



# Submission

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## International Law Section

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### Administrative Review of Australia's Anti Dumping Regime

To: Trade Measures Branch

A submission from the International Law Section of the Law Institute of Victoria (ILS4)

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## 1 Introduction

The Minister for Justice and Customs and the Minister for Industry, Tourism and Resources have announced a Joint Study of the administration of the Australian anti-dumping system. The Joint Study is being conducted by the Australian Customs Service (**Customs**), the Department of Industry, Tourism and Resources, Department of Foreign Affairs and Trade and the Trade Measures Review Officer. The Joint Study will examine Customs' current administrative practices and consider options to improve the operation of Australia's anti-dumping system.

The Law Institute of Victoria (**LIV**) welcomes the opportunity to make a submission to the Administrative Review (**Review**) of Australia's anti-dumping regime.

The International Law Section ("Section") was initially established as a committee of the LIV Council in late 2001. It was formerly known as the International Law Briefing Committee until changing its name to the Section in December 2004. The Section comprises members with diverse legal experience across the Section's three focus areas of international law:

- (a) International Trade and Commerce Law;
- (b) International Arbitration Law; and
- (c) Public International Law.

In this capacity, members of the Section have significant expertise in anti-dumping regimes, whether pursuant to the WTO Anti Dumping Agreement (**WTO Agreement**), the Australian anti-dumping regime or the equivalent regime in other countries.

The Section would welcome the opportunity to make further written or oral submissions to the Review or provide further information as required.

## 2 Issues for consideration and terms of reference

The LIV notes that Issues for consideration in the Joint Study of the Administration of Australia's Anti-Dumping System include:

- (a) access to the anti-dumping system;
- (b) transparency;
- (c) conduct of investigations into dumping, injury and causation; and
- (d) post imposition of dumping measures.

The terms of reference for the Review are:

- (a) administrative procedures for the conduct of anti-dumping investigations including transparency matters and administrative procedures relating to verification and analysis of industry, importer and exporter information;
- (b) access to the anti-dumping system, including liaison with potential applicants and other interested parties, screening of applications and the information required from applicants and respondents to an investigation; and
- (c) the manner in which Customs monitors compliance with measures imposed.

### 3 Nature of the Review

The LIV notes that the Review purely relates to administrative matters and does not propose to amend any legislative matters.

The LIV is aware that the Review has "been initiated in response to industry suggestions that there was scope for improvements to existing administrative arrangements".

However, the LIV is concerned that the Review should not result in any changes aimed purely at supporting the position of the Australian manufacturing industry to the exception for the need to ensure a transparent and equitable system pursuant to the WTO Agreement.

The LIV notes that the Productivity Commission Inquiry Report No. 3 dated 28 February 2005 (**Productivity Commission Report**) entitled, *Review of National Competition Policy Reform* makes certain observations and recommendations. The Productivity Commission Report touched on Australia's anti-dumping regime. Specifically, Recommendation 9.3 in the Productivity Commission Report states that, "The Australian Government should, as soon as practicable, initiate the independent review of anti-dumping arrangements previously scheduled under the NCP".

The LIV seeks clarification as to whether the Review is intended to take place or replace the review contemplated by Recommendation 9.3 of the Productivity Commission Report. It would appear that the review recommend by the Productivity Commission would adopt a different approach to that adopted by the Review. The LIV also notes that the Productivity Commission Report calls for an independent review of the Australian anti-dumping regime and is concerned that the Review may be construed as not being independent. The LIV endorses the conduct of a further independent review of the type contemplated by the Productivity Commission Report.

### 4 Observations as to the anti-dumping regime

The LIV makes the following observations as to Australia's anti-dumping regime.

At the moment, the aim of the Australian process is to complete an anti-dumping or countervailing case within 155 days of the initiation of any investigation. The LIV notes that in Customs' annual report for the financial year 2004-05 (Annual Report), under "output 5" (pages 91 to 95), Customs have indicated that only 56 per cent of the investigations initiated were completed within that 155 day period. Accordingly, while there may be some pressure from local industry to shorten the 155 day period, the LIV is concerned that any reduction in this period may not be practical and could have an adverse affect on the way in which investigations are conducted.

The LIV understands that some parties would propose the imposition of interim anti-dumping measures at a stage earlier than it is currently imposed at the Preliminary Affirmative Decision ("PAD"). The LIV believes that PAD remains the correct stage for imposition of such measures.

Based on the comments in the Annual Report as to reasons for delay in investigations and some delays in subsequent investigations (such as delays in the investigation regarding alleged dumping of canned mushrooms), it appears that the majority of the delays are due to a combination of the following:

- (a) a need to obtain additional information;
- (b) a need to verify information;
- (c) a need to process large volumes of data collected; and
- (d) the complexity in verify data.

This suggests that additional time needs to be found for these stages of the investigation to enable these matters to be properly addressed.

The LIV understands that a number of parties within Australian industry have expressed reservations and current procedure makes it more difficult to lodge an application based on the following reasons:

- (a) the information which is required by Customs; and
- (b) the tests imposed by Customs and the review of the application to determine whether a prima facie case exists to pursue an application. Australian industry is concerned that it does not want a de facto "verification" process to take place at this early "screening" stage.

There are concerns as to delays between recommendations by Customs to the Minister for Justice and Customs and the date on which the Minister adopts or rejects those recommendations.

The LIV observes that the majority of investigations relate to goods from Asia. There are specific concerns that the increased use of Free Trade Agreements and the associated decrease in duty rates will significantly increase imports which necessitates additional focus to ensure that trade is fair and not just free. To this effect, the LIV notes that the US and EU experience points to increased focus on export of goods from Asia such as foodstuffs, shoes and furniture as being subject to anti-dumping inquiries.

The LIV notes that many of the issues to be addressed in anti-dumping investigations have significant economic and competition considerations such as:

- (a) the market for goods;
- (b) what are "like goods"; and
- (c) what constitutes material injury.

From this perspective, we note that the Annual Report indicate that Customs works with the ACCC on a variety of issues given the expertise of the ACCC with these issues.

## 5 Recommendations

Based on the comments above, the LIV makes the following recommendations as to review.

- (a) The review recommended by the Productivity Commission Report should be undertaken without further delay.
- (b) Australia must remain committed to the procedures as set out in the WTO Agreement. The Review should not result in changes perceived by assisting Australian industry to the exclusion of the interests of all other parties involved in any investigation or in a way which is inconsistent to the WTO Agreement.
- (c) There should be increased liaison with the ACCC and use of ACCC resources when resolving economic and competition questions. It is the view of the LIV that, ultimately, responsibility for administration of Australia's anti-dumping regime may best be addressed by the ACCC rather than through Customs.
- (d) A decrease in the time which Customs have to undertake the "screening" review of an application at the "prima facie" stage and the re-allocation of that time to provide additional time to produce the Statement of Essential Facts ("SEF") and the PAD may be of assistance. As set out above, many investigations require extensions of time to achieve the SEF and the PAD.

- (e) There should be no imposition of measures before the PAD stage, as that is the stage when both parties have made first submissions.
- (f) Additional resources need to be provided to Customs to undertake their difficult investigations, whether by way of additional staff or access to additional information or expertise in other areas. The LIV endorses the move of Customs to open an office in Beijing and appoint officers in Beijing to assist with Customs matters. However, the LIV is concerned to ensure that officers appointed to the Beijing office of Customs have sufficient time allocated and sufficient expertise (including language skills) to assist with anti-dumping investigations. Further, the LIV is of the view that given the likely increase in dumping investigations relating to goods imported from Asia, then additional resources should be allocated to China and other Australian diplomatic outposts in Asia with a focus on anti-dumping investigations.
- (g) Parties to an investigation should be provided with additional access to statistics provided by the Australian Bureau of Statistics. Currently, access to those statistics is limited by way of legislative confidentiality provisions. However, these need to be amended in relation to dumping investigations so that parties can properly determine levels of imports and local production of "like goods". The information needs to be provided in detail down to quantity of goods imported and produced according to specific tariff classifications. The information also needs to identify the names of the relevant importers and members of Australian industry. This could be released subject to a rigorous confidentiality regime.
- (h) Consideration should be given to the increased use of meetings of interested parties in an endeavour to focus on any contentious areas in the investigation. This could also provide an alternative means to resolve disputes as to alleged dumping by way of the parties explaining their positions and responses to various allegations. This process has been used elsewhere in the world in other anti-dumping regimes.
- (i) The use of confidential/non-confidential submissions can create issues where parties are not aware of the precise grounds of claim or relevant and important information is not disclosed on the basis that it is "confidential". For these purposes, the LIV would recommend more use of public hearings to disseminate information or to review as to what could constitute confidential/non confidential information. In the event of a dispute as to whether information is confidential or non confidential, there should be an independent forum within which to review claims for confidentiality. Additional guidelines should be provided as to what evidence constitutes "confidential" or "non confidential" information. There may also be the opportunity to have "confidential" information provided subject to a rigorous confidentiality regime so that the information is solely provided for the purposes of any anti-dumping investigations. Severe penalties could be imposed for breach of the confidentiality. It is extremely unfair on (for example) an importer if the Australian manufacturer will not make details of its sales or financial position readily available to determine the grounds of the claim by the Australian manufacturer.
- (j) The Act should provide for a maximum period within which the Minister makes a decision as to recommendations made by Customs.
- (k) Consideration should be given to adopting a different test at the "screening" or the "prima facie" stage so that Customs do not feel the need to undertake an unnecessary verification of the claim at the initial stage. However, the LIV appreciates that if there is an actual (or perceived) reduction of the threshold test for Customs to apply when determining whether to initiate an investigation that could lead to a number of vexatious or unsupported allegations. That could be used by

Australian industry to unnecessarily burden Australian importers and overseas exporters with the significant costs and time of an investigation. Accordingly, to address these concerns arising from any reduction in time given to Customs to review an application or a change to the test at the screening stage, there should also be associated changes to the administration so that if a person is found to have made a vexatious or unsupported application, then those parties can be punished by way of penalty under the Customs Act or other legislation.

- (l) Establish a system of rulings or guidelines for issues associated in an anti-dumping investigation such as accounting treatments or related issues such as the tests as to what constitutes material injury or what constitutes an Australian industry. Examples could be provided from previous investigations and court findings. This could also be provided with examples of situations in which Customs have departed from local prices in the country of export determining normal values.

## 6 Conclusion

The LIV seeks Australia's anti-dumping regime as holding a significant role to ensure that trade is both free and fair. The LIV welcomes the Review and would be pleased to provide more details regarding its views and recommendations set out above.