Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989

Date Introduced: 8 March 1989
House: House of Representatives
Presented by: Hon. Ralph Willis, M.P., Minister for Transport and Communications

Digest of Bill

Purpose

To replace Part X of the Trade Practices Act 1974 (the Principal Act) with a new Part that will alter the treatment of liner cargo conferences.

Background

International cargo trade can be broken into two main groups, bulk cargo and liner cargo. Bulk cargo, for example wheat, is usually carried in chartered vessels or, increasingly, ships owned by the purchaser of the cargo, and does not operate to regular schedules. Shipments are determined according to demand and there is no guarantee that a certain port will be serviced at a specific time. Liner cargo operates on an entirely different basis. The service is guaranteed to call at specified ports during specific periods even if the amount of cargo available at that port would not economically justify such a visit. The goods carried usually represent high value goods, such as equipment, and goods from many producers are usually carried on the same trip. Perhaps the best example is container ships, where the ship is owned by a shipping line and, rather than the ship being chartered for a specific voyage, carrying space on the ship is sold.

International liner cargo is dominated by a number of conferences, cartels of operators who co-operate to service a market. The conferences can take many forms, the most important being the U.S., or open conference, and the closed conference. Open conferences are those that service the U.S. and which are required by anti-trust laws to admit new members if they can meet the agreed standards of the conference. As the name implies, closed conferences are able to exclude new members. Conferences operate agreed freight rates and often the arrangements involve cargo and/or revenue pooling. By their nature, conferences are anti-competitive, particularly the closed conference with pooling arrangements (i.e. the pooling of earnings, taxes, traffic etc). The benefits from the system are that regular services to designated ports are assured and that the conference is likely to serve a wide range of overseas ports, thus facilitating exports.
Australia has been serviced by shipping conferences since the 1880s, with the first conference applying to inward cargo from the United Kingdom in 1884. The attitude to the conferences altered in the first decades of this century. The Industries Preservation Act 1906 was largely based on the U.S. legislation and the conferences operating to and from Australia took on many of the attributes of open conferences. However, in 1930 a need was seen to rationalise shipping, particularly to and from the U.K. As a result, the Australian Overseas Transport Association was established in which the conferences negotiated with a shipping body on such matters as rates and frequency of service. The move was significant as it legitimised closed conferences and saw the emergence of negotiations between shippers and the conferences. This situation largely continues today (see below).

While the conferences dominated shipping in the areas they covered (there are approximately 350 conferences worldwide), they do not have a complete monopoly. Other shippers who are not part of a conference can compete on a route and the growth of containerisation has led to a decrease in the dominance of the conference carriers. For example, the proportion of liner exports carried by conference carriers to Europe in 1982–83 was 88%, while in 1983–84 the figure had fallen to 81.6%. Another important area of competition for the conferences is government backed shipping lines, such as Australia’s ANL.

The anti-competitive nature of the conferences would be a breach of the Principal Act but for Part X of that Act. This Part provides that the restrictive trade practice provisions of the Act do not apply to conference agreements. Section 113 deals with agreements to which the Part applies. These are agreements between two or more shippers that, in relation to outwards trade, provides for the restriction of competition between the members of the agreement or third parties, and includes provision for fixing freight rates, the allocation of ports and the pooling of revenue and traffic etc. Agreements are to be filed and the Minister may require parties to an agreement to give a number of undertakings, including that they negotiate with the designated shipping body.

The liner shipping industry and its regulation was examined by an Industry Task Force in 1986. The Task Force considered that the full removal of the exemption under the Principal Act would not be the best course due to the international character of the liner industry and its unique structure. However, changes to the nature of the regulations governing the industry were recommended to take into account industry’s concerns and the changed nature of the industry. Amongst the recommendations were that a Shipping Industry Tribunal be established to examine agreements, that a public interest test be included when examining agreements and that allegations of unfair competition be examined. Although this recommendation has not been followed, a number of the Task Force’s recommendations are included in this Bill.
Main Provisions

Clause 4 will substitute a new Part X into the Principal Act.

The object of the new Part are listed in proposed item 10.01 and include to ensure that exporters have access to services of adequate frequency and at competitive rates and to ensure that Australian flag shipping is not unreasonably hindered from participation in outwards shipping. This is to be achieved by the prevention of abuse of a conference's power.

The Minister may declare an association to be a designated shipper body if of the opinion that the body represents the interests of those involved in outwards liner cargo shipping and of Australian shippers generally. Other bodies may be declared to be designated secondary shipping bodies if they represent a particular part of the shipping industry (item 10.03).

Ocean carriers are not to discriminate between shippers if such discrimination would substantially lessen competition in the market. In proceeding against a person for discrimination it will be a defence if a person made allowance for different ports from which services are required, different types or quantities of goods, was due to the time when the service was provided, or was done in good faith to meet the rates etc. offered by a competitor (item 10.05).

Proposed Division 3 deals with minimum standards for conference agreements. Disputes under such agreements are to be resolved under Australian law (item 10.06) and must contain provisions relating to minimum service levels (item 10.07). A conference agreement may only include certain exclusionary provisions, including, provisions to fix or regulate freight rates, the pooling of earnings, losses or traffic, regulation of the quantity or type of cargo to be carried and the restriction of new entrants (item 10.08).

Conference agreements are to be filed with the Registrar and will be open for public inspection (item 10.09).

Proposed Division 5 deals with exemptions from certain trade practice prohibitions. The Division will generally apply only to activities involving the transport of cargo by sea. Section 45 of the Principal Act, which deals with general restraint of trade, will not apply to registered conference agreements (item 10.17). Similarly, section 47 of the Principal Act, which deals with exclusive dealing, will not generally apply to the parties of conference agreements (item 10.18), and their loyalty agreements will also be exempt (proposed sub-division B). The above provisions apply to outwards cargo services while proposed sub-division C will apply the exemptions from sections 45 and 47 to activities related to the transport by sea of inwards cargo. The exemptions will also apply to negotiations to establish such agreements (item 10.24).

Proposed Division 6 deals with the registration of conference agreements. The proposed Division is largely mechanical.
Item 10.41 will require parties to a registered conference agreement to take part, when reasonably requested by a designated shipper body, in negotiations with that body on the terms and conditions that will apply to outwards liner shipping services, including such matters as freight rates, frequency of services and the ports of call. The parties to the agreements will also be required to provide information that is reasonably necessary for the negotiations.

Proposed Division 8 deals with the Ministers powers in relation to registered agreements. Principally, and subject to the items mentioned below, the Minister will have the power to cancel all or part of an agreement (item 10.44). Item 10.45 deals with when the Minister may exercise these powers. This includes when the Minister is satisfied that the provisions relating to the use of Australian law, minimum services or registration are breached, or where the parties have failed to agree to the required negotiations. The Minister may also act where Australian flag shipping has been prevented from engaging efficiently in the supply of an outward liner service. Where action is taken without a report from the Trades Practices Commission, the Minister is to refer the matter to the Commission (item 10.46).

Following a determination that a non-conference carrier has substantial market power, the Minister may direct the carrier to enter negotiations with relevant designated shipper bodies (item 10.52). The Minister will have similar powers in relation to such bodies as with conference carriers (principally, the Minister may require the carrier to conform with the normal anti-restrictive trade provisions of the Principal Act).

The Minister will be able to serve a notice on an ocean carrier that they not engage in unfair pricing practices (item 10.61). Such carriers are not to breach such an order or any undertakings they may give in relation to the issue (item 10.65). Such determinations may be made on the grounds that the practice is not in the national interest, as defined in item 10.67. This includes such matters as ensuring the continued availability of adequate outward services and the effect on the competitiveness of Australian exporters.

Ocean carrier agents are to be registered (proposed Division 12) and the position of Registrar of Liner Shipping will be established (item 10.77).

Conference agreements in force before the commencement of this Bill will continue to be subject to the current Part X for six months after this Bill comes into force (clause 6).

For further information, if required, contact the Law and Government Group.

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