

6 April 2006

Mr Andrew Rice
National Manager, Trade Measures
Australian Customs Service
Customs House
5 Constitution Avenue
Canberra City ACT 2601

Dear Mr Rice

Administration of Australia's anti-dumping system

We refer to the joint study of the administration of Australia's anti-dumping system regarding matters such as the application process, the screening of applications and the investigative process, as well as the effectiveness of measures.

Coles Myer has several concerns regarding the proposed administrative arrangements. Broadly they are around ensuring transparency, impartiality, consistency, speed and certainty.

It must be stressed that Coles Myer understands and accepts the need for anti dumping laws. While our overall position on anti dumping laws should be seen in this context our specific concerns and suggestions noted below are guided by a preference for an administrative approach which ensures competitive market outcomes rather than one focusing on individual competitors in the market. Consequently, we believe that there should be a role for the Australian Competition and Consumer Commission (ACCC) in ensuring both competition and consumer issues are considered.

1. *General principles*

In Coles Myer's view, the administration of Australia's anti-dumping system must be transparent, impartial, compliant with relevant domestic legislation and consistent with Australia's WTO obligations. We believe that adherence to these principles is fundamental to ensuring that the administrative system is not a de-facto non-tariff barrier.

Coles Myer acknowledges the importance of an accessible and robust anti-dumping system to domestic industries. Nevertheless, we strongly believe that such a system must be administered in a way that balances the interests of domestic industries, importers and consumers in a fair and transparent manner.

It is therefore important that the burden of proving alleged dumping and consequent injury should remain with the applicant.

Coles Myer is of the view that there is scope within Australia's anti-dumping system for all relevant interests to be taken into account in a balanced fashion.

2. Dumping applications

Our legal advisers referred a recent review of a decision to reject an application for the imposition of dumping duties on sections of hollow steel from the People's Republic of China, the Republic of Korea, Malaysia and Thailand, the Trade Measures Review Officer (**TMRO**) stated that:

"...extensive conclusive evidence is not required to establish reasonable grounds for the publication of a dumping duty notice...Rather, evidence of a sufficient quantity to establish a prima facie case to enable the initiation of the investigation is required."

While we concur with the views expressed by the TMRO, we strongly believe that an application for the imposition of dumping duties should contain sufficient evidence substantiating the claims made.

Article 5.2 of the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (**WTO Anti-dumping Agreement**) provides that:

"...simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient in an application for anti-dumping duties..."

The rationale behind this requirement is obvious. The initiation of a dumping investigation alone can have significant and unintended consequences resulting in importers incurring substantial costs through their involvement in the investigation and higher prices to consumers. Given Australia's global position as an exporter it is arguably not in Australia's economic interest to undertake a dumping investigation at the cost of reduced trade and at the expense of importers only to discover that the application was based on unsubstantiated claims.

The requirement that an application is accompanied by substantive relevant evidence is vital to ensuring that Australia's anti-dumping system does not become a barrier to trade.

Coles Myer, therefore, recommends that the approved form for an application for the imposition of dumping duties be reviewed to ensure that, where a claim is made, the approved form requires that it be supported by corresponding evidence.

3. Dumping Investigations

Coles Myer believes that a dumping investigation should be split to allow for the questions of injury and dumping to be considered separately.

For example, in Canada, the *Canadian Border Services Agency* assumes responsibility for the question of dumping while the *Canadian International Trade Tribunal* assumes responsibility for the question of injury. Similarly, in the USA different government agencies are responsible for different aspects of a dumping investigation.

Coles Myer is of the view that this approach allows each agency to focus exclusively on the particular aspects of a dumping investigation before it and this lends to a more informed and thorough consideration of the matter.

Our view is that the investigation process should be separated to allow the Australian Customs Service (**Customs**) to assume responsibility for the initiation of an investigation and to investigate whether the goods the subject of the dumping application are being exported at dumped prices - as alleged - and for a separate agency, such as ACCC or the Productivity Commission, to be responsible for investigating whether the goods under investigation, if they are being exported at dumped prices, are, *because of that*, causing material injury to competition in an Australian industry. This would allow for a more thorough expert economic analysis of the effect of dumping on an Australian industry.

While the investigation by two separate independent bodies is the preferred position, Coles Myer acknowledges that this may require legislative change. Nevertheless, a similar, albeit less effective, separation could still be achieved without legislative change with Customs seeking expert economic analysis of material injury and causation from the ACCC.

4. Appeals to the Trade Measures Review Officer

The current appeal process needs to be restructured to ensure that independence, transparency and impartiality are observed when assessing evidence. At the moment it is deficient, as the TMRO is not empowered to substitute findings or make appropriate recommendations to the Minister for Justice and Customs.

A successful appeal to the TMRO will result in a recommendation to the Minister that a degree of doubt surrounding an element of the Customs investigation warrants remitting back to Customs for reinvestigation. We are aware that on occasions Customs, having completed its reinvestigation has disagreed with conclusions reached by the TMRO and by maintaining its original position has essentially dismissed conclusions reached by the TMRO. In our view such a process seriously undermines the current appeal process.

Coles Myer believes that if the TMRO concludes that one or more of Customs' findings was flawed and the Minister agrees with the TMRO, then Customs should proceed in a reinvestigation on the basis that those findings were flawed and reassess its recommendations to the Minister on that basis.

Coles Myer is also of the view that the appeals process should be independent and impartial. Currently, where the Minister accepts and acts upon a Customs recommendation, which is subsequently reviewed by the TMRO, and the TMRO's review finds Customs' recommendation to be flawed, the TMRO's findings are ultimately sent back to the very same Minister who had already accepted and acted upon Customs original recommendation.

The same Minister, having accepted the TMRO's findings and referred the issue back to Customs for reinvestigation can then, after Customs has completed its reinvestigation, reject the TMRO's findings and maintain the status quo of Customs' original recommendations. This does not appear to be an impartial and independent review.

Coles Myer also believes that legislative change is required to allow the TMRO to accept new evidence and such evidence considered in any subsequent reinvestigation.

5. The Role of the Minister

Coles Myer is of the view that the decision whether or not to publish a dumping duty notice should be administrative rather than political.

Currently, the decision rests with the Minister of Justice and Customs. According to the *Customs Act 1901* (Cth) and consistent with Article 5.2 of the WTO Anti-dumping Agreement, three elements are necessary for the publication of a dumping duty notice – **dumping, material injury and causality**.

Where these three elements are established through an investigation by Customs or, ideally, by Customs and a body referred to in point 3, the publication of a dumping duty notice should necessarily follow as the outcome of this *administrative* process. Consideration by a Federal Minister is unnecessary and only serves to politicise the anti-dumping process.

Unless the decision to impose dumping duties is discretionary, even if Customs has found dumping causing material injury, then there would seem to be no reason for the decision to impose dumping duties to be vested in the Minister. It is simply an administrative decision not requiring any discretion. If, on the other hand, the decision to impose dumping duties is discretionary, Ministerial guidelines should be published setting out what matters the Minister will take into account in exercising that discretion. Coles Myer believes that within the current legislative framework, the Minister is capable of delegating his decision making power and should do so.

Furthermore, whether the final decision is made by the Minister or another body, Coles Myer believes that the timeframe in which such a decision is to be made after a recommendation from Customs should be provided for in the current legislation. **A set timeframe, of say no more than 20 days, for the decision to be made would provide greater consistency and predictability to the administrative process and certainty for the**

market. Again, Coles Myer acknowledges that such legislative reform is beyond the scope of this review but considers such changes are necessary.

Conclusions

- The administration of Australia's anti-dumping system must balance the interest of Australian industry and importers in a fair, transparent and impartial process that is compliant with relevant domestic legislation and consistent with Australia's WTO obligations.
- Applications for the imposition of dumping and countervailing duties should include sufficient information and supporting evidence to establish a case that the goods the subject of the application are being exported to Australia at dumped prices and, because of that material injury is being caused or threatened to an Australian industry producing like goods;
- Dumping investigations should be split to allow the questions of injury and dumping to be considered separately so as to provide for a more detailed and considered analysis of injury.
- There should be an independent appeal process that provides for the acceptance of new evidence and the ability to substitute any findings by Customs found to be flawed.
- The Minister should delegate his decision-making powers to a government authority independent of the agency or agencies that conducts the dumping investigation.
- The final decision should have a set timeframe, of say no more than 20 days, to provide consistency and predictability to the administrative process and certainty for the market.

If you have any queries regarding the foregoing or wish to discuss any of the above matters, please contact Chris Mara, Adviser Government Affairs to Coles Myer on (03) 98294141.

Yours sincerely

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