



Shipping Australia Limited
ABN 61 096 012 574

Head Office
Level 6, 131 York Street, Sydney NSW 2000
PO Box Q388, Sydney NSW 1230

Tel: (02) 9268 0988
Fax: (02) 9268 0170

19 June 2002

The Secretary
Trade Practices Act Review
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Attention: Mr John Jepsen

Dear Mr Jepsen,

Review of the Competition Provisions of the Trade Practices Act, 1974 (Cth)

Shipping Australia Ltd (SAL) welcomes the opportunity of making a submission to the Committee of Inquiry reviewing the operation of the competition provisions of the Trade Practices Act, 1974 (the "Act"). SAL was formed in July 2001 as a result of a merger between the Australian Chamber of Shipping Ltd and the Liner Shipping Services Ltd. SAL represents 37 shipping lines and shipping agents representing all types of shipping, and it is the peak industry body which, along with the Australian Shipowners' Association, represents an industry vital to the facilitation of Australia's international trade. A list of the members of SAL are attached for the Committee's background information.

The Company has two Divisions; viz. an Industry Policy Division and a Liner Trade Practices Division. The latter Division provides secretariat services and policy advice to liner shipping companies, parties to Agreements registered under Part X of the Act. However, it is important to point out that Part X only provides limited exemptions from the restrictive trade practice provisions of the Act contained in Part IV, and, for example, no exemption is provided for any breach of Section 46 or contravention of Sections 47(6) and (7) prohibiting third line forcing. It is also worth noting that the necessary exemptions only relate to Agreements actually registered under Part X.

The terms of reference enable the inquiry to consider whether the Act provides sufficient recognition to the globalisation factors and the ability of Australian companies to compete globally. SAL wishes to raise a number of specific issues with the Commission, but in terms of this broader objective, SAL will have input into the submission by the Australian Chamber of Commerce and Industry (ACCI) as SAL is a member of the State Chamber of Commerce in NSW which, in turn, is a member of ACCI. SAL will join with ACCI in its opposition to giving the ACCC power to issue "cease and desist" orders and to the introduction of an "effects test" into Section 46 of the Act,

which would place the onus of proof onto business to show that it had not contravened the Act rather than, as at present, requiring the ACCC to demonstrate wrong doing.

Also consistent with the ACCI approach, SAL would support the view that changes need to be introduced into the Act, which will ensure that there is greater accountability and transparency in the manner in which the Act is administered, because it is clear that the ACCC actively seeks increased power to regulate business and has proposed a number of changes to the Act which would result in interference in the legitimate operation of businesses.

SAL believes there are good grounds for an oversighting body or person that would ensure that there is proper governance within the ACCC, similar to the proposal to establish a new Tax Regulator who will be given sweeping powers to investigate the activities of the Australian Taxation Office. It is envisaged that this new Regulator would be a key adviser to the Government on tax administration and an advocate for all taxpayers. Similarly, a business advocate could be established to undertake similar functions in relation to the ACCC as this would not detract from the importance of the ACCC in fulfilling the objectives set for it by Government under the Act. Naturally, other organisational arrangements could be adopted to fulfil a similar function, but SAL sees value in that function being performed on behalf of all the interest groups affected by the activities of the ACCC.

In relation to the impact of large business on small business, reference has rarely been made over the last few years to the Government strengthening the commercial “unconscionable conduct” provisions of the Act and the Franchising Code of Conduct has been revised with amendments having taken effect from 1 October 2001.¹

We would not support any proposal to introduce criminal sanctions for breaches of the Act, as we believe that the existing financial penalties are severe and of a level to deter behaviour prohibited by the Act. As far as we understand, there has been no evidence provided to the contrary.

SAL notes that under its terms of reference the Committee may consider other aspects of the Act, and a “bone of contention” for a long time among SAL members has been the fact that Section 74(3) of the Act exempts providers of services for land transport and storage of goods from liability under Section 74(1) for loss or damage to the goods they carry. On the other hand, there is a reasonably high level of liability and scope of liability placed upon shipowners under the Australian Carriage of Goods by Sea Act, 1991. It is difficult for SAL members to see the logic of a situation where shippers, or their insurance companies, may be able to recover some compensation for damage under a through Bill of Lading, for example, even if it occurred in the landside component, and yet land transport operators in Australia can escape any liability short of gross negligence.

The present Freight Transport Logistics Industry Action Agenda, which is currently before the Government, highlights the fact that logistic chains require full accountability and an appropriate sharing of risk and responsibility. Any capacity for key players in the chain to “opt out” of their responsibility and/impose undue risk and related costs on others, is inconsistent with the principles of best practice, logistics chain management. The Action Agenda considers it timely for the various industry interests, with Government support, to review the liability arrangements of domestic carriage of goods to resolve the best way forward.

¹ Source: ACCC Journal No. 37 pages 1-5, and ACCC Journal No. 35 page 43.

It would be most useful if the Committee could recommend removing this exemption in Section 74(3) to facilitate that review, irrespective of its final conclusion. In other words, abolition of such an outdated Section as Section 74(3) would not necessarily result in providers of land transport accepting some liability, but, at least, it would open the way for a commercial resolution of the issue.

SAL would be happy to appear before the Committee to further explain issues raised in this submission, if so required.

Yours sincerely,

Llew Russell
Chief Executive Officer