



Dr Brett Williams

Senior Lecturer, Faculty of Law

Programme Director, Public International Economic Law, Sydney Centre for International Law

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Australian Government
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra ACT 2600
Email : tmpolicy@customs.gov.au

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Introducing Myself

I am an academic at the Faculty of Law of the University of Sydney specializing in the law of international trade regulation, primarily the law of the World Trade Organization and competition law. I hold degrees in law and in economics from the University of Adelaide and a PhD from the University of Adelaide. I am the programme director for Public International Economic Law in the Sydney Centre for International Law at the University of Sydney. I teach on a broad variety of aspects of the law of international trade regulation. I have published on a variety of aspects of WTO Law including trade in services, the dispute settlement system, application of the rules to agricultural trade and the accession of the China to the WTO.

The Productivity Commission's Report

The Productivity Commission has presented an opportunity to adopt a reform of antidumping law that would be welfare enhancing for the Australian nation. The opportunity should not be missed.

I welcome the Reports' statements that:

Selling at different prices in different markets is a manifestation of the common practice of price discrimination which ought not in itself to be regarded as undesirable (see section 4.2 at p39);

"Countering predatory behaviour by overseas suppliers does not provide a basis for Australia's antidumping system", certainly as the system is now configured (see Annex D, p191); and



The market circumstances that would allow an overseas supplier to employ dumping to create anything more than a transitory monopoly in an export market are very narrow. “Any attempt by the dumping firm to charge a monopoly price after the exit of local suppliers from the market concerned would be likely to attract additional competition from abroad or from substitute products.” (See Annex D p190)

The Report could have made these points more forcefully and have manifested them in its suggested design of a public interest test. I elaborate on this below.

I also welcome the Report’s statements that

There are reasons to distinguish between dumping by overseas businesses and subsidies by overseas governments; (at D2, p191) and

That there might be broader reasons for taking action in response to other government’s subsidies.

I agree that there is a significant difference. Dumping arises from behaviour of private entities which would normally be engaging in behaviour for profit maximizing efficiency reasons. Subsidies arise from government behaviour. Sometimes that government behaviour might be regarded as predatory but sometimes it is merely a way of addressing a production externality. The arguments for and against restraining or discouraging government behaviour seeking to give private entities an advantage are completely different from the arguments for and against penalizing private entities seeking to profit maximize. However, the Report fails to separate its analysis of dumped imports and subsidized imported when it comes to make recommendations.

My comments below are confined to the reform proposal as it applies to antidumping law.

The Usually Positive Welfare Effects of Dumping and the Usually Negative Welfare Effects of Antidumping Measures and the Significance of Enacting Reforms

The essential background to the PC’s recommendations must be that the prevailing view of economists is that most acts of price discrimination are welfare enhancing behaviour and that the only such acts that are not welfare enhancing behaviour can be dealt with adequately by laws dealing with use of market power. The ascension of this view resulted in Australia repealing the former s49 of the *Trade Practices Act* which used to prohibit price discrimination. This followed the recommendation of the Hilmer Report which followed earlier recommendations to repeal the prohibition of price discrimination in the Swanson committee report in 1977 and the Blunt Committee report in 1979.



A review of the leading textbooks on the subject (e.g. Hershleifer, *Price Theory and Applications*, Scherer, *Industrial Market Structure and Economic Performance*, Carlton and Perloff, *Modern Industrial Organization*) reveals the reason for the prevailing view that price discrimination is generally not welfare diminishing behaviour and need not be addressed in laws specific to price discrimination. The standard accepted economics of price discrimination is that price discrimination is not a rational price maximizing strategy unless:

- (1) a firm has some market power;
- (2) a firm is able to know or infer willingness to pay of different customers or groups of customers;
- (3) arbitrage between low price consumers and high price consumers must be impossible.

In those situations in which it does occur, there is nothing unfair about it. It is a rational response for a seller finding that different consumers or groups of consumers are prepared to pay different prices. If a seller finds that when it tries to increase price of sales to one group it does not lose many sales but when it tries to increase price of sales to another group it will lose many more sales, then it is likely that it will maximize profit by setting a different price to the two different groups of consumers. In all circumstances, the outcome will involve a transfer of wealth from some consumers to the seller. If the seller can determine the preparedness to pay of each and every customer then the output supplied will be more than the outcome that a monopolist would otherwise supply and is exactly the same as the output in a competitive market. In that situation, the net welfare of society is higher than if the monopolist had not been allowed to price discriminate. However, there will be a transfer of welfare from consumers to the seller. If the seller can only set prices for different groups then the outcome could be better or worse than if the entity having market power could not price discriminate. The determining factor will be whether the total quantity supplied goes up or down. If compared to the across the board monopoly price, the price is pushed higher for those consumers whose quantity demanded does not respond much to price changes and if the price is pushed lower for those consumers whose quantity demanded does respond significantly to price changes, then compared to the simple monopoly position the high price (non-price responsive) consumers will suffer a loss in the form of a greater transfer of wealth to the seller but the low price (significantly price responsive) consumers will accrue a gain because the margin of the price paid over the competitive market price would become less (they are transferring less wealth to the seller than they would if the monopolist could not price discriminate).



This basic theory needs to be adapted to explain the welfare losses in cases where the price discrimination is between markets in different countries.

First, if the seller does have market power and is price discriminating, it is still possible that the price discrimination could still be either welfare enhancing or welfare diminishing for the world. However, to the extent to which there are losses and gains to be considered in comparison with the position that would exist in the presence of the market power but the absence of the price discrimination, the losses would accrue to consumers in the high price country and the gains to consumers in the low price country, so regardless of whether the act of price discrimination is positive or negative for world welfare, it will have a positive effect on welfare in the importing country.

Second, it might be possible for price discrimination to occur even if the seller does not have market power. Two aspects of the international circumstances are different. First, import barriers and carriage transaction costs prevent opportunities for arbitrage sales from consumers buying at low prices to sell to consumers facing a higher price so there is no need for any other basis upon which to prevent arbitrage. Second, the seller's ability to charge a price above the competitive market price may not arise from market power but may arise from legal barriers that reduce competition, for example an import tariff. Therefore, even if a seller does not have market power, it may be rational for it to price discriminate since its own government's policies enable it to charge a higher price in its home market. This would impose costs on consumers in the home country but would not change the fact that the seller would sell up to the point that marginal cost equalled marginal revenue in the low price market. As in the standard situation in which the seller has market power, the price discrimination would have negative welfare effects in the high price market in which quantity of output is reduced and price is raised. However, this loss is not taken into account in determining the welfare cost or gain in the importing country market.

The conclusions are that price discrimination among separate country markets may be more common than price discrimination within single countries because what would not be a feasible profit maximizing strategy in a single country may become a feasible profit maximizing strategy between countries since the barriers between countries may create the conditions favourable to price discrimination (the ability to charge a price in one market above the competitive price, and the ability to prevent arbitrage). However, the fact that price discrimination occurs between countries rather than within a single country does not change the conclusions as to whether the price discrimination is welfare enhancing for the world. It can go either way depending on the extent of the losses and gains to different groups of consumers. However, since all of the losses are situated in the exporting country and all of the gains are situated in the importing country, then the receipt of more quantity at lower prices is always welfare enhancing for the importing country.



The above analysis assumes that the effect of the price discrimination in the importing country is that a higher quantity of supply is made available at a lower price. If this situation were to change markedly then the analysis would need to change. The only way in which the effect of price discrimination would not be to supply more quantity at a lower price in the importing country would be if the price discrimination caused a change in the level of competition in the importing country market that caused prices to rise. This could happen if the price discrimination enabled the seller to acquire some market power or enabled it to increase a pre-existing level of market power. The possibility that this could occur within Australia was reflected in the Hilmer Report:

Price discrimination can be anti-competitive where it enables a firm to entrench its position of market power by creating strong buyer- seller ties and thus raising barriers to the entry of new competitors. Extreme forms of price discrimination can amount to predatory pricing.

When considering whether a foreign supplier could acquire market power through predatory pricing, one needs to consider the extent to which the Australian market would remain contestable. In particular, one would need to consider not only the possibility of potential new Australian entrants into the market but would also have to consider the possibility of other sources of import competition from any other source in the world acting as a constraint on the exercise of market power, given the likely absence of any relevant Australian import barriers.

Therefore, from the sole point of view of the importing country, dumping which causes prices to fall is always going to be welfare enhancing. It will only be welfare diminishing if the price discrimination causes prices to go up rather than down. That could only happen if the price discrimination reduces competition in the market to the required extent. One should also note that there may be an additional positive effect of dumping if the receipt of the dumped goods provides some separate welfare gain distinct from price in the form of technology, or productive efficiency. They may not only be cheaper than the local alternative but may be better. This benefit in the form of quality could persist even where the price discrimination does reduce competition in the Australian market by damaging competitors supplying less desirable technologies. In such a case, the benefit from the new product would have to be weighed against the detriment from the lessening of competition.

The fact is that the provisions of Antidumping law of countries all around the world have not adjusted to this modern view of the economics of price discrimination. In addition, the WTO rules on antidumping duties are also stuck in an outdated view of the economics of price discrimination. The WTO rules permits Members to respond to price discrimination by imposing import barriers in a range of situations which is much broader than the



narrow situation in which price discrimination would be welfare diminishing; that is, the WTO rules permit members to impose welfare diminishing government policies to penalize welfare enhancing private behaviour.

The continued maintenance of antidumping laws and permission for them under the WTO causes a significant loss of economic welfare for the world as a whole. Focus on the actual volume of antidumping investigations and measures understates significantly the welfare cost for the world and for Australia, as it does not fully capture the difference between the factual in which unsound antidumping systems are in place and the counterfactual in which they would not be in place.

In the past, this loss arose because a small number of countries (the United States, the European Community (as it then was), Canada and Australia imposed antidumping duties against exports from Japan, Korea and a range of developing countries. With the coming into force of the WTO and the accession to it of many new countries, the erroneous view has been adopted that Member countries should enact antidumping law so as to fully exercise their rights under the WTO. Over the last 15 years the profile has changed markedly and now there is a much longer list of countries that are major users of antidumping duties. There is a much longer list of countries that are using the presence price discrimination as a pretext for raising barriers to imports (that is, using welfare enhancing private behaviour as a pretext for welfare diminishing government action).

Attempts within the WTO to reform antidumping law have been very unsuccessful. Most proposals are directed to arcane details of the calculation of dumping margins, the determination of injury or causation. However, none of the proposals before the WTO squarely address the reform that would be necessary in order to limit the tolerance of antidumping duties to situations where price discrimination might cause welfare losses, that is, where the price discrimination is likely to lead to the relevant sellers being able to exercise market power so as to increase prices in a later time period.

The fact that antidumping duties are applied based on an erroneous basis that dumping is bad and that it is necessary to discourage dumping by applying measures according to criteria that take no account of whether the dumping is good or bad for the welfare of the importing country or whether the antidumping duty is good or bad for the welfare of the importing country is not a problem confined to Australia. It is a problem which undermines Australia's effort in conjunction with other Members of the WTO to create a more open and non-discriminatory trading system.

Therefore, Australia needs to be:

First, adopting reforms which limit antidumping duties to situations in which the dumping itself is likely to have a negative effect on economic welfare in Australia;

Second, attempting to influence other countries to adopt similar reforms, say through APEC; and

Third, attempting to gain support within WTO Members for reforms which would amend the WTO Antidumping Agreement so that Member freedom to impose antidumping duties is limited to circumstances in which the dumping itself has negative effects on welfare for countries as a whole or the world as a whole.

A properly defined public interest test could be a vehicle for bringing antidumping law within a sensible economic rationale. Adoption of such a public interest test in Australia would put Australia in a good position to be arguing for modification of WTO rules to require a public interest test.

The Public Benefit Test

The suggestion of the introduction of a public interest test provides an opportunity for Australia to stop using Antidumping Duties in situations where they are a welfare diminishing policy, that is, where they are taken in response to welfare enhancing private actions. The best form of a public interest test would be one which provided that antidumping duties cannot be applied unless the designated authorities establish that:

- There is dumping ;
- That the dumped imports are causing material injury to a domestic industry
- That the material injury to the domestic industry is likely to lead to a detriment to the Australian community arising from a substantial lessening of competition in an Australian market which would not be outweighed by any other public benefit.

Therefore, I support the PC recommendation that a public interest test be introduced into Australian antidumping law.

The PC's formulation of a Public Interest test

I draw attention to the aspects of the PC's formulation of a public interest test that I wish to comment on:

Recommendation 5.1 includes the following:

"That there be a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:"

There follows an exhaustive list of circumstances in which the decision maker would be obliged to find that the imposition of a measure would be contrary to the public interest. The list of 5 circumstances includes the following

- “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 [i.e the import- competing petitioner] to exploit market power could not be addressed through application of the lesser duty rule.”

It indicates that the Explanatory Memoranda ought to elaborate on the intent and application of the list of circumstances, having regard to the commentary in the body of this report. This would include elaboration of when it could be found that the imposition of a measure “would preclude effective ... competition”. The body of the report indicates that the Commission’s view was that the interests of the Community as a whole would be best served by “the sort of presumptive public interest test proposed in its Draft Report. (p77) The Draft Report proposed that one of the specific circumstances in which “prima facie the imposition of measures would not be in the public interest” would be:

“where there was advice from the Australian Competition and Consumer Commission (ACCC) that the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned.”
(p72)

On this point, the Commission stated that its objective “was to focus attention on circumstances where the imposition of measures could remove or significantly reduce the ability for importers of the like goods concerned to compete in the Australian market and leave users with little choice but to purchase from the applicant supplier” (p83) and expressed the view that:

- where there are readily accessible alternative import sources for the goods concerned, the imposition of measures would not significantly reduce competition in the domestic market so there could not be a finding that it was in the public interest to terminate the investigation; and

- where there were not readily accessible alternative import sources for the goods concerned or close substitutes, Customs would need to consult with the ACCC on the potential impact of the proposed measures on the degree of competition in the domestic market concerned. (p83)

The Report recommends that the assessment under the public interest test and of whether there is a situation falling within one of the exhaustively specified situations in which it would not be in the public interest to apply the measures would be carried out by the Minister, having regard to the assessment by Customs, with appeals on questions of



law going to the Trade Measures Review Officer. (p72) Pertinent to the issue of whether it would be more appropriate to vest assessments of reductions of competition in the ACCC, which already carries out similar functions, rather than the ACBPS or the Minister is PC recommendation within 7.1 that:

“Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission”

The PC does not make a specific recommendation on how the statute could ensure that the advice of the ACCC is obtained. It neither provides for interested parties to be able to trigger the reference to the ACCC nor does it provide for the ACBPS to be mandated to refer matters to the ACCC.

The PC report appears to contemplate the possibility that having the ACBPS, the Trade Measures Review Officer and the Minister making decisions under a public interest test may be to inferior to other possible ways of allocating decision making responsibilities. The PC Report recommends that there be another review 5 years after implementation, to examine, among other things:

“the efficiency and effectiveness of the ACBPS, the Trade Measures Review Officer and the Minister in administering the anti-dumping system and giving effect to the new requirements, and whether any changes to their responsibilities are warranted in the light of that experience”

Comments on the Form of Public Interest Test

I support the view that a suitable public interest test could be operated effectively by specifying an exhaustive list of circumstances in which there could be a finding that imposition of the ADD would not be in the public interest.

I support the view that a suitable public interest test should require a consideration of the impact of dumping on effective competition in the Australian market.

I support the view that the question of assessment of impact on competition would benefit from consultation with the ACCC which already carries out that function in various other contexts.

The PC test would deny an ADD in the circumstance in which but for the dumped imports, an incumbent Australian supplier would be likely to exercise market power in the Australian market. This would be an improvement on existing ADD law. I support amendment to Australian antidumping law in order to deny ADDs in those circumstances.

The proposed reform would prevent imposition of ADD in one specific situation in which the price discrimination would be contributing an enhancement of welfare to the Australian community. However, this formulation would still allow ADD to be imposed in a range of other situations in which allowing the price discrimination behaviour to proceed without any ADD would be welfare enhancing for the Australian community.

The form of public interest test proposed by the PC would still allow ADD to be imposed in situations in which the dumping contributes an enhancement of economic welfare to Australia and the imposition of the ADD would impose net losses on the Australian community. A better formulation of the test could enable Australia to reap the benefits of a greater range of welfare enhancing private activity.

The incorporation of consideration of competition in Australia should be turned around:

- Instead of prohibiting ADD only where it is demonstrated that the ADD would preclude effective competition in Australia or would lessen competition in Australia;
- The formulation should be to prohibit any ADD except where it is demonstrated that the dumping itself is causing or likely to cause a substantial lessening of competition in Australia which results in a net loss of economic welfare in Australia.

Allocation of Decision-Making responsibilities

I submit that it would be a mistake to vest the Australian Customs and Border Protection Service ('ACBPS') or the Minister with responsibility for making decisions as to whether

- existing suppliers have any capacity to exploit market power the imposition of ADD measures
- whether ADD measures would preclude effective competition in the Australian market

and it would be a mistake to vest responsibility for decisions on appeals on such matters with the Trade Measures Review Officer ('TMRO').

Since 1974, it has been necessary for decisions to be made under the *Trade Practices Act 1974* (Cth) as to when various forms of conduct or various situations would result in a substantial lessening of competition and it has been necessary that decisions be made as to whether certain entities are in a position in which to exploit market power. Such decisions could be made by the Commission (originally the Trade Practices Commission, now the Australian Competition and Consumer Commission) from which appeals lay to



the Tribunal (originally the Trade Practices Tribunal, now the Australian Competition Tribunal) and by the Federal Court. It is important to note that the Tribunal was created and constituted because of the specialized nature of the task of making assessments of substantial lessening of competition, presence of market power or existence of public benefit. It is a body constituted with a mixture of Federal Court judges and economists. The history of the exercise of this decision making responsibility is that many mistakes have been made and the quality of decision making has been improved over the years largely as a result of the Tribunal offering guidance to the Commission and to the Federal Court. In turn, much of the guidance provided by the Commission has been adopted in decisions of the High Court and become binding upon the Federal Court.

Even when these decisions about the state of competition in markets and the effects of conduct upon state of competition in markets is made by appropriately qualified bodies, there is a margin of error. Vesting these decisions in bodies that are not qualified to undertake the appropriate evaluations would lead to the possibility of a much wider margin for error. The margin of error is managed in the competition law field by allowing matters to be reconsidered in the future, either after specific periods of time or when new facts arise. In the case of dumping there is no reason why an investigation into the effects of dumping could not be revived if new evidence indicates dumping is causing adverse effect on competition in Australia.

I submit that the government should vest these decisions in the ACCC and should allow an appeal to the Australian Competition Tribunal.

I make this recommendation even if the form of public interest test is as narrow as the one proposed by the PC. However, I have submitted above that the form of the test should be much broader so that the ACCC would be required to decide whether the dumping substantially lessens competition leading to a net welfare loss for the Australian community.

Replication of Reforms

The adoption of a public benefit should allow a more thorough taking into account of the extent to which the price discrimination confers benefits of lower prices on Australian consumers and for this to be weighed against the loss imposed on local suppliers. The referral of issues relating to competition to the ACCC should ensure that the quality of decision making is not influenced by erroneous views of the underlying economics of competition or views that the application of the test should achieve objectives that ought to be achieved in other ways.

These would be reforms that Australia could recommend to other countries. The Australian government ought to vigorously support the inclusion of a public interest test in



WTO negotiations aimed at reforming antidumping. I note that the Productivity Commission report indicates that the Department of Foreign Affairs and Trade has taken the view in WTO negotiations that the WTO agreement should leave each Member free to decide whether to adopt a public interest test.

Achieving Objectives Relating to Temporary Protection from Imports

I endorse the parts of the report which indicate that where there is an objective of providing support to Australian industry that the antidumping system is an inappropriate mechanism. Australia has some freedom under WTO rules to pay subsidies to support Australian industries. It can use the GATT rules on safeguards to impose subsidies or tariffs as temporary protection. Safeguard measures are required to be imposed only after decision making authorities have given interested parties an opportunity to make submissions as to whether imposition of the safeguard measures would be in the broader public interest. Import tariffs imposed under the safeguards rules are required to be imposed on all sources of trade.

The question of availability of an appeal

It is worth noting that under Article X:3 of the General Agreement on Tariffs and Trade (an appendix to the Agreement Establishing the WTO), Australia is bound to provide for an objective review of administrative actions affecting trade by a tribunal or procedure independent from the agencies entrusted with administrative enforcement.

We have had a situation in Australia in which:

- the initial decisions are made by a Minister who has been a junior Minister to the Attorney General, on the advice of the ACPBS; and
- the appeal is made by an employee of the Attorney General.

This situation would be markedly improved if at least the decisions on questions concerning competition were made by the ACCC with appeals to the ACT.

However, further consideration ought to be given to creating a genuinely independent appeal mechanism for all parts of the decision. The Australian Competition Tribunal would be the most appropriate appellate body.

Further Contribution

I am happy to answer any questions on this submission.

Yours Sincerely

Dr Brett G Williams