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Joint Study on Anti-Dumping  
c/o Trade Measures Branch  
Australian Customs Service  
Customs House  
5 Constitution Avenue  
CANBERRA ACT 2601



Attention: Antonina Bolschelarski

Dear Sir/Madam

I am writing in respect of the announced Joint Study of the administration of Australia's anti-dumping system. Windsor Farm Foods Pty Ltd ("WFF") has recently been involved in an anti-dumping investigation as an applicant in preserved mushrooms exported from the People's Republic of China.

It is therefore appropriate for WFF to convey its recent experiences with the anti-dumping process.

WFF welcomes the announcement by the Minister for Justice and Customs, and the Minister for Industry, Tourism and Resources to conduct a joint study into the administration of Australia's anti-dumping system. WFF also endorses the Ministers' commitment to "improve the operation of Australia's anti-dumping system" which can be achieved through changes to administrative practice in the conduct of anti-dumping inquiries.

## **1. Access to the Anti-Dumping System**

### *Onus of Proof*

WFF is considered a small to medium sized enterprise company. WFF does not retain the resources internally upon which it could rely to assist in the preparation of an application for anti-dumping measures. WFF must therefore seek external assistance in the preparation of an application. WFF is also a privately held company, with no representation or linkages with organisations offshore. As such, WFF is limited in its ability to obtain domestic pricing information in the country of export for the allegedly dumped goods.

In the case of preserved mushrooms exported from China, WFF was aware that the industry in the United States had taken anti-dumping action against exports of preserved mushrooms from China. WFF was able to contact the U.S. Department of Commerce and obtain normal value information for preserved mushrooms exported from china,

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which was based upon “surrogate” data using cost information for Indian producers. This approach for “prima facie” normal value evidence was unacceptable to the Australian Customs Service (“Customs”) as Australia (at the time) considered China an ‘economy-in-transition’. It was, and remains, Customs’ approach to reject applications involving China which rely upon surrogate data as the basis for normal value determination.

Circumstances occur whereby it is beyond the resources of small to medium-sized companies in Australia to obtain domestic pricing information in the country of export. Due consideration to this limitation is not readily exercised by Customs in this regard.

### *Like goods*

An issue of contention of exporting/importing companies in the preserved mushrooms investigation related to the matter of ‘like goods’. Customs formally rejected the original preserved mushrooms application based upon the personal viewpoint of the delegate that WFF did not manufacture like goods to the imported goods for sale into the retail market.

WFF recognises that the onus of proof in establishing that it manufactures like goods to imported goods rests with the applicant company. WFF also recognises that it is the producer of the GUC and it is well versed on the market in which it supplies (and has supplied for many years) the GUC. WFF does not believe Customs is in a position to determine, at the pre-screening phase of an application, whether or not WFF produces like goods to the imported GUC. WFF supports the position ultimately adopted by Customs in April 2005 that following initiation of an investigation, submissions will be sought from interested parties on the question of like goods.

Customs is required during the pre-screening phase to examine the merits of the application as to whether reasonable grounds exist for the publication of a dumping duty notice. It is not open to Customs to deny access to the applicant of a formal inquiry on the basis of a personal viewpoint as to the question of ‘like goods’. Such a decision can only be made once market participants have been provided the opportunity to comment on like goods qualification.

### *20-Day Pre-screening Period*

The legislation provides Customs with a 20 day period in which it must arrive at a decision whether to reject or commence a formal investigation into an application made by an Australian industry. WFF understands that the prescribed 20-day pre-screening period is rarely achieved by Customs (whether for rejection or initiation purposes). Customs will “re-start” the 20-day pre-screening period upon the receipt of any “new” information; for example, the provision of the data in electronic form previously supplied in hard copy form upon lodgement of the application will trigger a re-commencement of the 20-days.

WFF believes that Customs does not achieve the prescribed 20-day deadline as it attempts to verify information beyond what is considered a reasonable prima facie basis for the application. In essence, Customs attempts to commence its verification process during the 20-day pre-screening period and seeks to confirm “beyond reasonable doubt” the grounds for publication of an anti-dumping notice. Clearly, the test or “hurdle bar” for initiation of an application of recent times has been set a much higher level than intended by the legislation where an applicant is required to evidence reasonable grounds to publish an anti-dumping notice.

## **2. Transparency**

### *Confidentiality*

The issue of confidentiality of submissions as claimed by interested parties is a major area of concern in anti-dumping investigations. Large extracts of submissions and importer/exporter reports prepared by Customs are often blacked with the interested party citing “confidentiality” as the reason for details of the matter not being disclosed in the Public File version of the document. The deletion of information in exporter visit reports (in particular) which remove the basis and methodologies for adjustments to normal values for s.269TAC(8) purposes, prevents the applicant from understanding the reasons for the adjustment and whether the adjustment is consistent with industry practice.

Claims for the removal of information from Public File documents on the basis that the publication will disclose confidential/sensitive business information should be carefully considered by Customs. It is reasonable for the applicant to expect to understand the nature of the adjustment being sought; in the absence of an adequate non-confidential summary of the claim, Customs should consider rejection of the adjustment as sought by the exporter.

### *Public File*

Access to the Public File during investigations is an ongoing problem for all interested parties. Current arrangements result in delays to accessing documents and concerns about the timeliness of reports/submissions (with statutory deadlines). Urgent consideration should be afforded to the loading of all public file documents onto the Customs website, enabling interested parties immediate access to documents as submitted throughout the inquiry.

This practice has been adopted by the U.S. Department of Commerce for anti-dumping investigations.

It may be appropriate for Customs to consider the removal of the documents from its website once appeal periods have expired.

## **3. Conduct of an investigation**

### *Verification*

WFF recently experienced a full Customs’ verification visit of its manufacturing and financial operations. Customs’ examination of WFF’s financial data was akin to an audit by the ATO. The visit was over a three-day period, with a number of follow-up requests for information. Customs’ visits to five Chinese exporters of the GUC generally lasted a similar three-day period. From the reports prepared by Customs, it would appear that Customs was also thorough in its examination of the exporter’s financial records. WFF would have expected that a visit to an exporter would be relatively complex, in light of language and translation difficulties.

It appears, however, that Customs is able to conduct the investigation within similar timeframes – and in some instances, shorter timeframes – than a verification visit to the Australian industry. On this basis, WFF questions whether in fact the same level of verification is being conducted at the exporter’s premises as is occurring with the Australian industry.

WFF is concerned that Customs' approach to the assessment of whether the exporter's records are maintained in accordance with generally accepted accounting principles in the exporting country, involves little more than "asking a couple of questions and ticking a couple of boxes". Whilst WFF recognises that the financial records (i.e. sales and cost data) of an exporter may have been audited and signed-off by an independent auditor, there are considerable differences between the allocation of costs to the GUC versus the top-level auditing of a reporting entity's financial statements.

Customs' approach to "co-operative" exporters is one of complete acceptance of information provided. WFF understands that in recent years Customs has not rejected the financial records of a co-operative exporter as being "unreliable" despite there having been significant concerns held by the Australian industry as to the accuracy and consistency of the exporter's financial data with industry standards. The 100 per cent acceptance rate of an exporter's financial data is indicative of Customs' reluctance to upset the co-operative exporter.

WFF requests the Reference Group (to the Joint Study) to inquire of other anti-dumping administrations (e.g the EU, Canada and U.S.) as to the level of acceptance of an exporter's financial data in the context of an anti-dumping investigation.

#### *Exporters in China*

Customs has recently amended the Customs Manual to address "artificially low" prices in a domestic market of the GUC. The recent changes follow Australia's entering into Free Trade Agreement ("FTA") discussions with China.

WFF's application involved preserved mushrooms exported from China. WFF asserted that Chinese exporters benefited from a number of inputs into the manufacturing process for the GUC which were influenced by the participation of State Owned Enterprises or Government involvement in the sector (or raw material supply sector).

Customs' investigations found no influence whatsoever by the State in the supply of raw materials, or in the cost or selling price for the GUC as sold in China.

WFF is concerned that whereas other administrations will not readily recognise market costs and selling prices in China, the Australian government is prepared to accept prevailing Chinese costs and selling prices as being determined by market forces. In preserved mushrooms, for example, the State owns all the land upon which mushrooms are grown and harvested, and the processing sector is dominated by State-owned facilities. The impact of these two factors on the selling price for the GUC cannot be readily measured – however, there it should be of sufficient basis to suggest that raw material mushroom prices and processing costs are not consistent with free-market determined prices.

The Reference Group to the Joint Study is requested to examine how it can recommend guidelines to Customs to substantially improve Customs' approach to evidencing costs and prices for exporters in China. WFF believes that a major shift is required of the current policy which accepts costs and prices in China which "appear" to have been determined by market forces. The current approach followed by Customs is unacceptable to industry and is the single greatest area of concern to Australian manufacturer's competing with Chinese exports.

### *Provisional measures*

The WTO Anti-Dumping Agreement does not permit the imposition of provisional measures before Day 60 of an investigation. WFF understands that in one recent case (Mill grinders from Canada) measures were imposed at Day 85, prior to the Statement of Essential Facts (“SoEF”).

In recent times, Customs has followed an approach of publishing a Preliminary Affirmative Determination (“PAD”) at approximately the same time as the SoEF. In preserved mushrooms, a PAD was published two days prior to the final report and recommendations to the Minister for Justice and Customs.

Whilst WFF understands there may have been some extenuating circumstances in the preserved mushrooms case, Customs is encouraged to publish a PAD in advance of the SoEF, particularly in circumstances when the applicant verification visit has been completed by Day 40 of the investigation and the completed exporter questionnaire indicates that dumping margins are evident.

WFF fully endorses the publication of a PAD and the imposition of measures as soon as practicable from Day 60 as is possible. WFF requests the Reference Group to recommend the early publication of a PAD in advance of an SoEF where practicable.

### *Retrospective Measures*

The present unwillingness to impose retrospective measures reflects on an anti-dumping system that lacks “bite” and has no inbuilt deterrent to further dumping and material injury. Importers and exporters are aware that once an investigation commences that as long as the imports arrive prior to the SoEF, no penalties will be imposed.

Applicants find this approach unsatisfactory, particularly where dumping measures have been imposed by the Minister.

There exists an urgent need for the imposition of retrospective measures. WFF calls on the reference group to examine opportunities to impose retrospective measures to ensure that a penalty system involving some “clawback” on the importer (who has inflicted material injury upon the applicant industry) operates as an ongoing deterrent. In simple terms, it must be a much more effective “fair trading” system, for Australia to have provisions for retrospectivity, thus providing a major disincentive to dump in the first place, rather than a fresh approach on each occasion. It is precisely for this reason that the tax-office exercises penalty provisions, on top of seeking to recover tax owed, when a person or business has been found to have avoided tax. The large long-term damage has to be considered, rather than the short-term impact of shifting some excess stock.

## **4. Post imposition of dumping measures**

### *Monitoring*

The monitoring of interim duties on a particular product is not a high-priority task for Customs. The Trade Measures Branch is not adequately resourced to monitor imports of the GUC for the levying and collection of interim duties. Monitoring of duties is a task undertaken by the Branch in the “down” times, when the number of investigations is in decline or limited.

Despite this, industry considers the monitoring of anti-dumping measures an integral task of ensuring the effectiveness of the measures imposed. There exists an expectation by applicants that Customs will ensure that dumping duties are collected and that there will be a consequent increase in the eventual selling price for the GUC.

The applicant companies are anxious that the measures work effectively, to afford them the best opportunity to recover from the material injury sustained throughout the investigation period.

WFF would welcome the initiative of ongoing liaison with a “Monitoring” team within the Trade Measures Branch to ensure that the measures imposed are providing the intended relief. WFF also considers that there exists benefits to an ongoing monitoring relationship between Customs and the applicant industry – Customs will be aware of the impending need for reviews of measures as it becomes involved in ongoing monitoring activity (particularly in regard to the industry’s costs and selling prices).

#### *Circumvention*

The avoidance or circumvention of measures by importers should be addressed with severe penalties and ongoing monitoring of an importer’s activities. WFF supports initiatives to impose heavy fines and penalties which act to deter the circumvention of dumping duties.

WFF has provided the above comments on the basis of its recent involvement in the preserved mushrooms inquiry. WFF would be pleased to discuss any aspect of this submission with the Reference Group as is required. If you have any questions, please do not hesitate to contact me.

Yours sincerely

Michael Leahy  
Group General Manager