



**Law
Institute
Victoria**



**Law Council
OF AUSTRALIA**

31 August 2010

Mr Geoff Johannes
National Manager
Trade Measures Branch
Australian Customs & Border Protection Service
Customs House
5 Constitution Avenue
Canberra ACT 2601

Dear Mr Johannes,

Productivity Commission's Report On Australia's Anti-Dumping and Countervailing System

I refer to the joint Media Release dated 27 May 2010 from the Assistant Treasurer and the Minister for Home Affairs announcing the tabling of the Productivity Commission's Inquiry Report into Australia's Anti-dumping and Countervailing System and inviting interested parties to make submissions on the Report and its recommendations by 31 August 2010.

Set out below are the submissions of Law Council of Australia and Law Institute of Victoria on the Productivity Commission's Report and recommendations.

1. Executive Summary

The Law Council and Law Institute of Victoria welcome and support the Productivity Commission's Report and recommendations. In particular, the following recommendations of the Productivity Commission are supported:-

- (a) the inclusion in Australia's anti-dumping and countervailing system of a public interest test;
- (b) the practice of zeroing when calculating normal values not be adopted;
- (c) any continuation of anti-dumping and countervailing measures be limited to a maximum of three years;
- (d) continuation inquiries must comprehensively examine and recalculate all variable factors;
- (e) an annual adjustment of anti-dumping and countervailing measures; and
- (f) anti-dumping and countervailing duties should be imposed on the actual export price relative to the export price at which no duty is payable, thereby obviating the need to apply for refunds;

Law Institute of Victoria Ltd
ABN 32 075 475 731

Ph (03) 9607 9311 Fax (03) 9602 5270
Email lawinst@liv.asn.au
470 Bourke Street Melbourne 3000 Australia
DX 350 Melbourne GPO Box 263C Melbourne 3001
Website www.liv.asn.au

Law Council of Australia Limited - ABN 85 005 260 622

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

- (g) successful appeals to the Trade Measures Review Officer (**TMRO**) not be reinvestigated by the Australian Customs & Border Protection Service (**Customs**) unless the TMRO so directs but any such reinvestigation be confined to a directive from the TMRO as to where Customs' findings were flawed;
- (h) decision by the Minister be made within a 30 day period on receipt of advice from Customs or the TMRO;
- (i) the maximum amount of information concerning anti-dumping and countervailing measures be published; and
- (j) a further review of Australia's anti-dumping and countervailing regime be undertaken within five years of implementation of the Productivity Commission's recommendations,

for the reasons set out later below.

However, the Law Council and Law Institute of Victoria do not support the following recommendations of the Productivity Commission that:

- decisions concerning the annual adjustment of the magnitude of anti-dumping and countervailing measures not be appellable;
- reinvestigations and ensuing decisions by the Minister not be appellable; and
- implementation of the public interest test be delayed for two years,

for the reasons set out later below.

Finally, the Law Council and Law Institute of Victoria reiterate their recommendation that the system be made more transparent by enabling solicitors of interested parties to have access to confidential information.

2. Recommendation 5.1 – Public Interest test

The Law Council and the Law Institute of Victoria support the introduction of a public interest test into Australia's anti-dumping and countervailing system because, as the Commission itself has noted at page 57 of its Report, "*the anti-dumping system should serve the broader public interest, rather than only consider the interests of particular firms or sectors*".

While the Law Council and the Law Institute of Victoria are of the view that Minister may take into account matters concerning the public interest in deciding whether or not to impose anti-dumping and/or countervailing measures notwithstanding the decision of the Federal Court in *Re Hyster Australia and Hyster Europe Limited v the Anti-Dumping Authority, the Minister of Small Business, Construction and Customs and Clark equipment Australia Pty Limited* [1993] FCA 36, nevertheless there is considerable merit in including an express requirement for the public interest to be taken into account.

Further, the Law Council and the Law Institute of Victoria support the model being proposed by the Commission. Namely that, in parallel with the usual investigative procedures in a dumping or subsidy investigation, Customs would be required to;

- seek input from interested parties on the wider impact of imposing measures;
- analyse and publicly report on those impacts; and
- the Minister would be precluded from imposing measures if any one of the public interest criteria were met.

The adoption of a 'bounded' public interest test also is supported as providing clear and specific guidance as to what matters are in the 'public interest' and, consequently, mitigate against the imposition of measures. Further, the adoption of 'bounded' public interest test enables interested parties to address specific public interest criteria and provide evidence in support or against such criteria as appropriate.

The Law Council and the Law Institute of Victoria do not consider that the adoption of a public interest test along the lines recommended by the Productivity Commission would impose an unreasonable burden either on Customs or on interested parties in terms of additional administration or cost.

However, the Law Council and Law Institute of Victoria recommend that an additional circumstance where to impose measures would not be in the public interest and that would be where:-

- the imposition of measures would preclude effective choice and competition in the Australian market for like goods and would lead or would likely lead to material injury to downstream manufacturing of products using like goods as inputs to manufacture.

The Law Council and Law Institute of Victoria consider that it is not in the public interest for downstream industries that use like goods as inputs to manufacture to bear the additional costs that would result from the imposition of measures and which may materially affect their economic viability for the benefit of a domestic producer of like goods. Typically, the local industry producing like goods consists of one or two manufacturers producing a commodity product. Downstream producers who use those commodity products as inputs to manufacture add significant value in the products they produce. The imposition of measures on their inputs to manufacture may materially affect their economic viability and lead to reduced profits and profitability, loss of jobs, reduced return on investment and other forms of injury. The issue, therefore, as the Law Council and Law Institute of Victoria see it, is whether it is in the public interest for measures to be imposed in circumstances when it benefits a few producers of like goods but disadvantages and causes injury to downstream producers who use the like goods as inputs to manufacture. The Law Council and Law Institute of Victoria do not consider this to be in the public interest and hence the recommended addition to the public interest criteria.

3. Recommendation 6.2 – Australia not adopt zeroing

The Law Council and the Law Institute of Victoria support the Commission's recommendation that Australia not adopt the practice of 'zeroing' in dumping calculations.

As noted by the Commission, 'zeroing' is the practice of inflating dumping margins by ascribing negative dumping margins a value of zero. This has the effect of artificially increasing positive margins instead of providing a weighted average dumping margin taking into account both positive and negative dumping margins. To artificially inflate dumping margins cannot be justified on any grounds and has been found to be 'WTO inconsistent', that is, inconsistent with provisions of the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* by the WTO Panel and Appellate Body.

4. Recommendation 6.4 – Measures to be limited to a maximum of three years

The Law Council and the Law Institute of Victoria support the Commission's recommendation that the continuation of anti-dumping and countervailing measures is limited to a maximum of three years and that, any further imposition of measures are subject to the same requirements as in an original application.

It is of concern that the continuation of measures should not become a protective barrier shielding domestic industries without regular and comprehensive examination of whether the continued imposition of measures is justified. Domestic industries would not be precluded from seeking protection in appropriate circumstances from the injurious effects of dumping and/or subsidies. However, a thorough and comprehensive examination equivalent to that in respect of an original application for the imposition of measures must be undertaken, as opposed to the less stringent tests applied in a continuation inquiry, to ensure that the imposition of measures is warranted.

5. Recommendation 6.4 – Continuation reviews should comprehensively examine and recalculate all variable factors

The Law Council and the Law Institute of Victoria support the Commission's recommendation that continuation reviews should comprehensively examine and recalculate all variable factors.

To only examine the likelihood of a continuation of or recurrence of the material injury that the measures in question were intended to prevent if they were allowed to expire can result in measures being continued at their original levels, which may be out of date due to changes in economic circumstances. The object of anti-dumping and countervailing measures is to offset the injurious effect of dumping and subsidies and, consequently, such measures need to be kept up-to-date to be effective and to only offset the injurious effects of dumping and/or subsidies and not act as de facto protectionist measures.

6. Recommendation 6.5 - Magnitude of measures to be adjusted annually

The Law Council and the Law Institute of Victoria support the Commission's recommendation that there be a new mechanism whereby the magnitude of all anti-dumping and countervailing measures are adjusted on an annual basis in substitution of the existing review procedures. This is consistent with the objective that anti-dumping measures and countervailing measures should only be levied to the extent necessary to remove the injurious effects caused by dumping and subsidies and ensures that measures remain current.

7. Recommendation 6.6 – Basis for collecting duties to be modified

The Law Council and the Law Institute of Victoria support the Commission's recommendation that the basis for the collection of dumping and countervailing duties be modified to the effect that duty collected at the time of importation is based on the amount, if any, by which the actual export price is less than the export price at which no duty is payable.

Again, this is consistent with the objective that anti-dumping measures and countervailing measures should only be levied to the extent necessary to remove the injurious effects caused by dumping and subsidies.

Further, this would obviate the need for importers to seek refunds of duty, which can be onerous and not always available as it depends upon information being provided by an exporter. Also, refund reviews are retrospective in nature and do not update the variable factors and, consequently, are of limited utility notwithstanding an importer's entitlement to a refund. Further, the fact that an importer is entitled to a refund means the measures are operating as a penalty as they are operating at levels in excess of that required to remove the injurious effects of dumping and/or subsidies.

8. Recommendation 7.2 – Reinvestigations

The Law Council and the Law Institute of Victoria support the Commission's recommendation that successful appeals to the TMRO not automatically result in reinvestigations by Customs. This generally has led to the same outcome but for different reasons or with Customs disagreeing with the views expressed by the TMRO.

The Law Council and the Law Institute of Victoria concur with the Commission's view that, unless the TMRO recommends that a reinvestigation be undertaken, the Minister should act on the advice of the TMRO. This would avoid unnecessary reinvestigations by Customs and the absurd situation of the Minister receiving differing advice from two arms of the executive on the same subject matter. By way of recent example, this was the case in relation to the investigation regarding the alleged dumping of toilet paper from the PRC and Indonesia where the reinvestigation by Customs led to the revocation of measures which had been imposed following the original investigation.

Further, if the TMRO directs that a reinvestigation is undertaken, then:

- (a) the reinvestigation be confined to those findings of Customs that the TMRO identifies as being flawed; and
- (b) the reinvestigation be conducted in accordance with directions of the TMRO concerning the flawed findings of Customs; and
- (c) if necessary, take into account information not previously before Customs necessary to address the flaw in Customs' original findings.

The Law Council and the Law Institute of Victoria consider that implementation of this recommendation will lead to greater certainty and transparency in Australia's anti-dumping and countervailing regime.

9. Recommendation 7.4 – Ministerial decision making

The Law Council and the Law Institute of Victoria support the Commission's recommendation that the Minister be obliged to make a decision whether or not to impose anti-dumping and/or countervailing measures within 30 days of receipt of a report and recommendations from Customs or the TMRO.

Protracted decision making is in the interests of neither the Australian domestic industry nor importers and exporters as it leads to uncertainty in the Australian market, which can have adverse economic effects for both Australian manufacturers and for importers supplying the Australian market, as well as downstream consumers.

10. Recommendations not supported

The Law Council and the Law Institute of Victoria do not support the Commission's recommendations that certain decisions not be appellable, namely:-

- the annual adjustment of anti-dumping and countervailing measures; and
- any reinvestigations and ensuing decisions by the Minister.

While such decisions should not be reviewable as to their merits, nevertheless, if such a decision involved an error of law, it should be subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. The Law Council understands that this is the position of the Productivity Commission: see page 139 of the Report.

The Law Council and the Law Institute of Victoria do not support the delayed introduction of the public interest test for a two year period after the other reforms recommended by the Commission have been implemented. The review process contemplated by the work of the Commission was initiated following agreement by the Council of Australian Governments in July 2008. The Commission was requested to undertake the work on 26 March 2009. The Commission issued an Interim Report and recommendations, sought submissions and conduct public hearings. The Commission's (final) Report and recommendations have been available since 18 December 2009. There is now this period for submissions to Customs on the Commission's Report and recommendations, which submissions will be considered by an interdepartmental committee and a report prepared for the Government. No doubt there will be a further period when the Government will consider the report and then, hopefully, legislation prepared and introduced into Parliament to implement the reforms recommended by the Productivity Commission. To then add a further two year period to the implementation of the public interest test to provide "some breathing space" would seem unnecessary and simply prolong the inevitable.

The Law Council and the Law Institute of Victoria recommend that all reforms, including the implementation of a public interest test, take place at the same time but apply only to applications filed with Customs, say, three months after the commencement of the Act giving effect to the reforms.

11. Increased transparency

The Law Council and the Law Institute of Victoria believe that Australia's anti-dumping and countervailing system would benefit from increased transparency through enabling solicitors of interested parties and, perhaps, other professionals to have access to confidential information in an investigation.

This could be achieved by:-

- (a) the legal representatives of each interested party be provided with access to all confidential information provided to Customs in an investigation;
- (b) such access be conditional on the legal representative giving a legally enforceable undertaking to keep all confidential information confidential and not to disclose it to any person including his/her client without the prior written consent of the person who provided the confidential information;
- (c) such an undertaking is given in favour of not only Customs but also in favour of each other interested party to the investigation.

It is noted that the Productivity Commission rejected the adoption of such a regime within the anti-dumping and countervailing system, largely due to cost considerations:

see pages 150 to 152 of the Report. The Law Council and the Law Institute of Victoria do not believe that the adoption of such a regime would lead to increased costs. Rather, it remains the view of the Law Council and the Law Institute of Victoria that any increased costs would be offset by improved decision making as procedural errors would be readily identified and at an early stage and would provide for greater accountability throughout the process.

12. Conclusion

As is evident from the foregoing, the Law Council and the Law Institute of Victoria support the reforms to Australia's anti-dumping and countervailing system recommended by the Productivity Commission including the adoption of a 'bounded' public interest test. However, the Law Council and Law Institute of Victoria do not support the delayed introduction of the public interest test but, rather, recommend that all reforms be implemented at the same time.

If you have any queries or require further information concerning any of the foregoing please contact Andrew Percival on behalf of the Law Council and Andrew Hudson on behalf of the Law Institute of Victoria.

Yours sincerely,

A handwritten signature in black ink, appearing to read "W Grant". The signature is fluid and cursive, with the first letter "W" being particularly large and stylized.

Bill Grant
Secretary-General