carrying capacity, and ports of call[18].

Key provisions of the Law

There are a number of key provisions which are important for the protection of carrier and shipper interests in an international environment where the market strategy of international carriers may overlook the specific interests of a national group of shippers.

These provisions are looked at in the following paragraphs.

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[17] See the language used in s.45 which is concerned with contracts, arrangements or understandings that restrict dealings or effect competition and prohibits those that contain an exclusionary provision, or have the purpose or have or be likely to have the effect of substantially lessening competition.

[18] s.10.02

1. Shipper benefits

The most important benefits to Shippers are the obligations on conference carriers[19], and on non-conference carriers with substantial market power[20]. These provide a significant framework preventing carriers from acting unilaterally and without regard to the interests of Australian shippers.

These provisions are concerned with "negotiable shipping arrangements" which broadly define the arrangements, terms and conditions applicable to outwards shipping services under a conference agreement, including, for example, freight rates, frequency of sailings and ports of call. In addition these include Bunker Adjustment Factors (BAFs), Currency Adjustment Factors (CAFs) and Terminal Handling Charges (THCs).

The sections require carriers to:

1 Give APSA 30 days notice of any change in negotiable shipping arrangements, unless a lesser period is agreed;

2 Take part in negotiations with APSA whenever reasonably requested, and consider the matters and representations made by APSA;

3 Make available any information requested by APSA which is reasonably necessary for the negotiations;

4 Provide an authorised officer with information relating to the negotiations, notify the officer of meetings, permit the officer to be present at the meetings, and consider suggestions made by the officer.

A proposed amendment announced by the Commonwealth[21] will allow a shipper body which is refused information[22] to obtain a determination from an

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19 s.10.41

20 s.10.52

21 Department of Transport, Enhancements to Part X, Information Paper, undated.

22 s.10.41(1)(b)

authorised officer who will exercise a currently undefined discretionary power to decide whether the information was reasonable necessary for the negotiation, with a right of Appeal to the Administrative Appeals Tribunal.

A potential problem exists with this amendment to the extent that an authorised officer is to make a decision and give his reasons, as it may in some circumstances be invalid as amounting to the exercise of a judicial power. However, if the role of the authorised officer is to be limited to expressing a non-binding 'opinion' this objection may not arise. But what is the point of an 'opinion' if it has no force, as the shipper body and carrier will be put to the trouble and expense of presenting an argument to an authorised officer, when the whole matter is doomed to failure if one of the parties is intent on not accepting any opinion which is not in its favour. This is not a matter of bad faith, so much as it is commercial reality!

2. Carrier benefits

The principal benefit to carriers is that they are exempted from the restrictive trade practices provisions of the Act, though the concessions are subject to an important reservation in relation to a prohibition of the misuse of market power[23].

For the purposes of testing misuse of market power, the Act adopts a highest common denominator approach[24] by which the carriers in a conference agreement are all deemed to have a substantial degree of market power if any single member has that market power.

Carriers enjoy certain exemptions from a number of restrictive trade practice prohibitions in relation to:

1 Conference agreements[25]

2 Loyalty agreements[26]

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[23] s.46

[24] s.10.04

[25] s.10.14

[26] s.10.19

3 Specified negotiations[27]

4 Negotiations with stevedores

5 Door to door operations

Conference Agreements

The exemptions from restrictive trade practices for carriers are available for outwards and inwards conferences, with the exemptions for inwards conferences[28] mirroring the exemptions for outwards conferences[29].

Conference agreements (including agreements relating only to freight rates[30]), are exempt from the prohibition against restrictive trade practices, specifically:

- contracts, arrangements or understandings that restrict dealings or affect competition[31];

- Exclusive dealing[32];

where there is an application for provisional registration within 30 days of the agreement[33].

The exemptions are available 30 days after registration of a conference agreement[34] or a variation[35] and only apply to 'blue-water' service and

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27 s.10.24

28 ss.10.22 and 10.23

29 ss.10.14 and 10.18A

30 ss.10.17A and 10.18A

31 s.45

32 s.47

33 ss.10.17 and 10.18

34 s.10.15

35 s.10.16

activities outside Australia, and are not available for stevedoring operations, domestic air carriage or inland carriage within Australia[35].

This restriction on stevedoring and inland carriage operations has adverse implications for carriers who provide combined transport or through transport bills of lading as a so-called 'one-stop' shipping service, except for an extension of the exemption[37] to the fixing of door-to-door freight rates for an outwards liner cargo shipping service. Freight rates are also fixed for shippers wishing to use only those parts of the service that consist of the transport of cargo by sea, and activities that take place in Australia within the limits of a wharf appointed under section 15 of the Customs Act 1901 (Cth), activities outside Australia at a wharf or adjacent terminal facilities, and the determination of common terms and conditions for conference bills of lading.

However, the proposed amendment of Part X includes an extension of the exemption to some of these activities involving LCL cargo.

Loyalty Agreements

Similarly, a Loyalty Agreement is exempted[38] from the prohibitions on contracts, arrangement or understandings that restrict dealings or affect competition[39] and Exclusive Dealing[40] but, the exemption is only available at the option of shippers and they cease to apply where the shipper gives written notice to the Trade Practices Commission and each of the carriers to the agreement.

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[36] s.10.14

[37] s.10.14(2)

[38] See s.10.19, 10.20 and 10.24

[39] s.45

[40] s.47

Specified Negotiations

Certain negotiations between carriers, conference members and shipper bodies or designated shipper bodies are exempted from the prohibitions in ss.45 and 47[41]:

- Loyalty agreements[42];
- Minimum level of shipping services after provisional registration of an agreement[43];
- negotiations in relation to negotiable shipping arrangements involving a registered conference[44];
- negotiations in relation to negotiable shipping arrangements involving a non-conference carrier with substantial market power[45].

However, no exemptions are available for subsections 47(6) relating to exclusive dealing where there is third line forcing, and subsection 47(7) relating to refusal to supply which is associated with forcing another person's goods or services.

These subsections are particularly important in the context of a recurrent threat over recent years by carriers that they will introduce 'insured bills of lading' during various negotiations with shippers. Insured bills of lading are understood by Australian shippers to mean that the carrier will also offer insurance to shippers, either as a compulsory part of the service, or as an optional but convenient add-on to be purchased when freight is pre-paid. This threat has posed important and adverse revenue ramifications for the Australian insurance market, which has been understandably sensitive to this threat which could see a significant reduction in premiums placed in the

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41 s.10.24

42 s.10.24(1)

43 s.10.29

44 s.10.41

45 s.10.52

Australian insurance market. However such threats can not be carried through as such conduct is prohibited and is illegal[46].

Negotiations with stevedores

Carriers currently have no rights to enter into collective negotiations with stevedores, but amendments are proposed to allow this[47].

Door to door operations

In recent years the use of combined transport and through bills of lading has increased, and carriers see commercial advantages to these documents in the form of 'one-stop shipping' services offered to shippers.

The proposed amendments[48] will allow the Part X exemptions from Part IV to apply to operations involving freight consolidation and distribution depots outside the limits of a wharf.

3. Prohibited anti-competitive conduct

Conference agreements may include only certain restrictive trade practice provisions, otherwise they are illegal.

Discrimination between shippers can have a serious anticompetitive effect, and its use is prohibited[49] for reasons which can not be commercially justified.

Discrimination by ocean carriers is prohibited between shippers requiring similar outwards liner cargo shipping services on a particular trade route (whether the discrimination is in relation to freight rates, levels of shipping services, the provision of equipment and facilities or otherwise) if the

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[46] See subsections 47(6) and (7)

[47] Department of Transport Enhancements to Part X, Information Paper.

[48] ibid, for example, see the restriction on the exemptions in s.10.14 (outwards service) and s.10.22 (inwards service), as applying only to "Blue-Water" parts of service and activities outside Australia

[49] s.10.05

discrimination is of such a magnitude or such a recurring or systematic character that it has, or is likely to have, the effect of substantially lessening competition in a market for goods or services, being a market in which the shippers supply goods or the ocean carrier supplies outwards liner cargo shipping services.

However, a carrier has a defence if it proves that the discrimination made or the carrier reasonably believed it only made reasonable allowance for:

- differences in the cost or likely cost of providing outwards liner cargo shipping services resulting from different ports, quantities of cargo or kinds of cargo carried;

- the capacity of the ocean carrier to carry cargo, different times at which the outwards liner cargo shipping services were required, during an act in good faith to meet freight rates, levels of service, equipment or facilities, or benefits offered by a competitor.

This prohibition applies to a wide class, including servants and agents of both shippers and carriers, and third parties such as freight forwarders, and prohibits[50] a person from:

- knowingly inducing, or attempting to induce, an ocean carrier to discriminate between shippers;

- entering into a transaction that, to the knowledge of the person, would result in the person receiving the benefit of a prohibited discrimination.

An exclusionary provision of an agreement that has or is likely to have the effect of substantially lessening competition (within the meaning of section 45 of the Act) must either deal only with the following matters[51]:

- fixing or regulation of freight rates;

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[50] s.10.05(3)

[51] s.10.08

- pooling or apportionment of earnings, losses or traffic;

- restriction or regulation of the quantity or kind of cargo carried by parties to the agreement;

- restriction or regulation of the entry of new parties to the agreement;

or it must be necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

If a conference agreement includes a provision that permits or requires exclusive dealing[52], the provision must be necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

The prohibitions in s.10.08 do not apply to a loyalty agreement.

There are a number of consequences which flow from a breach of minimum standards which are contained in s.10.28 (decision on application for provisional registration), s.10.33 (decision on application for final registration) and s.10.45 (circumstances in which the Minister may exercise his powers in relation to registered conference agreements).

Ministerial Powers

The Minister for Transport has certain powers which can be exercised over registered conference agreements[53] and non-conference carriers[54] including a direction to the Registrar to cancel the registration of either a registered conference agreement, or alternatively, a registered conference agreement in relation to a particular provision, party or conduct.

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[52] Within the meaning of section 47.

[53] s.10.44

[54] s.10.55

However, the circumstances in which the Minister can exercise his powers is limited[55] to a number of situations where the Minister must be satisfied of one or more of the following matters:

1 The agreement does not comply with one of the following provisions:

1.1 application of Australian law to conference agreements and withdrawal from agreements[56];

1.2 minimum levels of shipping services to be specified in conference agreements[57];

1.3 conference agreements may include only certain restrictive trade practice provisions[58].

2 Parties to the agreement have already or propose to contravene either of the following provisions:

2.1 the obligation to negotiate with APSA etc.[59];

2.2 parties to registered conference agreement fail to notify happening of affecting events etc.[60].

3 Application to be made for registration of varying conference agreements has not been complied with in relation to a conference agreement that varies or otherwise affects the agreement[61].

4 Parties to the agreement have given or propose to give effect to or apply the agreement without due regard to the need for outwards liner cargo shipping services provided under the agreement to be:

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55 s.10.45

56 s.10.06

57 s.10.07

58 s.10.08

59 s.10.41

60 s.10.43(1)

61 s.10.42

4.1 efficient and economical; and

4.2 provided at the capacity and frequency reasonably required to meet the needs of shippers.

5 Parties to the agreement have given or propose to give effect to or apply the agreement in a manner that prevents or hinders an Australian flag shipping operator from engaging efficiently in outwards liner cargo shipping services[62].

6 Provisional or final registration of the agreement was granted on the basis of a statement or information that was false or misleading in a material particular[63].

7 Parties to the agreement have breached an undertaking given by them[64].

In addition, the Minister is required[65] to have or attempt consultations with parties to obtain an undertaking or action so that it is unnecessary for him to direct the Registrar to cancel a registered conference agreement, and either the Minister has taken a Trade Practices Commission Report into account, or is satisfied that the special circumstances of the case make it desirable to give the direction before waiting for the Commission's Report.

There has been at least one situation in Australia where the Minister has exercised his power in requesting a report from the Commission, which involved the issue of Terminal Handling Charges (THC's) introduced at US Ports on 1 January 1991[66].

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[62] ANL Ltd trading as the Australian National Line.

[63] The language of this section is interesting as it does not adopt the formula used elsewhere in the Act, eg section 52 which prohibits conduct that is or is likely to be misleading or deceptive. It is not clear why a different approach is taken in this regard.

[64] s.10.49

[65] s.10.45 (b)

[66] Report of the Trade Practices Commission, Canberra

Further, the Minister has power[67] to order a carrier not to engage in a pricing practice. The relevant circumstances for the exercise of the power are set out in s.10.62, and the matter may be referred to the Trade Practices Tribunal for inquiry[68].

Commission Investigations and Reports

The Trade Practices Commission is required to conduct investigations and report to the Minister[69] or at the request of an affected person[70]. An 'affected person' is widely defined[71] as meaning a party to the agreement, a designated shipper body, an Australian flag operator, a shipper who uses the service, and an association representing shippers.

Shippers have called on the Trade Practices Commission to investigate a number of matters, including:

- The implementation of THC's introduced at US Ports on 1 January 1991
- Introduction of CAF's by Bridge Line Pty Ltd in June 1995

Carriers - How to avoid deregistration

The principal method is to comply with the negotiation requirements[72] but also, in the event of other problems, for a conference carrier[73] or non-conference carrier[74] to give undertakings.

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[67] s.10.61

[68] s.10.63

[69] s.10.47

[70] s.10.48

[71] s.10.48(5)

[72] s.10.41 and s.10.52

[73] s.10.49

[74] s.10.59

Carrier Agents

The appointment of a Carrier agent is of considerable interest in light of the recent 1995 repeal of the Ship's Port Agent provision in the Sea Carriage of Goods Act 1940 (NZ), by the Maritime Transport Act 1994 (NZ)[75], and in Australia, lawyers acting for cargo interests in claims against carriers have used the information on the Register to obtain an Order of the Court for substituted service on the Carrier Agent to overcome difficulties with having to serve some Carriers at overseas addresses.

Australian Jurisdiction

Australian law[76] applies to conference agreements and they must expressly provide for a question in relation to an outwards liner cargo shipping service to be determined in Australia in accordance with Australian law unless the parties and the Minister agree in writing to the contrary.

Dispute Resolution

Shippers and carriers have been concerned that their disputes should be the subject of 'commercial negotiations' rather than litigation in the Courts, and during the Brazil Inquiry submissions were made by a number of parties to this effect, and a recommendation for arbitration or mediation was included in the Brazil Report[77]. An important consideration has been the high cost of litigation, but also the belief that adversarial conflict with high risk of damage to ongoing relationships between carriers and shippers should be avoided.

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[75] See the article by MacImrie 'Marine Cargo Claims in New Zealand: The Former Role of Section II of the Sea Carriage of Goods Act in the Recovery Process' in (1995) II MLAANZ Journal 46.

[76] s.10.06

[77] Brazil Report, Chapter 9, p157

There are already 'consultation' procedures in the Act which are intended to lead to an undertaking by a conference carrier[78] and a non-conference carrier[79].

The Department of Transport has recommended[80] alternative, low cost dispute resolution processes to provide for commercial resolution of problems at industry level using mediation, conciliation or arbitration where the parties agree. The Department notes in relation to arbitration that where the parties have a written agreement to adopt the arbitrators decision, no government involvement in the arbitration process will be necessary.

The law in Australia has already become highly developed for resolution of maritime disputes by mediation or arbitration[81].

Penalties and Civil Remedies

There are currently no financial penalties for breaches of Part X by a conference carrier or non-conference carrier for failure to comply with their obligations under s.10.41 and s.10.52 respectively. The current penalties relate to offences under Part IV[82] which apply where the conduct of a carrier does not get the benefit of the limited exemptions under Part X, and are a comprehensive deterrent[83].

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78 s.10.45(b)

79 s.10.55(b)

80 Department of Transport, Information on Enhancements to Part X, p6. The amendment will be consistent with s.10.01(2)(b).

81 Levingston, J. The Development of Arbitration and Mediation as Alternative Dispute Resolution Procedures for Resolving Maritime Disputes in Australia, (1995) 6 ADRJ 127.

82 Restrictive Trade Practices

83 See Part VI Enforcement and Remedies: s76 Pecuniary Penalties for a Body Corporate is up to $10 million and a person up to $500,000.00.

It is in this respect that shippers perceive the law as currently having no teeth in relation to carriers, and both APSA[84] and NSWSA[85] made submissions to the Brazil Inquiry calling for the introduction of penalties and civil remedies for damages arising from the conduct of carriers.

These submissions were adopted by the Brazil Inquiry and are included in its recommendations[86], and form part of the proposals for amendments to the Act[87].

The proposed amendment will impose a pecuniary penalty where a party to a registered agreement contravenes an undertaking under s.10.49. This will remove an anomaly and make the provisions in relation to conference carriers consistent with those applying to non-conference carriers under s.10.60[88].

Civil Remedies

There are two proposed amendments which relate to injunctions and damages[89].

The Federal Court of Australia has the power to grant injunctions under the Act[90], and this power is to be extended to apply to a breach of an undertaking given under s.10.49.

In addition, section 82 provides for damages, and the proposed amendment will allow a party to recover where their loss or damage results from:

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84 The APSA submission at p3.

85 The NSWSA submission at p2.

86 Brazil Report, discussion commencing p159, Findings and Recommendations p162.

87 Department of Transport, Enhancements to Part X, Information Paper.

88 Pecuniary penalties have been available against non-conference carriers under s.10.60 by application of Part IV and s.76.

89 Part VI - Enforcement and Remedies , s.80 Injunctions and s.82 Actions for Damages.

90 s.80

- a breach involving freight rate modification or other charges without the required notification or negotiations, or from failing to provide information[91];

- contravention of a carrier's undertaking[92].

The proposed amendment for damages (as currently advised) is defective in a number of important respects:

- It seems to create an anomaly as it is limited to conference carriers[93] and does not include the obligations of non-conference carriers[94];

- It is expressed more narrowly than the field of activities referred to by the words of the sections which refer to 'negotiable shipping arrangements'[95];

- It is not available for any loss or damage arising from a breach of any obligation under Part X. This limitation is remarkable as the future may involve currently unforseen circumstances in which a shipper suffers losses from other breaches of Part X, for example, first or third line forcing.

Importers

An important anomaly exists in Part X by which the consumers in Australia's export markets get the benefit of the negotiations between Australian exporters and carriers but Australian consumers receive no reciprocal benefits

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91 s.10.41. This problem arose for Australian Shippers whose contracts were adversely affected when THCs of US$250.00 were introduced for LO TEU Containers to North American Ports.

92 s.10.49

93 s.10.41

94 s.10.52. Perhaps the reason is that to date non-conference carriers have not featured in Part X other than in theory.

95 ibid

as there is currently no similar legislation in countries exporting to Australia, and Part X does not apply to importers.

In September 1995, Victorian Shippers complained to both the Prices Surveillance Authority and the Trade Practices Commission seeking investigation of south bound THCs imposed by a number of conference carriers[96] from Asian Ports to Australian Ports.

Implications for Closer Economic Relations (CER)

The practical implication for CER[97] between Australia and New Zealand is the absence of the application of Part X to importers is for New Zealand to adopt the effect of the provisions of Part X into its legislation.

On 1 August 1994 the Trade Practices Commission and the NZ Commerce Commission signed an agreement on co-operation and co-ordination formalising an agreement that has evolved from increasing business between the two countries as a result of CER, mutual assistance in business regulation and criminal matters between the two countries and the OECD's call for co-operation between member countries on restrictive business practices effecting international trade. The agreement does not mean the imposition of either country's laws or practices upon business, but will promote co-operation and co-ordination and lessen inconsistencies for business[98].

The success of CER in creating a free trade relationship between Australia and New Zealand also has implications for APEC[99].

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96 'Importers Demand THC Probe', Daily Commercial News, 8 September 1995, p3 and 'Lines Defend THC's; Japan Trade is Next', Daily Commercial News, 11 September 1995, p3.

97 Closer Economic Relations

98 Co-operation and Co-ordination Agreement between the Australian Trade Practices Commission and New Zealand Commerce Commission, see Australian Trade Practices Reporter, vol 2, para 30-294.

99 Asia Pacific Economic Council (APEC). See the paper by the Bureau of Industry Economics (BIE) "Impact of the CER Trade Agreement", Canberra, September 1995.

CER has been promoted as a possible model containing important lessons for APEC as trans-Tasman merchandise trade had grown faster under CER than the two nations' trade with the rest of the world, with Australian exports to NZ growing at an average 12% per year compared to 7% for total exports.

In the context of CER, NZ should implement the law in Part X of the Act, particularly the key provisions requiring negotiations[100].

Application of Part X

Part X has been applied in a number of areas which are discussed below.

Bills of Lading/Australia to Europe Shipping Conference

During 1991[101], clauses on the AESC Bill of Lading were negotiated by APSA to more fairly spread the share of responsibility for carriage of goods by sea under a combined transport bill of lading[102].

Bills of Lading - Columbus Line to USA

In 1992, clauses in the Columbus Line Bill of Lading to North America were negotiated by APSA to achieve terms which considered issues relevant to Australian exporters[103].

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[100] s.10.41 and 10.52

[101] The negotiations commenced in February 1991 and were finalised in November 1991. Mr Frank Beaufort of APSA led the shipper delegation and Mr John Richardson from P & O in London, and a member of the Bills of Lading Committee led the carrier delegation.

[102] Levingston J., Combined Transport Bill of Lading Introduced by the Australia to Europe Shipping Conference.

[103] Levingston J., Through Transport Bill of Lading Introduced by Columbus Line to North America.

Minimum Service Levels

APSA held Part X negotiations with a number of Conferences and Consortia on minimum levels of service. The following Agreements have been registered:

- Hapag-Lloyd Slot Charter Agreement with JMG
- Variation to the Australia to Europe Liner Association
- Anscon/Australia New Zealand Eastern Shipping Conference Pooling Agreement
- Australia to South East Asia Shipping Forum
- Variation to Trans Tasman Agreement
- Variation to Anscon Inwards Agreement
- Southern Africa/Australia Agreement
- Variation to Anscon/Anzesc Pooling Agreement
- Australia Japan/Korea & East Asia Rationalisation Agreement
- Australia J/K & E/A Service/Yangming Slot Charter Agreement
- Australia to Europe Liner Association Northbound Trade Agreement
- Heads of Agreement between JMG & Hamburg SUD
- Variation to the Australia South East Asia Shipping Forum Constitution
- Heads of Agreement between JMG & Wilhelmsens
- Heads of Agreement between JMG & Lloyd Triestino
- ANRO/JMG Charter Agreement
- Amended Anscon Constitution
- OOCL/ZIM Service Agreement
- Anscon/Zim Agreement
- AELA Northbound Trade Participation Agreement

In APSA's view, some of the Conferences and Consortia offered unsatisfactory levels of service which would have resulted in fewer and therefore less frequent sailings and less space for shippers. As a consequence of negotiations, higher minimum service levels were achieved.

Terminal Handling Charges

The North American Conferences imposed Terminal Handling Charges relating to the use of North American ports to be paid by either exporters or importers

effective from 1 January 1991. APSA used its powers under the Trade Practices Act to bring about negotiations whereby the North American Conferences were asked to justify and substantiate their charges.

A satisfactory conclusion to negotiations could not be reached and APSA referred the complaint to the Minister for Transport who referred the complaint to the Trade Practices Commission for investigation. A satisfactory resolution to the complaint was subsequently achieved.

Part X negotiations were held with the Australia Northbound Shipping Conference to establish the bona fides of their THCs for Asian Ports.

Anscon was obliged to provide copies of invoices justifying THCs to ensure that the charges covered costs outside of the terminal to terminal freight rates. As a consequence the THC at Manila was significantly reduced.

There is currently a campaign by some carriers to introduce THCs at Australian Ports on outwards cargoes which APSA has rejected and this is clearly an ongoing issue for Shippers.

Freight Rate Negotiations

APSA assists in freight rate negotiations if negotiations between Exporters and Shipping Conferences break down and on a number of occasions APSA has assisted Shippers in their negotiations with satisfactory results.

Bunker and Currency Surcharges

APSA is working towards the abolition of these surcharges. As a first step, APSA has negotiated an emergency arrangement with the European and South-East Asian Conferences. The agreement allows for a combined movement of CAF and BAF of minimum 4% up or down before there is any adjustment to the combined surcharge. In the European trade the combined CABAF moved to negative 4.66% on 18 March 1993 and has remained at this level ever since.

APPENDIX

APSA conducts many of its negotiations through 11 industry and regional sub-committees:

Dairy Industry Shipping Association
Australian Horticultural Exporters Association
Australian Malt Exporters Committee
Metals & Minerals Shippers Association (MAMSAAL)
Western Australian Shippers Council Incorporated
Australian Raw Cotton Exporters Committee
Australian Horticultural Corporation
The Meat Industry Shipping Association
South Australian Shipping User Group
Australian Wood Panels Association
Wool Industry Shipping Group

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