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Mr Andrew Rice
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Customs House
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Dear Mr Rice,

Joint Study into the administration of Australia's anti-dumping system

We refer to the joint study into Australia's anti-dumping system and the invitation for submissions from interested parties on matters concerning the administration of Australia's anti-dumping system.

The objectives of the Australian Services Roundtable include the identification of domestic regulatory obstacles to international competitiveness, the promotion of the need for domestic policy reform to enhance international competitiveness and establishing a focus on the international dimension to government policy affecting the services industry. In addition a number of services sectors represented by the Roundtable are directly concerned with or impacted by the operation of Australia's anti-dumping system.

We consider that the administration of Australia's anti-dumping system should be:

- transparent;
- efficient;
- impartial
- in compliance with relevant domestic legislation; and

- in compliance with WTO rules and jurisprudence.

Against this general background, we have a number of current concerns regarding the implementation of individual anti-dumping cases. As you are aware, many of our concerns with the system involve issues of policy and/or legislation. We note that the terms of reference for the inquiry specifically exclude examination of such matters. The Australian Services Roundtable nevertheless takes this opportunity to reassert our conviction that a fundamental external review of all aspects of Australia's anti-dumping system should be initiated and as soon as possible.

Meanwhile we welcome this more limited review of certain administrative aspects of the system and believe that regular reviews of this type would assist significantly in enhancing the integrity of and confidence in the administration of the anti-dumping system.

Access to the Anti-Dumping System

The question of access to the anti-dumping system involves consideration of both the stipulated information requirements and the issue of whether the complexity and cost of meeting those requirements justifies the provision of some Government help to small and medium sized enterprises. The Australian Services Roundtable is aware that concerns have been expressed regarding the amount of information and evidence being required in dumping applications.

In this regard, we draw attention to the fact that Article 5.2 of the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 provides that:

“An application ... shall include evidence of (a) dumping, (b) injury ...and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient ...”

A dumping application must therefore contain sufficient evidence that the goods the subject of the application are being exported at dumped prices and, because of that, material injury is being caused or threatened to a domestic industry.

Although obtaining the evidence necessary to complete a dumping application may be onerous, nevertheless the legislation requires that an application and any other relevant material considered by the CEO must contain sufficient evidence to support a satisfaction that there appears to be reasonable grounds for the publication of a dumping notice. This statutory requirement cannot be compromised. We consider that the current level of information required by Customs in support of an application is the minimum compatible with the statutory requirement.

We consider it essential to stress that the initiation of a dumping investigation has an anti-competitive impact on the market under examination irrespective of the ultimate outcome. Consequently any such initiation should only occur when the evidence presented to the authorities provides reasonable grounds for believing that a dumping notice will be justified.

Of particular concern to the ASR would be any reduction in information requirements relating to alleged normal values in the country of export.

We are aware that the Dumping Liaison Unit of the Australian Customs Service currently provides 'advice' to potential applicants for dumping notices. The scope and nature of this advice is unclear.

The Australian Services Roundtable considers that the Federal Government should not assist applicants in the collection of information and evidence or otherwise assist in the preparation of dumping applications. To do so would raise questions concerning the impartiality of any ensuing dumping investigation where the Federal Government was involved in the preparation of the dumping application that led to the investigation.

The role of the Federal Government is to assess a dumping application as to whether it contains sufficient information justifying the initiation of a dumping investigation and, if it does, to conduct a dumping investigation.

In our view, the Federal Government should confine itself to this role. If any kind of government assistance mechanism was, however, to be maintained, we believe;

- it should be limited in scope;

- transparency should be ensured by public disclosure of the details at the time of initiation of an investigation;
- it should not involve any financial assistance; and
- it should be provided by a Government agency separate from the Australian Customs Service.

Methodology

The Australian Services Roundtable is concerned by a lack of clarity regarding the methodology used to determine whether domestically produced goods are ‘like goods’ to the imported goods the subject of a dumping application.

We note that both Australia’s anti-dumping legislation define ‘like goods’ to be goods that are identical to the imported goods or, if not identical, having characteristics closely resembling the imported goods.

We understand that Customs often uses market based tests, such as whether the imported goods and the goods produced domestically compete with one another and whether they are functionally equivalent and substitutable, in determining whether the domestically produced goods are ‘like goods’ to the imported goods.

Such tests are relevant, because whether two products have the same end-use and are substitutable may indicate or suggest that they are like products, but they can not be determinative of the matter.

We note that in ‘Japan – Taxes on Alcoholic Beverages’, the WTO Panel examined the meaning of ‘like product’ in the context of Article III of the General Agreement on Tariffs and Trade 1994 and expressed the following view:

*“In the view of the Panel, like products should be viewed as a subset of directly competitive or substitutable products. The wording (‘like products’ as opposed to ‘directly competitive or substitutable products’) confirmed this point, in the sense that all like products are, by definition, directly competitive or substitutable products, whereas all directly competitive or substitutable products are not necessarily like products.”*¹

¹ Japan – Taxes on Alcoholic Beverages, WT/DS11/R of 11 July 1996, para. 6.22.

Under Australian legislation, a determination as to whether domestically produced goods are 'like goods' to the imported goods the subject of a dumping application can be made only by determining that they are identical or, if not identical, that they have characteristics closely resembling each other.

The Australian Services Roundtable recommends that the Customs Dumping & Subsidy Manual be amended to clarify the methodology to be used.

Transparency

The major potential threats to the transparency of the Anti-Dumping investigation process are unjustified claims of confidentiality of information or material submitted to Customs, inadequate summaries of confidential information and any failure by the administering authority to clearly articulate reasons for its recommendations to the Minister. The latter issue is of critical importance and will be addressed later in this submission.

The Australian Services Roundtable supports the view that protection of commercial-in-confidence information is fundamental to the integrity of any anti-dumping system and believes that the principles adopted by Customs to ensure this protection are generally applied in an enlightened manner.

However, the provision of non-confidential summaries of confidential information by both interested parties and by Customs itself does not always meet the requirement of *s 269ZJ(2)* that such summaries contain *...sufficient detail to allow a reasonable understanding of the substance of the information*. Such failures are of particular concern in relation to indexed material contained in applications for a dumping notice and the summaries, generally in tabular or graphic form, of material injury indicators set out in Statements of Essential Facts and Final Reports.

In our view the legislation clearly envisages that while confidentiality must be protected, summaries of confidential information must contain sufficient detail to facilitate informed debate by interested parties on the key issues emerging in an investigation.

Conduct of investigations into dumping, injury and causation

The Australian Services Roundtable considers that investigations of the comparability of export prices to Australia with normal values in the country of export (the dumping price investigation) are of a generally high standard and comparable with the best practice demonstrated by some WTO members.

On the other hand, the Australian Services Roundtable believes that investigations and reports by the Australian Customs Service into material injury and, in particular, the essential element of causation are inadequate and compare unfavourably with other anti-dumping administrations.

The requirement in both Australia's anti-dumping legislation and the Anti-Dumping Agreement is clearly for the injury incurred by a domestic industry to be causally linked to the dumped imports. At a practical level, however, the analysis of both injury indicators and causation routinely seems to ignore Australia's obligations under Article 3 of the Anti-Dumping Agreement.

These obligations, as interpreted by WTO panels and the Appellate Body, include a requirement to examine and evaluate all the economic factors listed in Article 3.4 bearing on the state of the industry and a further requirement that alternative causes of injury must be examined and injury due to such alternative causes must not be attributed. Reports by Customs rarely meet these obligations.

At a practical level, there appears to be very little appreciation in the Australian Customs Service of the difference between, establishing that dumping and material injury are occurring at the same time and, demonstrating that the former caused the latter. There is no doubt that current procedures need to be made much more rigorous and detailed.

In light of the WTO Appellate Body's clear position that determinations of injury must be based on well-reasoned and meaningful analysis and that such analysis must contain persuasive explanations of any conclusions of an authority, there is, in our view, a serious risk that because many of the anti-dumping reports prepared by the Australian Customs Service do not satisfy this requirement, they would not withstand a challenge in the WTO.

We believe, therefore, there is an urgent need to review existing processes in relation to the examination and analysis of issues related to material injury and causation with a view to producing reports and statements that contain detailed explanations of the reasons for conclusions and recommendations, thus enabling all interested parties to participate in properly informed debate.

In cases where the dumped imports are undercutting the prices of the domestic industry, establishing that causal link should be relatively straightforward. Even in such circumstances, however, consideration should be given to the amount by which the imports undercut the prices of the domestic industry and the amount of the dumping margin of the imports. If the amount by which the imports undercut the domestic industries prices significantly exceeds the amount of the dumping margin, then presumably the imports would undercut the prices of the domestic industry and cause the injury in question regardless of whether they have been imported at dumped prices: see, for example the New Zealand Ministry of Economic Development's final report on 'Tamoxifen from the United Kingdom' in February 2001.

In cases where, on the other hand, the dumped imports do not undercut the prices of the domestic industry, a detailed analysis would be required to establish why the more expensive imported product, even at dumped prices, were being purchased in preference to the lower priced domestic product. This is not to suggest that dumped prices could not cause injury in such circumstances but, rather, a detailed analysis would be required in order to causally link the dumped price to the injury.

Injury

The Australian Services Roundtable understands that, where it is found that the domestic industry has incurred injury, it is common for such injury to consist of price undercutting, price suppression, price depression, loss of sales and sales volumes, loss of market share and reduced revenues and profits.

Price undercutting, price suppression, price depression, loss of sales and sales volumes and loss of market share do not, of themselves, constitute injury, although they may lead to injury.

Injury to an organisation conducting a business is reduced revenues and profits. The purpose of any commercial organisation engaged in business is to make revenues and profits from the conduct of that business.

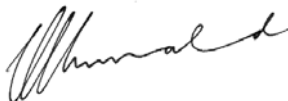
Matters such as price undercutting, price suppression and price depression, while relevant, nevertheless are merely observable events that may occur in a market. They may lead to injury but of themselves do not constitute injury.

The Australian Services Roundtable believes that this approach to injury would assist not only in identifying and quantifying the injury incurred by a domestic industry but also in causally linking the dumped prices to the injury.

Finally, I have been asked to draw specifically to your attention the fact that one of our Associate Members, AEEMA, has no association with this submission, opting on this occasion to submit its views solely through the Trade Remedies Taskforce. Some other members of the Australian Services Roundtable have made additional independent submissions.

If you have any queries regarding any of the foregoing or require further elaboration on any of the points raised, please do not hesitate to contact us.

Yours sincerely,



Dr Vince FitzGerald
President
11 April 2006