

International Trade, Industry Policy & Customs Services

35 Clive Road,
East Hawthorn,
Victoria 3123, Australia.

Telephone (+61 3) 9882 1111
Facsimile (+61 3) 9882 0300
E-mail: johncaldis@casselle.com.au

19 August 2010

National Manager Trade Measures,
Australian Customs and Border Protection Service,
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Sir,

Re: PRODUCTIVITY COMMISSION REPORT ON AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM – ACDN 2010/19

We refer to the subject report and to the invitation issued by Australian Customs and Border Protection Service (“ACBPS”) for comment on the recommendations contained in that report.

Accordingly, we welcome the opportunity to submit the following for your consideration:

Recommendation 5.1

“The imposition and continuation of anti-dumping and countervailing measures should be subject to a ‘bounded’ public interest test, embodying 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:

- 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*
- the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers’ costs to make and sell*
- un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported 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*
- 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).*

The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.

Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.

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. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.

In giving effect to these requirements, the ACBPS should also:

- clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures*
- give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts*
- include a synthesis of that commentary from interested parties in its final report to the Minister.”*

Comment

The proposed introduction of a “public interest” test in accordance with prescribed circumstances (as outlined in the Commission’s recommendations) appears to restore balance to the deliberative process when assessing desirable levels of barrier assistance for import competing industries. However, we recommend an additional criterion or circumstance that in our opinion would discourage some of the “exploitable” elements presently existing within the system.

We specifically refer to the discriminatory nature of certain applications which seek to impose measures against particular exporters while conveniently ignoring others. This is particularly important where applicants for anti-dumping assistance also import like goods in addition to their Australian manufacture. Such importations may occur at dumped prices but are unlikely to be detected for anti-dumping assessment because their origins are either deliberately omitted from applications or, are not specified as sources of injurious pricing and therefore, fall outside the scope of the investigation process.

Such occurrences have the propensity to unfairly leverage the anti-dumping system in favour of applicants who become beneficiaries of measures imposed against their competitors, while simultaneously permitting access to low cost imports to enhance their commercial positions.

Therefore, in order to remove the inherent bias, we suggest the following criterion should be added to the Commission’s list of prescribed circumstances:

- “like imported goods from sources not covered by inquiry are readily available at a comparable price to the dumped or subsidised imported goods”**

Recommendation 6.1

“The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:

- whether the provisions have had a meaningful impact on the outcomes of any past cases*
- if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances*
- whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements, and what benefits and costs would ensue*
- what arguments would justify the retention of the provisions more generally*
- what changes, if any, should be made to the provisions in light of the above. The working group should consult with interested parties and publish a draft report for comment.”*

Comment

This recommendation is accepted without alteration.

Recommendation 6.2

“Australia should not adopt the practice of zeroing when calculating normal values.”

Comment

The recommendation to reject zeroing is supported in this instance but, with the following modification.

It is understood zeroing is applied (in other jurisdictions) to the calculation of dumping margins and not normal values as indicated in the Commission’s report. Clarification needs to be sought from the Commission on whether it intended to refer to dumping margin calculations on this occasion and therefore, whether the reference to “normal values” was incorrect.

Recommendation 6.3

“In conjunction with the introduction of the new public interest test (see recommendation 5.1), the arrangements governing the imposition of provisional measures should be modified as follows:

- If the requirements for imposing provisional measures are met, then prior to the commencement of any assessments against the public interest test, the Australian Customs and Border Protection Service should, without exception, be required to release a Preliminary Affirmative Determination (PAD) and impose provisional measures.*
- Unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation.”*

Comment

To impose provisional measures prior to completing assessments of public interest suggests a “shoot first” strategy that is likely to generate greater uncertainty for the market and for participants in the investigations process.

Notwithstanding the additional analysis required for public interest assessments, it is suggested such assessments be conducted in parallel to the normal investigation process so that all relevant facts are reasonably known within the prescribed time limit.

We envisage ACBPS will require (and should be supplied with) additional resources in order to perform the additional tasks within the statutory deadline.

Recommendation 6.4

“There should be no change to the current five-year default term for anti-dumping and countervailing measures.

However, extensions of anti-dumping and countervailing measures, following a continuation review, should be limited to one three-year term. And an application for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application (including assessment against the public interest test as detailed in recommendation 5.1).

Continuation reviews should, in all cases, comprehensively examine and recalculate the relevant variable factors.”

Comment

This recommendation is totally supported as it reflects an expectation that the causes of, and effects from, earlier material injury to Australian industry should have dissipated within an eight-year period.

The automatic recalculation of variable factors during Continuation inquiries also reflects a more balanced approach when assessing arguments for and against a three-year extension of measures. Moreover, it obviates the need for exhaustive and expensive Review inquiries which are presently conducted separately.

However, the review process would need to be co-ordinated with the proposal for “annual reviews” as discussed in Recommendation 6.5. For example, the last annual review of variable factors within the initial five-year period would need to occur no later than at the conclusion of the third year.

Recommendation 6.5

The current ‘review of measures’ and ‘administrative review’ provisions should be abolished and replaced by a single new mechanism to adjust the magnitude of all anti-dumping and countervailing measures on an annual basis. The resulting adjustments, which should be determined and notified by the CEO of the Australian Customs and Border Protection Service (ACBPS), should not be appellable.

- *The new mechanism should employ the sort of risk-management approach applied by the ACBPS when assessing requests for duty refunds under the current administrative review provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on desk-audits of information provided by the relevant parties, international price indexes, or other relevant price benchmarks.*
- *Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.*

- *If considered necessary to facilitate greater reliance on desk audits, the ACBPS should be granted additional powers to apply appropriate penalties for false reporting.*

Comment

This recommendation carries a presumption that all computations performed by the ACBPS during review determinations will be totally correct. For the reasons expressed in responses to recommendation 6.6, this recommendation is neither practical nor acceptable in its current form. In addition, we believe disputed determinations made by ACBPS should be appellable in the normal course.

Adjustments to measures resulting in a zero duty rate, suggests export pricing is either no longer dumped or, is not causing material injury. Under such circumstances, the retention of measures “*for the original term*” appears to conflict with Article 11.1 of the Anti-Dumping Agreement which states: “*An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*”. We believe adjustments or assessments leading to a zero duty rate over **two consecutive years** should be sufficient to warrant the removal of measures.

Recommendation 6.6

“The basis for collecting dumping and countervailing duties should be modified. Specifically, for goods subject to a dumping duty, or to a countervailing duty involving the lesser duty rule, the duty collected at the time of importation should be based on the actual export price relative to the export price at which no duty would be payable on the basis of the prevailing, annually adjusted, variable factors. Concurrent with this change, provision for importers to seek refunds of overpaid duties should be abolished.”

Comment

The first part of this recommendation appears to have been made under a misapprehension that “annually adjusted variable factors” have the same degree of currency as export prices at the time dumping duties are assessed and collected. In reality, “annually adjusted variable factors” can only accurately be determined from historical values derived from periods which precede those to which they are eventually applied. In other words, when revised measures (derived from “annually adjusted variable factors”) are implemented, they are actually applied to import shipments prospectively. Therefore, any “updated” measures would have limited relevance during the period in which they are applied to imports, particularly to those imports that are subject to monthly pricing volatility.

During periods of protracted decline in market prices, revised measures will continue to reflect outdated values when compared with contemporary export prices. This suggests exporters will continue to be found dumping thereby incurring IDD which is likely to be overpaid due to the “lag” effects associated with inappropriate matching of historical and contemporary data. (Conversely, during periods of protracted price increases, revised measures are likely to be determined at levels which offer little or no protection against dumping).

Nevertheless, we accept the need for regular revisions of variable factors which are more likely to accurately portray contemporary movements in pricing than they otherwise would if left at levels when measures were originally implemented. At the same time

however, we believe there is need for a process which permits an accurate calculation of dumping duties based upon contemporary values for both variable factors and export prices. Such an outcome is only achievable in a post-importation environment when both sets of values are capable of being determined. We envisage neither the ACBPS nor exporters ever being in a position to supply “live” (and accurate) contemporary values for the purpose of making reliable dumping duty assessments at the moment of importation.

Therefore, the second proposal (to abolish refund provisions) is entirely inappropriate as it denies exporters recourse to correct assessments of their definitive dumping duty liabilities. It also appears to contravene Article 9 of the WTO Anti-Dumping Agreement in relation to final assessments of anti-dumping duties.

Recommendation 6.7

“The Australian Customs and Border Protection Service (ACBPS) should, as part of the annual adjustment of measures (see recommendation 6.5), seek feedback from the various parties on the impacts of those measures over the preceding 12 months — including on market prices — and investigate further if appropriate.

Where such feedback indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the CEO of the ACBPS should advise the Minister to revoke the measures. This process should replace the current revocation arrangements.”(emphasis added)

Comment

We interpret the recommendation to imply that revocation will only ever occur where there is evidence of cessation to local manufacture. The replacement of current revocation arrangements with those proposed, effectively limits the circumstances under which removal of measures may occur. The proposal also appears to dilute the scope of Article 11 of the Anti-Dumping Agreement which provides opportunities for interested parties to seek revocation based upon evidence that either dumping or material injury is no longer occurring.

We agree with the notion of a comprehensive review of the impact of measures during the annual adjustment process. We also agree with an automatic revocation of measures in the event of cessation to local manufacture. However, we believe the question of revocation should not be limited solely to the absence of local production activity and that any suggested changes would need to take Australia’s international obligations into account.

Recommendation 6.8

“Australia’s list of actionable subsidies should be aligned and kept aligned with the lists in the latest relevant WTO agreements”.

Comment

This recommendation is accepted without alteration.

Recommendation 7.1

“The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission’s other recommendations.

These roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11) in the light of experience with the new system.”

Comment

This recommendation is accepted without alteration.

Recommendation 7.2

“The following changes should be made to the current appeals arrangements for anti-dumping decisions.

- Decisions on whether or not to commence an investigation into the continuation of anti-dumping or countervailing measures beyond the initial five-year term — and any ensuing decisions by the Minister — should be appellable.*
- Where the Trade Measures Review Officer (TMRO) finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to the Australian Customs and Border Protection Service (ACBPS) for reinvestigation, unless the TMRO explicitly recommends a reinvestigation. In the event of the latter:
 - the reinvestigation and report to the Minister should be conditioned and constrained by a directive from the TMRO on where the initial investigation was flawed*
 - within the confines of that directive, there should be scope for the ACBPS to consider relevant new information.**

Any such reinvestigations and ensuing decisions by the Minister should not be appellable.”

Comment

Provisions within this recommendation are broadly accepted, with the exception of the outcome from reinvestigations. We submit all decisions made by the Minister should be appellable where the circumstances are warranted.

Recommendation 7.3

“Provision should be made for the Australian Customs and Border Protection Service (ACBPS) to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.

This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the next review (see recommendation 7.11), having regard to experience in the intervening period under the new system.

Through its 'Anti-Dumping and Countervailing Actions — Status Reports', the ACBPS should provide an annual, consolidated, summary of the timeliness of each of its investigations in the preceding 12 month period."

Comment

This recommendation is accepted without alteration.

Recommendation 7.4

"Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit."

Comment

This recommendation is accepted without alteration.

Recommendation 7.5

"The Australian Government should ensure that the Australian Customs and Border Protection Service (ACBPS) and the Trade Measures Review Officer (TMRO) are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks."

Comment

This recommendation is accepted without alteration.

Recommendation 7.6

"In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate in its investigation reports whether there have been any comparable recent cases in other countries; what the outcomes of those cases were; and what is the relevance, if any, of those outcomes to the investigation at hand."

Comment

While we agree with the recommendation in principle, we would further propose that its implementation be carefully managed so as to avoid creating assessment criteria of a type that are likely to lead to higher levels of disputation. We are mindful of the disparate administrative processes applied in other jurisdictions and therefore, are compelled to emphasise the need for accurate, reliable and appropriate comparisons.

Notwithstanding the resourcing issues addressed in Recommendation 7.5, the additional burden upon the ACBPS to conduct forensic reviews of foreign cases within its existing, statutory timeframes further needs to be considered. It is assumed the outcomes of such reviews would be fully disclosed in all ensuing investigation reports.

In adopting the recommendation, the ACBPS also needs to dispel any inference that identification of “comparable recent cases” in other jurisdictions would automatically lead to adverse findings against exporters under investigation.

Recommendation 7.7

“Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.”

Comment

This recommendation is accepted without alteration.

Recommendation 7.8

“Through its various reports and/or Australian Customs Dumping Notices, the Australian Customs and Border Protection Service (ACBPS) should be required to publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures and the underlying variable factors that is consistent with maintaining appropriate protection for commercially sensitive information submitted by individual parties.

- *Where the ACBPS determines that the firm-specific nature of the measures or the variable factors (or some other reason) militates against disclosing full details on those measures, it should reduce the amount of information published by the minimum necessary to provide the requisite protection for the commercially sensitive material concerned.*
- *At the very least, the ad valorem equivalents of measures should be publicly notified at the time of imposition and following annual adjustments under the new adjustment mechanism (see recommendation 6.5).*

Customs should also report annually on the number of cases where the lesser duty rule has been applied.”

Comment

This recommendation extends a broader discretion to the ACBPS to release certain information on a case by case basis. There is likely to be significant adverse reaction to certain disclosures where they are deemed by affected parties to represent unwarranted releases of proprietary information. It is suggested the ACBPS conducts further work on appropriate standards of disclosure that can be applied consistently to all its investigations while at the same time, assuring participants of the privacy of their information.

Recommendation 7.9

“The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.”

Comment

This recommendation is accepted without alteration

Recommendation 7.10

“All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see recommendation 5.1) and the changes to the continuation provisions (see recommendation 6.4). These should take effect two years later.”

Comment

This recommendation is accepted without alteration

Recommendation 7.11

“There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:

- the impacts on decision-making of the public interest test and whether that case history points to any gaps or deficiencies in the test and/or the accompanying legislative guidance, or to the need for supporting changes to other aspects of the legislative architecture*
- the need for changes to the system framework separate from the public interest test requirements*
- the efficiency and effectiveness of the Australian Customs and Border Protection Service, 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*
- whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities*
- what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes*
- the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more might be done in this regard*
- whether there have been changes to overseas anti-dumping regimes that could be relevant to the Australian system”.*

Comment

This recommendation is accepted without alteration

In concluding, we again thank the ACBPS for the opportunity to comment on the report prepared by the Productivity Commission.

Yours sincerely,
Casselle Commercial Services Pty Ltd



John G. Caldis
Director