

## Executive Summary

OneSteel Limited (“OneSteel”) does not support the proposed architectural changes to Australia’s Anti-Dumping System as recommended by the Productivity Commission (the “Commission”) in its final report. OneSteel is absolutely opposed to:

- the introduction of a public interest test;
- a three year limitation on the extension of anti-dumping measures;
- the abolition of the current review of measures process;
- the abolition of the duty assessment process; and
- the determination of the level of anti-dumping duties at time of importation.

The Commission’s suggested architectural changes will undermine the integrity of the Anti-Dumping System as it presently operates. The public interest test – supported by vague criteria – limits access to anti-dumping measures for some manufacturers that are considered too large or too small (in an Australian market size context). Similarly, local manufacturers that cannot compete with world scale manufacturers will also be denied access to measures.

Combined with changes to the review of measures and duty assessment processes, the Anti-Dumping System will be ineffective in addressing dumping and material injury.

Having reviewed the Commission’s recommended administrative changes to the System, OneSteel considers that these suggested changes can be supported. In particular, OneSteel welcomes the Commission’s recommendation that import data the subject of suppression orders be released to Australian industry for the purposes of an anti-dumping application when it can be identified the data is available from an alternate source.

OneSteel has also identified two areas of improvement to the effectiveness of the Anti-Dumping System. These include clarification on the market situation provisions and the need for a Ministerial guidance on profits foregone and loss of market share in an expanding market.

## Introduction

The Productivity Commission's Report No. 48 on Australia's Anti-Dumping System was tabled in Federal Parliament on 27 May 2010. The Report was released following the Commission's review of Australia's Anti-Dumping and Countervailing provisions.

OneSteel – through its range of steel manufacturing interests – is a stakeholder in an effective Anti-Dumping System. OneSteel participated in the Commission's inquiry by providing formal submissions in response to the Commission's *Issues Paper* and *Draft Report*.

OneSteel has reviewed the joint media release dated 27 May 2010 published by the Assistant Treasurer and the Minister for Home Affairs that has called for submissions in response to Report No. 48 to “*allow the Government's response to be developed and considered in the 2011-12 Budget process*”. OneSteel notes that the media release indicates “*The Government will also consider any further matters raised by stakeholders that may be required to improve the system but were outside the focus of the recommendations.*” OneSteel welcomes this acknowledgement that there may be additional issues requiring attention to improve the Anti-Dumping System that were not the focus of attention in the review and addressed in the recommendations.

As notified by OneSteel in its response to the Commission's Draft Report, the company is concerned by the Commission's proposals that will erode the effectiveness of the Anti-Dumping System. OneSteel therefore will address the recommendations contained in the Commission's report and also re-visit certain additional areas within the Anti-Dumping System requiring attention.

## Public Interest Test

OneSteel has previously detailed its opposition to the introduction of a public interest test. Having reviewed the Commission's final report, OneSteel is not wavering in its opposition to the proposal to negate the apparent “costs” of the system despite the Commission conceding “*all indications are that the economy-wide effects of Australia's anti-dumping system are very small*”<sup>1</sup>.

The Anti-Dumping System is a complex and time-consuming process as it presently operates. An additional impost for consideration by the investigating agency (and Minister) that involves an increase in the investigation timeframe and additional demands on resources will undoubtedly further increase the uncertainty associated with the process.

OneSteel is concerned by the justifications proffered by the Commission in suggesting that industries the subject of anti-dumping measures do not provide an adequate return on investment to the broader community. In particular, the Commission referred to the notion of ‘allocative efficiency’ and suggested “*resources attracted to (or retained in) industries as a result of the imposition of anti-dumping measures will generally provide a lesser return to the community than if used elsewhere.*”<sup>2</sup>

OneSteel does not consider such broad-sweeping generalizations can be relied upon.

The Commission has modelled its recommendation for introducing a public interest test on the existence of similar provisions that operate in Canada and the European union (“EU”). The Commission has indicated that the provision in Canada has been used in only a very limited number of cases (in only six of some 160 investigations since its introduction in 1984). When invoked, the provision can result in the adoption of the lesser duty rule (in a mere 4 cases).

---

<sup>1</sup> Productivity Commission Inquiry Report No.48, Australia's Anti-Dumping and Countervailing System, December 2009, P. 3.

<sup>2</sup> Report No.48, P.40.

In the EU, the community interest is a consideration in each investigation. The application of the test has resulted in the non-imposition of measures in approximately 10 per cent of cases. The EU test is a relatively simplistic test that examines the cost of the measures to the downstream industry, versus the likely economic benefit to the applicant industry.

The Commission's proposed public interest test far exceeds the intent of the provisions in Canada and the EU and, unlike the provisions in either jurisdiction, is aimed at limiting access to measures for certain industries.

OneSteel notes the opposition to a public interest test by "virtually all" manufacturers who responded to the Commission's *Draft Report*. A "few" participants supported the introduction of the test with the majority of those three identified government agencies.

OneSteel considers that the broader community interest is adequately addressed by the adoption of *the lesser duty rule* in the Anti-Dumping System. That is, when measures are imposed, they are established at a level that is sufficient to only remove the effects of dumping. Consequently, benefits that may be derived from imposing measures at the full margin of dumping (which does occur in other jurisdictions such as the United States) can only occur when the normal value is assessed at levels below the non-injurious price.

The Australian Customs and Border Protection Service ("ACBPS") currently follows a policy in determining the basis for a non-injurious price<sup>3</sup>. The principal methodology involves reverting to market determined prices which evident prior to the onset of dumping. This policy is consistent with the 'correctional' intent of anti-dumping measures as espoused in the WTO Anti-Dumping Agreement and the anti-dumping provisions of the Customs Act. The Commission's view that there exists a 'windfall' to industries the subject of measures is not evidenced by the process that determines the level of the measures.

The Commission's proposed public interest test is intended to operate separate from ACBPS's material injury assessment. OneSteel considers that a public interest provision could prejudice a reasoned assessment of material injury to the Australian industry – that is, the ACBPS could prematurely take account of the provisions of the broader community interest in its material injury assessment.

OneSteel's opposition to the introduction of a public interest test is absolute. OneSteel, however, is also opposed to the five criteria nominated by the Commission as grounds for not imposing anti-dumping measures. OneSteel considers the public interest provision is a de-facto means of restricting access to anti-dumping measures and further increasing the uncertainty of the investigation process. The Commission's proposal of a "bounded" public interest test ensures that the ACBPS will have determined that the industry has suffered material injury from dumping and a causal link is evident, however, anti-dumping measures will not be available to applicant industries that fail one of the five prescribed limiting criteria.

As indicated in its response to the Commission's *Draft Report*, OneSteel views the circumstances in which the imposition of measures are not in the public interest as simply a catalyst for interested parties to seek each and every opportunity to oppose the imposition of measures, particularly as the proposed criteria are subjective and vague. The directives introduce a range of factors that provide exporters and importers with the opportunity to deflect attention away from the dumping and material injury that has occurred.

The subjective nature of the proposed circumstances in which measures would not be applied is of significant concern to OneSteel. For example, the ill-defined suggestion that "*the imposition of measures would preclude effective choice and competition in the Australian market for the like goods*,

---

<sup>3</sup> Refer Trade Measures Policy Advice 2004/1.

*and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule” will likely be the subject of debate in every investigation due to subjectivity associated with the proposition.*

OneSteel does not support a process whereby Australian manufacturers are discriminated from accessing anti-dumping measures viz-a-viz competing industries in other jurisdictions. The proposed criteria will limit access to anti-dumping measures for industries that are considered too large (i.e. hold large market shares) or too small (i.e. hold less than 20 per cent market share). Similarly, where an exporter recovers its full costs and a reasonable level of profit in its export price, and that export price plus the dumping measure remains significantly below the Australian industry’s costs, then no measures will be applied.

In summary, OneSteel is also opposed to the introduction of criteria that restrict access to anti-dumping remedies even though dumping and material injury has been established. The proposed limitations will disadvantage the Australian steel industry when contrasted with the steel industry in other countries.

OneSteel perceives the proposed public file test and its limiting criteria as a basis for limiting access to anti-dumping measures for Australian industry. On this basis OneSteel maintains absolute opposition to the introduction of a public interest test.

### **Continuation/extension of measures**

Article 11.1 of the WTO Anti-Dumping Agreement 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”.*

The Commission has proposed that the continuation (or extension) of measures be limited to a single three-year extension. It would appear that the Commission has sought a maximum ‘life’ of anti-dumping measures of eight years based upon the ‘sum of the provisional, initial and extension periods’ applicable to WTO Safeguard provisions.

The Anti-Dumping provisions and the Safeguard provisions cannot be compared. The Anti-Dumping provisions relate to unfair (or discriminatory) pricing behaviour, whereas the Safeguard provisions address the circumstances of increased trade volumes (with an absence of unfair trading behaviour).

Of more relevance to the issue is the fact that WTO members in other jurisdictions (notably Canada, the EU and US) do not apply maximum periods for the duration of measures. Nor should Australia. To apply a three-year limitation on the extension of anti-dumping measures will significantly disadvantage Australian industry – particularly where other jurisdictions apply measures on like goods from the same exporter that extend beyond an eight year period. Examples of this kind are emerging on a not uncommon basis (e.g. steel products exported from China).

Report No.48 details a change to the Commission’s view as evidenced in the Draft Report. Initially, the Commission was predisposed to prohibit access to anti-dumping measures for a two-year period immediately following the expiration of measures after eight years (i.e. the initial five years plus a single maximum three-year extension). However, in the Final Report, the Commission has abandoned the two-year prohibition and suggested that an industry may re-apply for anti-dumping measures as per the requirements of a new application.

This change is problematic given the operation of the initiation process.

A new application must evidence dumping, material injury and a causal link. The ACBPS is unlikely to accept a new application until at least a full twelve months (minimum) following the expiration of the

anti-dumping measure as it would view the measure that was in operation as effective and therefore no material injury would have been experienced by the Australian industry until following the expiry of the measure. The Australian industry would therefore have to again experience material injury from the dumped exports and re-apply for anti-dumping measures to address the injurious imports.

Article 11.1 of the Anti-Dumping Agreement, however, details that the measure **shall** remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Article 11.3 also prescribes that “*any definitive anti-dumping duty.....unless the authorities determine.....that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury*”.

The premature removal of the measure on the basis that a maximum timeframe similar to that applicable in the Safeguard provisions is not reflected in the WTO Anti-Dumping Agreement. If the measure is required to prevent the Australian industry from again experiencing dumping and material injury, it should be retained – as is predicated in the WTO Anti-Dumping Agreement.

OneSteel does not support the Commission’s recommendation to limit the extension of measures to one single three-year period (i.e. to a maximum eight years). The proposal is inconsistent with the requirements of the WTO Anti-Dumping Agreement and would significantly disadvantage Australian industry when contrasted with industries in other jurisdictions (particularly where measures apply across jurisdictions to the same exporter(s)).

The Commission has stated that it considers that the relevant variable factors should be recalculated as part of a continuation investigation. OneSteel concurs with this view.

## Reviews of measures

The Commission has recommended the abolition of the present review of measures process to be replaced by annual reviews that it describes as a ‘risk managed’ desk audit approach. The Commission proposes the adoption of the desk audit approach with increased reliance “*wherever possible without significantly reducing investigative rigour*”<sup>4</sup>.

Having participated in a number of recent reviews of measures (hot dipped galvanised pipe and hollow structural sections), OneSteel does not consider the current review of measures process as inadequate. OneSteel does recognise that the currency of measures may be an issue – however, abolishing the current process and moving to a desk audit approach whereby the rigour of the original investigative process is undermined (by a less rigorous desk audit review) further erodes the effectiveness of the system.

The proposal fails to recognise that the exporter has previously engaged in an unfair trading practice and that in the absence of a physical verification of sales and cost data in a review of the initial measure, it is (highly) likely the exporter will seek to reduce its exposure to ongoing measures (i.e. the exporter will submit unreliable information).

OneSteel does not support the abandonment of the physical verification of each of the variable factors associated with the present review of measures. OneSteel, however, does consider that the currency of an anti-dumping measure may be enhanced by reflecting industry-agreed benchmarks for key raw materials (e.g. hot rolled coil for HSS). This would permit monthly adjustments to applicable normal values.

Agreements as to the appropriate benchmarks could be secured from interested parties during the original investigation process.

The present review of measures process would otherwise continue to operate.

---

<sup>4</sup> Report No. 48, P.121.

## Duty assessments

The Commission has similarly proposed the abolition of the duty assessment process. OneSteel is strongly opposed to this recommendation as the duty assessment process supports the effectiveness of anti-dumping measures and requires the applicant party to demonstrate that dumping and material injury has not occurred across the administrative review period.

The Commission has recommended abolishing the duty assessment process on the basis of the existence of a perceived “asymmetry” by importers that the interim duty is not immediately refunded even though the export price might reflect a non-dumped level.

The interim duty process is a key attribute of the Anti-Dumping System that ensures anti-dumping duties are effective. The change proposed by the Commission is essentially the process that applied prior to the introduction of the interim duty system in the early 1990s. That system, however, was open to exploitation as exporters increased their declared export price to non-dumped levels yet there was no subsequent change in the Australian selling prices of the exported goods. Exporters would provide the importer with a rebate at a later date to ensure sales volumes at competitive prices on the Australian market were maintained.

The present duty assessment process ensures that the export prices are:

- (i) at non-dumped (or non-injurious) levels;
- (ii) duties collected do reflect the assessed dumping margin; and
- (iii) selling prices in Australia recover all costs incurred.

Reversion to a system as proposed by the Commission whereby the dumping duty payable is based upon the difference between “the actual export price relative to the export price at which no duty would be payable given the prevailing variable factors” is open to misrepresentation and abuse. ACBPS abandoned the Commission’s proposed approach to duty assessments at the time of importation due to problems associated with ensuring anti-dumping measures were effective. OneSteel can again perceive problems similar to those previously encountered prior to the introduction of the present interim duty system.

Of particular concern with the Commission’s proposal to abolish duty assessment is that the current interim duty system permits the refund of the interim duty (or part thereof) following an interim duty assessment review. Under the Commission’s proposal, any shortpayment of the interim duty cannot be collected subsequent to the initial duty payment, hence it is likely that reduced interim duty payments would prevail.

OneSteel also notes that the duty assessment process is governed by the requirements of Article 9 of the WTO Anti-Dumping Agreement. Article 9.3.1 addresses the issue of final assessment of the anti-dumping duty – a process that is reflected in the present duty assessment arrangements. The Commission’s proposed abolition of the duty assessment process is also inconsistent with the WTO Anti-Dumping Agreement.

OneSteel opposes the abolition of the duty assessment process as this will significantly reduce the deterrent effect of the System.

## Conclusion on proposed architectural changes

The planned introduction of a public interest test will reduce access to Australian industry to anti-dumping measures that address unfair trading behaviours. In addition, the identified criteria deny access for applicant industries to measures, are subjective and ill-defined. Of itself, the introduction of a public interest test will further limit access to anti-dumping measures through a process that is already shrouded with uncertainty.

The proposed abolition of the present review of measures and duty assessment processes would curtail the ability of the system to provide adequate re-dress to dumped and injurious imports.

The proposed architectural changes (individually and in aggregate) will undermine the true intent of the Anti-Dumping System and cannot be supported.

## **Administrative changes**

### *Decision-making responsibilities*

OneSteel welcomes the Commission's recommendations to retain the present roles of ACBPS, the Trade Measures Review Officer ("TMRO") and the Minister.

### *Review decisions*

OneSteel also supports the inclusion of decisions as to whether or not to commence an investigation into the continuation of anti-dumping measures, and any ensuing decisions by the Minister, as reviewable decisions.

Where the TMRO finds in favour of an appeal against a decision made by the Minister, the Commission has proposed that the matter not be referred back to ACBPS for reinvestigation. OneSteel does not support this proposal. A decision by the TMRO - which is proposed to overturn that of the Minister - should be subjected to assessment by ACBPS to ensure that all relevant matters have been considered.

### *Resourcing and skilling issues*

OneSteel is supportive of Recommendation 7.5 to ensure that the ACBPS and the TMRO are adequately and appropriately resourced to enable each to effectively undertake their respective responsibilities. OneSteel also welcomes the recommendation that "*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.*"<sup>5</sup>

OneSteel has observed that the ACBPS appears to have been impacted by recent budgetary cuts and that the Operations areas within the Trade Measures Branch appears "stretched" in terms of available resources. This situation is detrimental to the applicant's accessibility to the System and to the rigour associated with the anti-dumping investigation process. OneSteel is concerned that in periods of limited resources the rigour of an investigation would be compromised – with outcomes reflecting a lack of forensic analysis and investigative diligence necessary in respect of information sourced from interested parties.

OneSteel is also concerned by the apparent reduction in numbers of ACBPS personnel with adequate experience and policy knowledge of the anti-dumping and countervailing functions. Whilst it is recognised it is difficult to recruit suitably qualified staff, it should also be recognised that retaining experienced and qualified staff within ACBPS is also important. OneSteel would like to see a maximum period of no more than six years duration for investigative staff within the area.

---

<sup>5</sup> Report No.48, P.146.

### *Investigations by other administrations*

The Commission's proposal that ACBPS should indicate in its investigation reports whether there have been any comparable recent cases in other countries and the relevance of those cases to an ACBPS investigation is supported. In recognising that there exist differences between the Australian Anti-Dumping System and those of other jurisdictions, concern arises where one administration makes a decision that is contrary to another administration.

In indicating in reports the outcomes of investigations by other administrations, ACBPS is encouraged to address the matters that it considers accounts for significant differences in outcomes by it and those other administrations.

### *Increased transparency*

OneSteel does not support the recommendation of the Commission to increase the transparency of the magnitude of measures subject to decisions by the Minister. The disclosure of such information may compromise commercial confidentiality.

OneSteel does support ACBPS enhancing its monitoring of anti-dumping measures and obtaining feedback from interested parties on the effectiveness of the measures. It is OneSteel's experience that relevant feedback to ACBPS would assist in understanding whether the measures are being circumvented, or whether the desired impact has been achieved.

### *Access to ABS import data*

OneSteel welcomes the Commission's recommendation that:

*"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."<sup>6</sup>*

The suppression of import data has represented a significant barrier (in terms of cost and resources) in the preparation of an application for anti-dumping measures. OneSteel particularly welcomes the Commission's views that it does not share the Australian Bureau of Statistics' concerns about the "integrity" and the "public's confidence in the security of material provided to the Bureau" when it is conceded that the suppressed information is available from an alternate source.

OneSteel supports the Commission's recommendation to have the issue of confidentiality addressed with the ABS.

---

<sup>6</sup> Report No.48, P.160

## Further changes to the Anti-Dumping System

The Joint ministerial media release encouraged parties to comment any further matters “that may be required to improve the system but were outside the focus of the recommendations”.

OneSteel identified in its initial submission to the Commission two areas where it considers enhancements are required to improve the effectiveness of investigations.

These are:

- (i) interpretation of criteria relevant to ‘market situation’ requirements; and
- (ii) recognition via ministerial guidance on profits forgone and/or reduced market share in a growing market as injury indicators.

## Market Situation

Section 269TAC(2)(a)(ii) details the legal basis for considering whether domestic sales are suitable for normal value purposes.

In December 2008, the ACBPS issued a Discussion Paper on Market Situation (the Paper) that sought to address the test contained in s.269TAC(2)(a)(ii) and provides clarification, as follows:

- requires identification of the situation in the market that makes sales in that market unsuitable for normal values – in this case a government activity that influences costs or prices; and
- a finding that the market situation has rendered domestic selling prices unsuitable for normal values i.e. there has been a material reduction in the domestic selling prices of the goods that is attributable to the market situation.

OneSteel is concerned as to what ACBPS constitutes circumstances for a market situation. A material reduction in selling prices may only be one indication of a market situation. A further consideration involves domestic selling prices at levels below what they might otherwise be, due to government influence on inputs (e.g. energy, water and/or raw materials). The explanation provided in the Paper suggests that the only contemplation of a market situation is where the domestic selling prices have been reduced. This should not be the sole consideration. Government influence (via controls on inputs and/or fiscal policies such as exemptions from taxes) may impact domestic selling prices materially to suppress prices to levels below what they would otherwise be.

OneSteel highlights this matter as a further consideration to the reduction in selling prices suggestion.

OneSteel has previously supported the ACBPS recognition of the Canadian administration’s approach to assessing whether domestic prices are unsuitable – i.e. “whether domestic prices are materially influenced by the government of that country and are not substantially the same as they would be if they were determined in a competitive market”. OneSteel continues to encourage ACBPS to utilise this approach in ‘market situation’ assessments. OneSteel retains concerns with the limiting nature of the interpretation of the following factors by ACBPS in its assessment of a market situation:

- the number of government owned enterprises in the sector under examination;
- whether government enterprises are trading profitably so as to significantly lower prices in the market; and
- the prices of the private enterprises are also lowered due to the unprofitable trading of the government owned enterprises.

It would appear that each of these items is linked and that failure in any one area discounts a possible finding of government influence.

The key consideration in OneSteel's view is whether the prices in the exporting country are lower than they otherwise would be because of the government owned enterprise influence in the sector (as distinct from determining whether prices have been reduced).

OneSteel considers the interpretation of what constitutes a market situation can be improved by:

- replacement of the "significant reduction in prices" criteria when examining the impact of government owned enterprises with an assessment of "whether prices have been determined as they would have been in a competitive market";
- concern that the 'hurdle bar' has been set at an unattainable level so that a market situation finding (e.g. in respect of goods exported from China) is unlikely to be established;
- adoption of benchmarking of prices and costs in investigations where there is more than one country (where it is alleged a market situation is evident in one country), and consideration of surrogate information from a market economy supplied by the applicant;
- recognition that it might not always be practicable to obtain specific written documentation identifying the government's influence or control, which renders domestic selling prices unsuitable, although the prices can be established as artificially low based upon best available information;
- acknowledgment of inquiries conducted by other administrations (particularly Canada and the EU) which confirm the existence of the equivalent 'market situation' in the same industry sector subject to investigation; and
- that in the absence of adequate cooperation from the government of the exporting country, ACBPS may rely upon the information provided by the applicant company.

## Material injury

The consideration of injury matters should take account of profits forgone and/or reduced market share within a growing market, even if sales volumes are improving. OneSteel considers that clarity is required on these matters.

A new Ministerial guideline on material injury is required as to how profits forgone relates to material injury assessment. Article 3.4 of the WTO Anti-Dumping Agreement identifies relevant economic factors and includes "*actual and potential decline in sales, profits, outputs...*". The directive also needs to recognise that a decline in the industry's rate of growth may be just as relevant as the movement of an industry from growth to decline. The directive should also address that it is possible for injury to be evident where an industry suffers a loss of market share in a growing market.