RIGBY COOKE LAWYERS

Submission to the Productivity Commission Referral on Vulnerable Supply Chains in response to the Interim Report dated March 2021

Introduction

This submission is made on behalf of myself (as a Partner at Rigby Cooke Lawyers or **RCL** practising in Customs and Trade) and on behalf of the Food and Beverage Importers of Australia (**FBIA** – see here) which is Australia's peak industry association representing importers of food and beverage. My details can be found here and here. I have been involved in earlier work of the Productivity Commission (**PC**) including submissions by various parties to the PC referrals into the anti – dumping regime, the efficacy of our Free Trade Agreements, the imposition of GST on low – value transactions and the review of the rise of protectionism. I have also been involved in making submissions to State and Federal government agencies and Parliamentary Inquiries. As a member of the Executive Committee of the FBIA I am its representative on the National Committee on Trade Facilitation (**NCTF**) (and its advisory groups) and the International Trade Remedies Forum (**ITRF**) (and its sub – committees). At the NCTF I am the chair of the Private Sector Group (**PSG**) which generally represents the interests of non – government members. This is an unofficial grouping at NCTF which does not preclude members representing their own interest. I am also a member of other unofficial groups conducted by government agencies such as the DFAT Working Group on Rules of Origin and Certificates of Origin. I am also involved in legal bodies at FIATA, the American Bar Association and the New York Trade Customs and Trade International Bar Association.

The FBIA is also separately represented with other advisory bodies for other government agencies such as those conducted by the Department of Agriculture, Water and Environment (**DAWE**) and the Department of Industry, Science, Energy and Research (**DISER**).

On this basis we believe that our submission has substance and while this submission is made on behalf of myself and the FBIA, if there are any differences in opinion, I will identify those differences.

Preliminary comments on the Referral and the Interim Report

1. We are grateful to be given the opportunity to comment in response to the PC's Referral and the Interim Report. The issues raised by the Referral are vital and their importance is also reflected in the subsequent review of certain supply chain vulnerabilities announced by the US Federal Government.
2. We would also be willing to be further involved in the Referral including by further submission or personal appearance before the PC.
3. We note that the majority of the Interim Report tends to focus on the types of goods whose supply chain may be "vulnerable" and appears to conclude (at least primarily) that there are only a small number of goods whose supply chain is "vulnerable" according to the PC's criteria and could be replaced with other locally – produced

goods. In undertaking the Referral we would suggest that the PC adopt a broader criteria around "vulnerability" which takes into account broader issues such as price and quality of goods and that the mere presence of a locally – produced good is not, by itself, grounds to suggest that the supply chain for the imported goods are not vulnerable. It is our view that many imported goods are valued by the end – users and consumers due to their specific qualities, ingredients and benefits. This is particularly the case in Australia with our multicultural society which requires the import of products from different countries of origin. Many consumers have a long – established preference for the imported product which could not be readily replaced (if at all) by locally – produced goods. Accordingly, we believe that the real vulnerability of the supply chain is broader than the primary assessment of the PC.

4. Further to the comment in the preceding paragraph, we request that the PC take into account that many of our exports (especially of manufactured goods) rely heavily on imported goods for which there may not be appropriate local production, evidenced by the large number of Tarif Concession Orders (**TCOs**) and By – laws set out in the fourth schedule to the *Customs Tariff Act 1995* which allow those goods to be imported free from customs duty. It is our position that such goods should be considered as "vulnerable" because of the absence of locally produced goods.
5. In addition, weather and seasonal changes alter the availability of some goods, food and other related products. Accordingly, it is important to be able to source products from overseas not merely from Australia. This reflects a specific vulnerability for the food and beverage imports in the supply chain.
6. We have raised many issues of supply chain vulnerability with the NCTF, the ITRF and the Federal Government's Deregulation Taskforce and government agencies such as the DAWE and the ABF.

Specific additional comments

Please note that these comments are more focussed on the wider focus of the Terms of Reference for the Referral and highlight acknowledged risks to the supply chain.

1. In undertaking the Referral, we urge the PC to assess the specific threats to the supply chain occasioned by infestation of goods by insects and other diseases existing overseas to ensure that they are not introduced. Recent examples can be found in the processes adopted by industry and the DAWE in relation to the Brown Marmorated Stink Bug and the Khapra Beetle. We believe that more resources should be allocated to an "early intervention" and intelligence gathering on such potential risks and their massive possible impact on the supply chain.
2. We are of the view that one specific vulnerability which needs extensive attention are the risks posed by deficiencies and failings in the electronic systems used by the ABF, DAWE and other agencies to report the movement of goods through the supply chain such as the ABF's Integrated Cargo System (**ICS**). The significant disruptions to the supply chain occasioned with the introduction of the ICS and associated new reporting systems in 2005 is a prime example of problems which could arise. Further, the ICS is now quite aged and there is active consideration of the enhancement or replacement of the ICS. We recommend that the PC look at the findings of several reports of the 2005 problems with the introduction of the ICS including the report of

the ANAO and the separate independent review commissioned by the (then) Australian Customs Service so that its final report includes recommendations on a pathway in which similar issues do not arise again.

3. Further to the comments in the preceding paragraph, there has been an increasing incidence of outages and delays in the reporting systems used by the agencies at the border which threaten the operation of the supply chain. This also extends to delays in the consideration of permit applications required for the movement of goods. Both the ABF and DAWE are reviewing their systems and processes to better align their operation, to enhance efficiencies and provide a more "real time" experience for importers and exporters. Their lack of resources, coupled with the slow uptake of technology that may able to assist processes or support human resources (or replace human resources). The delays and interruptions have a significant impact on Australian production schedules. The inability to import or source single ingredients can stop production or require a significant change to production (particularly in relation to food and pet food). These issues need to be addressed and one specific recommendation be that proper allocations of funding and other resources be made to deal with current issues. All agencies are trying to do more with the same or less money. One option to increase revenues could be to introduce a processing charge on self – assessed clearance declarations (known as **SACs**) for "low value" goods. There are currently no such processing charges as opposed to significant processing charges associated with "Full Import Declarations" (or **FIDs**). Effectively, the charges imposed on importers using FIDs cross – subsidises the cost of processing SACs and there has been a massive increase in e – commerce reported through SACs. Such a processing charge on SACs could raise revenue to assist in the maintenance of current systems and developing new systems. It would also reflect that there are the same security and risk issues in the review of SACs.
4. One specific vulnerability for those undertaking imports and exports is the sheer complexity of reporting to various agencies which is the source of review by government agencies towards a "Single Window for Trade". However, development of that initiative has been quite slow and behind other developments in other countries. It is important that the PC supports this development. Although it will take significant time for a full single – window to be developed, there are other interim steps which could be advanced more immediately, such as a "Border Permits Portal" which would allow importers and exporters to have a "one stop shop" to determine what permits are required for the movement of various goods, from which agency those permits can be secured and through which permits or approvals can be sought.
5. In recent times, there have been significant problems with the movement of goods through the supply chain caused by the COVID pandemic, congestion at ports, the unavailability of containers and increased costs. Our estimates suggest that total container freight costs for an Australian importer have risen from an average of $1,500.00 per imported container in 2019 to $5,000.00 per imported container in early 2021. These costs will ultimately be passed onto consumers. Often importers and exporters can only treat charges and delivery times as "estimates" which creates uncertainty on availability of goods. (See here) We would recommend that the PC look at systems for the more transparent availability of information regarding the movement of cargo and containers and eliminate the "bidding" which is beginning in industry Groups such as UNCTAD and FIATA are investing resources in developing

such technology and the PC could recommend additional work on this topic with assistance from the shipping lines and airlines.

6. There is a real and present danger to the supply chain through congestion, increased shipping charges (of all types) by the lines and increasing and unregulated land – side access fees charged by stevedores. This has been raised in many articles and commentaries (including by myself) such as a recent Ai Group paper (here). The ACCC states it has no direct power over rates and land – side access fees (although it raises the issue in its annual Container Stevedoring Report here) and now many of the States are separately moving on these types of issues such as the NSW PBLIS system. The Victorian Government is developing a voluntary scheme on land – side charges and now moving to reform regulation of Victorian ports including creating a new Ports Victoria agency. There was also agreement by National and State Government Departments in November 2020 to advance these issues (see here). These actions should be expedited and co – ordinated as it adds to vulnerability of the supply chain and increases uncertainty and costs – especially for SMEs who are being priced out of the market. My recommendation (supported by a number of parties) is that Australia needs a new regulator such as the US Federal Maritime Commission (see here) . That agency would also have authority over the "reasonableness" of detention and demurrage charges which are ruinous. The FMC also recently published a Rule on such charges (see here) and is now investigating possible breaches. An equivalent Australian agency would be a much – needed body with specialist expertise and powers, serving to fill holes in regulation and removing duplicative and less – effective acts by Federal and State governments.
7. Many in the supply chain (including licensed customs brokers" (**LCBs**)) are exposed to liability for customs duty due to the term of "owner" in the *Customs Act 1901* based on an ABF approach to the term. This differs to GST law where the "importer" is liable. Similarly, liability for amounts equivalent to duty (for goods in bond) and possibly for excise have now been applied to companies, directors, managers and employees of the premises (as in the recent HC *Zappia* case). Similarly, those parties are faced with extensive liabilities to penalties from the agencies at the border including those imposed on a strict liability basis for which Infringement Notices could also be issued. This leads to ongoing uncertainty for importers, exporters and others in the supply chain who could find liability for duties arriving years after the goods are imported and where they have no chance to recover the duty from their end – customers or from other more culpable parties. A similar outcome exists in relation to liability to prosecutions, penalties and Infringement Notices. This could be addressed by reducing regulation to specific crucial issues, paring back the use of strict liability penalties and Infringement Notices and recommending the creation of a programme to encourage younger people to enter the career path of LCBs and other service providers to the supply chain. The relevant population of service providers is both ageing and reducing in size. This is a real vulnerability to the current and enhanced operation of the supply chain. We therefore also suggest that the PC recommend a new and independent review of the vital role of LCBs and other services providers such as freight forwarders and transport companies with a view to preserving and augmenting their position. Their status should be enhanced by Governments. Without such service providers no goods would be able to move through the supply

chain or would move in a less – compliant manner creating a risk to governments and security.

We would be pleased to assist further as required.

Yours faithfully

Andrew Hudson
Partner