

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TRADE PRACTICES (INTERNATIONAL LINER CARGO SHIPPING)

AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and Communications, the Honourable Ralph Willis MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

TRADE PRACTICES (INTERNATIONAL LINER CARGO SHIPPING)
AMENDMENT BILL 1989

OUTLINE

This Bill gives effect to major changes to the regulatory system governing international liner cargo shipping, announced by the Government in November 1987. The changes will encourage a more competitive shipping environment. Australia's exporters and importers will continue to have access to liner conference shipping services with appropriate safeguards to ensure frequent and reliable sailings at internationally competitive freight rates.

Reduced exemption from Part IV

The total exemption from Part IV of the Trade Practices Act for conferences (ie shipping cartels) will be reduced to that necessary for the continued provision of rationalised services. Exemption will be limited: to Sections 45 (anti-competitive agreements) and 47 (exclusive dealing) in Australia's export trades; applied only to certain specified conduct; and made available for other restrictive conduct but only where there is overall shipper benefit. Section 46 (misuse of market power) will be applied to conference operations. Discrimination between similarly situated shippers will be prohibited by including a provision based on Section 49 (price discrimination) in the amended Part X.

Exemption for conferences will be generally restricted to the "blue-water" component of the shipping service. The exemption does not extend to the Australian stevedoring operations and the transport of cargo by land or air.

Designated shipper bodies and carriers will, without regulation, be able to enter into loyalty agreements without breaching Part IV of the Act.

Minimum standards and public availability

All conference agreements for outwards services must be registered, comply with minimum standards and be publicly available for 30 days before they can enter into operation

The two stage transport registration procedure gives shippers advance notice of proposed carriage arrangements, permits shippers to participate in negotiations regarding minimum service levels before the agreement is finally registered and provides an early opportunity for registered agreements to be challenged by the TPC.

The minimum standards for conference agreement will include details of minimum service levels based on negotiations with a designated shipper body; provide for the resolution of

disputes in Australia in accordance with Australian law unless excepted by the Minister; and allow parties to the agreement to withdraw upon reasonable notice without penalty.

Agreements for inwards services are not required to be registered.

Negotiation with designated shipper bodies

The Bill strengthens the rights of shipper bodies. It provides Conferences and (non-conference operators with a substantial degree of market power) be required to negotiate with the relevant designated shipper body whenever reasonably requested over arrangements for and the terms and conditions of carriage of Australia's liner exports. They will have to provide a maximum of 30 days notice to the relevant designated shipper body before freight rates and service levels can be varied. Designated shipper bodies will be given the necessary exemption for the purposes of negotiations from Part IV of the Trade Practices Act.

Unfair Pricing

Allegations of unfair pricing can be referred, through the Minister, for consideration by the Trade Practices Tribunal.

Australian Flag Shipping

The Bill continues the existing policy of providing limited safeguards for Australian flag shipping in the Trade Practices Act. Conferences, and non-conference operators with substantial market power, will be prohibited from hindering an Australian flag operator, for example, on non-commercial grounds. Complaints of hindrance will be able to be referred to the Trade Practices Commission for investigation.

FINANCIAL IMPACT STATEMENT

There is no financial impact on Commonwealth revenues arising from the Bill.

NOTES ON CLAUSES

Clause 1 - Short Title, etc

1. Provides for the Act to be cited as the Trade Practices (International Liner Cargo Shipping) Amendment Act 1989
2. The "Principal Act" referred to in the Bill is the "Trade Practices Act 1974"

Clause 2 - Commencement

3. Provides that the Act shall commence on a day to be set by Proclamation or 6 months after it receives Royal Assent.

Clause 3 - Application of Act to Commonwealth and Commonwealth Authorities

4. Provides for the Act to bind the Crown, consistent with the rest of the Trade Practices Act.

Clause 4 - Repeal of Part X and substitution of a new Part

5. Repeals the existing Part X of the Trade Practices Act and substitutes a new Part as follows:

PART X - INTERNATIONAL LINER CARGO SHIPPING

DIVISION 1 - Preliminary

Section 10.01: Objects of Part

6. The main objects of the Part are to: ensure frequent and reliable liner shipping services for Australian exporters at competitive freight rates; promote conditions in the liner shipping industry encouraging stable access to export markets and to safeguard efficient Australian flag shipping from unreasonable hindrance in commercial participation in Australia's outwards liner shipping trades.
7. These objectives will be achieved by reducing current conference (ie shipping cartel) exemptions from the restrictive trade practices provisions of Part IV of the Act. Section 46 (misuse of market power) will be made applicable; agreements must meet certain minimum standards and be publicly available and conferences will be required to negotiate with designated shipper bodies.
8. The Bill provides for additional safeguards to shippers and in limiting Conference exemptions from Part IV will permit increased reliance on commercial resolution of disputes and a reduced level of

Government intervention in routine commercial matters. The Trade Practices Commission will have a greater role in examining industry complaints.

9. The Bill limits jurisdiction to those carriers providing services to or from Australia for the purpose of enabling remedies for breaches of Part X to be enforced within Australia.

Section 10.02: Interpretation

10. This section defines terms used in the Bill. The more significant definitions include:

"Agreement" extends to any contract, agreement, arrangement or understanding made overseas or in Australia and includes oral agreements.

"Association" includes a body corporate.

"Australian flag shipping operator" is a person or body corporate providing shipping services of any type using a majority of ships registered in Australia. This would include, for example, liner, bulk, domestic and international shipping services.

"Conference" means an unincorporated association of two or more ocean carriers carrying on two or more businesses each of which includes, or is proposed to include, liner cargo shipping services in a particular trade.

"Liner cargo shipping service" means a scheduled service for carriage by sea of various types of mainly containerised cargoes on particular routes at predetermined freight rates.

"Loyalty agreement" is an agreement between an ocean carrier or a conference and a shipper or designated shipper body which gives benefits to the shipper if the shipper ships a particular cargo or a particular portion or quantity of cargo with the carrier or conference. These benefits may include such things as price discounts or rebates, provision of special services or equipment by the carrier.

"Vary" means to vary a conference agreement by changing, omitting, adding or substituting any provisions of or parties to the agreement.

11. Minimum service levels include frequency of sailings, ports of call and cargo carrying capacity to be provided under a conference agreement.
12. An agreement that affects a conference agreement includes an agreement between the parties to the conference agreement, or the parties and other ocean carriers which affects: the conduct of the parties to the conference agreement; the minimum service levels

provided under the agreement; or otherwise affects the operation of the conference agreement or outwards liner cargo shipping services to be provided under the agreement.

Section 10.03: Designated shipper bodies

13. This section allows the Minister to declare that a shipper body which represents Australian shippers generally is a designated peak shipper body and that a shipper body which represents the interests of a particular group of shippers is a designated secondary shipper body. Shipper bodies designated by the Minister as a peak shipper body have the power to require conferences to negotiate over minimum service levels. They can also compel conferences and non-conference operators with a substantial degree of market power to negotiate over freight rates and terms and conditions of carriage. A shipper body designated by the Minister as a secondary shipper body may also be able to require negotiations if it is nominated as a relevant body by the Registrar, in the absence of a peak shipper body. Such designated shipper bodies receive a limited exemption from the restrictive trade practices provisions of the Trade Practices Act to conduct and seek agreement at these negotiations. All designated shipper bodies will receive a limited exemption from the restrictive trade practices provisions of the Trade Practices Act to negotiate and to enter into loyalty agreements.
14. Sub-section 5 provides for the Minister to issue guidelines to the Registrar of Liner Shipping for use when nominating secondary shipper bodies to conduct negotiations.

DIVISION 2 - Additional restrictive trade practices provisions applying to ocean carriers

Section 10.04: Application of Section 46 in relation to conference agreements

15. Where parties to a conference agreement collectively are found to have substantial market power consistent with the test for corporations then Section 46 can apply. If the parties to a conference agreement meet this collective test then each member of the conference is deemed to have a substantial degree of power in a market by virtue of its membership of that conference.
16. This section applies to both inwards and outwards conference agreements.

Section 10.05: Discrimination between shippers prohibited

17. No ocean carrier may discriminate between shippers requiring similar services on the same route, outwards from Australia, if the discrimination is likely to

affect competition for either the supply of shipping services or between shippers supplying particular goods. This does not apply to loyalty agreements.

18. It is not considered to be discrimination if allowance is made for different ports to or from which services are required, different types or quantities of goods, the capacity of the carrier to carry cargo or the time at which services are provided. It is also a defence if the ocean carrier was acting in good faith to meet benefits offered by a competitor.
19. Penalties for contravention of this section are the same as if the ocean carrier had contravened Part IV of the Act, ie Part VI applies.

DIVISION 3 - Minimum standards for conference agreements

Section 10.06: Application of Australian law to conference agreements and withdrawal from agreements

20. A conference agreement must provide for disputes to be settled in Australia under Australian law unless the parties and the Minister agree otherwise.
21. Any party to an agreement must be allowed to withdraw, without penalty, from an agreement on reasonable notice.

Section 10.07: Minimum levels of shipping services to be specified in conference agreements

22. A Conference agreement must specify the minimum levels of service to be provided, ie the minimum frequency of sailings, ports of call, etc.

Section 10.08: Conference agreements may include only certain restrictive trade practice provisions

23. A conference agreement may only include certain exclusionary provisions or provisions which restrict competition, which are deemed necessary for Conference to continue to provide rationalised services to Australian shippers, ie to fix or regulate freight rates, to pool earnings, losses or traffic, to restrict the quantity or kinds of goods carried by parties to the agreement and membership of the Conference. Other restrictive exclusionary conduct may be given exemptio provided that it meets the test of it being necessary for the effective operation of the agreement and of overall benefit to Australian exporters.
24. If a conference agreement permits exclusive dealing, other than loyalty agreements, then it must meet the test of being necessary for the effective operation of the agreement and of overall benefit to Australian exporters.

Section 10.09: Where consequences of conference agreements not complying with minimum standards arise

25. This is a 'signpost' provision pointing to the consequences of a conference agreement not complying with Division 3.

DIVISION 4 - Registers and files and public inspection of them

Section 10.10: Registers and conference agreement files open to public inspection

26. The public may look at the registers and conference agreement files kept by the Registrar and the Trade Practices Commission, and on payment of a fee, are entitled to a copy.

Section 10.11: What registers are to be kept by the Registrar?

27. Lists the registers which must be kept.

Section 10.12: What conference agreement files are to be kept by the Registrar?

28. The Registrar must keep a file, containing the specified documents, for each conference agreement registered.

Section 10.13: What register is to be kept by the Commission?

29. The Trade Practices Commission shall keep a register of investigations by it, containing the specified documents.

DIVISION 5 - Exemptions from certain restrictive trade practice prohibitions

Subdivision A - Exemptions relating to conference agreements

Section 10.14: Exemptions apply only to 'blue-water' parts of service, etc

30. Exemptions relating to outwards liner cargo shipping services only apply to that part of the service which is by sea and activities which take place outside Australia. Stevedoring operations and transport of the cargo by land or air are not covered by the exemptions.
31. The exemptions do apply to fixing door-to-door rates provided shippers also have the choice not to use these rates and to only use the part of the service and associated terminal facilities which is by sea,

and to determining common terms and conditions for bills of lading offered by conference members. These exemptions provide shippers with the option to use door-to-door services and provide standard conditions of carriage when shipping with any member of the Conference.

Section 10.15: When do exemptions commence to apply in relation to registered conference agreements?

32. Conference may only operate outwards liner shipper services with the protection of the exemptions at the end of 30 days after the conference agreement is finally registered.

Section 10.16: Exemptions do not apply to variations of conference agreements unless varying agreement registered

33. Exemptions do not apply to variations of agreements or variations of specific provisions of agreements until the variation has been finally registered.

Section 10.17: Exemptions from Section 45

34. Section 45 which prohibits the making of anti-competitive agreements, does not apply to conference agreements providing the parties to the agreement apply for provisional registration within 30 days of making the agreement.
35. Section 45 does not apply to conduct of a party to a registered conference agreement provided the conduct is authorised by a provision in the agreement and is limited to outwards liner shipping services.

Section 10.18: Exemption from Section 47

36. Section 47, which prohibits exclusive dealing, does not apply to conduct of a party to a registered conference agreement provided the conduct is authorised by a provision of the agreement and is limited to outwards liner shipping services. This exemption does not apply to conduct known as "third line forcing", which is prohibited by Section 47(6) and (7) i.e. attaching a condition to provision of a service which obliges a shipper to use services of a particular third party.

Subdivision B - Exemptions relating to loyalty agreements

Section 10.19: Exemptions from Section 45

37. Provides exemption from Section 45 anti- agreements) for making of and conduct giving effect to loyalty agreements.

Section 10.20: Exemption from Sections 47 and 10.05

38. Conduct of a party under a loyalty agreement is exempt from Sections 47 (exclusive dealing) and 10.05 (discrimination between shippers prohibited) provided it is authorised by the agreement and is limited to outwards liner shipping services. An ocean carrier may discriminate between shippers on the basis that one is prepared to sign a loyalty agreement and the other is not. However, the carrier may not discriminate by refusing to offer shippers the option of a loyalty agreement. The exemption does not apply to conduct known as "third line forcing", which is prohibited by Section 47(6) and (7).

Section 10.21: Exemptions cease to apply in relation to shipper at shipper's option

39. If a shipper notifies a loyalty agreement to the Trade Practices Commission and all other parties to the agreement, the exemptions cease to apply to conduct by an ocean carrier in relation to that shipper only and Part IV applies. Other shippers who may be party to the same or a similar agreement are not affected.

Subdivision C - Exemption relating to inwards liner cargo shipping services

Section 10.22: Exemption applies only to "blue-water" parts of service and activities outside Australia etc

40. Exemptions relating to inwards liner cargo shipping services apply only to that part of the service which is by sea and activities which take place outside Australia. Stevedoring operations and transport of the cargo by land or air are not covered by the exemptions.
41. The exemptions do apply to fixing of door-to-door rates provided shippers also have the choice not to use these rates and to only use the part of the service and associated terminal facilities which is by sea, and to determining common terms and conditions for bills of lading offered by conference members. These exemptions provide shippers with the option to use door-to-door services and provide standard conditions of carriage when shipping with any member of the Conference.

Section 10.23: Exemption from Sections 45 and 47

42. Sections 45 and 47 do not apply to conduct in relation to provision of an inwards liner cargo shipping service. This exemption does not apply to conduct known as "third line forcing" which is prohibited by Section 47(6) and (7).

Subdivision D - Other exemptions

Section 10.24: Exemptions from Sections 45 and 47 in relation to certain negotiations

43. Sections 45 and 47 do not apply to conduct by an ocean carrier, conference, shipper or designated shipper body in relation to conduct relating to: the determination of terms and conditions for model loyalty agreements; or the obligations of an ocean carrier to negotiate under this Part. The exemption does not apply to conduct known as "third line forcing" which is prohibited by Section 47(6) and (7).

DIVISION 6 - Registration of conference agreements
Subdivision A - Provisional registration

Section 10.25: Application for provisional registration of conference agreement

44. This is a "signpost" provision pointing to the requirements necessary to make a valid application for provisional registration.

Section 10.26: How application is to be made and verified

45. Parties to a conference agreement may apply for provisional registration of the agreement. The application shall be made and verified in accordance with the regulations.

Section 10.27: Copy of agreement to be filed with application etc

46. An application for provisional registration of an agreement must have a copy of the agreement attached or if the agreement is not in writing a copy of a written memorandum which fully sets out all the provisions of the agreement other than details of minimum service levels. Any document which accompanies an application for provisional registration must comply with any regulations requiring its verification.

Section 10.28: Decision on application for provisional registration

47. The Registrar has 14 days to decide whether or not to grant provisional registration. Whether or not the agreement is provisionally registered the Registrar shall notify the applicants accordingly.
48. There are several reasons for refusal of registration: the application has not been made correctly; agreement does not apply Australian law or allow for withdrawal of members without penalty on reasonable notice; a request for confidentiality has been refused and the application is returned;

application has not been made for provisional registration of a varying agreement; notification has not been made of an event affecting the operation of the agreement.

Section 10.29: Parties to conference agreement to negotiate minimum level of shipping services after provisional registration of agreement

49. Parties to a provisionally registered conference agreement must negotiate with the designated peak shipper body or if there is no peak body a designated secondary shipper body nominated by the Registrar, over minimum levels of service to be provided under the agreement (including any provisions of the agreement that affect the level of those services).
50. Parties to the agreement and the shipper body must make available to each other any information reasonably necessary for the purposes of the negotiations. Parties to the agreement must provide an authorised officer with information relating to the negotiations, permit the officer to be present at the negotiations and consider suggestions made by the officer.
51. The shipper body may choose not to have negotiations in relation to an agreement. This may occur, for example, where a varying agreement which does not affect minimum service levels is submitted for provisional registration.

Subdivision B - Final registration

Section 10.30: Application for final registration of conference agreement

52. Parties to an agreement which is provisionally registered may apply for its final registration. This section also contains a "signpost" provision pointing to the requirements necessary to make a valid application.

Section 10.31: How application is to be made and verified

53. An application for final registration must be made and verified in accordance with the regulations.

Section 10.32: Copy of agreement to be filed with application etc

54. An application for final registration of a conference agreement must have a copy of the agreement attached or if the agreement is not in writing a copy of a written memorandum which fully sets out all the

provisions of the agreement. Any document which accompanies an application for final registration must comply with any regulations requiring its verification.

Section 10.33: Decision on application for final registration

55. The Registrar has 14 days to decide whether or not to grant final registration. Whether or not the agreement is finally registered the Registrar shall notify the applicants accordingly.
56. There are a number of reasons for refusal of registration: the application has not been made correctly; the agreement does not specify minimum levels of service or does not comply with the requirement that agreements may include only certain restrictive trade provisions; that parties have not negotiated minimum levels of service; that a request for confidentiality has been refused and the application returned; an application has not been made for registration of a varying agreement; or notification has not been made of an event affecting the operation of the agreement.

Subdivision C - Confidentiality requests

Section 10.34: Request for confidentiality

57. An application for provisional or final registration may also include an application for certain parts of the agreement to remain confidential and not be placed on the public register. Any such application must include a statement of reasons in support of the request.

Section 10.35: Abstract to accompany request for confidentiality

58. A request for confidentiality must be accompanied by an abstract, prepared in accordance with the regulations, of the part of the document for which confidentiality is requested.

Section 10.36: Examination of abstract

59. The Registrar shall determine whether or not to accept the abstract and if he refuses to accept the abstract, shall refuse the request for confidentiality. The Registrar may refuse to accept an abstract if it does not comply with the regulations or if it does not adequately describe the scope of the part of the document for which confidentiality is requested. If the Registrar refuses to accept an abstract he must notify the applicants accordingly.

Section 10.37: Decision on request for confidentiality

60. The Registrar has 14 days in which to decide whether or not to accept a request for confidentiality. Provided the request has been properly made and the abstract is adequate, the Registrar shall accept the request if the Registrar is satisfied that granting the request would not be disadvantageous to Australian exporters and that disclosure of the information would adversely affect the conference in relation to its business. The criteria used for determining whether disclosure of information would adversely affect the conference are the criteria used in the Freedom of Information Act. If the Registrar refuses a request for confidentiality he must notify the applicants accordingly.

Section 10.38: Application for registration etc to be returned where request for confidentiality refused etc

61. Where a request for confidentiality is refused, the application for provisional or final registration of the related conference agreement will also be refused and the Registrar shall return the application and any documents accompanying it.

Subdivision D - Miscellaneous

Section 10.39: Application also to be made for registration of varying conference agreements

62. The Registrar shall not provisionally or finally register an agreement if another agreement that affects or varies the original agreement has been made, unless an application has been made for the provisional registration of the affecting or varying agreement.

Section 10.40: Notification of happening of affecting events prior to final registration etc

63. This section compels conferences to file details of events (other than varying conference agreements) and agreements with other ocean carriers which may have some impact on the conference agreement for which provisional or final registration has been sought. These events or "side agreements" may not necessarily vary the conference agreement in a technical sense, but it nevertheless may affect the operation of the agreement in some way. These would include those parts of an inwards shipping agreement which directly affect the provision of outwards services or an agreement between parties to a conference agreement and other ocean carriers which affect the provision of services to shippers on a specific or related trade route.

DIVISION 7 - Obligations of ocean carriers in relation to registered conference agreements

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

64. Parties to a registered conference agreement must take part in negotiations over shipping arrangements with the designated peak shipper body or the designated secondary shipper body nominated by the Registrar whenever reasonably requested, and must consider matters raised by the body.
65. Parties to an agreement and the shipper body must make available to each other any information reasonably necessary for the purpose of the negotiations. Parties to the agreement must provide an authorised officer with information relating to negotiations, permit the officer to be present at negotiations and consider suggestions made by the officer.
66. The parties to an agreement shall give the shipper body with whom it negotiates at least 30 days notice of changes in shipping arrangements, unless the shipper body agrees to a lesser period (in cases, for instance, where the changes benefit shippers e.g. freight rates are being reduced, or capacity being expanded).

Section 10.42: Application to be made for registration of varying Conference agreements

67. Parties must apply for provisional registration of an agreement varying or otherwise affecting an original agreement within 30 days of making the agreement.

Section 10.43: Parties to registered conference agreement to notify happening of affecting events etc

68. This section compels parties to a registered conference agreement to file details of events (other than varying conference agreements) and "agreements" with other ocean carriers which may have some impact on the conference agreement. These events or "side agreements" may not necessarily vary the conference agreement in a technical sense, but nevertheless may affect the operation of the conference agreement in some way. These would include those parts of an inwards shipping agreement which directly affect the provision of outwards services or an agreement between parties to a conference agreement and other ocean carriers which affects the provision of services to shippers on a specific or related trade route.

DIVISION 8 - Powers of Minister in relation to registered conference agreements

Section 10.44: Powers exercisable by Minister in relation to registered conference agreements etc

69. The Minister may direct that either (1) the registration of an agreement be cancelled or (2) registration of an agreement be cancelled in so far as it relates to a particular provision, a particular party or particular conduct. The Ministerial direction must be entered onto the register of conference agreements by the Registrar.
70. Cancellation of registration of an agreement or cancellation of an agreement in so far as it relates to a particular provision, a particular party or particular conduct means that the relevant parties to the conference agreement no longer have exemption from Sections 45 and 47 for the particular provisions of the agreement or the particular conduct.

Section 10.45: Circumstances in which Minister may exercise powers

71. The Minister may only exercise his powers under this Section if he is satisfied that the agreement does not comply with the minimum requirement for registration or if the parties to a conference agreement contravene or propose to contravene obligations established by the Part. These include negotiations with certain designated shipper bodies, notification of agreements or events affecting a registered conference agreement, hindering Australian flag shipping from participating in outwards liner shipping services and not having due regard for Australian exporters needs for outwards liner shipping services.
72. The Minister may only take action if the Minister (or an authorised officer) has attempted to consult with parties to the agreement with the aim of obtaining an undertaking to comply with the relevant provisions of the Part.
73. The Minister shall not take action unless the Minister has either first received a report from the Trade Practices Commission on whether grounds exist for the Minister to exercise his powers in relation to conference agreements or the Minister is satisfied that special circumstances make it necessary to take action before receiving a report from the Commission.

Section 10.46: Action to be taken where powers exercised by Minister without first obtaining Commission report

74. Where the Minister decides it is necessary to take action before receiving a TPC report(s), the Minister shall immediately after taking action refer the matter

to the TPC. In these cases the TPC shall report to the Minister within 60 days on the matters concerned. (The Ministerial direction must be entered onto the register of conference agreements by the Registrar).

75. Unless the Minister directs the Registrar not to, the Registrar shall after 21 days after the Minister receives the Commission's report, delete the particulars of the direction from the notation entered in the register of conference agreements.

Section 10.47: Investigation and report by Commission on reference by Minister

76. The Minister may refer to the TPC for investigation and report whether grounds exist for the exercise of his powers in relation to a specified matter. The Commission is to give special consideration to any matters specified in the Minister's reference.

Section 10.48: Investigation and report by Commission on application by affected person

77. A person affected by the operation of a registered agreement may apply to the TPC for an investigation. The TPC may hold an investigation, and if it does, shall inform the Minister and make a report.
78. A person affected means: a party to the agreement, a designated shipper body; an Australian flag shipping operator in relation to the agreement and an individual shipper or an association representing shippers who use or may be expected to need to use services provided under the agreement.

Section 10.49: Undertakings by parties to registered conference agreement

79. Parties to an agreement may offer an undertaking to do or not to do a specified act which is subject to a reference to the TPC or a Ministerial direction concerning the cancellation of the registration of a conference agreement. If the Minister accepts the offer the Minister may revoke a reference to the Commission, direct that a TPC investigation be terminated or revoke a direction cancelling registration of the agreement or cancelling registration of an agreement in so far as it relates to a particular provision, a particular party or particular conduct. An undertaking or a revocation of a Ministerial direction must be entered by the Registrar in the register of conference agreements.

DIVISION 9 - Obligations of non-conference ocean carriers with substantial market power

Section 10.50: Inquiry by Tribunal into market power of ocean carriers

80. The Minister may refer to the Trade Practices Tribunal for inquiry and report whether or not a non-conference ocean carrier has a substantial degree of power in a market. The Tribunal is to give special consideration to any matters specified in the Minister's reference.

Section 10.51: Determination by Minister of market power of ocean carriers

81. The Minister may direct the Registrar to register an ocean carrier as a carrier with a substantial degree of market power, where the Tribunal has reported positively or the ocean carrier agrees in writing to the Minister giving a direction, (in which case there is no need for the Minister to refer the matter to the Tribunal for inquiry).

Section 10.52: Non-conference Ocean carrier with substantial market power to negotiate with certain designated shipper bodies etc

82. A registered non-conference ocean carrier with substantial market power is subject to the same obligations to negotiate with designated shipper bodies as conference members. It must take part in negotiations over shipping arrangements with a designated peak shipper body or the designated secondary body nominated by the Registrar whenever reasonably requested to do so and must consider matters raised by the shipper body.
83. The ocean carrier and the shipper body in question must make available to the other party any information reasonably necessary for purpose of the negotiations. The ocean carrier must provide an authorised officer with information relating to the negotiations, permit the officer to be present at the negotiations and consider suggestions made by the officer.
84. The ocean carrier shall give the designated shipper body with whom it negotiates at least 30 days notice of changes in shipping arrangements unless the shipper body agrees to a lesser period (in cases, for instance, where the changes benefit shippers e.g. freight rates are being reduced, or capacity being expanded).

Section 10.53: Non-conference Ocean carrier with substantial market power not to hinder Australian flag shipping operators etc

85. A non-conference ocean carrier with substantial market power shall not hinder an Australian flag shipping operator from engaging efficiently to a reasonable extent in outwards liner shipping services.

DIVISION 10 - Powers of Minister in relation to non-conference ocean carriers with substantial market power

Section 10.54: Powers exercisable by Minister in relation to obligations of non-conference ocean carriers with substantial market power

86. The Minister may make an order requiring an ocean carrier to comply with its obligations (ie to negotiate with certain designated shipper bodies and not to hinder Australian flag shipping operators). The Registrar shall register such an order.

Section 10.55: Circumstances in which Minister may exercise powers

87. This section mirrors the provisions applying to conference operators.
88. The Minister shall not make an order unless the Minister is satisfied the non-conference ocean carrier with substantial market power has failed to negotiate with relevant shipper bodies or has hindered an Australian flag shipping operator, and the Minister (or an authorised officer) has attempted to consult with the carrier with the aim of obtaining an undertaking which would make a Ministerial order unnecessary.
89. The Minister shall not make an order unless the Minister has either first received a report from the Trade Practices Commission or is satisfied that special circumstances make it necessary to take action before receiving a report from the Commission.

Section 10.56: Action to be taken where powers exercised by Minister without first obtaining Commission report

90. This section mirrors the provision applying to conference operators.
91. Where the Minister decides it is necessary to take action before receiving a TPC report(s), the Minister shall immediately after taking the action refer the matter to the Commission for a report within 60 days.

92. Unless the Minister directs the Registrar not to, the Registrar shall after 21 days after the Minister receives the Commission's report, delete the particulars of the Ministerial direction from the notation entered in the register of non-conference ocean carriers with substantial market power.

Section 10.57: Investigation and report by Commission on reference by Minister

93. This section mirrors the provisions applying to conference operators.
94. The Minister may refer to the TPC for investigation and report whether grounds exist for the Minister to make an order in relation to a non-conference ocean carrier with substantial market power. The Commission is to give special consideration to matters specified in the Minister's reference.

Section 10.58: Investigation and report by Commission on application by affected person

95. This section mirrors the provisions applying to Commission investigations in relation to conference operators.
96. A person affected by the conduct of a non-conference ocean carrier with substantial market power may apply to the TPC for an investigation. The TPC may hold an investigation, and if it does shall inform the Minister and make a report.
97. A person affected means: a designated shipper body, an Australian flag shipping operator, an individual shipper or association representing shippers who use or may be expected to need to use services provided on the trade route.

Section 10.59: Undertakings by ocean carrier

98. This section mirrors the provisions applying to conference operators.
99. An ocean carrier may offer an undertaking to do or not to do a specified act. If the Minister accepts the offer the Minister may revoke a reference to the Commission or direct that an investigation be ceased or revoke an order. An undertaking or a revocation of a Ministerial order must be entered by the Registrar in the register of non-conference ocean carriers with substantial market power.

Section 10.60: Enforcement of orders and undertakings

100. Penalties in Part VI of the Trade Practices Act apply to contravention of an undertaking or an order.

DIVISION 11 - Unfair pricing practices

Section 10.61: Powers exercisable by Minister in relation to pricing practices etc

101. The Minister may order (in writing) an ocean carrier not to engage in unfair pricing practices. A Ministerial order must be entered by the Registrar into the register of obligations concerning unfair pricing practices.

Section 10.62: Circumstances in which Minister may exercise powers

102. The Minister shall not make an order in relation to unfair pricing practices unless he is satisfied that: the ocean carrier has engaged in unfair pricing; the rates charged by the carrier are less than the normal freight rates for services of that kind; the practice threatens or has hindered or prevented the provision of outwards liner shipping services which are efficient, economical and adequate to shipper needs; and the practice is contrary to the national interest.
103. The Minister shall not make an order unless (s)he has received a report from the Trade Practices Tribunal on the matter and (s)he (or an authorised officer) has attempted consultations with the aim of obtaining a voluntary undertaking to refrain from the practice.

Section 10.63: Inquiry and report by Tribunal

104. The Minister may on complaint of an affected person or otherwise request from the Tribunal an inquiry and report on whether a carrier is engaging in unfair pricing practices. The Tribunal shall hold an inquiry and report on the matters in accordance with the method of determining normal freight rates and national interest issues. Special consideration is to be given to any matters specified in the reference.

Section 10.64: Undertakings not to engage in pricing practices

105. At any time, an ocean carrier may offer the Minister an undertaking not to engage in an unfair pricing practice and from time to time to give the Registrar information for the purpose of ascertaining whether the ocean carrier is engaging in or has engaged in the practice. If the Minister accepts the offer, he may revoke any reference to the Tribunal for an inquiry or revoke any order made for the carrier not to engage in unfair pricing. If the Minister accepts the offer, the Registrar shall enter appropriate particulars in the register of obligations concerning unfair pricing practices.

Section 10.65: Enforcement of orders and undertakings

106. Penalties in Part VI of the Trade Practices Act apply to contravention of an order or undertaking (offer).

Section 10.66: Determination of normal freight rates for shipping services

107. Normal freight rates are defined to be the rates actually charged by non-subsidised carriers for the same or similar services on a comparable trade route in the course of ordinary business.
108. If it is not possible to ascertain what normal freight rates are, these rates can be constructed by comparing costs of the ocean carrier concerned with comparable carriers who are not subsidised and allowing reasonable margins of profit, the comparisons shall take into account all costs incurred in the ordinary course of business and allow for overhead expenses.

Section 10.67: Determination of whether practice contrary to national interest

109. Factors to be taken into account in deciding whether a practice is contrary to the national interest are: the effect the price has had (or is likely to have) on continued access by Australian exporters to outwards liner cargo shipping services of adequate frequency and reliability at competitive freight rates; stable access to export markets for exporters in all States and Territories; the extent to which the same or similar advantages are granted to foreign competitors of Australian exporters; the effect removal of the practice would have on the competitiveness of Australian industries.

DIVISION 12 - Registration of ocean carrier agents

Section 10.68: Ocean carrier who provides international liner cargo shipping services to have registered agent

110. Every ocean carrier providing services to or from Australia must have an agent registered, for the purposes of this Part with the Registrar of Liner Shipping.

Penalty: \$2000 for an individual or \$10000 for a body corporate.

Section 10.69: Representation of ocean carrier by registered agent

111. Everything done by a registered agent in that capacity shall be taken to have been done by the ocean

carrier. A document served on the agent or sent to the address for service of the agent is considered to be served on the ocean carrier.

Section 10.70: Application by ocean carrier for registration of agent

112. An ocean carrier may apply for registration of an agent in accordance with the regulations. An agent must be an individual (ie. natural person) resident in Australia and have an address for service in Australia.

Section 10.71: Registration of agent

113. Where an ocean carrier properly applies, the Registrar must register the agent.

Section 10.72: Change of agent, etc

114. An ocean carrier may revoke the appointment of an agent, appoint a new agent or otherwise vary the particulars of that carriers' agent entered on the Register of ocean carrier agents.

DIVISION 13 - General provisions relating to registers and conference agreement files

Section 10.73: Form of registers and conference agreement files

115. The registers and conference agreement files shall be kept in a form in which the Registrar decides.

Section 10.74: Deletion of entries wrongly existing in certain registers

116. Where the Registrar is satisfied that an entry wrongly exists in a register he may delete that entry.

Section 10.75: Deletion of obsolete entries in certain registers

117. The Registrar may delete an entry from the register if (s)he is satisfied that the entry is obsolete.

Section 10.76: Correction of clerical errors and other mistakes in certain registers etc

118. The Registrar may correct clerical errors or other mistakes in registers.

DIVISION 14 - Administration

Section 10.77: Registrar of Liner Shipping

119. There shall be a Registrar of Liner Shipping.

Section 10.78: Appointment of Registrar etc

120. The Registrar of Liner Shipping shall be appointed by the Minister.

Section 10.79: Acting Registrar

121. The Minister may appoint a person to act as Registrar whenever the Registrar is absent from duty or the office of the Registrar is vacant.

Section 10.80: Registrar and staff to be public servants

122. The Registrar and staff are to be public servants.

Section 10.81: Delegation by Minister

123. The Minister may delegate to the Registrar any of his (her) powers under the Part except those in relation to: designation of shipper bodies; cancellation of an agreement or particulars of an agreement or conduct; references to the Trade Practices Commission for inquiry; making an order in relation to unfair pricing practices; references to the Trade Practices Tribunal for inquiry.

Section 10.82: Delegation by Registrar

124. The Registrar may delegate any of his (her) powers to a person occupying a specified office in the Department of Transport and Communications.

DIVISION 15 - Miscellaneous

Section 10.83: Act not to affect rights under Freedom of Information Act

125. The Part does not affect rights a person has under the Freedom of Information Act 1982.

Section 10.84: Review of decisions of Registrar

126. Any decision of the Registrar may be appealed to the Administrative Appeals Tribunal except a decision to provisionally or finally register a conference agreement (disaffected parties may challenge the agreement before the Trade Practices Commission and seek to have the Minister deregister it) and a decision on the form of a register.

Section 10.85: Statement to accompany notices of Registrar

127. Where the Registrar makes a decision, a written notice to an affected person of the decision shall also include a statement saying the person may appeal to the Administrative Appeals Tribunal for a review of

the decision and any person entitled to appeal has the right to request a reason for the decision under the Administrative Appeals Tribunal Act 1975.

Section 10.86: Evidence

128. A certificate signed by the Registrar stating a matter in relation to registration under the Part is considered to be prima facie evidence. The matters which may be certified in this way include: whether or not an ocean carrier's agent, a conference agreement, undertaking, determination or order is registered under the Part; the name and address for service of an ocean carrier's agent and the provisions or other particulars of an agreement, direction, undertaking, determination or order.

Section 10.87: Notification by Commission of references etc

129. The Commission is to make public all references from the Minister and applications from affected persons investigations under the Part.

Section 10.88: Exclusion of documents etc from register of Commission investigations

130. Where a person gives a document or makes an oral submission to the Commission in relation to an investigation, the person may request that certain particulars be excluded from the register of investigations because of their confidential nature.
131. The criteria for assessing a request for confidentiality are the same criteria as in the Freedom of Information Act 1982. However, the Commission may also exclude other particulars if it considers it desirable to do so.

Section 10.89: Disclosure of confidential information

132. No person who has been or is the Registrar or his staff or a person to whom the Registrar or the Minister have delegated their powers may make a record of or communicate any information which has been granted confidentiality by the Registrar except for the purposes of performance of their duties under the Part.

Penalty: \$5000 or 2 years imprisonment or both.

133. An officer shall not be required to produce a document or information which has been granted confidentiality by the Registrar to a court except for the purposes of carrying into effect the provisions of the Act.

Section 10.90: Fees

134. Regulations may prescribe fees for the purposes of the Part. These shall not exceed the maximum levels set out in the Bill.

Section 10.91: Application of section 155 to investigations under Part

135. Application of section 155 of the Act gives the Trade Practices Commission power to obtain information, documents and evidence, for investigations under this Part.

Section 10.92: Constitution of Tribunal for inquiries under Part etc

136. For an inquiry under the Part the Tribunal shall be constituted of a presidential member and two non-presidential members.
137. Sections 109 and 110 of the Trade Practices Act do not apply. Section 109 deals with persons to whom an authorisation has been granted and is not relevant to this Part. Section 110 is unnecessary as a specific participation provision has been included in of this Part.

Section 10.93: Participation in inquiries by Tribunal under Part etc

138. This section sets out a list of the persons entitled to participate in an inquiry by the Trade Practices Tribunal under this Part.

Clause 5 - Repeal of section 154

139. Section 154 is a "savings clause" relating to undertakings given under the Trade Practices Act 1965-1971 and the Restrictive Trade Practices Act 1971-1973. With the enactment of this Part it will become obsolete.

Clause 6 - Continued application of existing Part X to existing conference agreements

140. This Act and the current Part X of the Trade Practices Act will operate simultaneously for a transitional period in respect to certain Conference agreements.
141. Conference agreements in force, or arrived at before the commencement of this Part continue to be subject to the existing Part X for six months after the commencement of this Part. Agreements arrived at after the commencement of this Part will be subject to regulation under this Part.









