



**CEMENT INDUSTRY
FEDERATION**

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Dear Mr Johannes

CIF RESPONSE: Productivity Commission Report (No.48) on Australia's Anti-Dumping and Countervailing System

1. Introduction

Thank you for the opportunity for the Cement Industry Federation (CIF) to respond to the Productivity Commission's Final Report (No.48) on Australia's Anti-Dumping and Countervailing System tabled in Federal Parliament on 27 May 2010.

The CIF participated in the Productivity Commission (PC) inquiry via a submission addressing matters contained in the Issues Paper circulated for comment from interested parties. The CIF detailed key issues of its members concerning the policy and administration of the Anti-Dumping System. These concerns included:

- retention of the functions performed by the Minister, the Australian Customs and Border Protection Service (ACBPS), and the Trade Measures Review Officer (TMRO);
- benchmarking in 'market situation' investigations;
- strengthened investigative probity in the verification of exporter data;
- recognition of profits forgone and loss of market share as material injury indicators;
- improved clarity on threat of material injury;

- early access to provisional measures; and
- opposition to any proposed public interest test.

The CIF also highlighted that maintaining the effectiveness of the Anti-Dumping System was critical to the manufacturing sector.

The CIF seriously questions the Commission's recommendations targeted at limiting access to, and reducing the effectiveness of, Australia's Anti-Dumping System. It is the CIF's view that the proposed public interest test (with imprecise criteria which restricts access to anti-dumping measures), the limitation on the extension of measures to three-years, and the suggested abolition of the review of measures and duty assessment measures, will erode the effectiveness of the Anti-Dumping System and encourage exporters to target Australian markets with unfair prices.

The CIF does not support the Commission's recommended changes to the Anti-Dumping System architecture. Investment decisions taken by the industry in Australia are premised on the principle that the industry can address unfair trading practices in a timely and effective manner. The proposed public interest test would restrict the Cement Industry's ability to address dumping and material injury and is not in the interests of Australian manufacturing (both upstream and downstream).

2. Public Interest Test

The CIF notes that the interested parties calling for change to the present Anti-Dumping System are in the minority¹, yet the Commission argues that it "*sees the need for significant change to the current arrangements. Indeed, without significant change, the case for Australia to retain an Anti-Dumping regime would be much weaker.*"² This is despite the Commission recognising that the "*public test issue is contentious and far from straightforward*"³.

The Commission further states that the "*highest priority is to introduce consideration of the wider effects of imposing anti-dumping measures*".

These comments are not supported by an overwhelming response from stakeholders that the inclusion of a public interest test is critical for the efficacy of the Anti-Dumping System. Rather, the proposal is based upon theoretical assumptions that the imposition of anti-dumping measures contributes to a distortion in the efficient allocation of resources in the economy. The Commission's viewpoint fails to recognise that the Anti-Dumping System *corrects* unfair trading behaviour that has caused (or threatens to cause) material injury to the Australian industry.

¹ Productivity Commission Inquiry Report No.48, 18 December 2009, Box 5.1, P.58.

² Ibid, P.57.

³ Ibid, P.66.

The Commission has referenced the public interest mechanisms in both Canada and the European Union (EU). Interestingly, Canada's public interest mechanism does not occur in every investigation and has only been triggered in a mere six of almost 160 investigations since its introduction in 1984. Predicated on a request from an interested party, four of the six investigations have resulted in the imposition of the lesser duty rule.

In the EU, the community interest test has resulted in the non-imposition of measures in approximately 10 per cent of cases. The EU process, whilst having regard to the community interest, is also required to consider "*the need to eliminate the trade distorting effects of injurious dumping/subsidization and to restore effective competition*"⁴. The European Commission's analysis is⁵:

- of an economic nature, with no regard given to political or broader policy considerations (for example, foreign and regional policies);
- takes into account the viability and future prospects of the applicant industry;
- may have regard to any impact of measures on the degree of competition in the market, including the creation or strengthening of a dominant position for the applicant industry;
- is not a cost-benefit analysis in the strict sense where the various interests are weighed against each other quantitatively, but rather involves the application of a proportionality test that considers whether the costs of imposing measures on other parties would be disproportionate to the benefits for the applicant industry;
- focuses on the situation of entities that would be directly affected by the measures, meaning that assessments will normally only go one step up or down the production chain.

The EU broader community interest mechanism operates in all investigations. Where anti-dumping measures are assessed as in the Community's interest, the lesser duty provision may also be applied.

The Commission's proposed public interest test, however, extends well beyond the mechanisms of either the Canadian or EU Systems. The Commission rejects the concerns of manufacturers who made submissions to the inquiry (all were opposed to the introduction of a public interest test) as having "little merit". Specifically, the Commission rejected the lesser duty rule as not being "a substitute for application of an explicit public interest test" as it argued that in applying the rule "*there is no capacity to weigh the benefits for the applicant industry against the costs for other stakeholders*". This is where the CIF is in strong opposition to the Commission's justification. The so-called "*benefits*" to which the Commission refers are presented as apparent '*windfalls*' that reward the applicant industry. In reality the measures are designed to address a

⁴ Ibid, P.60.

⁵ Ibid, Box 5.2, P.60

correction of a trade-distorting event that has materially impacted the Australian industry's financial viability (in a negative sense). The operation of the lesser duty rule ensures the measures are only sufficient to remove the harmful and injurious effects of the dumping and nothing more.

It is therefore clear that the referred "benefits" to the applicant industry are no more than a correction to remove the effects of trade distorting dumping and material injury.

The CIF is further concerned by the ambiguous nature of the proposed criteria to be considered as part of the public interest assessment process. It views the criteria as imposing restrictions on industries accessing relief from dumping and subsidization and contributes to an erosion of the effectiveness of the Anti-Dumping System. The suggested criteria impose limitations that will prevent access to measures by Australian industry if any one of the criteria is observable. The CIF offers the following comments in respect of the identified criteria:

- ***the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule***

CIF Comment: The criterion is based upon a subjective decision of what determines 'effective choice and competition'. Whilst CIF considers that the current local manufactures provide "effective choice and competition" it is likely that the CIF would be denied access to anti-dumping measures on the basis of total market share held by the Australian industry.

- ***the price of the imported goods concerned after the imposition of measures would still be significantly below competing supplier's costs to make and sell***

CIF Comment: Imported goods the subject of measures may be priced below the Australian industry's costs to make and sell for a number of reasons. For example, the imported goods may be of a lesser quality, nevertheless they have been determined as dumped and are injurious to the Australian industry. Another reason may be that determined normal values are much lower than they otherwise should be due to verified data not including all fully absorbed costs and some not reflecting certain S,G&A and distribution expenses.

The pricing differential does not warrant rejecting the measures thereby causing material injury to the Australian industry. Of further concern is what may be considered "significant". In anti-dumping terminology significant is something that is not "insignificant or immaterial". No guidance is provided with explanations of this nature.

- ***un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidized imported goods***

CIF Comment: Subjective interpretations of what constitutes "readily available" and "comparable" again arise. Similarly, the non-dumped imports may not be available in

significant volumes as may be sourced from the exporter determined as supplying dumped goods.

- ***prior to the commencement of injurious dumping or subsidisation, the local industry's share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed***

CIF Comment: The Commission's view is that an industry with less than 20 per cent share of the Australian market is considered low. There exist no reasons why an Australian industry should be denied access to relief from dumping and/or subsidization when all the necessary provisions of the legislation are met. The suggested exclusion is premised on the basis that an Australian industry accounting for less than 20 per cent of the market is non-competitive with larger global manufacturers. Further, importers and exporters will seek to expand the definition of the local market to minimise the share held by the Australian industry (i.e. squeeze it below 20 per cent).

- ***the large majority of the overseas supplier's output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier's fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies)***

CIF Comment: This criterion is one based upon the efficiency and/or scale of the overseas supplier compared with that of the Australian industry. The Commission is proposing that more larger-scale, more efficient producers, should be encouraged to export at dumped prices onto the Australian market (at the demise of the Australian industry).

The Commission has proposed that industries that supply the Australian market and hold either small market share or a significant share of the market will be prevented from accessing anti-dumping measures. For those industries that fall in between, their ability to access measures will be based upon discretionary assessments of ambiguous criteria.

The CIF does not support the introduction of a public interest test. It is considered that the lesser duty rule sufficiently addresses concerns of exporters and importers to ensure any measures imposed are sufficient to remove the injury from dumping. The CIF reasserts the principle that anti-dumping measures are a means of correcting the trade distortionary effects caused by dumping – that is, returning prices to the levels evident prior to the onset of the dumping.

3. Supporting framework changes

3.1 Continuations

The Productivity Commission has proposed that the continuation of anti-dumping measures be limited to a single three-year extension. That is, measures would have a limited lifespan of a maximum eight years. The CIF considers that this recommendation is inconsistent with the legislative provisions on the continuation of the measures which permit the Minister to extend

the measures if the CEO of ACBPS is “*satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*”⁶

The CIF also considers that the proposal is inconsistent with Article 11.3 the WTO Anti-Dumping Agreement which addresses the duration of the Anti-Dumping Duties and Price Undertakings. The provisions of s.269ZHF(2) of the Customs Act reflect the requirements of Article 11.3 of the WTO Anti-Dumping Agreement.

The CIF is also concerned that the proposed limitations on the life of measures disadvantages Australian industry to industries in other jurisdictions where the “sunset” provisions do not restrict anti-dumping measures to a prescribed timeframe. This is particularly so where an exporter in one country is the subject of measures in a number of jurisdictions.

The CIF again questions the Commission’s rationale that the proposed limitation is intended to remove reliance on anti-dumping measures as a means of longer-term protection. The anti-dumping measures address marginal or discriminatory pricing and only remain in place for as long as is required to remove the material injury from dumping or threat thereof. The CIF views anti-dumping measures as a remedy to international price discrimination and remedies under the WTO Anti-Dumping trading rules are available to disaffected industries.

3.2 Reviews of measures

The Commission has suggested a replacement of the current review of measures process with annual reviews undertaken via ‘risk managed’ desk audit approach. The proposed changes are premised on retaining the “currency” of measures. The Commission considers that reviews of measures are infrequent and that as a result the currency of the measures is lost. The CIF does not agree with this proposition. The present interim duties system (which is supported by the duty assessment process) is effective in maintaining the currency of measures. Exporters to which measures apply are aware of the non-dumped pricing levels and make their pricing decisions on exports accordingly. The duty assessment process permits the importer to purchase at a non-dumped price and secure refunds of interim duty amounts paid.

The current review of measures process permits interested parties the opportunity for full cooperation – particularly exporters seeking to secure exporter-specific normal values. The legislated timeframes imposes strict requirements on interested parties to provide information on a timely basis – something that is unlikely to occur in an annual desk review of measures. The verification of financial information is paramount to the review of the variable factors to ensure that the original investigation is supported effectively. The intended desk audit approach is open to abuse and misrepresentation by parties providing information that has not been verified (as in the original investigation). The outcome is the erosion of the effectiveness of the anti-dumping measures (and therefore the effectiveness of the Anti-Dumping System).

⁶ S.269ZHF(2) of the Customs Act.

3.3 Duty Assessments and basis for collecting duties

It is further proposed by the Commission to abolish the present duty assessment process. This is a short-sighted proposal that fails to recognise that the present duty assessment process does impose a level of “currency” of anti-dumping measures across each duty assessment period.

The duty assessment process contributes to the effectiveness of Australia’s anti-Dumping System by ensuring that interim duties reflect the original dumping margins determined and takes account of subsequent movements in each of the variable factors over the duty assessment period. The Commission’s proposal to abolish this effective element of the Anti-Dumping System will return the System to the pre-interim duties process whereby parties could readily circumvent measures by simply declaring non-dumped export prices on commercial documentation at the time of entry of the goods (thereby not having an anti-dumping measure liability). Rebates from the exporter to the importer would follow to aide the circumvention.

The Commission’s suggested abolition of the duty assessment process combined with altering the collection of duties at the time of entry of the single consignment would encourage the avoidance of duties and is comparable with a self-assessment approach. The CIF does not support the abolition of the duty assessment process and is similarly opposed to the levying of duties on a shipment-by-shipment proposal that was previously used prior to the present interim duty process and was open to circumvention and misuse.

Of concern to the CIF is the unresolved issues surrounding confidential non-injurious price information used for non-injurious price calculations when assessing anti-dumping duties at the time of importation. The Commission has not suggested how these concerns could be adequately addressed, nor has it proposed an acceptable methodology to introduce an effective basis for collecting duties that does not diminish the effectiveness of the Anti-Dumping System.

The Commission has linked the annual review of measures to the abolition of the duty assessment system. In the Commission’s view *“there would be much less reason to retain a refund system within a regime where the magnitudes of all measures were adjusted on an annual basis to retain their currency, and where duty payments at the time of importation were based on these more contemporary levels.”*⁷ The CIF disputes the over-simplification of the proposed changes.

The integrity of the Anti-Dumping System will be lost should the abolition of the review of measures and duty assessment processes proceed. The Anti-Dumping System’s integrity is based upon the verification of audited financial data at the exporter’s premises (in both the original investigation process and in subsequent reviews of measures and duty assessment inquiries). Steps taken to exempt exporters from the verification process and permit data to be provided as part of a desk audit approach will undermine the credibility of the Anti-Dumping System. Exporters that have previously been found to have exported at dumped prices cannot be relied upon to voluntarily provide accurate data upon future duty liabilities will be determined.

⁷ Report No.48, P.123.

The CIF strongly urges the Government to reject the Commission's suggested changes to the review of measures, duty assessment and duty collection processes.

4. Administration of the Anti-Dumping System

4.1 Market situation provisions

The CIF is disappointed that the Commission was reluctant to address the present shortcomings associated with the treatment of Chinese exports under the Anti-Dumping provisions. The CIF recognises that Australia has granted China market economy status for anti-dumping purposes. This status, however, does not require Australian industry to compete with artificially low prices that are influenced by the government of China.

The Commission stated that it recognised Australian industry's concerns however it quoted the "Chinese Government's website" that "97 WTO members have recognised China as a market economy, including New Zealand, the Republic of Korea, Russia and South Africa⁸". The suggested inference that it is acceptable for Australia to treat China in the same manner as 97 fellow-WTO member countries is misrepresentative.

The Commission's review of the administration and architecture of Australia's Anti-Dumping System was an appropriate forum for this issue of the treatment of selling prices and costs in China in anti-dumping investigations to be examined. At the present time, the administrative arrangements which provide guidance on what constitutes artificially low prices in the country of export are not operating as intended following the removal of the "price control" provisions of the Customs Act.

The CIF does not consider that it is appropriate for the Commission to quote the Chinese government's website and nominate four countries which recognise China as a market economy as grounds for considering this as a non-issue. The reality is that many of the WTO member countries do not consider prevailing prices and costs in China to be determined on a competitive basis. As such, many WTO signatory countries do not use Chinese prices and/or costs in anti-dumping and subsidisation verifications.

The CIF encourages the government to address industry's concerns with the shortcomings of the present interpretation of the market situation provisions relevant to *s.269TAC(2)(a)(ii) of the Customs Act*.

4.2 Appeals arrangements

The Commission has recognised that decisions by the CEO of ACBPS to commence an investigation into the continuation of measures, and the Minister's decision on the continuation of measures, are presently not decisions subject to appeal.

The Commission has recommended that these decisions be appellable to the Trade Measures Review Officer (TMRO). The CIF supports both recommendations.

⁸ Ibid, P.102.

The Commission has also proposed that where the TMRO has reviewed a decision by the Minister, the matter should not be referred back to ACBPS for reconsideration. Rather, the Minister should make a decision based upon the information available from both the ACBPS and the TMRO.

The CIF is mindful that the TMRO – operating on a significantly reduced timeframe to ACBPS and with no previous involvement in the interactions with interested parties – is unlikely to have full account of the investigation as is available to ACBPS over the 155-day investigation timeframe. The CIF considers that ACBPS should be provided the opportunity to address the TMRO’s concerns should they arise from the TMRO’s desk audit review of the Minister’s decision (prior to the Minister deciding upon the TMRO’s recommendations).

4.3 Resourcing of ACBPS and TMRO

The CIF welcomes the Commission’s recommendation⁹ to ensure the ACBPS and TMRO “*are adequately and appropriately resourced to enable them to effectively undertake their functions...*”

Appropriately skilled officers and adequately resourced investigation teams are essential in an anti-dumping investigation. Inadequate resources (including in exporting countries) will deliver inadequate outcomes for Australian industry. The CIF considers that enhancements in forensic accounting capability and broad industry experience are import improvements that should be pursued. Further, the CIF welcomes initiatives to increase the rotation of suitably qualified staff through the Trade Measures Branch to ensure that additional resources may be requested from within ACBPS during periods of increased workloads.

4.4 Further proposed administrative changes

There are a number of further administrative changes proposed by the Commission. These include the following:

- (i) *increased transparency* – CIF is mindful that the publication of details concerning applications that have not proceeded to formal investigation may jeopardise the commercial interests of the applicant industry;
- (ii) *publication of information on the magnitude of measures and the underlying variable factors* – the CIF is concerned that the release of information relating to the Australian industry’s non-injurious price, including details of the basis for the price, could disclose commercially sensitive information. Similarly, exporters would be reticent for detailed normal value information to be generally available in the public domain;
- (iii) *suppression of import data* – the CIF welcomes the Commission’s initiative to ensure information relating to imports that are the subject of suppression by the Australian Bureau of Statistics and can be obtained from alternative sources, is made available to an industry seeking anti-dumping measures.

⁹ Recommendation 7.5

5. Concluding comments

The Productivity Commission has recommended changes to Australia's Anti-Dumping System that will dismantle the System's ability to effectively address unfairly priced imports. The CIF views the following key proposals as detrimental to the Anti-Dumping System:

- in Canada and the EU, based upon criteria which will limit access to anti-dumping measures for certain industries;
- limiting the life of anti-dumping measures to a maximum three-year extension;
- the abolition of the review of measures process and replacing it with annual reviews of variable factors utilising a desk audit methodology; and
- the abolition of the duty assessment process and replace it with duty payments applicable at time of importation (thereby removing the interim duty process).

The proposals will significantly weaken the ability of the Anti-Dumping System to deter exports at dumped and/or subsidised prices. The broad public interest test will impose restrictions on accessing measures for certain industries; the maximum three-year limitation on the continuation of measures will expose industries to repeated material injury; the abolition of the review of measures and duty assessment processes will remove the deterrent effect that anti-dumping measures have delivered since the interim duty system was introduced in the early 1990s.

The Cement Industry looks forward to working constructively with the Australian Government in its response to the Productivity Commission's Report on Australia's Anti-Dumping and Countervailing System.

Yours sincerely

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