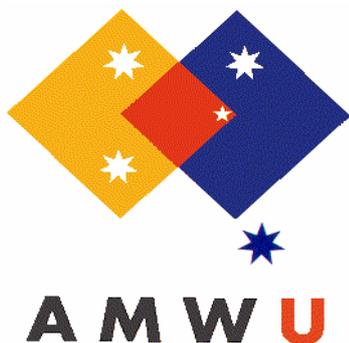


MAINTAINING AND IMPROVING THE INTEGRITY OF AUSTRALIA'S ANTI- DUMPING SYSTEM



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INTRODUCTION

The Australian Manufacturing Workers' Union (AMWU), the Australian Workers' Union (AWU) and the Construction, Forestry, Mining and Energy Union (CFMEU) represent more than 350,000 workers in virtually every industry, occupation and region across Australia. A distinguishing feature of our combined membership is how many of the workers we represent are employed by firms in industries where their job and income security depends on successfully exporting or competing against imports. That is why productivity, international competitiveness and fair trade have always been core business for the three unions.

Australia's anti-dumping regime is very much a part of that core business. We strongly agree with the view expressed by the Trade Remedies Task Force, a group of some fifty manufacturing firms and associations (co-ordinated by AI Group), who told the recent Productivity Commission Inquiry into Australia's Anti-Dumping and Countervailing System: "A rigorous anti-dumping system in Australia ... (is) an important and legitimate component of an open economy, especially in these tough and challenging economic times."¹

It is our submission that Australia's anti-dumping system would be seriously diminished in terms of both its efficiency and effectiveness if the Government was to accept the changes to the anti-dumping system recommended by the Productivity Commission in December 2009. In particular, this combined AMWU/AWU/CFMEU submission

- Opposes the PC recommendation that suggests Australia should introduce a new public interest test.
- Opposes the PC undertaking the next review of the anti dumping system as the PC has insurmountable conflicts of interest as a vested

¹ Productivity Commission: Transcript of Proceedings. Melbourne, Thursday 15 October, 2009; p.3
Page 2 of 30

interest that previously had charge of investigating dumping complaints and making recommendations to the Minister.

- With two exceptions we oppose all changes to Australia's current dumping regime until after any WTO proposal is finalised and fully considered by all participants in the context of concluding the Doha Round. We oppose in the strongest possible terms any changes to the continuation arrangements which are now in place.

The two exceptions where we support change include:

- A) We support a procedural change to the current appeal process. This proposal by the Unions flows from the events that saw the overturning of the original dumping decision on toilet paper products imported from China and Indonesia. That decision exposes a serious weakness in Australia's anti-dumping system that needs to be remedied. We provide our proposal to do this on pages 25-27 of the submission.
- B) We support a better information system, a better resourced ACBPS, the right of unions to initiate dumping action in appropriate circumstances, a wider list of actionable subsidies that Australian producers can take action on and other procedural changes outlined on pages 17-19 of this submission.

We turn now to the specific reasons for the position adopted by the three unions.

First and foremost, it is our submission that the recommendations contained in the Productivity Commission inquiry report respond to a domestic competition policy imperative – driven by a desire to respond to COAG's work program – rather than more correctly reviewing Australia's anti-dumping regime from the perspective of Australia's trade policy framework.

This introduces a serious flaw in the approach to the inquiry review and in the Productivity Commission's interpretation of the terms of reference.

This misalignment of aims and means is tacitly acknowledged by the

Productivity Commission when reviewing the appropriateness of achieving anti-dumping objectives through competition policy reforms such as for example, under the Trade Practices Act. The Productivity Commission dismisses rightly such options in its report as being either unworkable or inappropriate.

While noting a number of significant deficiencies, it favours instead “system preserving” retention of an anti-dumping regime on broader “political economy” grounds that equates anti-dumping measures with a “safety valve” against local protectionist sentiment rather than on trade policy grounds where the application of anti-dumping duties as a trade remedy is a specific entitlement under World Trade Organisation (WTO) rules.²

The Inquiry Report is therefore only a partial analysis because of the Productivity Commission’s chosen imperative to enhance local market competition and achieve domestic economic efficiency gains from stricter rules governing anti-dumping laws. This is however in isolation from the proper assessment of the potential economic losses of such action to the traded goods sector (i.e., both to exporters and import competitors) and thereby to the welfare of the nation operating under existing multilateral trading rules as defined by the WTO.

The submission provided to the Productivity Commission by the Department of Foreign Affairs and Trade (DFAT) expresses succinctly concerns about tampering with Australia’s anti-dumping regime in isolation from the multilateral trade policy framework and on-going WTO negotiations. These negotiations are aimed at enhancing transparency and compliance with multilateral rules governing anti-dumping practices and the application of countervailing duties.

For example, DFAT notes that the Doha mandate on Rules, covering trade remedies (anti-dumping, subsidies and countervailing measures), is to clarify

² The Anti-Dumping Agreement confirms the legitimacy of anti-dumping duties as a trade remedy and recognises that Members may employ different methodologies/practices in applying them (eg Article 17.6). Similarly, the Subsidies and Countervailing Measures (SCM) Agreement confirms that WTO Members may provide subsidies and may, where a domestic industry is injured by imported products benefiting from subsidies, apply countervailing duties. (DFAT Submission)

and improve the existing disciplines while preserving the basic concepts and effectiveness of the rules. Various proposals for amendments to the WTO's Anti-Dumping (AD) and the Agreement on Subsidies and Countervailing Measures (SCM) Agreements remain under consideration by WTO Members in the Rules Negotiations Group (RNG).

Although DFAT is too polite to say it, the recommendations by the Productivity Commission risk cutting across Australia's negotiating position including siding with those WTO Members wanting to reduce discretion for AD authorities to impose AD duties.

DFAT notes that Australia is among the top 10 users of anti-dumping measures, with an efficient and transparent system by international standards. Australian companies have also been targets of anti-dumping measures. Australia is an active participant in the AD negotiations, presenting moderate views encouraging transparency and clarification of anti-dumping practices rather than prescriptive, mandatory rules which favour one practice over another. Australia also has an interest in ensuring Australian exporters are treated fairly and due process is afforded them.

Several proposals may have implications for the administration and implementation of Australia's anti-dumping and countervail systems. These include proposals relating to (i) the practice of "zeroing", (ii) the "lesser duty rule", (iii) a public interest test, (iv) sunset reviews and (v) to enhance transparency. Each has implications for Australian exporters and import competing industries.

It is in this context therefore, that the recommendations made by the Productivity Commission must be assessed because they have the potential to "tip the scales" in the negotiations in a direction which may not ultimately be advantageous to Australia's negotiating position and damaging to domestic industry rights. This risks debasing Australia's negotiating coin in future multilateral deliberations at economic cost to the nation.

For example, DFAT has opposed, along with some other WTO Members, a mandatory public interest test (PIT) in the negotiations on the basis that it

potentially undermines the legal right to a trade remedy and the balance between exporter and domestic industry rights. But a mandatory PIT is precisely what is being recommended for adoption within Australia by the Productivity Commission.

Finally, DFAT notes that Australia has more generous anti-dumping and countervailing rights potentially available to it under the WTO than currently enacted in the Customs Act.³ Australia in other words is unable to avail itself of rights and entitlements that other WTO members enjoy today because of the existing limitations imposed by the Customs Act.

This includes the ability to take action, including countervailing duties on subsidies such as (a) research activities, (b) assistance to disadvantaged regions or (c) adaptation to new environmental requirements, since non-actionable limitations lapsed in 1999 under the SCM Agreement.⁴

Despite this, the Productivity Commission is apparently prepared unilaterally to cede existing rights and entitlements under Australia's anti-dumping and countervailing system in the quest to enhance domestic market competition. This is selling the national interest short because it is done unconditionally and goes beyond the scope of the Commission's inquiry in our view.

This point has been raised in similar terms by BlueScope Steel in their considered analysis of the mismatch of ends and means in both their main submission and response to the draft recommendations.⁵

It is important that these views are taken fully on-board by the Government because rather than starting from the premise that such arguments are simply rent –seeking sophistry to be expected from vested interests, they are an attempt to clarify exactly from which standpoint the review of the anti-dumping and countervailing system needs to be approached.

³ DFAT Submission, paragraph 3.14

⁴ The SCM Agreement is the agreement that sets out the rules for the provision of subsidies in general.

⁵ BlueScope Steel, Submission, 26 June 2009; Response to Draft Inquiry Report, 9 November 2009.

(Dismissing these views in such terms does a disservice to the consultative process and the spirit in which these views are being expressed). In our view the Commission has erred in its findings because of an approach which has been seriously flawed as outlined above.

The Australian Government must therefore decide whether it supports internationally recognised anti-dumping rights and entitlements for local industry or whether it prefers the position of the Productivity Commission which although prepared to accept on second best grounds the retention of the anti-dumping system (as amended) would actually prefer (on the strengths of its counterarguments on efficiency grounds) for Australia not to retain one.⁶

Trade exposed industries in steel, and aluminium extrusion

Analysis of the impacts of the Productivity Commission's recommendations pose a number of significant challenges to major Australian manufacturing industries. These include the steel, aluminium extrusion, plastics and paper manufacturers. The Productivity Commission has received a range of detailed submissions from these industries but has remained immune to many of their arguments.

Measures aimed at "levelling the playing field" really only serve to tilt the balance of interest in favour of importers (in the name of the downstream customer and consumer) and away from local manufacturers.

It is noteworthy that in assessing the costs of the current regulatory regime, the PC itself indicates that economy wide costs are "very small" in aggregate and WTO consistent.⁷ In other words, the existing protections available to industry to claim anti-dumping protection are not so inefficient that changes will produce major benefits to the economy.

However, the reverse does not hold. The proposed changes will produce major costs to affected industries by watering down and/or removing current

⁶ Productivity Commission: Australia's Anti-dumping and Countervailing System, Inquiry Report, p35

⁷ Productivity Commission: Australia's Anti-dumping and Countervailing System, Inquiry Report, p35

protections under the existing anti-dumping regime in the name of the broader “public interest” (such as downstream entities) and to consumers.

This weakens protections for a number of our industries in particular for steel and aluminium extrusion currently benefiting to some degree from countervailing duties on unfair competition. Details on support measures for the aluminium extrusion industry defending itself against subsidised Chinese imports is set out below.

But because the Productivity Commission does not support retention of Australia’s anti-dumping system⁸, the changes being recommended cut right across these outcomes and will make them more difficult to apply in future and expose our local competing industries to unfair competition.

Chinese imports meantime remain the largest recipient of anti-dumping measures of any country. Therefore while our laws may change, the actions of the Chinese Government in artificially lowering input costs or output prices will not. That will result in a competitive disadvantage for Australian manufacturers.

Perversely, it will also make it possible for China which is finding it difficult to defend against anti-dumping actions - because it is unable to establish normal value - to hide behind these changes including the new public interest test.

The proposed changes also put the onus on the relevant Minister (Minister for Home Affairs) by making more of their decisions (i.e. to extend anti-dumping arrangements) appellable by a Trade Measures Review Officer (a statutory appointee under the Australian Customs and Border Protection Service) and with reference to the public interest test – i.e. to activate support for industry only if it is also in the public interest.

The onus of proof already on industry claiming injury will simply tighten further while the discretion of the Minister is reduced compounding existing systemic weakness in the review process (see discussion below).

⁸ As above, p 39

The Productivity Commission was also not convinced by the AWU's arguments shared by the Australian Plantation Products and Paper Industry Council and regional members of Parliament that the current anti-dumping laws were important in order to preserve regional manufacturing industry and employment.⁹

As noted above existing derogations to countervail other countries under WTO rules have now lapsed, but because of inconsistency with Australian laws, local producers will not be able to benefit from potential action against other countries offering such support to their own regions. This puts Australia at a further competitive disadvantage.

Unfortunately, one of the side effects of mixing aims and means as noted above is to devalue the merit of many of industry's arguments in support of Australia's anti-dumping and countervailing system as pure rent seeking.

This is in contrast to the position adopted by DFAT which sees the interests of local industry as an important lever in extracting concessions from trading partners in terms of enhanced access to overseas markets. It also does a disservice to the legitimate rights held by industry for assistance under existing laws, notwithstanding the international rights and entitlements currently forgone as a consequence of the limitations of the existing Customs Act.

Overall, the evidence suggests that we should be wary of agreeing to pre-determined preferred policy outcomes of the Productivity Commission.

Steel

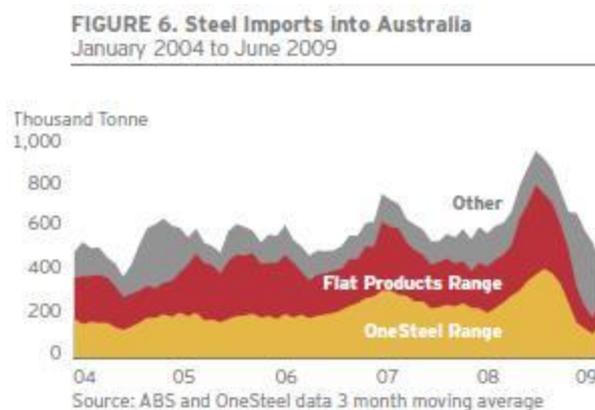
Australia is far from facing limited competition in the provision of goods at competitive prices. For example, it is estimated that there is a very large and diverse range of countries exporting steel to Australia.

⁹ Productivity Commission: Australia's Anti-dumping and Countervailing System, Inquiry Report, p195

The Australian steel market has very low tariff and non-tariff barriers and is characterised by substantial and growing levels of imports. Imported steel products are sourced from countries including China, Japan, Thailand, South Korea, Malaysia, Taiwan, Singapore, Vietnam, New Zealand and Indonesia.

Import volumes of steel into Australia increased in the first half of 2008-09 but the levels dropped in the second half as illustrated in Figure 6 below taken from a recent presentation by OneSteel.¹⁰

The drop in import levels resulted from overstocking and reduced demand in the construction segments.



In 2008-09, the value of imports increased for 16 of the 20 selected commodities.¹¹ The value of imports of gold (non-monetary excluding gold ores and concentrates) increased by 54 per cent (\$4 billion) and iron and steel increased by 49 per cent (\$2 billion) to \$5.5 billion. Manufactures of metals increased by 17.9 per cent to \$5.7 billion.

So the idea that anti-dumping actions deprive domestic customers of competitive sources of imports – something often claimed by opponents of the current anti-dumping system - is difficult to support. Anti-dumping actions normally leave a large number of foreign firms to compete – including on price - with the Australian industry.¹²

¹⁰ OneSteel Operational Overview: <http://www.onesteel.com/keymarkets.asp>

¹¹ ABS Year Book Australia 2009-10, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8A5D6FC54D76D053CA25773700169CD1?opendocument>

¹² *BlueScope Steel submission to Productivity Commission Anti-dumping Review*

Global steel prices have fluctuated significantly over time, driven by demand and supply patterns that are influenced by global construction activity and GDP growth.

Many other factors also influence global steel prices including: structural overcapacity in the market, a relatively fragmented industry structure, high exit barriers, high fixed operating costs and the involvement of government and regulatory policies including trade barriers and other subsidies.¹³

Overall, Australian domestic steel prices - particularly for lower value-add 'commodity' steel products - parallel and follow similar trends to international prices due to competition from imports.

Aluminium Extrusion

The Australian aluminium industry has suffered material injury from the effects of price undercutting from Chinese extrusion imports. For example, Capral Limited believes that this pricing reflects dumping and Chinese Government subsidy effects.

During the last decade, Capral indicate that Chinese extrusion imports have risen from 7000 tonnes to over 60,000 tonnes or 34 per cent of the Australian market.

On 24 June 2009, Australian customs initiated an investigation into the alleged dumping and subsidisation of certain aluminium extrusions exported to Australia from China. This followed an application by Capral, supported by G James, Australia's second largest aluminium extruder.

On 3 November 2009, Australian Customs gave notice that exports to Australia of certain aluminium extrusions from China would be subject to a provisional dumping duty rate of 16 per cent in respect of goods entering Australia on or after 6 November 2009. (See box below).

26-June-09

¹³ BlueScope Steel submission to Productivity Commission Anti-dumping Review

26-June-09

Capral still believes strongly in the merits of the case and remains actively engaged with Customs. There has been minimal market impact to this point as interested parties await final determination.¹⁴ The existing ruling is critical to their on-going economic viability and therefore employment at Capral.

CUSTOMS ISSUES PROVISIONAL DUMPING DUTY AT 16% ON ALUMINIUM EXTRUSIONS FROM CHINA

Australian Customs in late October 2009 issued a Preliminary Affirmative Determination in which provisional dumping duty of 16% will be levied on all imports of Aluminium Extrusion Products from China as of 5 November 2009.

Aluminium Extrusions are widely used in industrial manufacturing processes to produce a myriad of products such as cars, bikes, aircraft, parts and accessories of these goods and various construction materials.

The applicant in this case was Capral Ltd, which represents over 50% of aluminium extrusion production in Australia.

The most interesting aspect of this case is that Australian Customs did not believe that there was enough reliable information from Chinese producers and importers to establish the Normal Value of these products for sale in China. Instead Customs had to construct Normal Value largely based on information supplied by the Applicant. This information was based on items such as LME prices, waste and productions processes and overhead costings.

Under the Customs Act, Australian Customs may have recourse to these alternative methods of determining Normal Value where the usual direct sales information is unreliable or non-existent.

In the Report, Customs has also found that Chinese producers have the benefit of a subsidy that will lead to the imposition of countervailing duties. This relates to three programs one of which is the exemption of producers by the Chinese Government from Value Added Tax for imported plant and technology.

Customs has not levied countervailing duty provisionally, but have indicated that it will be levied by apportioning the tax benefits across the life of relevant assets and converting this to a value per kilogram.

Further, some state owned enterprises were found to be providing primary aluminium at less than market value and the benefit was calculated by comparing purchase prices with average LME prices.

Forest and Forest Products Trade Exposed Sectors and Communities

As noted earlier in this submission, Australia is currently unable to access a more rigorous anti-dumping and countervailing measures regime that other WTO members enjoy because of the existing limitations imposed by Australia's Customs Act.

¹⁴ Capral Limited, 2009 Full Year Results, 23 February 2010

It is our submission that the Productivity Commission approach is likely to have negative ramifications for regional timber communities.

The maintenance of the integrity of the anti-dumping system is very pertinent to the trade exposed Australian Forest and Forest Products Industry. The industry is vulnerable to the practices of intermittent dumping and/or predatory pricing and is unable to respond to this in many cases due partly to the industry agreeing to processes such as Regional Forest Agreements which balance the social, economic and environmental impacts of its economic activity.

For example, The National Forest Policy Statement (NFPS) introduced by the Australian Government and the mainland state and territory governments in December 1992, and by the Tasmanian Government in April 1995, guides the sustainable management of Australian forests and sets out national industry goals to be achieved on a regional basis.

The policy statement and the regional forest agreements were of course agreed to by democratic processes. Implicit in the agreements is the premise that an efficient and effective anti-dumping system was in place and would remain in place. Unilaterally (especially outside the Doha process) changing the goal posts for the industry and dependent communities may very well have negative economic, social and environmental outcomes. This is particularly the case if adverse decisions from a new dumping regime cause the industry to look offshore rather than in Australia for its future investments.

Social commitments and responsibilities, formed in many cases through community consensus and compromise and often regulated through laws and codes of practices determines that there are certain practical barriers to be able to react to dumping outside of the realms of a strong and effective system of anti-dumping. The reality of social commitments being response inhibitors to dumping is not exclusive to the Forest and Forest Products Industry and it is important that this issue is resolved in association with debates about climate change mitigation.

It is our contention that the recommendation of the Productivity Commission to introduce its proposed public interest test has the potential to undermine these social commitments. This would upset a very important balance of interest in the forest and forest products industry. As DFAT noted in its critique of the Productivity Commission's public interest test it ignores the need for:

*'A balance between the desire of members to retain certain flexibilities (to achieve, for example, environmental, social or economic objectives) and members' collective desire to liberalise world trade...'*¹⁵

In our assessment, part of the DFAT argument about the rationale for the anti-dumping system is dismissed by the Productivity Commission through it stating that:

*'The anti-dumping and countervailing system in general, and the public interest test in particular, would be a poorly targeted instrument for pursuing wider goals, such as promoting environmental or social outcomes.'*¹⁶

But, taking into account stakeholder input which stressed the necessity for regional based industries to be able compete on a level playing field, this argument cannot be accepted as compelling.

Regional Areas

Concerns for regional areas from the weakening of the integrity of Australia's anti-dumping system are not limited to timber communities but also include steel and aluminium communities (as argued above) and other communities in regional centers (including agriculture) where substantial trade exposed industries can be found.

Of concern, is that union, industry and other stakeholder arguments of the importance of the anti-dumping system to regional development are dismissed by the Productivity Commission when it says:

¹⁵ DFAT, Productivity Commission Inquiry: Antidumping and Countervailing System, p1 http://www.pc.gov.au/__data/assets/pdf_file/0010/90199/sub022.pdf

¹⁶ The Productivity Commission, Australia's Anti-Dumping and Countervailing System, Productivity Commission Inquiry Report, No.48 p 78 http://www.pc.gov.au/__data/assets/pdf_file/0006/93750/anti-dumping.pdf

*'...Particular measures may benefit regional activities in a general sense,(but) the system would, for the most part, be a poorly targeted and uncertain mechanism for delivering regional support.'*¹⁷

Industry policy can make an important contribution to the realisation of environmental, social and economic objectives at the regional level. Following the recent Federal election, it is clear that greater emphasis will be given to the legitimate needs of regional communities. An efficient and effective anti-dumping system has a role to play in making this happen. A weakening of the system could make the role of industry policy in regional development an ineffective tool.

The National Association of Forest Industries has emphasised the need for Government to:

*'Address anti-dumping issues to ensure the domestic industry, local jobs and reliant communities are protected from the effects of dumping of forest product imports.'*¹⁸

AP3's submission points out that that the Productivity Commission's proposed public interest test:

*'Is subjective and ideologically driven... an outcome, such as the discontinuation of industrial jobs in regional Australia, may be seen as a desirable public interest outcome'*¹⁹.

Regarding regional productivity, the Pulp and Paper Industry Strategy Group point out that employment opportunities and income generated in areas where the industry is concentrated have offered a range of opportunities for supporting local communities, such as:

¹⁷ Ibid, p 186.

¹⁸ NAFI, *Forest Industry Growth Plan*, August 2010, p 10, [http://www.nafi.com.au/userfiles/publication/NAFI%20Forest%20Industries%20Growth%20Plan%202010%20\(full\).pdf](http://www.nafi.com.au/userfiles/publication/NAFI%20Forest%20Industries%20Growth%20Plan%202010%20(full).pdf)

¹⁹ AP3, Submission to the Productivity Commission's Draft Inquiry Report into Australia's Anti-dumping System, p 3 http://www.pc.gov.au/__data/assets/pdf_file/0009/92196/subdr045.pdf

- New enterprise development
- The provision of infrastructure and services such as health and education
- The contribution of forest industry employees and their families in local communities
- Sponsorship of recreational facilities and events
- The provision of fire fighting services within the region.

And that furthermore, the pulp and paper industry's operations have underpinned the development of a range of supporting industries including:

- A well developed and highly efficient transport industry
- Engineering and maintenance providers
- Mechanics and vehicle maintenance companies
- Specialised forest harvesting equipment manufacturing facilities
- Professional service providers such as accounting, legal and medical practitioners²⁰

One of the important recommendations of the PPISG was for:

- The formation of a working group with the Australian Customs and Border Protection Service (perhaps in conjunction with the Trade Remedies Task Force) It would consider how to streamline the process for making a case that dumping or unfair competition through subsidies is occurring in order to reduce costs and complexity for the industry
- The Australian Customs and Border Protection would provide business with a clear definition of material injury in relation to dumping actions and remedies
- The Productivity Commission's draft recommendation to introduce a 'public interest test' would be rejected.

²⁰ PPISG, Final Report, p 20
http://www.pc.gov.au/__data/assets/pdf_file/0006/93750/anti-dumping.pdf

- The Productivity Commission's draft recommendation on the continuation of measures would also be rejected.²¹

The unions who are party to this submission support the thrust of the PPISG recommendations. Unfortunately these recommendations did not adequately influence the Productivity Commissions' final report.

Potential Improvements

Tissue papers were proven to have been dumped recently (as will be further discussed below) There is a current case before Australian Customs and Border Protection of plywood dumping²². Measures have recently been put in place for the alleviation of material injury to local industry through cartonboard dumping²³ and there is anecdotal evidence of the dumping of structural timber²⁴.

This dumping activity from the union's point of view causes or potentially causes material injury to local industry and also has triple bottom line detrimental impacts at a local, regional national and international level

The Pulp and Paper Industry Strategy group argued that:

'Although the Australian Government's anti-dumping and countervailing measures provide some protection against unfair imports, the industry believes that the current system is highly complex, onerous, time consuming and costly for most businesses. To ensure that Australian businesses operate on a level playing field, at least in their domestic market, the industry requires

²¹ Ibid, p 100

²² Customs Dumping Notice, 2010/07

<http://www.customs.gov.au/webdata/resources/files/MicrosoftWord-ACDN-extension.pdf>

²³ Customs Dumping Notice, 2010/23

http://www.customs.gov.au/webdata/resources/files/100623MicrosoftWord-ACDN_2_-review.pdf

²⁴ Gunns, Submission to Productivity Commission Inquiry into Australia's anti-dumping system.

http://www.pc.gov.au/__data/assets/pdf_file/0017/90026/sub008.pdf

CFMEU FFPD, 'Nangwarry cuts 90 jobs- Australia's "Green Triangle" devastated as more than 100 jobs go' *National Jobs Campaign Newsletter*, Winter 2009, p 4.

an effective, less onerous and less costly anti-dumping and countervailing system’

Despite noted limitations in the Customs Act, there is room for improvements that would make the anti-dumping system more responsive to the needs of local industry. Some of these are addressed in part by the Productivity Commission. For example it recommends and we support Australia’s list of actionable subsidies being aligned and kept aligned with the lists in the latest relevant WTO agreements.

There are other area where modest changes could improve the system. For example the unions support the Productivity Commissions’ recommendation:

- 7.9 *‘That the Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources²⁵ and*
- 7.5 *‘that the Australian Government should ensure that the Australian Customs and Border Protection Service and the Trade Measures Review Officer are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks.²⁶*

It would be anticipated that the above recommendations should contribute to:

- The establishment of an effective ‘own recognisance’ complaint laying regime by ACBPS where they believe industry parties are conflicted or otherwise unable to initiated anti-dumping investigations but the data indicates dumping is likely to be occurring causing material injury,

²⁵ Productivity Commission, Productivity Commission Inquiry Report, No.48, p xxxiv

²⁶ Ibid, p xxxiii

- Increased availability of dedicated liaison between the ACBPS and SMEs and trade unions whose members are or were employed in businesses that have or may be affected by dumping. This should include an expansion of availability of complainants to Trade Unions for the right to apply for the initiation of anti dumping investigations when their members are affected by dumping. This would be appropriate when enterprises:
 - Feel that they are too easily identifiable by customers with a track record of commercial retribution.
 - Are unable to make complaints because the globalised nature of their business creates a conflict of interest.
- An automatic broader analysis of material injury, which would be assisted by an agreed definition of material injury- on allegation of dumping or as part of an 'own recognisance' complaint laying regime taking into account economy wide measures such as:

Negative impacts or potential impacts on employment and investment in the Australian economy

This consideration should become a default determinant measurement of material injury including through the initiation, investigation and if necessary reinvestigation of a given case.

Unions will initiate liaisons with ACBPS to ensure that low expectations of success, limited resources within firms and increased use of Tariff Concession Orders do not remain barriers to anti-dumping investigations occurring. We will also be recommending how increased resources could be efficiently allocated and utilised. We will continue to assist in a review of the Customs department trade measures area ensuring that skills and resources are efficiently allocated for the magnitude of the task that is expected by industry and as legislated.

Why the Unions oppose the proposed public interest test

In its review of Australia's anti-dumping system the Productivity Commission recommended that a new public interest test should be enacted. If, for example, the imposition of anti-dumping measures against importers could eliminate or significantly reduce competition in the domestic market for the goods concerned, the public interest test would be a trigger for not imposing measures

“... even where there is found to be dumping or subsidisation which has caused, or threatened to cause material injury.”

There are six circumstances proposed, any one of which could trigger the public interest test overriding a dumping finding.

As noted earlier in this submission, the three unions oppose a mandatory public interest test (PIT). We agree with the DFAT position which strongly suggests that any consideration of a PIT should be linked to the DOHA round of trade negotiations.

This combined unions' submission also opposes the enactment of a new public interest test (PIT) on three additional grounds.

A) There is no need for a new public interest test because it already exists in the form of Ministerial discretion.

For several decades now the Commonwealth Government has determined that a separate public interest test is not appropriate and that such a test already exists in terms of what national interest considerations the Minister takes into account in taking the decision to impose measures or not impose measures.

As the then Minister for Science, Customs and Small Business, Barry Jones, pointed out in 1988 in the second reading speech on Amendments to the Customs Tariff (Anti-Dumping) Act 1975:

“Effective anti-dumping and countervailing arrangements are necessary to protect Australian industry from clearly unfair trading practices. This

is in accordance with Australia's rights and obligations as a signatory to the General Agreement on Tariffs and Trade (GATT) anti-dumping code and the code on subsidies and countervailing duties. Other signatories to the codes such as Canada, the European Economic Community (EEC) and the United States of America employ similar practices. Consistent with the GATT codes, however, anti-dumping actions need to be balanced between providing a means for effective relief from the disruptive effects that dumped or subsidised goods may have on domestic producers and ensuring that the measures do not constitute an unjustifiable impediment to international trade.

Upon this Government coming to office in 1983, a wide-ranging review was conducted, culminating early in 1984 in a number of significant legislative and administrative changes to the anti-dumping regime.

Then in February 1986 the Government commissioned Professor F. H. Gruen of the Australian National University to conduct another review of the anti-dumping system to determine whether further improvements could be made and in particular to consider the inclusion of a national interest provision. After considering Professor Gruen's report, the Government has decided to:

- establish an anti-dumping Authority to make recommendations to the Minister on anti-dumping or countervailing action;*
- Endorse Professor Gruen's view that there should be no 'national interest' provision written into the legislation;*

"The Government considers that such a provision would add to the uncertainty of the proceedings, would lead to administrative complexity and would increase the costs to participants. The range of issues which could be regarded as relevant in each case could no doubt be broadened and the way would be open for parties with indirect interests to claim a right to present views to the Authority and have them taken into account by the Minister in making his decision. Proceedings could thus become unnecessarily complex and protracted. While it is not defined in the Bill, the Minister will take national interest criteria into account in exercising his discretion in considering the reports of the anti-dumping Authority.

The issues of dumping have both economic and political significance and circumstances can change with disconcerting speed; hence the need to maintain or even enhance ministerial discretion.”

The existence of this national interest provision within the context of Ministerial discretion was reaffirmed as recently as August 14, 2009 in the Federal Court of Australia in the Siam Polyethylene Co. Ltd. v. Minister of State for Home Affairs [2009] FCA 837 case. As the Court pointed out in its judgement:

“It is significant that the decision-maker here was the Minister. The Statutory Scheme (Dumping Duty Act) seeks to give effect to Australian’s international obligations. In authorising the Minister to consider any other information that he or she considers relevant, in addition to requiring the Minister to consider the report of the CEO, the Parliament intended in S.269 ZDB (i) (a) to confer a broad discretion on the Minister. In the exercise of a Ministerial discretion, due allowance may have to be given to a Minister of the Crown to take into account broader policy considerations that may be relevant ... The subject matter, scope and purpose of the statutory power provides a context in which to assess the duties it imposes on the decision-maker in any particular situation.”

Simply put, the public interest test already resides in Ministerial discretion. It is within the Minister’s discretion not to impose measures if, for example, such action was likely to eliminate / significantly reduce competition in the domestic market. The fact that such Ministerial discretion has not been utilised reflects the seriousness of dumping actions that cause or threatens to cause material injury to Australian industry and thereby the job and income security of working people, their families and communities.

In Canada, recommendations by the Canadian International Trade Tribunal to the Minister in the public interest, to reduce (not eliminate) dumping duties have only been made five times in the last 22 years (and only 4 of the 5 by

unanimous decision). The Australian system can already impose a lower duty and Ministerial discretion to go further exists if required. There is no case for change.

B) There is no need for a new public interest test given the time, costs and risks associated with its introduction relative to the magnitude of the alleged problem and the expected benefits.

To impose the Productivity Commission's six-part public interest test would seriously disadvantage that part of domestic industry that are suffering from dumping.

It would significantly increase the cost of Government to administer the system and the cost for participants to prosecute cases under the PIT.

It would also increase the time of dumping cases by at least 30 days and probably more given that 60% of dumping cases under the current system are granted time extensions.

It would also significantly increase the risk of unbalancing the existing system.

Importantly, the additional cost, time and risks associated with introducing a PIT have to be weighed against the benefits:

- During the past decade only around five anti-dumping cases a year result in new measures being applied compared to an average of fourteen in the previous decade.
- During the global financial crisis in 2008-09, a time when dumping increases globally, Australia only initiated eight new investigations and imposed six new measures. During the most active year in previous recessions more than seventy investigations were initiated and fifty new measures introduced (early 1980s and early 1990s).

- It has been suggested with very little detailed analysis that the PIT in the European Union prevents about 10% of dumping cases from having measures introduced. As noted above, in Canada, only 5 recommendations in 22 years have been submitted to the relevant Minister to partially reduce dumping duties.

With the likelihood of measures being imposed in about fifty cases over the next decade, why would it be in Australia's national interest to incur the extra time, costs and risks of a new PIT to prevent measures being introduced in zero to five new cases?

Why would it be in the national interest to do this when national interest considerations already reside in Ministerial discretion and the option of lesser rates of duty already exist?

C) There is a very real possibility that a new public interest test would undermine the checks and balances in the existing system thereby diminishing its legitimacy.

The introduction of a new public interest test would of necessity require countervailing checks and balances, including the introduction of much broader public interest criteria than that proposed by the Productivity Commission.

As the CFMEU argued in proceedings before the Commission, there would need to be triple bottom-line accounting criteria regarding labour rights and the environment introduced into a PIT. This is entirely consistent with the ALP Party Platform that reads in part:

Labor recognises that economic growth and prosperity arising from increased international trade brings with it the responsibility to promote higher labour and environmental standards for Australia and internationally. Labor will support greater cooperation between the secretariats of the WTO and the ILO on the issue of trade and labour standards.

Labor supports the incorporation of core labour standards in all international trade agreements. Labor will outlaw the importation into Australia of goods or services produced with forced or prison labour. Labor will work actively through the WTO and other international trade organisations to combat and overcome the scourges of forced, prison or child labour.

Labor is fully committed to the goal of sustainable development. Labor will work towards the removal of environmentally damaging subsidies, and promote mechanisms which can reconcile the interests of environmental protection and open markets.

Labor notes the important role and responsibility we have at the Asian Development Bank and supports the inclusion of core labour standards in ADB decision-making including a role monitoring mechanism at the ADB.

Given the commitment to core labour and environment standards it is a logical extension to extend them into the PIT.

In that context could one seriously envisage an Australian Government telling a group of workers, retrenched because of the injury dumping was having on their industry, that although the overseas importer has an appalling human rights record, breaches ILO core labour standards, engages in devastating/unsustainable environmental practices, has been shown to be dumping and causing Australian workers to lose their jobs, that it's in the public interest for this to occur and dumping measures not be imposed?

The potential for that sort of an outcome would seriously risk the de-legitimisation of the existing system. It would take use **back into the past** to the environment surrounding highly politicised cases in the 1980s at a time when Australia's **future** trade engagement with China, Asia and emerging markets more generally is vital to the national interest.

Why a better appeals process is required after the toilet paper dumping case.

The recent toilet paper dumping case (Report 138) and the reinvestigation report (158) have highlighted a serious technical flaw in Australia's anti-dumping system and the appeal process.

In the original decision:

- Customs and Border Protection found that some toilet paper from Indonesia and China was being dumped into Australia causing material injury. In December 2008 the Minister imposed dumping duties.
- As is the practice in Australia's system, an appeal led to the Minister calling for a reinvestigation of the findings that were carried out by the Trade Measures Review Officer. (TMRO) The main finding of the reinvestigation was that factors other than dumping were more important in causing material injury. Accordingly the original decision was overturned.
- However under Section 269ZZL(2)(9)(i), in conducting the review Customs and Border Protection must have regard only to information and conclusions based on the relevant information in the original case.

If the conditions of the review do not satisfy this requirement of Section 269, there are no grounds for a technical appeal. As Kimberly Clarke Australia have put the case:

“The current legislative process affords aggrieved parties the ability to raise objections to the TMRO, who can request a reinvestigation. Once customs undertakes such a reinvestigation, should the determination change as has happened in the Toilet Paper case, there is no formal process (to) enable the new aggrieved party to be represented in the change of finding.

There is an option to pursue errors of law through the Federal Court, but this is limited and does not permit review of the merits of the finding.

Some mechanism needs to be provided to enable representations outside a Federal Court appeal of errors of law.”

The unions making this submission recommend:

- Following a reinvestigation by the Trade Measures Review Officer (TMRO) and prior to a final decision by the Minister, the parties to the appeal be provided with the TMRO’s draft recommendation and reasons for decision.
- That from the commencement to the conclusion of a reinvestigation there be a requirement for the TMRO to specifically identify the grounds for requesting a re-investigation and the evidence presented supporting this.
- If any party to the appeal has evidence that Section 269ZZL (2) (9) (i) has been breached, a ten-day technical appeal process will occur.
- That Customs will have on retainer two experienced “Section 269 Advocates” who can be called to:
 - (a) interview and review the findings and material utilised by the original investigation team;
 - (b) interview and review the findings and material utilised by the TRMO and the second investigation team; and
 - (c) provide the TRMO with a finding as to whether the conditions of Section 269 have been satisfied.

Conclusion

The Productivity Commission does recognise that:

‘The capacity for the Australian Government to point to the existence of an appropriately configured anti-dumping system may continue to be

*helpful in dealing with aspects of protectionist sentiment within industry and the community, especially during downturns in the economy.*²⁷

The introduction of a public interest test and other changes recommended by the Productivity Commission would mean that the anti-dumping system is no longer appropriately configured. It is appropriate that unions reiterate that the fragile 'social license' for the acceptance of liberal trade agreements, and the deregulation of the economy remains heavily dependent on perceptions of Fair Trade which at least in part is evidenced by an efficient and effective anti-dumping system.

Introduction of a PIT is fraught with difficulties. Triple bottom line accounting criteria would need to be applied in an analysis of the dumped product and this examination would need to prove that the products' importation at the lower price is indeed sustainable and can and will be maintained for exemption to be determined in the public interest.

A key risk is that any benefit for downstream consuming industries from the dumped products' exemption from anti-dumping duties is temporary.

In this scenario, local industry could be "sacrificed" as a consequence of overwhelming material injury despite the real likelihood of there being no lasting economy wide productivity dividends from not applying duties.

Indeed, a more likely long term outcome from exempting products which are unsustainably produced and dumped from anti-dumping duties is long term efficiency gains would be long term efficiency detriments. This occurs due to the emergence of sectoral import dependence and/or potential monopoly situations leading to higher prices being faced by downstream consuming industries than would have occurred had local industry avoided material injury from dumping and able to apply ongoing local competition. This outcome would also threaten supply security in key products made from aluminium and steel.

The Productivity Commission claims that there is no evidence that dumping

has been predatory in nature and therefore detrimental to efficiency²⁸. However, even if we are to accept this assessment at face value, it fails to acknowledge the checks and balances in the existing system contributing to this outcome. The onset of serious predatory dumping which targets Australian industry or intermittent dumping could plausibly be encouraged through the introduction of a PIT as there is no proposed safeguard mechanism for avoidance in the structure of the proposed PIT.

As argued in our submission, a case has not been made to justify introducing a formal PIT into the anti-dumping system. This is especially the case in the absence of the introduction of triple bottom line analysis. This requirement would necessitate extra administrative costs for undertaking a proper analysis of sustainability.

In addition, as the Unions have emphasised, the submission provided to the Productivity Commission by the Department of Foreign Affairs and Trade (DFAT) expresses succinctly concerns with tampering with Australia's anti-dumping regime in isolation from the multilateral trade policy framework and on-going WTO negotiations. These negotiations are aimed at enhancing transparency and compliance with multilateral rules governing anti-dumping practices and the application of countervailing duties of ultimate benefit to Australian producers and consumers alike.

It is therefore our judgement that the Minister continue to have the responsibility to make the decision to levy or not levy anti-dumping duties in the public interest when material injury has occurred without the regulatory 'guidance' of a public interest test.

Finally it has become clear that the Productivity Commission increasingly sees itself as a "player" in the anti dumping regime (as it was for a period up to the mid 1970's as the IAC), and therefore incapable of standing aside and offering impartial objective advice about how the system should function in the future. It has never accepted that dumping actually occurs and hence its resort to a "political economy safety valve" argument. This appears to be consistent with

²⁸ The Productivity Commission, *Australia's Anti-dumping and Countervailing System Draft Inquiry Report*, September 2009, p XVI

a “reform crusade” agenda driven by an internally generated, predetermined preferred policy position rather than any objective assessment of the balance of benefits of the existing anti-dumping regime or its multilateral context aimed at improved outcomes for domestic industry and consumers alike.

Accordingly, it is our assessment that the next review of the anti-dumping system be undertaken by an independent panel appointed by Government, as has occurred in the past, rather than the Productivity Commission. This should be aimed at ensuring the efficacy rather than effective abolition of the current anti-dumping and countervailing system.