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Submission to the Joint Study of the Administration of Australia's Anti-Dumping System

1 Access to the Anti-Dumping System

- *Complexity of the application and related information requirements and standards*

Articles 5.1 and 5.2 (part) of the WTO *Anti-Dumping Agreement* ("the Agreement") provide as follows:

"5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph..."

Article 5.2 then sets out, in subparagraphs (i) to (iv), the mandatory information requirements to be contained in an application. The important aspects of Article 5.1 and 5.2 are that a written application must be made, and that it must contain evidence of the requisite elements necessary to base a finding that there has been dumping and that the dumping has caused material injury to the industry concerned.

What "*evidence*" is, in a legal sense, is not easy to define. Whilst almost anything can be evidence, for the legal purposes of the Agreement and of Part XVB of the Customs Act 1901 ("the Act") it must have some credibility and probative value in order to be relied upon. Evidence may be given different weight depending on what it is and who is giving

it. Some evidence is inadmissible. Some evidence is considered to be better than other evidence. The value of evidence is affected by the credibility of the person giving it.

Both the Agreement and our domestic law can assist us in understanding what is required by way of evidence which is sufficient for the purposes of initiating an investigation. The relevant articles of the Agreement at least require that the evidence must be relevant, and must substantiate the assertions made. Our law requires cause to be shown before a person is put to any detriment, such as the commercial detriment which arises when an investigation is announced. On the other hand, it cannot be expected that the evidence provided in an application is incontrovertible. A decision to initiate an investigation is necessarily a *prima facie* decision.

The Federal Court has applied a balanced test in considering the nature and degree of the satisfaction which the CEO should achieve in deciding that it is appropriate to initiate an investigation. On the one hand, the Federal Court has left no doubt that a decision to initiate an investigation is a “*decision*” to which the *Administrative Decisions (Judicial Review) Act 1977* is applicable. However it is also clear that the rigour with which the Court will apply the disciplines of the Act is at a lesser level in the case of a decision to initiate than it is at the later decision-making stages of an investigation.

In the *Merman* case¹, the Federal Court referred to an initiation decision as being tentative or preliminary. The Court described the decision by Customs to investigate in that case as being based on a complaint that was “*arguable*”, and found no fault with that decision. In the *Powerlift* case², in describing the power to initiate without an application being made, the Federal Court endorsed the test under the Agreement of “*sufficiency*” of evidence.

The issue posed by the Joint Study, namely the complexity of the application and related information requirements, suggests that there is a concern that the application is too complex, and that high information standards are set for an application to be accepted. I am not sure that either of these things, namely complexity and high information standards, address what it is that the Agreement requires, or what the Courts have suggested should be required.

¹ Re Merman Pty Limited and Comptroller-General of Customs & Ors (1988) 84 ALR 521

² Re Powerlift Nissan Pty Limited & Anor and Minister of State for Small Business, Construction and Customs & Ors (1993) 113 ALR 339

I recall being asked to give my comments in relation to the proposed approved form of application, which I believe is the current form of application, in about 2000. At that time I suggested that the form should not be so prescriptive, nor complex. It remains my opinion that an industry really should be able to explain, in its own words, why it believes that there is dumping, what injury it has suffered, and why it is alleged that dumping has caused that injury. The industry should establish that there is dumping, or at least justify a real and credible suggestion that there is dumping. It should also give a good indication that it has suffered injury, and that the prices at which the dumped goods have been sold have caused material injury. This should be backed up by primary and independent evidence, to the extent possible.

It seems to me that an inquiry into whether or not the application and related information requirements are too complex is misguided. It suggests that a person might not meet the requirements of the form, and therefore be denied the entitlement to have an investigation initiated, even though the evidence presented substantiates the assertions made. If that is how the system is presently being administered, that would be a matter of concern. Substance is more important than form.

The concerns of both Australian industries and of importers and exporters may well be the same. An investigation should be initiated, and should only be initiated, where there is proper evidence provided which substantiates the assertions being made, and therefore gives reasonable grounds for an investigation to be initiated. Australian industry members do not want to have their entitlement frustrated by matters of form and complexity. By the same token, importers and exporters do not want to see an investigation initiated simply because someone was clever enough to fill out a form, where the information provided was neither logical nor credible.

An investigation should only be initiated where there is evidence of the elements necessary to impose dumping measures. The evidence needs to be relevant and sufficient. It has to be of a higher probative value than simple assertion. It needs to establish an arguable case, even if that case may or may not be proven in a full investigation. Whilst an approved form may give guidance to the matters which may be relevant, answers given to the questions in a form (or not given) should not be determinative. It is the substance of the evidence provided which is important.

Lastly, it should be noted that the above consideration is grounded on the premise that even a decision not to reject an application (as per the Australian legislation) requires a positive standard of evidence which meets ADA standards. If that is not the case then

Australia's legislation is not consistent with the Agreement and would be open to challenge in the WTO.

- *Consideration of applications (the "screening" process)*

Following on from the above, it is this topic which is of more interest and importance to stakeholders. We can break down a consideration of this topic into these parts: who screens; why screen; and how to screen.

The answer to the first question, "*who screens*", is a vexed one. A suspicion is often expressed by foreign exporters that an investigating authority might not be impartial if it has been closely involved in the "*screening*" of an application and its initiation. In other words, it is felt that conclusions reached at an early stage, without the benefit of opposing views, set the tone for conclusions made thereafter. This is especially the case where the officers involved in the initiation decision are the same as those who are later involved in the investigation.

I am not contending that there is a lack of impartiality by Customs, but rather that the system exposes Customs to just such a criticism. This concern is heightened if it transpires that the application has been through several iterations. During such a process Customs officers may, rightly or wrongly, have pointed out deficiencies which needed to be addressed and which later were addressed in the successful application. The form itself directs applicants to contact the Dumping Liaison Unit "*assistance*" in completing the form.

The Agreement does not require that the investigating authority (ie the authority which conducts the investigation) be the same as the initiating authority. There is scope for an independent body or procedure to be established, thus removing the screening process from within Customs.



A special panel should be established for the purposes of deciding whether an investigation should be initiated, with a small secretariat attached to it, with representatives appointed by the Minister for Industry, Science and Resources; the Minister for Trade; and the Treasurer. A working label for the panel could be the Australian Trade Remedies Panel. The Panel would receive and consider applications for investigations, and hand them on to the Australian Customs Service for investigation and report if the Panel decided that an investigation should be initiated. If initiation did not take place, the applicant should be entitled to a letter of explanation or similar, such as a statement of reasons.³

The second question, “*why screen*”, harks back to the considerations mentioned above. It is important to undertake a rigorous screening process. Otherwise the tests of sufficiency and relevance will not be met in any given case. That does not mean that each claim needs to be established without doubt. It does at least mean that evidence must have been provided which appears to be sufficient and relevant, such that an investigation is warranted.

The third question, “*how to screen*”, can be considered in the context of what is presently done. At present it seems that Customs adopts an internal screening process. There is no on-site verification (ie no visit to the applicant/s to verify what has been claimed in the application). The Customs Manual states that Customs can have regard to information not contained in the application but that Customs does not consider itself to be under any obligation to gather any evidence.

If this is a correct approach to adopt, then certainly there is a great risk in reducing the information requirements in the application form. It is noted that the form advises applicants that “*An application will be improved by including supporting evidence...*” (emphasis added). In view of the legal requirement of relevance and sufficiency, it would seem to be more appropriate to say that an application must contain as much supporting evidence as possible. It is submitted that Customs must (and must be entitled to) “*test*” information provided against any information Customs has or that it chooses to acquire. International and industry data available to Customs should be checked especially where Customs finds cause to question information provided in an

³ I envisage that the Panel would have wider roles in relation to the activation of the WTO package of defensive trade remedies. Customs would have the role of investigating the circumstances relating to the claim made for the application of a remedy, and of reporting its findings to the Panel. Hearings would be conducted by the Panel at the final stages of trade remedy relief. However further development of this concept is outside the terms of reference of this Joint Study.

application due to its inherent expertise and knowledge of industry and market conditions. Screening must be an active process, especially if there is to be no verification of the information.

The approved form for an application is fairly detailed. If properly completed, it would seem to include sufficient “*information*” which could be used to decide to initiate. The evidentiary value of that information is something that Customs needs to assess in the circumstances of each case. Supporting evidence will be important in the context of overcoming the “*simple assertion*” hurdle under the Agreement. The difficulty an applicant might have in obtaining evidentiary support for its claims is not something Customs can rectify by making the form less complex.

By the same token an applicant may be able to establish the elements of its case, with appropriate supporting documentation, without slavishly filling out each and every question in the form. An applicant might face difficulties if the form requires information to be reformatted in different ways to the ways in which it is usually held by the applicant, or if it simply does not have the information required. In those cases an incomplete form should not be an impediment to initiation, if the applicant has nonetheless provided enough supporting information in other ways.

- *The role of the Dumping Liaison function and whether it adequately addresses the needs of industries*

Law and administrative practice make it quite clear what type of information and analyses need to be presented in order to apply for the initiation of an investigation. The involvement of the investigative authority (Customs) or of an independent government body (such as the Panel) “*to address the needs of industries*” (emphasis added) compromises the objectivity of the administration of the anti-dumping system, or at least the appearance of objectivity. In the context of fairness, the appearance of objectivity is at least as important as actual objectivity.

Customs should not be involved in liaison with applicants for the purposes of filling out an application. Neither should any Panel established in line with my suggestion above. Sufficient expertise is available to applicants, both from within industry ranks and from professional service providers.

2 Transparency

- *Transparency issues including the operation of and access to the Public File*

The writer is of the view that transparency and proper information exchange is critical to the integrity of the anti-dumping system from the point of view of all concerned, including Customs itself.

Under the Act, there are these main stages for the submission of information and argumentation to Customs: the application itself; submissions by interested parties within 40 days of initiation; and submissions by interested parties within 20 days of the placement of the statement of essential facts on the Public File. Also, a practice has developed within Customs to notify interested parties that follow up submissions can be lodged within the period of about 20 days after the 40th day following initiation, if the interested party concerned has made a submission within the 40 day period.

Investigations rarely proceed along these lines. In the cut and thrust of an investigation process there is a less predictable flow of information between Customs and interested parties, and amongst interested parties. Information is exchanged much more frequently than the Act would suggest.

The Act contains provisions which, if put into literal effect, could only be considered to be draconian and out of step with current administrative law principles. Here I am referring to the statement in the Act that in formulating the statement of essential facts, or arriving at a preliminary affirmative determination, the CEO must have regard to the application and submissions received within 40 days of initiating, but may have regard to other information only if he considers it to be relevant. Relevant information is exchanged between Customs and interested parties well after the first 40 days of initiation of an investigation: this includes many of the critical industry visits and overseas verifications, and the supplementary information submitted as a consequence of issues discussed on those occasions. For the most part, and to Customs' credit, relevance has been valued above timeliness in the acceptance of information.⁴

It is often impractical to obtain information and instructions from clients within a 40 day time frame from initiation. This is understandable, in that exporters are in foreign countries, do not necessarily have English-speaking skills, and do not understand the

⁴ But see also my comments in relation to verification under 3 below.

operation of the Australian anti-dumping system. The exercise of receiving an application and Exporter Questionnaire and then seeking out and securing representation, can itself take up to four weeks, before the exporter actually starts to grapple with the questions in the questionnaire and starts filling out the answers.

It is unlikely that the process engaged in by the applicant, of conceiving and preparing an application, and re-lodging it in cases of insufficiency, ever takes less than 40 days. Yet foreign exporters are asked to meet this time limit from a *“standing start”*.

That said, we are mindful that Customs provides reasonable extensions of time where justification is provided. It is also true that over the recent history of the anti-dumping system it has been necessary for the Minister to grant extensions of time for the placement of the statement of essential facts on the Public File.

It is the writer’s view that the haste of investigations, as dictated by the legislation, is itself an impediment to transparency because it is difficult for all concerned to properly present their case and to have it fairly considered. Compressed information deadlines make it difficult for submissions to be complete and comprehensive, as well as *“within time”*. Customs itself is not given enough time to properly reflect upon information provided. Further, Customs may not always have the resources to be able to adequately and properly test information. Investigative processes ordinarily require further inquiries to be made of pertinent issues as raised by interested parties in their submissions. Without adequate time to *“investigate”*, there is in law no true *“investigation”*.

Transparency would be assisted by relaxing the present statutory time limits.

The Public File system was a welcome advance when it was first initiated. However it does not presently meet best practice in terms of its timeliness and usefulness.

Interested parties are often delayed in the provision of non-confidential versions of submissions, or in authorising non-confidential versions of information prepared by Customs. This delay makes it difficult for other interested parties to see and to comment on submissions within the short time limits of an investigation.

Even when information does go on the Public File, there is no automatic or electronic notification system in place so that interested parties are aware of that fact. Information placed in the Public File is accessed by request. It can be inspected personally by a representative of an interested party. Representatives are not entitled to make copies of

submissions placed on the Public File themselves, and therefore must rely on the photocopying done by Customs, and the mail (or in some cases, fax) systems for the delivery of those submissions. This is not always ideal, in that mistakes may be made in copying Public File information, for example by inaccurate recollection of which document was the last one copied for a particular interested party, or by missed pages.

In my case I have sometimes received copies of Public File information which omitted the information I had placed on the Public File on behalf of my clients. This may have been done to save time, however is also not an ideal practice. The fact that information has been placed on the Public File is a matter of importance, even if it is information provided by the person requesting copies of the documents on the Public File.

There are two issues to consider with regard to the Public File and transparency. The first of these is the provision of non-confidential versions of information submitted by an interested party, and of information prepared by Customs which relates to that interested party. Article 6.1.2 of the Agreement states:

“Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.” (emphasis added)

Article 6.5.1 of the Agreement states, in part:

“The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof.” (emphasis added).

In the case of the provision of non-confidential versions of information submitted by an interested party, Customs should impose a two business day rule for the provision of a non-confidential version of the information submitted.

The timeliness of a confidential submission should still be based on its original time of lodgment, however it should not be reviewed or considered unless and until a non-confidential version is provided within the two day period. This will indicate to interested parties the serious nature of the mandatory instruction given to Members under Article 6.5.1, and facilitate compliance by Customs with the “*promptness*” requirement of Article 6.1.2.

The case of the preparation of a non-confidential version of information prepared by Customs which relates to an interested party needs to be handled slightly differently, in that the information has not been prepared by the interested party, and therefore the interested party may need more time to consider it. Also, there is sometimes a sequence of “corrective” communications between Customs and the interested party, where the actual substance of the information is amended or is contested, before it is finalised in a confidential format.

In cases where Customs has prepared confidential information relating to an interested party, Customs should clearly identify a point in time, after the substantive views of the interested party have been sought and considered (and any amendments made) from which a (say) five business day rule should apply for the provision of a non-confidential version by that interested party.

I think the application of “rules” such as these will improve compliance, over time, with the important requirement that non-confidential versions be made available to other interested parties promptly.

The second important issue is the way in which other interested parties become aware that information has been placed on the Public File, and how they obtain copies of such information.

Access to the Public File could be handled electronically. A website could be set up for this purpose, with interested parties being able to access the website, by way of a password of some sort, and view .pdf versions of submissions provided to Customs.

Other government bodies have public information systems such as this (eg the Industry Commission).

I have heard reservations expressed about this type of access to Public File material, in that interested parties might give the password to other parties thereby enabling any person to access the information. Customs adopts a restrictive approach to the class of parties entitled to obtain information from the Public File, based on a literal reading of the relevant section of the Act (limited to “[interested parties] entitlement to inspect [the public] record”). However Customs cannot limit what interested parties might do with the information they obtain from the Public File, thus it seems illogical to be concerned about the dissemination of a password by interested parties to others.

Another way to ensure that interested parties obtain information is to require representatives to provide copies directly to other interested parties at the same time as they provide a copy of a submission for the Public File to Customs, and to certify to Customs that they have done this.

Customs would need to keep a registration list of representatives/interested parties and their addresses for service (within Australia) and circulate that list to representatives/interested parties when added to or changed.

3 Conduct of investigations into dumping, injury and causation

- *Determination of like goods*

The Act, like the Agreement, defines “*like goods*” in terms of the comparison between the imported goods (“*the goods under consideration*”) and the goods produced by the Australian industry. Thus our starting point must be to define the goods under consideration. It is those goods that are to be investigated, and it is those goods that the goods produced by the Australian industry must be “*like*”. Often this step is missed in any analysis of “*like goods*”. If it is missed, discussion of the like goods question can become even more confusing.

Accordingly, in the application by the domestic industry, and in the notification of the investigation, the goods under consideration must be clearly defined. Once an investigation is initiated, the scope of the investigation cannot and should not be susceptible of variation to cover different imported goods or a wider range of imported goods. That would require a new application and notification process.

Customs has recognised that the answer to the “*like goods*” question might not always be immediately apparent, or at least that it should not be conclusively decided until the views of interested parties have been sought. Customs usually seeks submissions on this point, at the time of initiation, eg by mentioning the issue in its initiation report. This is to be commended.

In my opinion “*like goods*” determination in dumping matters should have close regard to the physical likeness of goods, and not to their interchangeability in a consumer context. It is the sameness of goods in terms of their manufacture, their technology and their appearance which is relevant for the purposes of the test under the Agreement and the Act. Products need to be identical, or have characteristics closely resembling those

of the imported goods (the goods under consideration) in order to be “*like goods*”. Tests developed for comparing imported goods with domestic goods in the trade liberalising context (eg, the national treatment context) are not necessarily the same as those which should be applied in the trade restricting context (eg, anti-dumping).

Too liberal extension of the scope of “*like goods*” to goods which are clearly different creates difficult issues at the time that the claimed causal link between dumped goods and injury is under consideration. In my opinion Customs, in its investigations, does not take into account, or finds it difficult to take into account, the preferences of buyers for non-price related reasons. Non-price related factors are often equally or more important than price, but they are often discounted in the causal link analysis.

A strict like goods test, based on physical similarity, and not similarity of use or function, will give greater validity to final decisions made by Customs. Price related factors will be the most important factors in a buyer's selection when goods are closely similar. Alternatively, if Customs prefers a wider test of similarity, guidelines should be developed so that the impact of non-price factors are given greater weight when final decisions are made.

- *Verification of information from industry, importers and exporters*

Generally speaking, Customs conducts appropriate and comprehensive verifications. The one area of improvement would be to accept later submitted information more readily. Where an interested party has been fully cooperative, and its provision of evidence has been accurate and honest, later submitted information should be accepted by Customs in most cases. The fact that it was not uncovered at the verification should not be the major obstacle to its later acceptance.

Verifications are complex in their scope. They require both the representatives of the interested party concerned, and Customs, to digest large amounts of financial data, to understand different trading concepts, and to adjust for different accounting principles. Explanations from company officers can sometimes be second or third hand. There can be a number of translations before an answer is given or a document is provided. The giving of answers and the provision of documents frequently generate more questions, some of which are less relevant than others, but all of which are treated as important by the verification team.

The relevance of particular inquiries are not always realised until Customs forms its opinions and expresses them in its draft visit report. Those opinions are frequently not formed until the Customs verification team returns to Canberra, and sometimes they are formed by other people. The practice of “*exit meetings*”, where the exporter is given some idea of the outcome of the verification before Customs officers leave the country concerned, has diminished and now may have disappeared entirely.

The carriage of a verification is not an easy task. Customs officers are highly skilled in this regard and in most cases carry out their responsibilities very well.

If the company has been accurate and faithful in its participation in the verification, it should be possible for Customs to readily accept later submitted information which was missed out at the verification especially if it is critical to the proper calculation of normal values and export prices. For the most part these are matters of fact. If the facts are not accurate, they should be corrected, whether or not on-site verification has already taken place.

In this regard paragraphs 5 and 6 of Annex II to the Agreement provide as follows:

“5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.”

These paragraphs indicate that investigating authorities conduct themselves reasonably in the consideration of evidence. The only time limit referred to is that of the investigation. There is no “*cut off*” at the time of the verification. Paragraph 3 of the Annex states that information which is verifiable, and meets other conditions, should be taken into account when determinations are made. It does not require that information must be verified, in the sense of there being an on-site verification, for it to be taken into account.

- *Consideration of relevant economic factors in establishing material injury*

I have no comment on this issue at this time.

- *Information requirements for the application of retrospective measures*

I have no comment on this issue at this time.

4 Post imposition of dumping measures

- *Current standards for monitoring and their relationship with the Customs risk management policy*

I have no comment on this issue at this time.

5 List of recommendations suggested by this submission

A: An investigation should only be initiated where there is evidence of the elements necessary to impose dumping measures. The evidence needs to be relevant and sufficient. It has to be of a higher probative value than simple assertion. It needs to establish an arguable case, even if that case may or may not be proven in a full investigation. Whilst an approved form may give guidance to the matters which may be relevant, answers given to the questions in a form (or not given) should not be determinative. It is the substance of the evidence provided which is important.

B: A special panel should be established for the purposes of deciding whether an investigation should be initiated, with a small secretariat attached to it, with representatives appointed by the Minister for Industry, Science and Resources; the Minister for Trade; and the Treasurer. A working label for the panel could be the Australian Trade Remedies Panel. The Panel would receive and consider applications for investigations, and hand them on to the Australian Customs Service for investigation and report if the Panel decided that an investigation should be initiated. If initiation did not take place, the applicant should be entitled to a letter of explanation or similar, such as a statement of reasons.

C: Customs should not be involved in liaison with applicants for the purposes of filling out an application. Neither should any Panel established in line with my

suggestion above. Sufficient expertise is available to applicants, both from within industry ranks and from professional service providers.

- D: Transparency would be assisted by relaxing the present statutory time limits.*
- E: In the case of the provision of non-confidential versions of information submitted by an interested party, Customs should impose a two business day rule for the provision of a non-confidential version of the information submitted.*
- F: In cases where Customs has prepared confidential information relating to an interested party, Customs should clearly identify a point in time, after the substantive views of the interested party have been sought and considered (and any amendments made) from which a (say) five business day rule should apply for the provision of a non-confidential version by that interested party.*
- G: Access to the Public File could be handled electronically. A website could be set up for this purpose, with interested parties being able to access the website, by way of a password of some sort, and view .pdf versions of submissions provided to Customs.*
- H: Another way to ensure that interested parties obtain information is to require representatives to provide copies directly to other interested parties at the same time as they provide a copy of a submission for the Public File to Customs, and to certify to Customs that they have done this.*
- I: A strict like goods test, based on physical similarity, and not similarity of use or function, will give greater validity to final decisions made by Customs. Price related factors will be the most important factors in a buyer's selection when goods are closely similar. Alternatively, if Customs prefers a wider test of similarity, guidelines should be developed so that the impact of non-price factors are given greater weight when final decisions are made.*
- J: If the company has been accurate and faithful in its participation in the verification, it should be possible for Customs to readily accept later submitted information which was missed out at the verification especially if it is critical to the proper calculation of normal values and export prices. For the most part*



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