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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM

MR P. WEICKHARDT, Presiding Commissioner
MR M. WOODS, Deputy Chairman

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON THURSDAY, 15 OCTOBER 2009, AT 10 AM

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MR WEICKHARDT: Good morning, although some of you might not regard it as a good morning, but it's a Melbourne morning and we're grateful for the rain down here. Welcome to the Melbourne public hearing for the Productivity Commission's review of Australia's Anti-Dumping and Countervailing System. I'm Philip Weickhardt and I'm the presiding commissioner for this inquiry. I'm joined in this public hearing today by my colleague, Mike Woods, who's the deputy chairman of the Productivity Commission and the commissioner assisting on this inquiry and two of our staff team are with us today.

As most of you will be aware, the Commission released its Draft Report on 10 September. We received the terms of reference on 26 March and prior to preparing that report we made visits to a large number of organisations and received submissions from over 30 people. On behalf of the commission and all the team involved, I'd like to thank those people who have met with us and also who provided input and submissions and I thank all those who are appearing at the hearings today. Your input is extraordinarily important to our deliberations and we're grateful for it. This hearing represents the next stage of the inquiry with an opportunity then to submit any written responses to the draft report by Friday, 6 November and we will be providing the Final Report to the Australian Government by 24 December.

We like to conduct all hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason, comments from the floor cannot be taken. But at the end of the day's proceedings I'll provide an opportunity for anyone who wishes to do so to make a brief presentation. Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on issues raised in other submissions. The transcript will be made available to participants and will be available from the commission's web site following the hearings. Copies may also be purchased using an order form available from staff here today.

To comply with the requirements of the Commonwealth occupational health and safety legislation and also to abide with commonsense, I'd just like to let you all be aware of the fact that there are emergency exits signposted with green signs that follow to stairwell steps. In the unlikely event an evacuation of the building is required, please follow the directions of floor wardens and if there is anyone here who doesn't think they can walk down 28 steps, please make that clear to floor wardens when they arrive. Lifts are not to be used.

I'd like to welcome first of all the chairman of the Trade Remedies Task Force, Innes Willox. Please for the record if you'd state your name and position and we have around 40 minutes or so, if you'd confine your remarks to no more than, say, and give us a chance for some questions, that would be good.

MR WILLOX (TRTF): I will be much shorter than that. My name is Innes Willox. I am the Director of International and Government Relations with the Australian Industry Group and also the chairman of the Trade Remedies Task Force which is coordinated by the Australian Industry Group. The Trade Remedies Task Force is a group of around 50 Australian manufacturing companies and associations across a range of industries, including steel, glass, cement, chemicals and plastics. Members strongly support the need to retain a rigorous anti-dumping system in Australia. Members see such a system as an important and legitimate component of an open economy, especially in these tough and challenging economic times.

The Trade Remedies Task Force members welcome the commission's conclusion that Australia should retain its anti-dumping system and the commission's work in making recommendations to make the system work better which in turn will hopefully create an environment in which Australian industries can operate with greater certainty. It can be argued that the existence of a coherent, workable anti-dumping system mitigates against protect of sentiment in industry and unions and indeed in government. The Trade Remedies Task Force appreciates that the commission's draft report has identified a number of ways to strengthen the system, including that the anti-dumping system should remain under the control of the Australian Customs and Border Protection Service and its Minister, that decisions by the Minister should be subject to a 30-day time limit and that the appeals process should be made more robust to increase the timeliness and effectiveness of investigation outcomes.

We also welcome the commission's recommendation that the government convene a working group to examine the close processed agricultural goods provisions. There are several goods where such provisions may be applicable, including currants, mushrooms, hams and orange juice. Should this recommendation be accepted, the Trade Remedies Task Force would welcome the opportunity to provide input to the working group. That said, however, there are several key recommendations of the draft report which cause trade remedy task force members some concern, including that the extension of anti-dumping measures should be limited to one three-year continuation term beyond the initial five-year term. Secondly, that there should be a two-year freeze on reapplication for new measures following the three-year continuation term and thirdly, the proposed introduction of a public interest test.

These proposed changes will substantially reduce access to anti-dumping measures by Australian industry we believe by denying access to relief through measures to address unfair trading practices and introducing measures which are available to competitors in other countries. The Trade Remedies Task Force is also seeking further clarification on practical issues raised in the report, including

recommendations including self-assessment of duties, ACCC consultation, the use and display of potentially commercial-in-confidence information and the current appeals arrangements.

On the continuation of measures, the Trade Remedies Task Force supports the commission's recommendation to maintain the current five-year default term for anti-dumping and countervailing measures. However, the TRTF does not agree with the commission's recommendation that anti-dumping measures already in place be limited to a maximum eight-year term. We believe that it is essential that any review of measures is assessed on a case-by-case basis. We would argue against the imposition of only one three-year extension of measures beyond the initial five-term. The fact is that if the dumping is still occurring measures should not be terminated or restricted arbitrarily.

We also strongly reject the recommendation that there should be a two-year freeze on reapplication for new measures following the three-year continuation term. We believe this recommendation does not duly consider the speed of change and the impact of dumping, even over the short term. This approach would allow dumping for the two-year period which would then mean that Australian industry would have to compete against dumped products without any remedy available to them and the effect on Australian industry could be very serious indeed.

We believe this recommendation also does not duly consider other effects of dumping on Australian industry, including preparation costs and the time required to make an application, the amount of injury suffered, and while preparing an application before an investigation is initiated and that the system already affords the opportunity for a nominal review at any time through which measures may be revoked or amended. There are other approaches which the commission may wish to consider when finalising its report such as the requirement to lodge fresh applications beyond 10 years of continuously imposed measures and if it must proceed with the sunset review, then perhaps it could be benchmarked against other countries' anti-dumping system of a five-year term.

On the public interest test, the introduction of a public interest provision we believe will limit access to the anti-dumping system. This test is used in other jurisdictions but only rarely, including in Canada and the European Union. In the EU the rest is rarely used and often fails where the local industry accounts for a greater volume in sales than in imports, the subject of the application. The proposed public interest test is designed to restrict the imposition of measures where it can be demonstrated there is a lessening of competition. The fact is that every affected exporter and importer will argue a lessening of competition. Where an industry does not account for more than 20 per cent of the local market, it will be denied access to the measures.

By contrast, if an industry holds a significant proportion of the market it will also be denied measures as it would be argued that there would be a lessening of competition. For any industry which overcomes either restriction, it must also be a globally efficient producer, as measures will also not be imposed if the export price of the allegedly dumped goods recovers all costs and some contribution to profit, or the resulting non-dumped price, after the imposition of measures, is significantly below Australia's industry cost to make and sell.

There will also be a lengthening of investigations under this proposal because an application of a public interest will lead to protracted debates on the effects of the measures. There is already an existing mechanism for the Minister to intervene in line with the public interest so therefore we believe there is little need for this additional requirement. Accordingly, the trade remedies task force believes there should not be the introduction of public interest test because this would only add unnecessary complexity to the current system; would add time, cost and uncertainty; will apply a test which is not already used in other countries' administrations and all this would be done without significant benefit to the public interest.

On the matter of further clarification the Trade Remedies Task Force would appreciate further clarification from the commission on the practical application of the following recommendations - we are simply seeking advice on what these recommendations would mean in practice. Regarding the self-assessment of duties, the Trade Remedies Task Force assert that voluntarily deciding duty and normal value will greatly undermine the anti-dumping system as verification is the touchstone of systems around the world. How would Customs ensure the veracity of the self-assessment? Does this approach increase the risk of false reporting? It has been posited in the United States and Canada that misinformation has been provided blatantly and how would this recommendation work with non-cooperative parties? How would they be forced or compelled to cooperate?

Regarding proposed consultation of the ACCC by customs, the question we have is what impact is it thought that this would have investigation time frames. Regarding the Australian Bureau of Statistics suppression of import data, we support this recommendation but question whether it goes far enough. Regarding the publishing of more information on measures imposed, the question is how would customs ensure that greater injury is not caused by the release of commercially sensitive information. Finally, regarding situations where the Minister would receive separate advice from both the Trade Measures Review Officer and customs, the question is how would the Minister arbitrate who has given the most appropriate advice and would there be any plans for mechanisms for the Minister to get independent expert advice outside of that which he has received earlier from the Trade Measures Review Officer and customs.

On the issue of the resourcing of customs the Trade Remedies Task Force appreciates very much the work being undertaken by customs to conduct anti-dumping investigations, but we would argue that they need to be resourced better to continue to do so more effectively. We would argue that customs should receive additional resources to recruit extra staff which would allow for the improvement in the veracity of data collection and analysis to improve the processing time of applications and imposition of measures, to improve transparency through greater feedback to industry and to allow customs officers to better understand commercial realities and to allow customs to access specialist skill sets, especially including forensic accounting and to seek independent expert advice where necessary.

On the whole the TRTF believes the Productivity Commission draft report is a very good strong body of work. We've just raised a few questions which we'd like to seek further clarification, but as we put out in our press release after the report, we believe it was a very worthwhile exercise and we believe it gives us a good platform to move forward from. Thank you.

MR WEICKHARDT: Thank you for those comments. Perhaps I can start and then I'll give my colleague ample opportunity for some questions of his own. I'd like to start on some issues around your comments in regard to the public interest test. You said that you oppose the public interest test and one of the reasons for that is that you don't believe it will have significant benefit to the public interest. Could you just elaborate on that. Is it that you think our test does not give enough weight to the public interest or gives too much weight to the public interest and if it gives too much weight to the public interest, then why wouldn't it protect the public interest?

MR WILLOX (TRTF): My response to that would be to ask in return, how would you define the public interest?

MR WEICKHARDT: That's the overall interest of all the citizens of this country, I would suggest.

MR WILLOX (TRTF): Public interest is always in the eye of the beholder, it's always arguable. It's always going to lead to questions and disputes about what is the public interest in this case. That is where we think there would be a lengthening of time frames, we get into a lot of argument about that.

MR WEICKHARDT: We'll come back to that issue. What I'm trying to understand is if you accept that the public interest is a weighted aggregate of the interest of all the citizens of the country and you recognise that anti-dumping measures do something to help support the manufacturers and parties affected by

dumping but that comes at a cost to others, if you accept that the public interest is a weighted aggregate of the balance of all those things, is it that you oppose the public interest because you think we give insufficient weight to the public interest?

MR WILLOX (TRTF): Again, if you accept your argument that it's the aggregate good being done, then we get into a question of what is the aggregate good. Is the aggregate good the continuation of production of a good or a service in Australia or is it to bring it in from outside, perhaps at a slightly cheaper cost but at the equivalent cost of the loss of jobs, employment, skill sets. These are debateable things. That's why we think in the examples where there is a public interest test in the European Union and Canada it rarely gets used and it often fails there because it is hard to argue.

MR WOODS: Could we take it to - - -

MR WILLOX (TRTF): What we're saying is it's an argument over definition and it's going to lead to more complexity.

MR WOODS: Can we establish though whether in principle of the concept that these measures should improve the public interest for them to be applied? Can we start at that level and then work our way down through the components of it to see whether each of the components does or doesn't help come to that view? But at the level of in-principle, presumably you would only want to apply measures where the overall public good is satisfied.

MR WILLOX (TRTF): Correct.

MR WOODS: So we can start from that position and then we can work our way down then to say - - -

MR WILLOX (TRTF): "But then what is the overall public good?"

MR WOODS: Yes. Some of the clear components of that are the activity generated by local suppliers throughout manufacturing, employment and production and the like and continuity of supply and the various positive components that all of that entails and on the other side you have price raising effects and you have an administrative process and other things which provide an element of detriment to the broader public so it's matter of trying to weigh those up. So we can agree that they're the elements.

MR WILLOX (TRTF): Yes.

MR WOODS: So that then takes us usefully then to say how do we test it and

we've proposed a number of components there.

MR WILLOX (TRTF): Under the proposals companies that have less than 20 per cent of the market are denied access and then companies which have, let's call it a significant proportion of the market are also ruled out.

MR WEICKHARDT: I think you have been a bit looser with your language - - -

MR WILLOX (TRTF): Yes, I'm trying to talk very broadly.

MR WEICKHARDT: - - - than we were in terms of the issue of companies with significant market share because what we said in our report was that there should be a test as to whether or not the imposition of measures would eliminate or significantly reduce competition.

MR WILLOX (TRTF): Yes.

MR WEICKHARDT: The ACCC in the past has opined that where imports represent 10 per cent of the market that they are reasonably relaxed under normal circumstances, that that provides sufficient, I guess, check and balance on the local industry in terms of being able to exert any monopoly power. So 90 per cent is a pretty significant share. The figure at the other end was a figure that - interestingly you quote the EU test. The EU have a similar test and apart from the exception of companies that are in a start-up mode, which we specifically refer to, it is simply to say if you're protecting a very small manufacturer the benefit to that manufacturer in overall economic terms has to be small, the cost to all the other users who are importing at least 80 per cent of the needs of that particular market is quite high and so there is a weighing effect here of how much good are you doing to one versus how much cost is there to all the other users.

MR WILLOX (TRTF): It's always a weighting game.

MR WEICKHARDT: Absolutely.

MR WILLOX (TRTF): But from our examination and discussion in the EU, as I said, the test usually fails.

MR WEICKHARDT: When you say the test usually fails, do you mean that the test is rarely applied?

MR WILLOX (TRTF): Rarely applied, exactly.

MR WEICKHARDT: I think in our report suggested that the initiation of the

public interest test in Australia should be on the basis that there was a presumption that measures would be applied unless things got through these particular check lists. We start off with the presumption that most cases, as in the EU, would probably get through this check list. It's only to sort out the more, if you like, egregious cases that we think is an important issue.

MR WOODS: Would you characterise our test as overly draconian? I know you've got to argue certain elements of it but I don't think we've hit the spectrum of, "Let's try and cut out all cases where possible."

MR WILLOX (TRTF): No. I was just going to say to the commissioner's comment that it's for the more egregious cases, that maybe the aim - and it may well be a laudable aim, our question would be, but if it's there, then it is there and accessible to all. Once you put something there, maybe to deal with the more egregious cases, it still overlays the system and isn't an option to be pursued.

MR WEICKHARDT: It is. You have suggested, I think, in your presentation that it could be one that involved lengthy and intractable debates. We didn't see that at all. We saw this as being a fairly quick check list that customs could apply that would be done and dusted in 30 days. The ACCC would be asked to advise very early on in the case, so if you take the entire period before the public interest test would be applied, you've got a considerable period I think the ACCC would be able to meet quite easily and we don't see it leading it to lengthy debate. This would be a series of checks that could be satisfied reasonably quickly and cleanly.

MR WILLOX (TRTF): I think from members' experience nothing in this is quick and clean. I think that would be the overwhelming view.

MR WEICKHARDT: It is a whole issue, isn't it, one involving judgment?

MR WILLOX (TRTF): Yes.

MR WEICKHARDT: But we tried to make these and we would intend that there would be guidance notes associated with these that would make the interpretation of this test reasonably straightforward compared to a lot of the other judgments that are made in the whole process.

MR WILLOX (TRTF): I think where the concern is that people who have been dealing with this system for years and years have got somewhat jaundiced about the ideas of quick resolution and the very thought of the imposition of another test overlaying the process I think makes them want to run screaming from the building.

MR WOODS: You have focused on two of the tests and as I would agree with my

presiding commissioner that your portrayal of our first one was perhaps a little looser than us where we talk about eliminate or significantly reduce but we've dealt with that and then at the other end of the market where there's less than 20 per cent. There are a number of other tests there, are there any others that you would particularly want to focus on and draw our attention to some of the consequences of them or, in your view, if there is to be a public interest test, do they seem a reasonable set of tests?

MR WILLOX (TRTF): If you were to go down this path, I would only re-raise our very strong concerns that what you are going to then get is a lengthening out of the process which companies and organisations have already invested a significant amount of time and effort and money to get redressed. We've discussed earlier, these are not raises willy-nilly these cases, they're well researched and they're as well researched as possible and encompass a lot of money being spent on lodgment of applications.

MR WEICKHARDT: Can I just test where the lengthenings are going to occur? We've said a 30-day time line, are you saying you think that is unrealistic?

MR WILLOX (TRTF): Are you saying that the 30 days is in addition to what is already done or is it incorporated in the - - -

MR WEICKHARDT: 30 days is in addition to what's already done but with provisional measures put in place as soon as the preliminary affirmative determination is made.

MR WOODS: So the application of measures would start at the 60-day time.

MR WILLOX (TRTF): So 60-plus?

MR WOODS: Yes, 60-plus but in that category.

MR WILLOX (TRTF): So there are numerous examples which you will be aware of where cases have got to point X and then suddenly an extension has been thrown in, it's just what happens and it's frustrating and annoying and I think the concern is that we would once again have another - you know, 30 days can easily become 60.

MR WOODS: We have a statement of essential facts at 110.

MR WILLOX (TRTF): Yes.

MR WOODS: So there are milestones even in that process.

MR WILLOX (TRTF): There are checks, I acknowledge that, but there are, once this process has started, easily ways and means to have things lengthened out.

MR WOODS: When you're putting your final submission to us, we understand though you have an in-principle objection that you may or may not want to maintain - - -

MR WILLOX (TRTF): Concern.

MR WOODS: Concern about public interest tests but if you could then go beyond that and take yourself to the position that if there was to be one, if you could work through those individual tests and also give us some guidance on, given your expert knowledge in how firms operate, where you think that they could potentially be gained.

MR WILLOX (TRTF): Yes.

MR WOODS: I think that would be helpful to us in understanding the consequences of the application of those tests because you do have members that play both sides of the fence in general terms.

MR WILLOX (TRTF): Yes, absolutely.

MR WEICKHARDT: Can I turn then to the issue of continuation measures. You rejected our recommendation that measures be limited to a maximum of an eight-year term and you've suggested if dumping is still occurring measures should not be terminated or restricted arbitrarily. I guess that brings us to the nub of the issue and that is if measures are in place it's highly unlikely dumping will still be continuing and so continuation is at the moment necessarily adjudged on the basis of whether or not there is a threat, that if the measures were removed that dumping would continue. As such, it is highly judgmental. It just has to be so.

It seems if you're trying to strike a balance of fairness between those people downstream who are paying higher prices as a result of measures being in place, as opposed to the company that's being supported by those higher prices, that it's at some stage you have to test whether or not dumping would indeed continue. It seemed bizarre to us that there are some cases and measures being in place for 20-plus years. In one of those cases it's an industry I'm quite familiar with. It's a highly cyclical industry. It strikes me as being extraordinarily unlikely that during that 20-year period there weren't times when the market was sufficiently tight that dumping would not have occurred if the measures were withdrawn.

Yet on the basis of an argument that I assume was put, the threat of dumping

was asserted and it just seems that if you're trying to strike a fair balance between the needs of the downstream customers and the needs of the upstream supplier, you've got to occasionally test whether or not the fear of dumping continuing is real or not.

MR WILLOX (TRTF): Point taken and accepted. But there are numerous examples too of where dumping resumes almost immediately. You then have to restart the process which again, from our members' perspective is costly in terms of time. It's not a common occurrence but it's a fairly regular occurrence where this happens, where measures are lifted and then the old process resumes again. Again, I would say to your point, yes, it is a matter of finding the right balance but experience tells our members that once the restrictions, if I can put it that way, are lifted then everything goes back to square one and we start the process again.

MR WEICKHARDT: That can't be the case in all cases because not all cases are renewed.

MR WILLOX (TRTF): No, exactly. But there is enough of a concern among our members that it does happen frequently enough for it to be a concern.

MR WOODS: So again it's not an absolute issue, it's how to strike the right balance because one would argue that after eight years either it is an industry which does have this cyclical pattern and therefore there will be dumping, whether it's opportunistic or over an extended part of a cycle or in fact there's some structural event that's occurred in the marketplace which should be examined in its own right to test whether anti-dumping is still the correct response.

MR WILLOX (TRTF): We would agree with that. The question to you is - I mean, if you wanted to come up with an arbitrary eight years, the question would be, why eight years? Why not 10 or 12? It's a judgment, I assume, that you've made. It's the rationale behind that judgment is what we've tried to explore.

MR WOODS: In the first case we've accepted that if dumping can be shown to be occurring and there is no public interest that overrides that, then a five-year is the most appropriate first start, that has been a common industry practice, it's a common international practice and we see that that continues to be appropriate. It is then a question of, well, if after that period of protection there remains the threat, how soon should you test the market reality of that and we've opted then for first of all meeting the test for a continuation, but then the three year is a judgment but it is founded on that first five years as an appropriate start.

MR WILLOX (TRTF): Could there not be another mechanism where after the three years or towards the end of the three years there was an opportunity for it to be re-examined?

MR WEICKHARDT: Well, you raised the issue in your comments about lodging a fresh application beyond 10 years. What did you have in mind by "a fresh application" and how would that differ to the applications that are now made for continuation?

MR WILLOX (TRTF): What we are looking at there is again, what has happened in the meantime, in the 10-year period? Is there anything that has demonstrably changed to alter the situation? That's the question that we're putting out there to think about.

MR WEICKHARDT: How would that application differ from - - -

MR WILLOX (TRTF): Differ from the original?

MR WEICKHARDT: - - - what is now put up as the application for continuation?

MR WOODS: Is there some way of strengthening that so that you actually get some demonstration of market behaviour rather than at the moment with continuations it's an assumption?

MR WILLOX (TRTF): Again, you can look at the evidence based in the meantime, that's what we're looking at, how have the circumstances changed.

MR WOODS: I guess that's not overly convincing me at least but it would significantly differ from a continuation process. I'd be looking for something more rigorous. If you can turn your mind to that again.

MR WILLOX (TRTF): Yes, we'll have a good look at that.

MR WEICKHARDT: The other comment you made is that there are significant risks to the Australian industry by this approach. I think you used words like "disastrous" or something of that sort and I guess we are bound inextricably to follow a WTO process for putting measures in place. Australia already has the fastest scheme in the world, but we know it takes in practice - by the time companies have lodged an application, got all the evidence they need and got measures in place it's probably going to take at least 18 months, maybe two years.

So companies have got to, if you like, regardless of whether we change the system, have enough resilience to be able to survive and, to a degree, part of our public interest test which you have commented on is a test of whether or not companies are internationally competitive. There is sufficient evidence that some of the manufacturers who have in the past had dumping measures put in place are no

longer in existence despite the dumping measures being put in place and one would have to guess that those companies, as tariff assistance has come down, haven't been able to, if you like, survive the rough and tumble of an internationally competitive marketplace. The question is therefore, again looking at this balance of a benefit to the upstream industry versus the downstream customer, that the upstream industry has to be robust enough to ride with a few punches otherwise they won't be there, even given the current system.

MR WILLOX (TRTF): Correct. There's no argument with that. However, the very existence of the dumping system gives companies an opportunity to either restructure, re-evaluate their business or work through their business, eliminates where applicable what would be deemed I think universally as unfair competition in the local market. But we're all part of a global supply chain, we recognise that. There's no argument with that. But what the argument is is that if you're being dumped upon, it doesn't give you an opportunity to stand on your own two feet and fight fairly in a fair, competitive environment.

Now, it may be correct - and it is undoubtedly correct - that companies have gone under or shut down despite the imposition of measures. But the dumping system has given them that opportunity to at least restructure or work out how to fight fairly and that is all that we're asking for; nothing more or less. As I said, we're in a global supply chain, we're in an ever-changing global economic environment, everyone is aware of that. It's just about basically getting a fair go.

MR WEICKHARDT: Just on another matter of confidential information, you've asked the question how will customs ensure greater injury is not caused by the release of commercially sensitive information.

MR WILLOX (TRTF): Yes.

MR WEICKHARDT: Do you accept there is a balance here that there is information at the moment which is not available which actually would be helpful to both the manufacturers who are, if you like, applying for measures as well as the downstream users, as well as importers, as well as members of the public? It is at the moment very much a black box. Whilst it recognised some of this information might be commercial-in-confidence, it struck us that at the moment it is sufficiently opaque as not to be very fair to anyone.

MR WILLOX (TRTF): I would agree with that, but I would turn it around the other way and the question is, how much information needs to be released. That's the question we have, that's the concern.

MR WEICKHARDT: If I could turn that question back to you in your final

submission, if you accept there is a balance and that some more information would be helpful to your members as well as to others, then perhaps you might suggest to us where that balance might best be struck.

MR WILLOX (TRTF): Yes, okay.

MR WOODS: Can I go to the one at the top of that page on clarifications regarding self-assessment of duties. We, in our draft recommendation, referred to spot audits and the possibility of penalties for false reporting and I'm just wondering if behind your questions is an underlying disquiet with the concept of annual reviews and updates so that you get some symmetry of treatment of when imports occur or do you accept the principle of it and are just wanting to ensure that the process is the most efficient process?

MR WILLOX (TRTF): The latter.

MR WOODS: So the concept, you're quite happy that we should move to a symmetrical arrangement up and down?

MR WILLOX (TRTF): We're just raising questions until there is some more information.

MR WOODS: Okay.

MR WEICKHARDT: I'm assuming you believe that your members will provide fair and true self-assessments.

MR WILLOX (TRTF): That's what we always expect, commissioner.

MR WEICKHARDT: We've got a number of other systems that fundamentally depend upon that sort of self-assessment, the tax system is one.

MR WILLOX (TRTF): Yes.

MR WEICKHARDT: I think the evidence is that from such systems provided people speak softly but carry a big stick, you can make such systems work.

MR WILLOX (TRTF): Yes, granted.

MR WOODS: With the ABS we have made our representations to the review panel looking at those issues and where they come to, it's an open question at this stage.

MR WILLOX (TRTF): Yes, we raise it as a question.

MR WEICKHARDT: Again, if you believe it doesn't go far enough, if you've got some suggestions as to how it could go further and yet protect the confidentiality upon which, if you like, the ABS and all statistical organisations around the world depend on it, then - - -

MR WILLOX (TRTF): We'll put in some views.

MR WEICKHARDT: - - - again some suggestions would be greatly appreciated.

MR WILLOX (TRTF): Yes.

MR WOODS: You've put in your proposal here, "Advocacy for greater resources for customs." We phrased ours in terms of "appropriate level" which is what you would expect from us.

MR WILLOX (TRTF): We were looking at things like language skills, forensic accounting skills and the like. At least if they don't have them in house at least giving them the opportunity to go to an appropriate place to get more flexibility.

MR WOODS: There is a significant administrative cost of this process already. If that cost were to be increased but to produce a more appropriate outcome, would you then follow that through saying that the beneficiaries of that more appropriate outcome should therefore be meeting a greater cost?

MR WILLOX (TRTF): There's a cost in everything. If cost is a better or fairer outcome and participants are aware of it, well, then I'm sure they would be willing to at least bear some of that burden.

MR WOODS: Okay.

MR WEICKHARDT: You also raised an issue about how would the Minister arbitrate about who's given the most appropriate advice. I guess the way Ministers always arbitrate, they presumably use their brains and their judgment.

MR WILLOX (TRTF): We just raised it as a question, if there be a formal mechanism or - - -

MR WEICKHARDT: We thought the Minister would use his or her best judgment based on the evidence before them and we didn't see that the Minister would call for separate independent advice, but the Minister would take the advice from customs and from the TMRO, presumably the Minister would be at liberty to, if you like, talk to both of those parties to elaborate on issues that he or she was concerned by but we

didn't see them being subject to calling for another consultant's view.

MR WILLOX (TRTF): No, it was a question we just raised.

MR WEICKHARDT: Okay. Thank you very much indeed for your input.

MR WILLOX (TRTF): No problem.

MR WEICKHARDT: We're now going to adjourn briefly for morning tea and our next participant is the Law Council of Australia and the Law Institute of Victoria and we will start again at 11 o'clock. Thank you.

MR WEICKHARDT: We will now resume the hearings and the next participants are the Law Council of Australia and the Law Institute of Victoria. Welcome, if you could please give your name and positions and the roles in which you are appearing. We've got in total about 45 minutes, if we could leave at least 15 of those for discussion, that would be appreciated.

MR PERCIVAL (LCA): My name is Andrew Percival. I'm Deputy Chair of the International Law Section of the Law Council of Australia and I appear in that capacity. I thank the commission for letting me appear.

MR HUDSON (LIV): I am Andrew Hudson, I am the Chair of the Internal Law Section of the Law Institute of Victoria and I appear in that capacity and thank the Commission for the opportunity.

MR PERCIVAL (LCA): We intend to respond to the draft report with a further submission in due course but we thank you for the opportunity to perhaps raise and discuss a number of the issues that have come out of the report. We have provided a brief summary of our response to the recommendations and I think probably you can glean from that that generally we're supportive of the direction that the commission has taken with Australia's anti-dumping legislation.

We're particularly supportive of the introduction of the public interest test and we're supportive of the way that has been structured and the way it's proposed to be structured which is working in a way which would balance issues of fairness. There are a number of issues or recommendations that we are not supportive. Probably the first one is we note that no economic modelling was done and I'm not clear why that wasn't undertaken by the commission. We would have thought, not necessarily on perhaps a global level, but perhaps even just looking at some instances where dumping measures had been imposed in particular cases to assess what those effects were through the local industry, what the downstream effects were, what the long-term effect on that industry was. I think you mentioned in your report a number of frequent users of anti-dumping industries; those industries have ceased to exist and manufacturing operations moved offshore. We're trying to look at a balance, whether really the current system or even the system as proposed will actually operate to effectively benefit those seeking to take advantage of it. We certainly, on I suppose the evidence that we've seen or are aware of, are not necessarily convinced that it actually does benefit those seeking to take advantage of the anti-dumping system through the imposition of measures.

The other area which is of concern to the Law Council is in connection with transparency. I think in our submission we suggested introducing possibly a system like the protection orders they have in the US or something similar to enable

certainly representatives of the parties, whether it be the local industry importers or exporters, to actually have access to the confidential information. We believe that would provide for a much more robust and transparent analysis of the issues. At the moment, notwithstanding the public file, it is very difficult to do that sort of analysis. You're really looking at only half the case. We would strongly urge the commission to perhaps reconsider that.

MR HUDSON (LIV): As you will see from the material that was delivered to the commission yesterday, the Law Institute and the Law Council are very much of the one mind in response to the recommendations. Our response to the commission at this stage basically essentially focused on a number of the recommendations with a couple of additional comments and I think they very much speak for themselves. Generally we endorse and probably encourage a number of the recommendations, but we do share similar views, in fact identical views, to those expressed by the Law Council. So they have come together by way of collaborative work, as you'd expect, the Law Institute being a constituent member. But Andrew and I both sit on a couple of the same committees, so we've done a lot of work, as well as doing this sort of work in our professional capacity, so we do share these views.

The national interest test, in the way which it's been explained and expressed by the commission, we believe has some merit, but I think there is some analysis which is worth doing in respect of the effect of the measures and whether they in fact benefit the parties who are seeking the measures. The administrative protective order we think is good because we think from a practical perspective, it is difficult when you're defending, for example, a dumping application where you really don't have all the detailed information on which you'd like to be able now to respond. Now, that's not just lawyers speaking, that's from a practical and a commercial perspective as well.

MR PERCIVAL (LCA): There's another area, and perhaps I could refer to it, is a suggestion that the Australian Law Reform commissioner look at ways in which import data could be released by the Australian Bureau of Statistics. I'm not certain whether that is where the same information is available overseas, or overseas other jurisdictions provide import data and it's to match it, and I wasn't entirely clear from my reading of the draft report.

MR WEICKHARDT: Perhaps we can clarify that now because I in turn didn't understand your comment back again. Our concept was that if the industry is publicly available, albeit perhaps after paying costs and with delays, but if the information is publicly available from an overseas source, then it doesn't seem very helpful and doesn't serve any useful service to suppress that information in Australia. So where somebody will make a case to the ABS that, for example, the US export statistics were available and would show for the particular tariff code concerned the

exports from the US to Australia show volume and value, then what useful purpose does it serve to suppress that information in Australia? Now, that's not a perfect solution but it would seem to us to be a recognition of the practical facts of the matter that in some cases this information is available publicly anyway.

MR HUDSON (LIV): It may not exactly correspond. I think all of us who practise in the area are aware that export statistics don't always match import statistics. Classification codes might be different. There may be compelling commercial reasons - - -

MR WEICKHARDT: Are you saying the tariff code would be different?

MR HUDSON (LIV): It depends on the level to which you go and how far down the statistical path you go. But it may well be that the amounts reported and the values reported occasionally don't necessarily correspond for a whole range of reasons, so there are some issues associated with that. So I guess should that proceed to be the case, one of the issues will be the reliance on which parties put on those export statistics.

MR WOODS: Doesn't that just put a caveat on the use of the data as distinct from having the data made available?

MR PERCIVAL (LCA): Yes. If the data is available overseas, whether you pay or not - and then presumably the way the ABS would make it available here would be at an aggregated level. I suppose the only concern is that if you've only got one importer, then you'd probably have a fairly clear idea what they're importing into.

MR HUDSON (LIV): But there is a corresponding issue which arises out of that in respect of the use of overseas findings - and I think we addressed these in our submission - in similar cases. There's a classic example on the record at the moment in respect of the aluminium extrusions case, where a lot of reliance has been placed on the Canadian findings. I'll get away from specifics because I'm involved in that matter, but I think the fact is, what we've put in our response is that we have concerns about over-reliance or undue reliance on overseas measures or overseas findings in our jurisdiction. They're out there of course but it still merits the usual comprehensive response.

MR WEICKHARDT: But do you accept that it would be a bit myopic to simply ignore entirely, not even read, refer to and look at that overseas evidence because that seems to be the current practice.

MR HUDSON (LIV): The overseas evidence, in respect of markets and injury and so forth, wouldn't be relevant. You've got entirely different markets, you've got

entirely different pricing systems. I think in respect of issues such as the presence of subsidies or countervailing-type offending processes perhaps, as long as they're - but that assumes also a certain level of investigation in the overseas measures. That assumes that it's been undertaken perfectly. It assumes a certain evenness in those processes.

MR PERCIVAL (LCA): I believe, and I think it would be the current position, that the outcome of an investigation in a different jurisdiction is a relevant consideration and you can get some guidance from it and that's probably the highest I'd put it. The Australian authorities would still need to do their own investigation, establish their own facts and work out, under our system, whether the subsidies exist and the dumping is occurring. But no, I don't think one just totally ignores what's happening overseas.

MR WEICKHARDT: If you could, in your submission, use some qualifying words of where you think account should be taken as guidance, background, or you use words that you think would be appropriate, that would be helpful to us.

MR PERCIVAL (LCA): I suppose the indication and the current one with the extrusions is that heavy reliance has been put on the Canadian findings on subsidies.

MR HUDSON (LIV): Admittedly at a prima facie stage only. We understand that.

MR PERCIVAL (LCA): That can obviously provide some guidance.

MR WOODS: There is a difference between countervailing and anti-dumping in that sense, that we are dealing with the one government with one set of policies.

MR HUDSON (LIV): And we are dealing with some similar exporters too. There are some allegations of countrywide measures and so forth.

MR WOODS: But we've formulated a set of words in our recommendation point 6, but if you could give them close scrutiny - I don't think we'll resile from the principle behind them and I don't hear you objecting to the principle - - -

MR HUDSON (LIV): No, they can't be ignored. We're not operating in an international vacuum.

MR WOODS: If there's some refinement to that that you would wish to propose, we'd be happy to reflect on it.

MR PERCIVAL (LCA): Again, I know in some cases, certainly from applicants' point of view, they have pointed to other investigations on findings of dumping and

draw the inference that because it's happening somewhere else, it must be happening in Australia, to me, particularly on the dumping side of it, customs authorities really need to do their investigation to work it out.

MR HUDSON (LIV): I would endorse that. Also, the notion that some applicants on occasions have looked at the effects on markets and overseas markets and said, "In the overseas market, there's been continuing damage and it's likely to continue and therefore the same applies here," we just don't necessarily accept that one would follow the other automatically.

One thing I might like to address, if that's okay, was the issue of resourcing. We have addressed it in our submission and we have addressed it in our brief response, but we wholeheartedly endorse the role. Inasmuch as I think our submission suggested that there be a different procedure in respect of reviews and a bicameral-type arrangement, that isn't in fact the ultimate recommendation or the way the commission leans. Certainly our view is that the Trade Measures Review Office does a terrific job and it's a very important job and its just should be endorsed and I think enhanced.

MR PERCIVAL (LCA): I think we support the recommendations that the TMRO reports to the Minister and the Minister makes a decision on that advice, rather than a continual loop that tends to go on.

MR HUDSON (LIV): Also the resourcing issue though - - -

MR PERCIVAL (LCA): Yes, resourcing, I suppose that's more a matter for the government.

MR WEICKHARDT: Yes. I guess none of us as taxpayers want infinite resources - we use the word "appropriate" - and that will always be subject I guess to judgment.

MR WOODS: Can I go back to the APO discussion. We do deal with it in the report and we do draw heavily - and thank you for your input - in the conclusions we've come to. We ourselves suggest that the Willet review may have overstated arguments against their introduction and come to certain conclusions there, but for the purposes of this draft, we came out with, on balance, that it should not be introduced at this time. We raised in our discussion a question of whether access need only be by the legal fraternity, whether other suitable experts - certified accountants or auditors - could be party to such a process. Do you have a comment on that, an objective, unbiased - - -

MR PERCIVAL (LCA): We always like the law profession to be a monopoly, but no - - -

MR WEICKHARDT: I assume if this were the environment, you would be declaring a conflict of interest in your views on this issue anyway.

MR PERCIVAL (LCA): To me, the extent to which representatives - whether it's auditors, accountants and others - be permitted to have access to it really goes to what are the sanctions under the APOs.

MR WOODS: Debarrings or whatever.

MR PERCIVAL (LCA): Because obviously for us, those sort of breaches are profession ending, so the sanction there is quite high. That's where I'd be looking at if I was going to extend it beyond the legal profession saying, "Yes, what is the effect of an APO and the breach of it?" so that there was confidence in the system.

MR HUDSON (LIV): But there's also an issue too that the sort of information you might wish to disclose under the cover of an APO is often quite technical in terms of financials and figures and so forth and that's probably not an area where lawyers would probably be relying on third parties or clients who would be relying on accounting and auditing experts to review that material.

MR WOODS: So your concern would be with the integrity of the system.

MR HUDSON (LIV): Yes.

MR WOODS: That follows easily in your case, and how would you get an equivalent sanction applying to other experts.

MR WEICKHARDT: On that score, you've suggested that the benefits would offset the costs. Do you have any sense of what the additional costs would be in a typical case if you had an APO system?

MR PERCIVAL (LCA): Not really. Obviously reviewing the confidential information would take further time, so there would be costs associated with that. I personally believe that the benefits in better decision-making would outweigh the costs. I don't really think that they would be significant. A lot of the costs actually goes in putting the information together, particularly in a dumping case where you're putting up the exporter questionnaire and that sort of assistance and doing the verifications, where a lot of the time the costs are involved. To be presented with some sets of accounts and to review them I wouldn't have thought necessarily involved a lot of costs. I see the benefit though of being able to respond to it.

MR WEICKHARDT: I don't want to overstress - this could be coincidental- but I

think yours was the only submission that actually suggested that an APO system might be put in place. Do you have any comment as to why other participants don't see on balance the net benefits of an APO system?

MR HUDSON (LIV): Just on that, this is not something that we've put in for the - I think with the joint study, the submissions put in on the joint study raised this issue as well and it's an issue that's been, as far as we have hearts, close to our hearts from the perspective of the transparency. But yes, I would not be aware of why others may not have addressed it.

MR PERCIVAL (LCA): No, I actually find it surprising that they haven't mentioned it because I know some of the people who have put submissions in and certainly in some of the industries that I've represented have often complained and commented on the fact that we're only looking at half a case and it's difficult to actually put in a response to customs which does the proper analysis on both sides. So I find it surprising that nobody else has.

MR WEICKHARDT: Although I'm professionally completely unequipped to do so, let me comment briefly on your issue on modelling. You're not the only participant today to comment on the fact that there is a lack of modelling, but I think I can confidently say my economic colleagues say that on an economy-wide measure, modelling this would be lost in the machine noise of even a Cray supercomputer, and when you've got the answer, what would you do with it? You seek the answer, but what would you do with it?

MR PERCIVAL (LCA): Yes, I suppose where I was coming from was not necessarily doing the economic modelling - though I understand the argument you're putting - but it was looking at the instances where measures had been imposed in a variety of industries, whether it was the chemical manufacturing, and seeing what effect - you know, what could have been done with discussions with relevant industries as to were prices affected, was there import substitution? Did the industry seek the measures as a last gasp? That sort of analysis, I thought, could have been done, and perhaps it has been done, but that to me tells me whether the system, through imposing these measures, is actually working and is actually conferring a benefit for those applying for it. To be honest, certainly those industries where I've been involved in dumping measures, I struggle to see the benefit that the applicants have actually obtained from it.

MR WEICKHARDT: That's a sentiment that was shared with us a number of times in our informal discussions. I asked a number of companies, "Having been through the process which cost you time and money, how did you see the cost-benefit analysis?" and most said, "We don't know." Now, of course, in many cases you don't know because you don't know the counterfactual, it's impossible to

know in business, but in other cases they don't know because the outcome is not very transparent. People have to deduce in many cases how big the effect should have been and nobody at customs have all the facts in these cases. That's an issue that we think ought to be resolved because customs don't monitor on a regular basis the impact of the measures. They know whether they're collecting the duty or not but they don't monitor the impact of the measures in the marketplace. The only people that have any, I guess, ability to monitor that are the industries the measures are supposed to be supporting, but the industry doesn't know how big the measures are in many cases, so it's difficult for them to really have a firm indication as to how much benefit they should be or could be getting from them.

MR HUDSON (LIV): There is the related issue that if the measures are put into place and the applicant or the applicant industry continues to suffer damage or injury, I guess the question is then asked: was the original analysis correct, in the perspective of you put the measure in place, the industry is still suffering. It may well be that in fact that causation or that materiality issue might have missed the mark, for example, or needs to be looked at again, because leaving the measure in place, there are some difficulties. So the idea of reviewing it and reviewing the impact I think has merit.

MR PERCIVAL (LCA): I certainly support the recommendation that there be regular reviews and I like the idea of, for example, exporters perhaps, once they have actually responded and have an exporter questionnaire, they would know the form in which customs likes information. As they continue to export, presumably they can collect that information and make it available to customs with some supporting evidence as may be necessary.

MR HUDSON (LIV): Certainly presumably it would be open to the applicant or the local industry to provide details of what it perceives is the effect of what's happened to its market as a result of post the measures and indeed whether there have been others of a counteracting type as well.

MR PERCIVAL (LCA): As I think you make the point in the report, measures are often put in place and not reviewed, not only within the five-year period but also on continuation, which sort of defeats the purpose of having them there in the first place.

MR WEICKHARDT: Okay. You made a point in your written summary that you don't believe that updating measures should be automatic but should be optional, so only importers or exporters who avail themselves of the option will get it. That somewhat mystifies me. Could you elaborate on why?

MR PERCIVAL (LCA): I suppose probably at a practical level, it depends how

the measures are put in place. If the exporter has participated in the investigation, they will have measures specific for them. There are other exporters who may not have participated and they just get whatever the general rate is. For those that have participated, they might decide it's not worth it to annually update the measures, in which case you wouldn't be in a position to force them to do it. That's why I saw it as being an optional one; it's something which is an inducement to get them to do it and they get a substantial benefit if they do participate, and if they don't and elect not to, their measures just remain as is, in my view.

MR WEICKHARDT: I guess an exporter that decides it's all too hard and withdraws from the market as a result of measures being imposed might see the annual review as being completely pointless; in that case, I guess you could try and find some sort of simple proxy that might update and refresh the measures. In some industries there are international indices of prices that might give you a proxy for renewing a measure.

MR PERCIVAL (LCA): Yes, I mean, there are indexes around from various products.

MR WEICKHARDT: Right. In other cases where the exporter was still keen on taking the opportunity, if the market situation changed or was still exporting to Australia, then I find it difficult to see that they wouldn't be interested in making sure that the measures were relevant, and avoiding having to go through the complex process of applying for refunds.

MR PERCIVAL (LCA): Certainly the exporters that I am aware of, if your proposal was in place, they would avail themselves of it in preference to paying the measures and then getting the refund. I know in cases I've represented, they would get pretty much a hundred per cent refunds. So actually having the measures adjust to me makes a lot of sense.

MR WEICKHARDT: Okay.

MR PERCIVAL (LCA): If I could go to one of the recommendations, and that was a proposal for customs to publish the applications that did not result in initiation and identified the - - -

MR WOODS: Countries and products as well.

MR PERCIVAL (LCA): - - - countries and products. I must admit, I was sort of perplexed as to what objective was being sought there, apart from just saying, "Well, in the past year, we've had 25 applications which didn't succeed." I'm not certain what the benefit was in identifying the countries and the products.

MR WEICKHARDT: It was put to us by some participants, and we don't know the extent of this, but it was put to us that some companies attempt to use the threat of taking anti-dumping action in a strategic manner, but they assert they are going to take action and by doing so, they try to gain a strategic advantage for themselves. The degree to which this takes place, we don't know. It would seem in many cases the costs and time even involved in putting a submission in place was a fairly big hurdle over which people would have to jump, but we felt to highlight whether or not that strategic activity was taking place or to dispel the myth, if it's not taking place, that publicising the information of who had applied and in what products might just lift the veil that applies over this whole area and a bit more.

MR PERCIVAL (LCA): I'd be surprised - the people putting applications in as a threat, just given the thresholds for the time and money. To actually spend a considerable amount of time and money to get an application, you'd generally want it to resolve in an initiation.

MR WEICKHARDT: And on the other side, why are you concerned by the extra transparency of who put in applications?

MR PERCIVAL (LCA): It seemed to me that identifying potentially importers and exporters of a particular product in a particular country as possibly being dumped or in the opinion of an Australian applicant of being dumped is a little bit, I describe, unfair, when there's no evidence at that point in time that it has been done.

MR WEICKHARDT: The fact of the application being withdrawn presumably suggests that there's not enough evidence to suggest they've been dumped.

MR HUDSON (LIV): Any number of things could have happened. There could have been a takeover, there could have been corporate decision changing. I guess the issue is what value or what purpose would that serve if there had been 10 applications but none of them have proceeded. What conclusion could be drawn from that? I sort of struggle a bit with the merits of that.

MR PERCIVAL (LCA): Also, if, for example, the product that is being imported from a country which gets named is used in downstream production, will it have the effect of those downstream producers switching to other suppliers because of nervousness by them because somebody has pointed out the potential? I just don't know the answer to that.

MR HUDSON (LIV): I guess in litigation more broadly, a lot of people threaten to take proceedings and a lot of people initiate and then withdraw. Those things don't necessarily establish - - -

MR WOODS: But you would admit that sometimes that is for strategic reasons.

MR HUDSON (LIV): Look, it may be.

MR WOODS: There are a whole range of reasons, but one by some parties is to have a chilling effect on the situation for the other party and because this view exists in the marketplace and there's no data to test it, we were inclined to say, "Let's reveal the data."

MR PERCIVAL (LCA): I'd be surprised if people put in applications as a threat, given the thresholds.

MR HUDSON (LIV): I mean, a threat is one thing; the actual making of the application is a separate thing.

MR PERCIVAL (LCA): I certainly believe in some industries once the application is initiated and an investigation commences, then there is a chilling effect, but that usually is - - -

MR WEICKHARDT: Okay. Just on the issue of transparency, you stress that a balance needs to be struck between the increased transparency and disclosure of information. Again, as we requested of the last participant, if you have any view as to where that balance might optimally be struck, to be fair to all parties, in some cases, almost as a cost to the people making the application, to be fair to all parties, but in some cases it's possible the information might be of little benefit to the people who have made the application too for the very purposes I talked about previously, that is, to understand how big these measures really are, which in some countries they see absolutely and in Australia they don't.

MR PERCIVAL (LCA): No.

MR WEICKHARDT: But if you've got a sense of where you think that balance should lie, then we'd be grateful for that.

MR PERCIVAL (LCA): I don't have a particular view at the moment but I'm happy to take that on board.

MR WEICKHARDT: Okay, thank you. You also made a point about the fact that you felt that all reform should take place at the same time and place and it take place immediately. We, I guess, felt that once the legislation is finalised, that those people who had applications for measures in place should be able to complete them on the basis under which they had undertaken them, if you like, and so to have somebody

who is sort of part-way through having their application processed, to suddenly say, "A public interest test that wasn't available in final form and legislative form will now be imposed at the end of your application seemed somewhat unfair - - -"

MR HUDSON (LIV): No, that's not the intention of what we were saying. If there are cases in place on a certain legislative basis, clearly then that's how you go ahead. I think what we were suggesting is that there was a suggestion that the national interest provision, that there be a tranche of changes in respect of other recommendations and then two years later, introduce national interest, I think our view was that if you're going to introduce legislative change, introduce the national interest at the same time.

MR WEICKHARDT: A two-year period, to try to take account of these people who, if you like, have got systems already in train.

MR PERCIVAL (LCA): Yes, and certainly it wasn't our intent to imply that - the reforms do, where applications are already in place and investigations are ongoing, I would imagine that those would continue under the existing legislative regime and the reforms would apply to new applications.

MR WOODS: If you could come up with a more elegant form of words that convey the same effect, we would be happy to look at those. All we were trying to achieve is that because of the lengthy time, which all participants comment on, of the process, that somebody who starts their process on one basis should not suddenly be confronted with a change of rule halfway through - - -

MR PERCIVAL (LCA): No, we certainly didn't intend that.

MR WOODS: However you think that that could be usefully expressed would be helpful to us.

MR WEICKHARDT: Recognising that some companies who haven't already applied may have just spent maybe a year getting ready and so have incurred some significant costs, even under those circumstances.

MR HUDSON (LIV): But by the same token, if they are preparing, they would be aware of the work of the commission and they would be aware of the debate.

MR WEICKHARDT: Yes. That's not a guarantee that governments will actually get legislation passed.

MR PERCIVAL (LCA): No, but I would hazard that once the report goes into the government and the government - let's assume that they adopt the recommendations

and legislation has to be drafted, that usually takes a while to get through, so people would be aware of it and no doubt the legislation could include provisions, so that applications which have already been filed or investigations which are going would remain under the existing system.

MR HUDSON (LIV): I'm sure the government would invest pretty heavily in a sort of outreach program to explain the changes, when they're going to come into effect, so people are fully appraised of it, because we understand it's a novel concept for our jurisdiction.

MR WOODS: All right. If you could put your mind to that, that would help us.

MR WEICKHARDT: Just a last one from me, at the start of your comments, in the process of looking at whether or not we had discharged our terms of reference, you say that we should have made a comprehensive analysis of whether the system achieves what it is intend to achieve. Of course that raises the interesting question of what it is intended to achieve and there are all sorts of answers that have been given to us on that score. Some would say it's intended to provide fairness, which is a pretty nebulous concept. Some say it's to ensure that Australian manufacturing continues. Some would say it's to stop import of dumped product. Some of these things are very short term, some are longer term. What is it that you think the anti-dumping system is intended to achieve?

MR PERCIVAL (LCA): I won't go down the fairness route. I take a fairly narrow route of accepting that you have a system, whatever the reasons are. What is it intended to achieve in the context of rectifying a dumped price into one which is non-dumped, and will that, in so doing, eliminate the injury that is caused from that dumping? That to my mind sort of brings into focus the analysis that needs to be undertaken in a dumping investigation which is obviously first establishing whether the exports in question are at dumped prices and the magnitude of that dumping, and then looking at that and seeing then do those prices - price undercutting or price suppression or whatever it might be - actually cause the injury to the Australian industry, and that needs a detailed analysis.

I tend to think that the injury that an industry incurs is obviously loss of revenues, profits, through either price effects or sales volumes effects and then you look at how did that fall in sales volumes occur. Was it because they have been undercut by dumped products? You can work through the chain.

MR WEICKHARDT: So just humour me: the dumping measures that were put in place, let's say hypothetically, a month before the global financial crisis occurred, after the global financial crisis, Company A has got measures in place and is showing decreased profitability and revenue, alongside every other company in their industry

and their sector. Do you then say the measures were ineffective or do you say a new source of injury has been inflicted upon you?

MR PERCIVAL (LCA): I would say a new source has been inflicted which is why I favour the annual reviews. I don't think one could do it continuously though, but I think if you're doing it annually, you're in a better position to pick up those sorts of things, whether there's a change in the market, whether it's the global financial crisis or a shift in consumer sentiment, whatever it might be.

MR HUDSON (LIV): We also come back to the point which is the analysis during the investigation and the rigour which is put over the examination of the effect of the dump, dumped prices and other factors, as to what is in fact causing the injury. So, for example, if there were measures being sought, there's a real analytical issue about the rigour of working out, "Well, what has been caused, for example, during" - you know, measures are being sought now of what has really been caused by the global financial crisis or other measures or other importers and what has really been caused by these specific things and that's something we are very keen on, the rigour and the analysis area.

MR WEICKHARDT: Causation is a vexed issue always and we attempted to comment on that in the public interest test of putting that check in place of was the primary source of injury due to dumping, because sometimes injury occurs from multiple sources.

MR PERCIVAL (LCA): Yes, I've certainly seen cases where an export from a particular country is singled out. At the same time, there's an export from a number of other countries in various volumes but at prices which are above and below the ones from the target country. You simply go, "Well, who's causing what?"

MR WOODS: I understand the convenience of having a narrow definition but at the same time as restricting that definition to injury, you're also supporting the introduction of a public interest test and the point of the public interest test is to say that there's an objective above and beyond whether injury was caused to the individual firm or even the industry sector. But overall, the community must benefit from the application, so immediately you have moved to a wider canvas of objectives.

MR PERCIVAL (LCA): Yes, the comment is made about the analysis of the dumping causation and injury. It was in the context of trying to establish will an imposition of measures actually have an effect on prices in the marketplace and does that effect actually result in a benefit to the Australian industry. I fully support the public interest test because there are other benefits to be had or to be weighed in.

MR HUDSON (LIV): It's almost like in the chain; the dumped prices and then the injury assessment and then you do the national interest type thing which takes into accounts are there benefits - you know, notwithstanding having established that there is the injury and it's caused by the dumping, are there still benefits? I think the way it's been expressed in terms of the - effectively, I think the primary starting point is that there is - - -

MR WOODS: Presumption.

MR HUDSON (LIV): - - - presumption.

MR PERCIVAL (LCA): Presumption and benefit to impose it, yes, and that has to be rebutted.

MR WEICKHARDT: We're about out of time. Are there any last-minute comments you want to make?

MR PERCIVAL (LCA): No. We thank you very much for your work on this.

MR WEICKHARDT: Thank you, and we look forward to a further submission from you.

MR PERCIVAL (LCA): Thank you.

MR WEICKHARDT: Thank you very much indeed.

MR WEICKHARDT: We've now got the Australian Steel Association, if they would please come forward. We welcome our next participant, the Australian Steel Association and if we could ask each of you please for the transcript just to give your name and the capacity in which you're appearing here today.

MR HOWARD (ASA): Thank you, Mr Weickhardt. Merton Jack Howard, I'm the CEO of the Australian Steel Association.

MR WAINCYMER (ASA): Jeff Waincymer from Monash University. I'm a consultant to the Australia Steel Association.

MR MORROW (ASA): Troy Morrow, member of the Australia Steel Association.

MR CROFT (ASA): Steven Croft, member of the ASA and the owner of Croft Steel.

MR WEICKHARDT: Okay. Now, if you'd like to make some brief opening comments. We've got about 45 minutes or so.

MR HOWARD (ASA): Thank you. I'll be brief, Mr Weickhardt - - -

MR WEICKHARDT: Philip is fine.

MR HOWARD (ASA): - - - Philip - and then I will refer to Mr Jeffrey Waincymer. I initiated the ASA back in 1979, it's a long time ago, I know, in the days when BHP was BHP, and we had high tariffs, and then licensing and quotas. Thankfully, there was a steel industry plan that came to be and of course BHP no longer became BHP, but what we had instead of the licensing and quotas is of course the anti-dumping system, which the current producers in Australia of steel - and of course I'm focusing on steel, that's our interest, and I've been a reluctant participant in the anti-dumping system since about 1981. The Australian steel industry, structure and market in my view and experience is unique in terms of the global situation.

Just briefly, current steel consumption globally is about 1.1 billion tonnes and the Australian market would be in the order of seven to eight million tonnes at the moment. The ASA comprises three different groups of people; firstly, the people who import the steel, we call them trading companies, and the trading companies have the relationship with the overseas steel suppliers. The second group are what we call distributors who participate in the competitive market, the retail market, and our third group of membership are those service providers such as shipping companies who have some relationship with our members.

The origin of the ASA was essentially about access to local product, in that in the early days, BHP, for instance, would need to seek authorisation from what was then the Trade Practices Commission to get an authorisation for its restricted trade practices. So our argument has always been about access to local product and anyone who's a manufacturer or a user, whether it be steel or plastics, would always like to have a dual source of supply. In Australia there is only the monopoly producer of one type of steel, and a monopoly producer of the other type of steel, and they both dominate the distribution market. So imports in one sense create or provide the only discipline competition.

In my experience with the anti-dumping system, if I can use the analogy, it's a bit like the daily double; if you don't get the first leg up, you don't have much chance in the second leg, none. My background is accounting and I unashamedly say that in my experience, the accounting system and the accounting skills have been the most significant part of the anti-dumping system. Unless they are trading company, members who have the relationship with the overseas producer and exporter of the steel product to Australia, unless they have that relationship whereby the mule overseas is prepared to cooperate fully in the customs process and provide the information that customs require to their satisfaction, then we don't have any chance of really defending a dumping action initiated by the local producers in terms of causation and material injury.

I believe any veiled criticism of customs or the veracity of data provided by exporters, certainly in my experience, is unwarranted. Customs I've found to be very professional and even more so in the last four or five years. I think it's explained, the background of the ASA, and we obviously appreciate this opportunity to present further comment on the draft report which we gratefully acknowledge and accept. So, Jeffrey, if I could defer to you.

MR WAINCYMER (ASA): Thank you. I should say at the outset, we will also be making up follow-up written submissions. In today's opportunity, we simply wish to address the key features and would be delighted for the commission to interrupt me at any time and hopefully have a dialogue issue by issue, rather than feel that you need to allow me to make the presentation. The ASA strongly supports the Productivity Commission's recommendation to include a public interest test; strongly supports the conclusions that there is no net benefit to the Australian economy from the system, and the main thrust of what we urge on the commission today is to recommend that improvements be made to the balance of the system to be consistent with and supportive of the public interest test. In particular we believe that if there aren't sufficient changes made to the whole process starting from the initiation stage, evidentiary stages, injury, causation and lesser duty, you would be likely to end up with an internal inconsistency between the primary system and your public interest. I'll go through the individual elements, but because so many of the features that you

have recommended involve the kind of economic analysis and objective analysis that we have stated are problems in the current system, it really ought to be a seamless introduction of these reforms.

Turning then to the public interest test, the ASA is strongly supportive of the approach of the commission to actually try and articulate a number of defined criteria by which it could be presumed that the public interest would not support the imposition of measures and may I make some comments in relation to each of these. The first criterion recommended by the commission is where the ACCC considers that the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned. We have one problem with that and one question: we recommend that it not be limited to the phrase "for the goods concerned". The public interest test by definition should consider the broader public interest. So really, the test should be something more along the lines of, "Will it substantially lessen competition in a significant part of the Australian market?" if one is only looking at the goods concerned. If you go back to the Gruen review, it was dumping of fertilisers that caused the problem to the primary production industry, so we're really trying to think about that kind of public interest. Indeed, it was that kind of scenario that Prof Gruen was considering when he actually recommended consideration of some kind of public interest measure, not recommending that at the end of the day.

The second issue, and I'll come back to it later on, is the question of using the ACCC for that purpose, and that goes back to the whole question of who should be making these assessments and we strongly support both of the previous submissions from the TRTF and from the Law Council that extra resources should be given to customs, and we strongly believe that customs be given appropriate economic expertise so that someone within the system can do the right causation analysis, do the right duty analysis and do these kinds of public interest analyses concurrently. If that's done, not only will the system be better and not have internal inconsistencies but there won't be the time delays that the TRTF was concerned. We wouldn't be thinking of this as an extra 30 days to do something completely different. It's really an extra 30 days to take the system to how it operates in practice, where extensions are given, to seamlessly do both analyses concurrently where they support each other.

The second criterion alluded to by the commission was where dumping may be a contributing factor but is not the major cause. Once again, that's the kind of analysis that should be in the system anyway in terms of a lesser duty rule, in terms of the mandate under the WTO agreement to only allocate to the dumping the injury that is actually caused by it. If your public interest test will have sufficient expertise to make that assessment at the end of the day, our strong recommendation is that the bureaucracy ought to have that expertise beforehand. It would be much more

coordinated and seamless if a proper lesser duty decision was taken at the outset. For example, you might get a situation where the duty was reduced to a sufficient degree that it would no longer be in the public interest to deny the local industry that kind of a protection, so it shouldn't be all or nothing polarising the scenario, it should be one robust analysis about what is truly causing the injury.

MR WOODS: Can I just clarify on that point because we there, in our recommendations, do suggest that you would still have a lesser duty arrangement, so that even where the public interest test on balance doesn't overturn the application of the duty, that you would still have a lesser-duty rule. So we're not excluding one from the other. If you're just making the general point that they should have the expertise to be able to do both of those, then I accept the point.

MR WAINCYMER (ASA): And it should be an identical finding. Someone has already mandated under the WTO agreement from the statute to do that analysis.

MR WOODS: Yes.

MR WAINCYMER (ASA): My recommendation would be at the stage of public interest, it ought not to be set in stone that it can only be used to lessen the duty along the lines of the Canadian system, but that may be an option if, on balance, that is seen to be the public interest.

MR WOODS: Yes. I don't think we're excluding that in what we've said though, are we?

MR WAINCYMER (ASA): No, the point is not taking issue with what you're saying about the public interest test but this simply reiterates the point that unless that analysis is to be done appropriately at the outset, then we create a polarised position and an undue political environment. The draft report itself noted that lesser duty applies less than one would think, and there are a range of reasons why that is so, and we believe that expertise is the main issue to get that kind of a causation analysis to be able to do it.

The third criteria that the commission recommends would be where the imposts on users would be large, relative to the benefits of the industry; again a cost-benefit analysis. You were dealing with cases where the share was very low. We certainly agree that if an industry share is very low, that could be a reason to exclude them. But the converse also holds true, and as Mr Howard has pointed out, the steel sector is very unique where the domestic manufacturers are monopoly producers. Now, when someone is in that situation and when the draft report has rightly found that the bulk of anti-dumping action is against input goods into further manufacture, then in those scenarios, a very high percentage of the local market

share can be as much of a problem as a very small share, and indeed the commission appointed to the ACCC 10 per cent rule of thumb with mergers and acquisitions.

So in the sense that you have tried to very reasonably identify as comprehensively a set of criteria as you could but have said other factors could be taken into account, we're concerned that stating that a low percentage is a ground for exclusion would lead to the bureaucrats using this to wrongly think that therefore a priori, anyone with more than 20 per cent wouldn't be a problem. So what we ought to be saying is at the two extremes, there may be good public interest reasons to exclude.

MR WEICKHARDT: They're on different grounds though.

MR WAINCYMER (ASA): Yes.

MR WEICKHARDT: That's why we've suggested in the material a significant lessening of competition is one ground and the other is where the costs to downstream users outweigh the support to the industry concerned.

MR WAINCYMER (ASA): I'm fully comfortable if no more than a guide note was included to say situations where there is a very large percentage of the market would be considered under criterion number 1. I'm not inviting a change.

MR WEICKHARDT: Do you think the ACCC really need that guidance?

MR WAINCYMER (ASA): It depends whether all of these will be utilised by the ACCC, if it is going to be a customs bureaucrat that looks at it. I'm simply concerned - and it's not a major concern - but I'm simply concerned that a criterion that says "less than 20 per cent we want to exclude" might lead some bureaucrats to think therefore a priori more than 20 per cent there's a presumption against. Again, I'm sure guide material would easily be able to deal with that issue.

The fourth criterion looks at costs to produce and a reasonable profit margin and here the devil will be in the detail and we're happy to make submissions in due course about how one would calculate a reasonable profit margin. It's not directly analogous but the ASA has concerns with the way customs utilises reasonable profit levels in the lesser-duty analysis and we invite the commission to look at their guidelines on that and they have from memory a three-part test, but they will often look at the aspirational profit hopes of the local industry and that will invariably lead to an inflated profit level that's not in accordance with the market reality. So as long as there was some guidance to use a realistic test, then we are certainly supportive of that.

MR WEICKHARDT: As long as you understand the inevitable consequence that "realistic" depends upon the eyes of the beholder, and for an investor in the industry, "realistic" is probably reinvestment capital. You will tell me that's completely unrealistic from the point of view of the downstream user, so I don't think we're ever going to get to an internal holy grail truth here.

MR WAINCYMER (ASA): No, but sometimes as much can be done by excluding inappropriate considerations as by trying to clarify, and I certainly am comfortable with broad-based principles rather than trying to be too prescriptive, but aspirational profits ought not to be the measure to be employed. It ought to be realistic profits, however that is to be determined, and I would certainly trust fully the Productivity Commission or the ACCC to identify a reasonable profit level consistent with the market reality at the time of the investigation. That's the only kind of overlay that I would be recommending and simply saying the practice at the moment is to look at aspirational, and that ought to be rejected by a robust economic body like the commission.

Some of the other submissions we made in relation to national interest, we did recommend that consideration be given to using the public interest test to stream local industry and other assistance mechanisms. We wish for a robust domestic steel manufacturing capability. That is in Australia's interests. We take the view that relying on dumping is misguided. One should be relying on R and D and getting appropriate products and an export focus in development of technology. We understand how opposing forces are concerned about a public interest test, but a public interest test could actually direct them not into an all or nothing, but into an appropriate industry support program. When one just looks at the broad data from your own draft report highlighting gross dumping duties collected a year of about $9 million, and that doesn't take into account refunds, and applying an American analysis, a possibility of $250 million a year loss, one could easily give support to those people who would benefit from the $9 million at two or three times that level, get rid of the system and the whole economy would be vastly better off. Once again, I say that not to be cheeky but to be positive, that we would be delighted that the Productivity Commission considers how to use the public interest test for the benefit of local of manufacturing and not simply as an all-or-nothing filter.

Finally on this issue, we're strongly opposed to leaving it all at the end of the day for Ministerial discretion. Just as the ACCC makes decisions on mergers and makes decisions on impact on the economy, I think history has shown that there is no net benefit to give the Minister the ultimate decision-making power over these issues. It's raised a whole lot of problems, one is time limits which you have sought to deal with. The other is the whole uncertainty about what the Minister can take into account. Mr Willox this morning said that there is a discretion in the Minister already, that is a debateable view but we know that in practice that is never done. It

would be ideal in a system which inevitably has people with strong polarised views to not end up on the Minister's table where there's the opportunity of ex-parte submissions at the end of the day and lobbying for an outcome and I think a strong recommendation to the commission is to set up a system that minimises any need for the Minister to get involved.

The more you put decent objective economic analysis into it, the more we have decent procedures and review mechanisms, then the more we should all live with the outcome win, lose or draw and not go back again to the Minister, particularly where general public interest is concerned.

MR WOODS: Just on that point you'll notice in the body of our report we say that the commission is intrinsically inclined to recommend that the Minister be removed from the process and we come to the view, however, that there are higher priority changes that should be made first and that this is something that could be re-examined once the other changes have been bedded down. Is that your point of objection, that you want this to be a decision made at the same time?

MR WAINCYMER (ASA): Certainly, yes, and I think it ought to be a very high priority issue and I think all of the good work at trying to put good economic rigour into the standards could easily be undermined if it becomes, "Let's do 30 days of analysis of public interest," and then all go rush off and try and have meetings with Ministerial advisers to try and lobby for particular outcomes and just as this commission itself has been a wonderful model at giving robust, independent advice to government in open fora like this, I see no reason, I see no logic why the Minister ought not be sheltered. It's not the sort of recommendation that takes a lot of time and effort, so it's not the kind of complex thing where you would say, "Let's wait for five years," it's just a matter of principle and you would look at it on a cost-benefit basis, "What's the benefit of the Minister being a decision-maker on these kinds of things?" I will come in a moment to the question of your recommendation about whether the Minister should consider the findings in other jurisdictions.

But the added work and concern for the Minister and potential for Federal Court challenges based on the behaviour, I see a range of costs and no benefit whatever as long as it's sufficiently open with sufficient review mechanisms.

MR WEICKHARDT: So what do you see as the merits review or appeal process?

MR WAINCYMER (ASA): We believe that there are a number of ambiguities in relation to the TMRO's powers at the moment that were alluded to in a number of the original submissions and we would urge the commission to revisit those things. Whatever one wants to do from a policy point of view, those of us in practice can say there are too many uncertainties, that there's too little clarity on what they're meant to

do, when they're meant to do it, what evidence they take into account. I've been to the Federal Court once already in relation to the meaning of the word "reinvestigation", what does it actually mean when customs was asked to do this. There are numerous examples where the current system doesn't clarify whatever is intended and that's before one gets to the separate question of what would be appropriate review mechanisms.

I'm happy to consider that further in follow-up written submissions and I don't wish to simply have a one-line indication of what those would be but appropriate one round of interval reviews and one round of reviews - I would argue preferably at the AAT but, if not, at a speciality court - would be a quicker and more robust system and again would shelter the Minister and remove this from a political exercise and if it is kept solely as an economic question, that not only gets better outcomes but I believe has an educative effect. If people are dealing only with what is really is the market share, what are the causal effects, what is the effects on downstream users, they are turning their minds to those aspects of the system and not whether the Minister's votes depend on a particular industry complaining more or less about this particular thing.

MR WEICKHARDT: So just to clarify that, you would see customs making a decision and then any review going to the AAT and the TMRO no longer exists?

MR WAINCYMER (ASA): May I defer that to our written submissions and I would certainly be happy to - - -

MR WEICKHARDT: Please be clear on exactly what you're proposing because I'm unclear now.

MR WAINCYMER (ASA): The first order concern of the ASA is to improve the primary decision-making. Customs has been excellent, they truly in Australia are an even-handed player. But the economic issues are the areas of the greatest problem, the adjustment issues, the need for forensic accounting, as mentioned by TRTF, the need for economic analysis. If we get that right at a level appropriate for the public interest test that we support, the times where you will need to review will go down significantly and so in that sense a major change for the reviews may be unimportant. In terms of the AAT versus not, there are cost benefits and I'm certainly happy, in the same light as the original written submission, to try and do an honest analysis of the cost benefit of AAT versus Federal Court and I haven't walked in here with a bottom line outcome of that.

MR WOODS: Can I just go back though to the Minister as the final decision-maker, that we're probably not too far apart in our views as to the ultimate position that should be reached. But your membership is well connected into the

broader industry and we would appreciate their collective views as to where you would put that in your priority list. Is that something that you feel so strongly that should be pushed for now or do you see trying to get some of the other gains, such as the public interest test bedded down and then come back to that issue? There is the academic perspective and, to some extent, our intellectual views on it but there is the wider judgment from industry as to where they would put that issue on the priority list.

MR WAINCYMER (ASA): I will certainly seek to do that but the obvious response is my members have no experience with a public interest test, they have no experience with the accusations in Europe that it's overly politicised and therefore I, on their behalf, are trying to say, to make your very highly desirable test and filter work well, it would be highly desirable to remove the Minister's involvement at the outset and not allow my members to have two years to feel the brunt of it and then make submissions to change it later on.

MR WOODS: If you could reflect on that and put it into your final submissions.

MR WAINCYMER (ASA): Yes. If I may now just go through the balance of the points on the provision - - -

MR WEICKHARDT: If you could limit this to at most 10 minutes to give us a change to have some questions.

MR WAINCYMER (ASA): Sure. Again, I'd rather you interrupt me along the way if that's okay and use the total time limit in that way, but I'm happy either way. In terms of the provisional measures we've recommended that if it's to be brought forward, and we don't believe that there's any analytical reason to do so, once again if the public interest test and the economic analysis is done throughout, then nothing is really being extended over the current system. If one looks at the time it takes realistically under the current system and if you extend the period to the realistic level and organise a proper process to have everything thought of, there is really no need to bring forward the provisional measures and the second thing we would say is that in any event there should be in-transit provisions.

A provisional measure system is always trying to do a cost benefit between the deserving local industry who ultimately deserves the duty, and the unfairly treated importers who get a provisional measure that is ultimately not appropriate. In-transit provisions where you, in my industry, ordered goods three to four months in advance, you have no chance of getting the exporters to pay the duty - - -

MR WOODS: With respect, there's a big difference between in-transit and ordered. If you're talking about ordered, I can write a blanket order for the next five years, that

could be gamed enormously; in transit on a ship is fairly black and white.

MR WAINCYMER (ASA): Gaming is always an issue but we live in a society - and I have acted for people who have been charged with criminal conspiracy to defraud the revenue which goes to gaol. So if people do that, things happen and the fact that some people game is an argument to have an anti-gaming response in terms of penalties and investigative powers and, as Mr Howard says, you can look at the history of the real dealings of a party and again, the onus can be on them to show that the habitual course of dealing is to order in this way. This is a legitimate order. This is within the quantitative levels of what they have done in the past and anyone who is gaming to try and avoid the duty would be identified as such and that would be demonstrably compared to people who hear rumours about an application who might import a lot of goods to try and stockpile in that way.

MR WEICKHARDT: This is on the balance argument. If somebody is genuinely being injured, the party exporting has had at least 150 or 180 days' notice that there is an investigation under way. To suggest that they should be hung out for the extent of all the orders that are in their system, even if it's habitual or not, doesn't seem to be striking a fair balance between protecting the local industry versus making sure that the exporter is properly dealt with.

MR WAINCYMER (ASA): That would depend industry by industry on whether it's really operating at the 150-day mark or whether it's operating at a 50-day mark will depend what the turnaround time is for the sale of those goods. Your concern is a realistic one and it's a live one but again it's a cost-benefit analysis at the end of the day and we will in written submissions try and suggest how an in-transit provision might try and deal with your legitimate concerns. Turning to your recommendation in relation to sunset provisions, we support that but we say that not only should there be a two-year freeze after a duty expires, but there ought to be sanctions on unsuccessful applications and the discussion earlier was about whether gaming was possible and it was difficult to get hard data.

Let me just give you some very back-of-the-envelope figures from one product in my industry. There have been three cases in a row on HSS steel products, largely unsuccessful. There are approximately $190 million a year of HSS imports into Australia. The American study shows that the mere bringing of an application can lead to decreases in imports of some 20 per cent. That would be $38 million and using a rough rule of 7 per cent profit, that would work out at about a $3 million a year gain on one product in one industry for an outlay of what you have found is between 50 to 200 thousand dollars worth of consulting fees and nothing in terms of marginal cost if you're using in-house people to bring the cases. The analytical cost benefits of strategic behaviour are extremely high and it's not about - - -

MR WEICKHARDT: Can I ask you and urge you in your application not to cite American evidence which I think is highly misleading and not relevant to the Australian situation. We spent a lot of time trying to ask everyone we've spoken to for evidence from Australia. There is a lot of academic writing and there is a lot of experience in America. It's an entirely different system, it works in different ways and quite frankly we couldn't find very much evidence at all for the sort of behaviour that you've talked about. So if you've got hard evidence, please quote it for Australia.

MR WAINCYMER (ASA): The evidence in Australia in our - obviously we speak for one industry and we have invited and we continue to urge commission staff to talk to us analytically about these particular cases on these products to show that kind of strategic behaviour. What I'm simply saying a priori analytically, with those numbers of imports on one product and the cost that you've already identified for bringing cases, it is worth the effort for local industry to bring the cases. Now, whether it's the 20 per cent as asserted by American scholars or whether it's 10 per cent or whatever, one could continue the analysis and find out where it draws the line.

MR WEICKHARDT: It may be nothing.

MR WAINCYMER (ASA): It would be extremely unlikely that analytically - and again, we can't explore this today and we'll seek to make submissions about it. But on economic logic there is likely to be some impact from applications and if it only costs $50,000 to start a case, in the large industries where you have input goods are targeted, it is likely, all other things being equal, that the benefit or the perceived benefits outweigh those costs. Otherwise, why would OneSteel bring three cases in a row in relation to HSS products? So whether it's the American literature, the habitual behaviour or the analytical reasoning, strategic behaviour is of concern and it's matter that's been alluded by shares of the ACCC on a number of occasions. So we simply invite the commission not to take my word for it or the American literature, but to take the time between now and the balance of the year to explore that particular issue.

MR WEICKHARDT: If you can provide evidence, we'd like to see it. There are lots of people who have put the contra point to us, that to an importer there is a zero cost of behaving in a manner that dumps and once dumping is found, simply to withdraw from the market. There is no cost to them. So the counter point of view is there is nothing that stops them continuing to behave the way they want until measures are imposed. So we need to find the truth between these two positions.

MR WAINCYMER (ASA): Certainly we will seek to do so.

MR HOWARD (ASA): Can I just interrupt. Philip, I know from my own experience that if an exporter values his relationship with his Australian customers sufficiently enough to engage in the process - and customs do put the hurdles fairly high - if you want to get one of the accounting firms in Korea or Japan, and that's been my experience, the starting point is about US$200,000 just to get the application and fill it out and complete it in terms of the cost to make and sell data and your domestic sales data and all that type of thing and I personally have had experience representing a Korean steel maker in the US system and the US system is very legalistic compared to ours. As I said in my introduction, I found it to be more an accounting-type procedure rather than legalistic. But the lawyers in the US - and I don't want to quote the US because it's a totally different system - but they want $200,000 up-front before they look at anything.

MR WEICKHARDT: There are some exporters who simply refuse to cooperate and walk away.

MR HOWARD (ASA): For that reason, yes, and I know that.

MR WEICKHARDT: Okay. Time is tight, go on..

MR WAINCYMER (ASA): If I can turn to the recommendation in relation to the use of foreign findings and obviously if you accept the other submission that the Minister should be wholly removed, then your direct recommendation that he be advised of what use has been made or not of foreign findings, we would strongly oppose that and my personal belief is Australia would be in violation of its WTO obligations if that recommendation in that form went ahead. As noted by the Law Council submissions, there is a separate question between admissible evidence and we have no problem with evidence from anywhere being admitted and considered and robustly tested.

But if you start by saying to any decision-maker, whether customs or the Minister, "You must consider this and you must turn your mind that," then it often will be a different supplier. Even if it's the same supplier, it's at a different point of time. It can often be a different product description under a like goods analysis. It will have a different local market, it will have a different currency conversion issue. It will have different causation elements of other issues. Unless from an economic point of view you thought a priori that an outcome in one case is a good working hypothesis in another, no matter how protectionist their system is, not matter how much those differences matter, then it's not something that should be imposed. If the concern is that customs currently will not receive any kind of information from overseas, then that's the problem that should be addressed and we'd be fully supportive of you addressing it.

If there is a blanket refusal to ever consider reasonable evidence from other jurisdictions, then a direction should be given that a priori there are no exclusions of any category and all evidence should be tested for its probative value.

MR WEICKHARDT: As we said to the Law Council, if you can provide some appropriate words that go to the point that evidence should at least be considered but with the appropriate caveats, then we would be happy to receive that.

MR WAINCYMER (ASA): Thank you. In terms of the time of implementation with the two-year delay for the public interest test, we argue that there is no better time than in a global financial crisis to be more concerned with the public interest and particularly as you have identified that anti-dumping action is taken in Australia against import goods. Most importantly when you think about all of the political economy arguments that you addressed, we're not just talking about importers versus local manufacturers, we're talking about the vastly larger number of industries that use steel in Australia and vastly larger number of employment that relates to those industries than those who actually produce the steel in Australia itself. So we're talking about the legitimate needs of all aspects of the Australian manufacturing sector up and down the value-added chain.

MR WOODS: We're looking for a sensible implementation plan and if you can construct some words that meet that requirement, then we're happy to reflect that.

MR WAINCYMER (ASA): I apologise for not hearing the dialogue you had before accurately. I know you had a dialogue with Mr Percival. I didn't understand what was your policy concern about meeting a delay.

MR WOODS: The issue is that for those who have already invested in undertaking the preliminaries for a commencement action and have tracked on one path with some certainty as to the process they will be following, that they shouldn't then have a change of rules part-way through their process. So it's an implementation process that is orderly and with some certainty that we're looking for.

MR WAINCYMER (ASA): Then I would recommend that the delay be exactly equal to the time period of a normal dumping investigation. So that a person who the day before the Minister's final announcement of government policy did have one of your actions in train, they would have the statutory time period to have that reviewed; they can do so. Once that period has expired, then people who are contemplating new actions after the Minister should not be prevented. Again, there could be gaming here. I mean, if you have a two-year test, then all of a sudden people have got two years to sit around and think about what are all the dumping actions we need to bring on the day before the test comes in.

MR WOODS: If you can address that in your submissions.

MR WAINCYMER (ASA): Certainly. We support the Law Council's suggestion there should be a comprehensive review of other matters and, as per your terms of reference, inviting consideration of all of the issues from beginning to end and I won't go into them again now. I made the point before that if we improve the consideration of material injury, causation, confidentiality, all of these things, we'll have a robust system which is supported by a public interest test. If you take the view that those are all matters of judgment and ought not to be fixed on a cost benefit basis, I'm troubled by why a public interest test will be workable and non-judgment based if the rest of the system can't equally be improved to the same level. I think they go hand in hand for the reasons I articulated before, I believe it's seamless.

In terms of confidentiality, I was very obtuse when I did it but in paragraph 410 of our submission I actually did support a protective order as a … and that was alongside much more work on non-confidential summaries. That is a major problem in the Australian sector, you are truly operating in the dark as a legal adviser, you're guessing at what they're saying to customs about injury and customs, through no fault of their own is basically saying to you, "I can't tell you anything, trust me, I'll be a honest broker," and you're actually not engaged in an open challenge of each other's arguments.

Your question, chairman, about the cost of an APO system, my bet analytically is that there wouldn't be a net cost because if you can't look at the actual data you try and hypothesise. So we've certainly spent time in cases trying to find indirect means to try and assess what their capacity is, what their market share is and a whole range of things. So you're doing the work in any event, you're just doing it very badly and in a more time-consuming way than if you were given the material.

So in conclusion, we again say that we're very supportive of the public interest test. We believe that inevitably if it's done in an optimal fashion it will automatically create the resource space for other things to be fixed adequately. Those things ought to be fixed adequately for us to have confidence that the system will work in a fair and balanced way and finally, in relation to some of the political aspects of maintaining the system, the political economy argument or whether the Minister should be involved or not, our recommendation is rather than make the political judgment call on behalf of government, the commission simply identifies the arguments for and against and puts it in front of the politician, present them with the economic analysis, present them with the economic arguments, explain to them you understand that there are political considerations, these are the ones that go this way, these are the ones that go that way and let the politicians make the decision rather than allow them to feel that you've found a clear need based on evidence based analysis of why local industry needs this kind of support.

MR WOODS: Government will make a decision. We make recommendations but we do draw to their attention the evidence and how we see it weighing.

MR WAINCYMER (ASA): Thank you for your time.

MR WEICKHARDT: Thank you. Can I just ask you a question that I've asked you before and that is, on balance, do you think Australia ought to continue to have an anti-dumping system?

MR HOWARD (ASA): Are you asking me, Philip? I do.

MR WEICKHARDT: Okay.

MR HOWARD (ASA): I mean there are industries, and I can't speak for them, I've moonlighted a couple of times in terms of cement and some chemicals but, as you know, my area of activity has been in steel products. I do believe that there are industries in Australia that certainly need a robust effective anti-dumping system.

MR WEICKHARDT: All right. Mike, do you have anything further?

MR WOODS: We have certainly covered my issues on the way through.

MR WEICKHARDT: There is a huge amount you've submitted to us and I want to say we're very grateful for the trouble you've gone to in terms of both your initial submission and the detail that that went to and also the second one. You've, in your notes, commented on the fact that we haven't responded to certain paragraphs in your initial submission. I would say respectfully that's not because we ignored them, it's because - - -

MR WAINCYMER (ASA): That wasn't the intent.

MR WEICKHARDT: - - - we chose deliberately not to respond to them. We have to provide something to government that's manageable and we chose to try to, in an overall strategic policy sense try and hit the big issues and obviously you can choose whatever you send back to us, but it will be most influential and helpful to us if you can focus on what you think the really crucial issues are here. This system has had many reviews, lots of it has gone into the minutiae and we chose deliberately not to. We thought this was an overall framework review and we should try and stick to the framework.

So if you can focus on what you think the crucial framework decisions will be, by all means give us whatever you choose in addition but it will be very helpful to

focus on those big priority issues.

MR HOWARD (ASA): Thank you, Philip. There's one lesser critical issue that I'd like to make some comment on and that's the ABS confidentiality claims. I personally find it unacceptable that the ABS would not publish what I call aggregate data. In other words, if I can use the example of what we call steel structurals, there's no input data published whatsoever and I find that unacceptable. I do appreciate and understand that the ABS has an obligation not to disclose an individual's or a company's business and, being very myopic in the steel sector, certain products you only have, say, one million in, say, four countries and then because of the relationship that mill might have with the importer, the publication of that data, in other words from Thailand into Western Australia, would demonstrate and publicise that entity's business activities.

So there is a balance but we get just as frustrated as other people might be with the ABS publication of data and, as I said, I'd reiterate that I see no justification for not publishing what I call aggregate data. I know it can be available from overseas, like customs and export data from Korea or Japan or the US but that doesn't give you the state in which it goes into and I know we're getting into another argument when we talk about regions but WA is a very big issue for the steel products because of the projects that are going on over there. The ABS data is also an issue in regard to what I call a legacy of the BHP days because the statistical key structure of a customer's tariff is based on what the industry, being BHP, might have wanted, say, 30, 40 years ago and that's no longer relevant in today's environment or market situation. So, therefore, there is a need, I believe, without any real degree of difficulty to look at the statistical structure of the customs tariff and certainly in terms of the steel tariffs.

MR WEICKHARDT: We recognise this is a fraught area. We've had discussions with ABS and there are many other issues around confidentiality that would impact upon this. We attempted to come up with, if you like, a practical, almost no regrets-type of suggestion that might make things easier, but if you've got any other practical suggestions along those lines, please let us know.

MR HOWARD (ASA): Thank you, Philip.

MR WEICKHARDT: Thank you very much indeed for your submission. We're now going to adjourn until 1.30.

(Luncheon adjournment)

MR WEICKHARDT: The first participant after lunch is the CFMEU, Forestry and Furniture Products Division. If you could introduce yourself, please, by name and give the position under which you're appearing at the hearing.

MR WACEY (CFMEU): Travis Wacey is my name. My position is Policy Research Officer at the CFMEU, as you've said, Forestry and Furniture Products Division.

MR WEICKHARDT: Thank you. If you want to make some introductory remarks and then we'll, I'm sure, have some questions.

MR WACEY (CFMEU): First of all, thanks for having an opportunity to comment on the processes and of the draft inquiry report into the anti-dumping reforms which are being proposed. I just thought it was important to come along on behalf of the CFMEU FFPD and clarify our position, based on our original submission, and also make a few general comments.

First of all I'd like to say that it was acknowledged by the Productivity Commission in the draft inquiry report that there weren't a lot of submissions looking for, I suppose, radical changes to the system as it is - or "significant changes" I think the Productivity Commission stated. The CFMEU FFPD was looking for changes in the system, predominantly to strengthen the system and come up with inefficiencies which we deemed were part of the current anti-dumping system, primarily for the point of strengthening it.

As part of a little bit of background, the CFMEU FFPD represents Forestry and Furnishing Product Division workers, and that makes up over 120,000 workers in Australia, 5.6 per cent of Australia's manufacturing base. We've had long-standing views that the manufacturing industry in Australia does require strong, transparent anti-dumping laws and we pointed out in our initial submission that there are quite a few cases of dumped items entering Australia and for various aspects - inefficiencies, I'd call them, in the system - don't get anti-dumping duties imposed on them. There are a few things we pointed out in terms of that, which I'll elaborate on as required.

I'd also like to make a brief comment on the public interest test. Essentially, we're sceptical about the merits of introducing the public interest test, just for the fact that we represent a lot of workers in regional areas as much as anything and are concerned about their job prospects, continued employment, and also regional productivity. But, in saying that, the CFMEU FFPD wasn't particularly looking to comment on the merits of a public interest test, but we're happy to take on notice any queries which we have in regard to that.

We think that anti-dumping duties should be in the public interest when they're

imposed and primarily we'd like to see the definition of the public interest widened to reflect not just an economic analysis but also an environmental analysis, and particularly a socioeconomic analysis, due to the effects. We'd also like a focus, I suppose, on the public interest of imposing anti-dumping duties and of not imposing anti-dumping duties and we think that this needs to be part of any correct measurement of the public interest. And ultimately, in a system such as this, we'd deem the Minister as suited to make the final decision. But it's, from our perspective, very important that they have the information from an economic, environment and social perspective when making this analysis of the public interest.

MR WEICKHARDT: If it doesn't disrupt your comments, can we just talk about that for a moment. I mean, the introduction of social and economic considerations opens the issue very broadly and, if one did that, how do you weigh the issues as to whether or not, from a social point of view, employing some person in China at $1 a day has higher social benefits than employing somebody in Australia at $100 a day? How would you weigh those benefits?

MR WACEY (CFMEU): Well, ultimately, this is the whole point of the wider public interest than what it should impose and what it shouldn't impose. As I said earlier, I might have to take some of these questions on notice, and it is a particularly good point that you make. However, we think that looking at an economic analysis, particularly with it directed to focus one step up and down the production line, would deem that leakage of labour rights, and also environmental standards and that sort of thing, need to be taken into account, as well as the economic analysis. What is the actual benefit of imposing measures and also of not imposing measures?

MR WEICKHARDT: It's a complex sort of system already and I guess you might also like to think about, if you were to go down that route, whether customs have the sort of resources and ability to be able to go through that pretty complex triple bottom line type of analysis. And I assume you mean that it is sort of not only looking at the Australian end of the spectrum, but looking at the exporting country's end of the spectrum. Otherwise, you'd say, I think, an economic analysis probably ought to capture what is happening at the Australian end, but if you want to make it a triple bottom line, I guess you're looking at the totality of the exporter and the importing country.

MR WACEY (CFMEU): I suppose. But I think that we were looking at a triple bottom line analysis of pretty much Australian conditions as much as anything. In terms of Australian Customs and Border Protection Service being able to adequately measure the triple bottom line, there were elements in terms of submissions which would take the public interest into account, which is allowed for under the proposed system, which is generally positive.

In terms of resources, yes, we think that it would have to be increased for this

to occur. I think in our initial submission we suggested some the firm being accused of dumping items would tend to foot the bill - not foot the bill as such, but some sort of payment, in terms of their right to dump. Another suggestion from - - -

MR WEICKHARDT: Sorry, say that again. They'd make a payment to secure the right to dump?

MR WACEY (CFMEU): No, sorry, that's not what I mean to say, but some sort of import levy in terms of - which could even be paid on all imports, which was a suggestion by someone involved in our industry as well, to make sure that Australian Customs and Border Protection was able to run this robust analysis of the triple bottom line.

MR WEICKHARDT: I don't know how that would stack up against the WTO requirements, but that will be for greater minds than mine. Sorry, Mike, you had a point?

MR WOODS: Just going back to your original submission: you were talking about the importance of taking account of economy wide impacts, including the impact or potential impact on employment levels. We agree with the principle of that, but I'm not sure then, reading your rejoinder to this, we are of like mind. We see what is the whole of economy, whole-of-society benefit of imposing an anti-dumping measure.

Now, to the extent that imposing duties has a price-raising effect throughout that part of the economy - and filtering through the economy more generally - that may reduce employment in certain parts of industry, but protect some employment in the supply side. We take the view that you should look at employment right across the economy, but as I read your rejoinder notes, you seem to be redefining employment levels a bit more specifically to the industry or to the firms. Have I got that right?

MR WACEY (CFMEU): Yes, we believe so, and that's why we aren't coming out here, at this point, and saying that we oppose a public interest in terms of upstream employment levels completely. It's something that we'll be analysing and get back to you in a written submission.

But I just was sort of pointing out, in the adjoining statement for today's point, that we were more looking at the economy-wide measures of duties not being imposed, for the various reasons, as opposed to the economy-wide reasons of duties being imposed, and, yes, it opens - that wasn't really an issue that we were commenting on in the original submission, and I thought that it may have been slightly misinterpreted in terms of the use of economy-wide measures to support a public interest test on the imposition of duties on dumped items.

MR WEICKHARDT: Just pursuing that so I'm sure I understand it - I mean, the economy-wide costs of not applying measures versus the economy-wide costs of applying measures is a sort of different case, I guess. In one case you apply. In one case you don't apply. As Mike said, if you apply measures it has a positive impact, we assume, on the company to whom the measures support, and it has some sort of negative impact on the customers of those goods, because they pay a higher price.

Now, if you are looking at the economy-wide impact, you've got to weigh up the benefits or impacts on the downstream industry versus those on the upstream industry. Is that what you have in mind? Because it can't be economy-wide if you're only looking at the impact on the upstream industry.

MR WACEY (CFMEU): I'll refer to the submission. The impact or potential impact on employment levels and the impact or potential impact on national, state or regional productivity - and that is based on measures not being imposed.

MR WEICKHARDT: Right, but economy-wide.

MR WACEY (CFMEU): Yes, as well.

MR WEICKHARDT: Okay, thank you.

MR WOODS: Just picking up your bit about regional productivity, I guess I'm a bit concerned that anti-dumping is a fairly blunt instrument to pursue regional development policies, that a firm may or may not be in a regional area, that if you were going to rely on government having, as a policy, that vibrant, social, environmentally sustainable and economically sound regions was good policy, anti-dumping just doesn't seem to be a very good way of doing that.

It may be, in part, a consequence of imposing duties because that particular firm may employ some particular workers in a regional area but if I was in a regional area and wanting government to adopt a regional development policy, I don't think I'd start with anti-dumping as the first policy mechanism to use. I'd be looking at very targeted support for the economy and society of that area.

MR WACEY (CFMEU): Well, probably I'd agree with you, I'd say, but we don't consider anti-dumping as a measure of protectionism for regional employment or regional development as such, but more as a sort of fundamental right to be able to trade fairly and competitively in the open market - and it's not just regional. Regional productivity is important for us, but national, regional and also state economies as well, yes. So that's where we stand on that.

MR WOODS: Yes, I just wouldn't put too much emphasis - that may be a consequence in some cases, but it wouldn't be a front-end rationale for having

anti-dumping.

MR WACEY (CFMEU): For retaining, yes. So I might just, if that's all right with you, sort of go over some of the points in our submission in terms of our original submission - sorry, in terms of a few of the cases where the imposition of anti-dumping duties has not occurred for various reasons, and get an interpretation on whether this is sort of in the public interest and that sort of thing. I think I refer here to point 3 and, yes, there's a number of reasons why anti-dumping duties have not been applied in the current system, and our whole argument was about reforming the system in order for that to be overcome as much as anything.

I want to make a particular reference to tariff concession orders and how the application for tariff concession orders is used as a proxy for dumping in Australia. There isn't a lot of mention of that in the Anti-dumping and Countervailing System draft inquiry report, but we do find that due to the ACB - the Australian Border and Customs - not having this mechanism to measure tariff concession orders by themselves, and relying instead on import self-recognition and mechanisms such as that, that dumping occurs through that.

There are a lot of other reasons why the imposition of dumping duties aren't placed on imported items, such as the low expectations of success, limited resources within firms, and a few of the methods that we suggest to combat this - - -

MR WEICKHARDT: Can I just back up. Sorry to keep interrupting, but maybe it's more efficient if we deal with these issues as they come up. The tariff concession orders issue: you're suggesting, I infer, that there are TCOs issued where you believe they should not be. But if that's the case, surely the way of fixing that is to go and look at the TCO system, not to have an anti-dumping system in place?

MR WACEY (CFMEU): Yes, we believe that the TCO in this sense is being used as a dumping mechanism, so we thought it was relevant.

MR WEICKHARDT: They're presumably also, if I use inverted commas, a "tariff evasion system", if they are genuinely being issued where there is a local manufactured alternative, so I guess that would be a policy concern to the government. I think if you genuinely believe that that's the case or any of the manufacturers whose members you're employed by, where you've got members employed by them, I think you ought to be raising that issue directly with the government around the TCO system. I don't think it's an anti-dumping issue really.

MR WACEY (CFMEU): I suppose an own recognisance system by Australian Border and Customs would be able to pick up on this and also dumped items at the same time entering Australia and for whatever reason not being imposed the duties which would be a positive thing for our industry.

MR WOODS: You do refer to this own sort of initiation by customs. I think they do have that ability now. I'm not aware that they've ever used but I think they do have that ability under the act now.

MR WACEY (CFMEU): I'm not sure. It might be a resource issue as well as much as anything.

MR WEICKHARDT: Before you finalise your final submission, if you want to touch base with our staff, they can show you where that capacity is, so you may be able to refine your argument as to whether it's a capacity in a legal sense, which we're casting doubt on, versus a capacity in a resource sense. That just may help you make your arguments clear.

MR WACEY (CFMEU): Thanks. Another issue I just want to bring into the discussion now is going back to the public interest test, and we did talk about it before. I had a few examples of why it could be widened. They're not industry specific but they could particularly happen; and just on the need for the Minister as the final decision-making body to have all the information at hand. You mentioned before measuring employment or productivity one step up or down the production line.

I guess the CFMEU FFPD envisioned cases in the future where there could be deemed to be a benefit one step up the production line, but the environmental and social dislocation which this would cause, especially where the legislation such as this EPRS being considered, would deem that it would not be in the broader public interest as such, despite the fact that on the base economic analysis that it could be deemed beneficial in the public interest.

The other factor there is if the broader public interest gets lost in the process of production, so it could be that the final consumer of a product would ultimately benefit very little as the public interest gets subsumed along the production line. Whether that, in terms of employment, justifies anti-dumping duties being removed would be something for the Minister to consider as well.

MR WEICKHARDT: Do you have any other comments or are you happy to take questions now?

MR WACEY (CFMEU): Thanks, I'm happy.

MR WEICKHARDT: Your written summary raised the issue of potential application or the expansion of complainants to include trade unions whose members were or are employees in the businesses that have been or may be affected by dumping. Given the resources that are required to mount a dumping case, it would

seem to me at first blush anyway impractical for a trade union on its own to mount a dumping case and, given the fact that trade unions today can agitate with the employer or anyone else they want to, what practically do you see that suggestion adding?

MR WACEY (CFMEU): Again, sorry, just based that on the original submission in terms of firms thinking that they're maybe victims of dumping but can't pursue matters due to the fact that they fear commercial retribution because there could be one or two firms. Their confidentiality would be scrutinised if they were to bring measures themselves. There are other examples as well that could, for whatever reason, not deem it in their commercial interest to do so. That can occur if they have large suppliers, customers and also parent companies who may be complicit in the dumping process as much as anything.

In terms of that, we think that it would be beneficial for trade unions to have that right. As you said, from a resource level it may not be a right which is used a lot. Maybe it would, as well. But it would create an allowance, for something like this, perhaps for a fairer outcome to occur if they had that right, to be able to pursue that case.

MR WEICKHARDT: But I guess if the company doesn't see it's in their commercial interest and therefore, one assumes, wouldn't cooperate, how would the trade union on its own behalf mount a dumping case?

MR WACEY (CFMEU): Again back to the issue of fairness, I guess. We were talking about the economy-wide measures, the economy-wide consequences of dumping. Even though how would they mount it, the need for mounting it is obviously there because it does affect the wider economy in terms of employment levels and also industry development, which is obviously a consideration as well, and also long-term investment, manufacturers' rights, the national interest in terms of not relying on sectorial inputs for products. That's why there is a need for it, despite the fact of whether it's not in their commercial interest.

I suppose the more likely would be that they don't feel that they have either the capacity in terms of resources, time or financial, or indeed as I mentioned earlier they fear retribution because there could be a small amount of companies operating in that particular industry or sector.

MR WOODS: But if they're not cooperating with the union, isn't the union going to have significant difficulty in (a) finding the resources itself and (b) pulling together the evidence to pursue such a claim?

MR WACEY (CFMEU): Possibly, and there's been a lot of thought around the issue about available data, whether that could become more transparent, which would

allow unions to be able to compile evidence on behalf of their members, and also maybe strengthening Australian Customs and Border services to be able to implement on their own behalf in reconnaissance and that, but it might be more the union movement or individual unions as well.

MR WOODS: Talking just briefly on that. You mention individual unions - that there could be a situation where a union that is manufacturing based sees benefits to its membership and the broader workforce of that sector in bringing an anti-dumping case, but other unions, whose membership or wider workforce are in areas that would be negatively affected because of the price-raising effect, may advocate the benefits of the national interest test to demonstrate that in fact it's in the collective interests of the workforce, at a national level, to, in fact, not have duties imposed.

So these are broader questions that you'd want to reflect on when you put forward your final submission to us. How do you balance, from the perspective of an individual union, the broader whole-of-economy benefits which may, in fact, flow the other way?

MR WACEY (CFMEU): I agree, and it's definitely all about balance I think, in terms of balancing different aspects of the public interest. That's why it's important that the final decision is with an elected body, I think. And as it says in the public interest test - which is mentioned - there's capacity for submissions to be made by interested stakeholders. I'd assume that that would include different unions with different priorities, different employment. Ultimately there will be trade-offs, yes.

MR WOODS: Okay, now the other pathway for you is pursuing this concept of customs having their own capacity to examine these issues, depending on where you get through your thinking on that, as to whether you would see that there may be greater merit - or at least less draining on your resources - to be able to provide some evidence to customs for them to be able to pursue an issue, rather than you try and take it on directly yourself. But I leave that open to you to contemplate.

MR WEICKHARDT: It still seems to me, from first principles, that if the company concerned doesn't - - -

MR WOODS: That's right.

MR WEICKHARDT: - - - because they see it's not in their commercial interest, or they're conflicted or something like that - if they're not willing to come to the party, I don't think customs can force them.

MR WOODS: No.

MR WEICKHARDT: So that's the issue. I can fully see that the union might have

a powerful voice in influencing a company, whether to, if you like, take the step and sort of go for it, but if you can't get them involved - I think they're pretty critical.

MR WOODS: Do you have other matters that you want to raise with us, or that you feel that we haven't adequately covered?

MR WACEY (CFMEU): I'll just sort of bring up something in conclusion. We've spent a fair bit of time talking about the public interest test and that. I think the CFMEU FFPD has finalised on a position on whether we support it or not. We do think that to be able to engage in fair and open trade through anti-dumping is a fundamental right, and that we note that the Productivity Commission didn't have a lot of input in sort of implementing a public interest test as such, in terms of submissions, and we will take it on notice to finalise the position on the public interests by the time the written submissions come in. I've brought up a few issues on the public interest, and think that any which are implemented must take in wider effects.

Just to reiterate that point, we'd say that we haven't finalised a position on that, on the actual merits of the public interest and how it would be measured, but generally speaking - and I think it's made pretty clear - we can't come up here, and we wouldn't come up here, and say that we think that this system should stay in place, even if it's against the public interest. But how the public interest is defined - and there was a lot of conjecture about that within our submission and - well, within submitters who commented on the issue - is something which would need further consideration, I think, if the union was going to support that.

As I said, we think that injury on private production, particularly in the manufacturing basis, generally does have wider impacts on the economy - which we mentioned - which aren't positive, and there would be very few cases which we would envision which anti-dumping duties would be removed in the wider public interest, given the facts of sectorial inputs reliance becoming a reality for the Australian manufacturing industry, and also levels of employment. I would envision that would be our position, going forward, on this issue.

MR WOODS: You may want to, after this set of hearings, look through the transcript of today's hearing as well, because that way you'll capture, in writing, the word of various other players. So in addition to going through the submissions on our website, you'll have access to the transcript, and that may help you at least understand the position of others.

MR WACEY (CFMEU): Yes, as I said, we've looked extensively at the other submissions, and that will definitely be a part of our planning going forward.

MR WOODS: Excellent.

MR WEICKHARDT: Thank you very much indeed for appearing, and we'll move right on to the next participant, PolyPacific and Townsend Chemicals.

MR WOODS: Thanks very much.

MR WACEY (CFMEU): That's fine.

MR WEICKHARDT: Thanks very much.

MR WOODS: We appreciate the work you've been doing.

MR WEICKHARDT: Our next participant is PolyPacific and Townsend Chemicals, and if you could give your names and the positions under which you're appearing today, that would be good, and we look forward to hearing your comments.

MR LATIMER (PATC): I'm Les Latimer, PolyPacific and Townsend Chemicals, and I'm the supply manager.

MR HOGG (PATC): Lindsey Hogg. I'm the Chief Executive of both companies.

MR WEICKHARDT: Okay.

MR HOGG (PATC): When we said that we were going to present here today we just gave you basically a one-liner - not to give you a chance to look at too much and hammer us on it, but a lot of our things - first of all, I should say I'm sorry if we were disrupting you before with regard to our discussion. We didn't realise that the room was so echoey and we disturbed you, so I apologise for that. I'd also like to say that anything I say or we say today, particularly me, is really what I think. I'm not making any definite statements about any situation. It's really only my opinion about things.

Most of what we'll talk about will be some anecdotal experience and feelings about where we sit and what we think about the inquiry.

First of all, we're very glad that - we've been waiting for years for this inquiry to be made, as you can imagine, a hell of a long time, and we welcome the opportunity to at least say our piece. We're sort of aghast a little bit at the fact that in this great country of ours these two puny little companies are the only ones left to sit here in an inquiry situation - it used to be IAC and all that sort of thing - and to be able to put the point of an Australian manufacturing business who is involved in the day-to-day operation of a particular manufacturing enterprise in Australia. I must say that in times or years gone by, of all the companies that have now disappeared off the face of the earth, in terms of - or the face of the Australian landscape - there's dozens and dozens of them, major companies.

You have to think about why that took place - and there's probably a lot of reasons for that. Tariffs have been a reason. Originally you had 60 per cent duties; we had support duties, whenever they put their hand up for it, as you know; and they had dumping duties; companies had permanent lobbyists in Canberra to look after their interests and today - that was when the pendulum was over here to the right, and now it's swung here. It has not only swung to left. As far as we're concerned, it's gone through the case on the other side and that's possibly the reason why we're the only ones that have taken the trouble to present a paper as a direct manufacturing business. So it's a shame. It's a real shame that there aren't more voices to dissent, to

some extent, with what's gone on, what's taking place, but that's the way it is.

There's industry groups that come here - and I think the plastics industry or the associated industry group buckle themselves or couple themselves with somebody else. They didn't even - and industry groups are very funny things, because they represent, as we saw before, a lot of different memberships. So who do they fight for? That was the PIA, the Plastics Institute, and who do they represent?

I also should say that in the early 80s, when the Labor government - and when Button was the Minister for trade and industry - we lobbied for an IAC inquiry then into the plastics and chemicals industry, fundamentally because we are low-tariff thinkers; we think of fair competition, and we think, "You've got to be shape up or ship out". It's with that premise in mind - and we felt that the whole industry should be looking at, within the plastics and chemical - every chief executive or whatever should be presiding over the same problems or even bigger ones or different ones. They should be all presiding over the same problems on a day-to-day basis.

When you had tariffs so high as what they were and all over the place, that wasn't the case. So we argued for 5 per cent, which was the final outcome. We argued for 5 per cent, but in our submission to that, we also said that as a cult thing, you absolutely need a rigorous and effective anti-dumping process. That's the reason why we've been waiting so long for this particular inquiry, because it gave us our chance. But the thing that's floored us, fundamentally, with the findings is this public interest test, simply because it doesn't - we've had several dumping cases and they've gone in all sorts of directions - and you probably realise that from our particular paper. But there's enough ambiguity and there's enough interpretation and subjectiveness already in the current system.

Like, what's "like goods", for example? What's "injury"? So now you're adding another one for the bureaucracy to have to wade their way through, which is another sort of dimension to the whole thing, which elongates it. You've got people that aren't equipped to be able to make these decisions - because in our dumping cases that we've had, we've had people that are totally ill-equipped making decisions about - these are Canberra people - totally ill-equipped to be able to make judgments over our case.

I'll cite an example, which we may have said in there. We had a dumping case about polyurethanes about four years ago or five years ago - - -

MR LATIMER (PATC): 2002.

MR HOGG (PATC): 2002, okay. In that, we actually named four people that were competing with us which we thought were dumping. Two of them were German based companies. One was Bayer and the other one was BASF. The main

one was Bayer, to be honest with you. Now, we went into the thing - and the trouble is that we've got the feeling that when you raise a dumping thing you're sort of semi-labelled as the whinger. Like you're a whinger because you want sort of help and protection and all that sort of thing.

The whole idea is not like that. The word "principle" hasn't come into the discussion today. It's all been sort of like "cost analysis". The words "cost analysis" - we've never done a cost analysis in our lives about whether it should be effective. We say there's a principle involved here. We've got a law. We consider that we're being disadvantaged by lower cost imports, so sometimes principles cost you money, and that's how we felt about it. So principle is a thing that didn't occur.

So we had this inquiry and they sent these people around the traps and to some of our customers. Now, if you go to people in the trade who are our downstream customers, are they going to say, "Yes, no problem, go for it. Give them what they want because it'll mean higher prices for us. We really want that"? They're not going to say that. So they're going to put all sorts of technical obstacles in the way, of which the guys don't have an appreciation for or can work their way through.

An example was that they went to a company called Screenex - which is out the other side of town and they mould these mining screens and things like that. Now, we have three customers in Australia - three customers that take our material for screens - three customers, regular business for screens - and they know who they were - and we got regular business and all that sort of thing. So they went out to Screenex - and this is our opinion again, I go back to my opinion thing - this is what we've said in the statement of essential facts, wasn't it - that they went to there and they said, "Well, you don't make like goods. You don't make like goods for screens." The reason was because the blokes there said, "Okay, we'll put Townsend material in the machine and we've got to turn that knob there 5 degrees, so it ain't like goods" - and they accepted it.

So it's not just the numbers of people that we've been talking about here to bolster up the Canberra capability, it's the appropriateness of them and their skills. So that's an issue, how you get somebody that's impartial to be able to make that, and they held right up till the last day that we weren't making like goods in Townsend Chemicals. We only had 60 customers that were taking polyurethanes from us, but we didn't make like goods. We had a Prof Cherry from Monash University, as he was then, and we asked him about it on the last couple of days of the thing and he said, "How ridiculous". So he wrote this beautiful letter about like goods and turning knobs, and he said, "Of course you make like goods. There's no question about it", and then the Customs Department rescinded - but we were dead in the water already because these things had come out. So we certainly lost the case.

It was those sort of things. We're ground feeders. Here's another thing. If

somebody today wants to bring in a candle, I want to bring in Christmas candles, so they apply for a duty free - let's say it's from a country that we haven't got an FTA with because there are heaps of them like mice out there now anyway. So we've got them from a country that hasn't got an FTA and there's 5 per cent duty or whatever there is on it. Unless the candle-makers in this country read the gazette, it will go through. Right? It will go through.

So then he says, "Okay." He goes through, he's got a duty exemption. So he says, "Let's have a crack at - let's dump." What's the point in dumping? We got that, we shouldn't have got that, so we'll go there. So it's like a sieve. It's just all these sort of things continue to escalate. They feed on each other, and once they get a green light in one area, they consider they're green-lighted in the other area and it's not until there's damage out there - and then the candle-makers of Australia have to get together, because it's got to be an industry based thing; it can't be one manufacturer.

The candle-makers of Australia would have to get together and unite. It's very hard to get competing companies to unite, but anyway they'd have to unite and present a case to try and stop these materials coming in. And then they say, "It's too hard." Then what are they doing it for? They've got low duty levels anyway. Most of the stuff is coming in through FTAs, or a lot of things these days, so they don't take the trouble, so the principle - the fact that they're being disadvantaged by low-cost imports or unfair competition through dumped products is put aside because it's all too hard.

We have never taken that attitude in our business. We've taken the attitude that there is the principle. I keep on referring back to it. We have been damaged. The thing with the Bayer one: there they were, this monstrous German firm. They've probably got about three or four competitors in Germany today where they would be competing against. Maybe five suppliers and a massive market for polyurethanes. What have we got here in Australia? We know of nine and it's a piddly little market. So the dynamics between these countries and our country - we've got nine. They're coming out of China, they're coming out of here, they're coming out of Mexico, they're coming out of Spain, they're coming out of Italy, and the whole thing is very, very complex for a small business trying to operate in this.

The last thing that we need, the most important thing we need, is somebody to recognise the input. There are 100 employees altogether, maybe 150 employees in both companies. You could say, "This is too hard," and on the public interest test you could say, "We've got only half a dozen people there, a hundred people there. What do they matter?" Right? But it's not only that, it's the technology that's capable within these businesses. We're developing technology and spending money in these businesses. We never stop spending money. We put a new reactor into our place in Townsend - it's about $5 million worth of equipment - to be able to make polyester

polyols and compete on the world stage, so it's not like companies, oil companies. They're sort of in a harvesting mode or they don't qualify. They are spending money to be able to survive and this is rigorous. They've got to shape up or ship out and there are companies out there that are shaping up to the challenge of these imports, but to be abandoned in terms of the one thing, one recognition of unfair competition - it's not public interest. We're not talking about public interest, we're talking about unfair competition.

That seems to have been put on the sideline, this public interest thing. I question the public interest thing. I sat in an aircraft once in the States. I was sitting next to this lady and she was bemoaning Bush. She said, "He's lost all the jobs in America," you know. "All our jobs are going elsewhere and all over the place. The quicker we get rid of Bush, the better." She wasn't the only one that was thinking that, but for different reasons. I said, "It's trade." She said, "All American jobs. There are some people on the dole and people who aren't working," and things along those lines. I said to her, "It's the way the economics are these days. This is what happens." I said to her, "Where do you shop when you go and buy things?" She said, "Kmart," you know, over there.

I said, "Why do you shop at Kmart?" She said, "Because it's low cost." This is the public, right? "Because it's low cost." I said, "Have you ever looked underneath the article you've bought?" And she said, "No." I said, "If you looked underneath it, you'd see 'Made in China', so that's where your jobs have gone. You're feeding this - it's something like 20,000 containers at any point in time on their way from China to the United States." That was just for Kmart. So, it's the public interest: what do the public know, to some extent, about the grand scale and who is in Canberra and who is going to be in a position to be able to say, "A company like Townsend Chemicals, they're doing all the research, and PolyPacific, doing all the research and development, employing technical people and being able to make technical products and in a very, very hostile world - that shouldn't exist. That company shouldn't exist. We can discard that business, because it's only got a few people."

MR WEICKHARDT: Let me say at the outset, I can empathise with a good deal of what you say, but I don't think anyone in Canberra is saying or should be saying that a certain company shouldn't exist. They may have a fairly robust view as to how companies should be able to survive. But if we come back to the anti-dumping regime, we do work within the constraints of the WTO system. The WTO system makes it very difficult on two grounds in businesses like yours. The first one is that small and medium-size enterprises have a very high threshold cost and a very small revenue base on which they can recover that. It's not as much a problem for a bigger company.

The second is that making any form of differentiated product, you run into difficulties against inevitably the like goods test. I won't get involved in the merits of

whether customs were right or wrong or you were right or wrong but I can totally empathise with the difficulty that you had in getting over that particular hurdle. What I can't do, however, is even recommend that the Australian Government try to do something that's outside the WTO guidelines, because that's a much more difficult fish to fry. What we can do is try and make sure the Australian system works effectively for all Australians. In that regard, the issues we've raised before are important: that is, there are balancing issues of the interests of customers as well as the interests of suppliers. But I understand from your submission the frustration and the cost of trying to go through the system.

MR HOGG (PATC): The WTO doesn't say you've got to have a public fairness test, does it?

MR WEICKHARDT: No, it doesn't, although it doesn't preclude that.

MR HOGG (PATC): No, but it doesn't say you have to, either.

MR WEICKHARDT: No, I know. It doesn't say a lot of things. It does say some of the things that we do and we go further in some regards than they do. Of course the Europeans have extensive experience of a public interest test as do the Canadians. I think in neither country - countries, given the fact that the EU is an amalgamation of many; in neither case, though, has the imposition of a public interest test really led to the sort of bureaucracy and time delays that you're talking about. It has led to, in the case of the EU, maybe 10 per cent of the cases not getting up. That's their assessment. But it's a minority of cases, for sure. So we saw it as a way of trying to balance some of the competing interests that we got submissions from.

You will have heard this morning from one industry, the steel association, who say, "Well, our downstream members become uncompetitive because these upstream suppliers are getting all this protection," and it is a matter of us trying to weigh the balance between all these interests.

MR LATIMER (PATC): It's not protection though. It's not protection.

MR WEICKHARDT: Well, beauty is in the eye of the beholder and - - -

MR LATIMER (PATC): You go through the case, you prove - and if you come to the point where you've established injury, the causal link and the dumping, that's it. It's unfair trade.

MR WOODS: Yes, but presumably the imposition of the duty should only occur where it's in the collective national interest as well.

MR LATIMER (PATC): This is your agenda, it appears. We object to it, because it's adding something that doesn't exist presently, and it's another complication where it has been established through the process that unfair trade is taking place. It's unfair.

MR WEICKHARDT: I think, with respect, the "unfairness" - and I understand the assertion - but the "unfairness" is a word that has been inserted. The WTO simply allow countries to take action against goods that have been dumped or subsidised. I don't think they use the word "unfair" in the WTO guidelines at all.

MR LATIMER (PATC): Well, that's what we use - because it's unfair.

MR WEICKHARDT: Okay, I hear that.

MR LATIMER (PATC): We've advocated for all these years against a lot of companies in our same sector for the reduction of tariffs. We saw the benefits of that. We have nothing to hide from that. We cut our cloth to suit our needs. We're globally competitive against fair trade - fair trade. Unfair trade you can't do anything about so you rely on the instruments that are there, not to protect you but to redress what is occurring that is unfair. And the public interest test is just adding another complication - and interpretation - which is going to dilute the ability of Australian companies to defend against unfair trade.

MR WEICKHARDT: I can see you have concerns about the degree to which it might, if you like, dilute - provide another hurdle that has to be jumped. In making that suggestion, however, we saw it being something that probably acted in the exceptional case, rather than the norm, and that it would not add a huge amount of extra bureaucracy. We saw it as something that could be a simple set of check lists that could be carried out pretty expeditiously. Now, of course it's another hurdle, it's another uncertainty, but our perception was that it was something that would not become a super-onerous, extra burden on the people seeking, if you like, some defence against unfair - in your words - low-priced or dumped imports.

MR LATIMER (PATC): Well, we think you're wrong.

MR WEICKHARDT: All right.

MR LATIMER (PATC): We think that it shouldn't be there. We think there's sufficient - - -

MR HOGG (PATC): We thought that this inquiry was going to come out with something that said - like a motherhood statement: fundamentally, dumping is for the protection or the recognition of Australian manufacturing industry and it's ongoingness. There is no motherhood statement about like that, so what's it for?

You know, they give out grants: there's government grants for companies; there's R and D grants; there's start-up grants - all these sorts of things - for different businesses. What's the point of giving out that money if they're going to have to face a tariff system and a dumping system that's like a sieve? Because that's what you've got today. And this other test is going to even make it, potentially - there's nothing that's come out of this inquiry or these findings of yours that actually put any bite back into local manufacturing. It's weakened it further.

So this hope of ours that one day somebody will grasp the nettle of these issues and think that Australian manufacturing is relevant and it has to be - like, in the IAC inquiry. A stone's throw from here, during the last war they were making fighter aircraft - not far from here. Today, if all these things happen the way they are, we'll be lucky enough to make a billy cart, because it will all be gone, all the capability. Once it's gone, it's gone. Once Townsend Chemicals doesn't exist and they can't make polyester polyols and they can't make polyurethane adducts and they can't make TPUs and they can't make polymeric plasticisers - and we are exporting polymeric plasticisers, we're exporting TPUs, we're exporting polyester polyols, we're exporting urethane adducts. We're out there doing that sort of thing.

How can we do export development if we don't have a company at the end of the day, if the Australian community or the Australian government or whatever, say, "But you're not important any more. You're not important, because you've only got a few people" or whatever. We're about exporting. We're about competing out there. But my goodness, like you say, these fellows in Germany that we talk about, they sent these guys over there - and the main one was Bayer in our situation - and the cost of this thing, what you talk about, the cost to the other company, like $300,000 and $400,000 for them to defend, right? All Bayer did in that inquiry was write a letter. It only cost them a postage stamp from Springvale to wherever it was here in Australia. They didn't even bother visiting them - and they were the main culprit.

They sent these guys overseas, couple of guys - in whatever class they prefer to travel in - and they saw the Italians and the Italians, you know, "Here" - and they saw BASF in Germany, on the Rhine River there. It's all very nice. And they came back and they didn't even bother going to see Bayer - and they were the main ones that are doing it for what we were concerned. So there you go. I mean, there's the ridiculousness of this whole situation for us. The main culprit wasn't even visited. And the cost to them was one postage stamp and a letter. That's all they did.

And the customer, "Bayer, they're pretty good", but they're pretty good over there too, because - you know, you see a lot of inquiries with these German chemical companies, who are involved in this sort of buggerising around and that buggerising around and their thingo by the EU and all around the world - they're past masters. They get a couple of guys to go over there and they're like - you know, they go and have a look - they're past masters of being able to put up the facade and do all that

sort of thing, and they come back and they say, "Yes, yes, yes". They do it all the time. So they're so clever, they're so capable of being able to defend that situation, that our guys - the fellows that really don't understand the product and don't understand the technology to any extent - are putty in their hands. That's what we think.

That's why we were looking for sort of a more robust system that gave Australian manufacturing the capability to at least present a case. They relied upon our customers. We gave them all our customer lists. And we never talked to one customer. We never went along to say, "These guys are going to come along, do the right thing". We said "We'll just do this pristine. We won't get ourselves" - so we gave them our customer lists and they went along to them. Some of them said, "They do a good job, Townsend, and they make good materials", and some of them piddled on us - and they did that simply because they didn't want to see prices go up.

I understand that, but the consequence of that - of not recognising Townsend - is a buy-buy company - with all the technology we've got, with all the employment that we have there, whatever they are, the money that we spend on development and the money that we spend on enhancement, the money that we spend on being able to become world competitive, the analysis that we do, and just to have this business here in Australia with this capability - and as I said before, all we ask is a robust system, so that when somebody - and the idea - let's just get on to the concept of where did we get the information from?

If we want to sell materials into some of these European countries - and I think it's like 8 or 10 per cent or 15 per cent duty. We've got 5 here. So even in some of these highly - and the same in Korea and some of these other places. So the duty levels are higher in these countries that are exporting - and we've gone down to 5 per cent down here. Good old Aussie, we're down to 5 per cent, so we're nice and fair with the WTO. But these other guys have got higher - so they've got natural protection themselves anyway.

I was going down a particular thing and I've just forgotten my train of thought. But the thing is that that's what we're after: somewhere where somebody recognises Australian industry and its capability and its ability and its right to survive in a level playing field market. That's fundamentally what it is. What your output has, it has done nothing to aid that, done nothing. All it's done is added, as we've said before, this other bureaucracy into the thing and it's going to make it even more difficult for us to operate.

MR WEICKHARDT: I hear what you say and I understand how strongly you feel about it, but there are companies that are downstream of those that take dumping action. You heard from one of them today, the Australian Steel Association. They represent a group of companies that say, "We become uncompetitive. We're not able

to compete because those companies upstream of us take dumping action," and indeed one of their consultants and advisers said this morning that they believe even the threat of taking dumping action causes overseas suppliers to quake in their shoes so much that they put up their prices immediately. I suspect that you don't think the Bayer did that in your case?

MR HOGG (PATC): No. They were just so arrogant, in my opinion, they just sent a letter to say, "That's that." You know, "How can Bayer" on the top there, "Townsend who?" What chance have you got? Anything that we show them down at our place, you know, this little technical enclave, this little capability enclave existing out there in the Australian economy; it means nothing.

MR LATIMER (PATC): Are these guys saying they can't exist in the Australian economy? They can't be competitive unless they've got access to dumped imports?

MR WEICKHARDT: Again it comes back to the comment that Lindsey was making about people wanting to take advantage of shopping for cheap goods. I'm not a spokesman for the Australian Steel Association, but they would say that in some cases the imports that they buy as a result of dumping action don't allow their members to be competitive when they're making fabricated products. So I guess, coming back to the issue of why are you reacting to the report that we produced, the Productivity Commission's act requires us to take account of the interests of all Australians, not subsets of Australians. That's what we've attempted to do in this report and to look at, to use one of your words, a fair system for all Australians.

That might mean that some companies get disadvantaged and other companies get advantaged, but if on balance all Australians are better off, then we've served our purpose. All I can say is that we're still at the draft report stage. We're still taking input and we're still trying to consider whether we've got the balance right. But our judgment was that the current system on occasions may impose costs on downstream users that are unjustified. You're saying you don't believe that's the case and we respect your input.

MR LATIMER (PATC): No, my question is: is their business only sustainable if they have access to dumped imports? If they're not dumped, if they don't have duties, then they don't have an issue. If they are dumped, then they're dumped. And if they're saying that, "We can only exist if we can access dumped imports," then you've got to question their viability anyway. And remember, they've got customers too. So would they advocate that their customers go out and source dumped imports?

MR WEICKHARDT: I think they would probably say in some cases they do and there's nothing they can do about it.

MR LATIMER (PATC): I'm sure they don't. They wouldn't advocate it.

MR WEICKHARDT: No, they wouldn't advocate it, but I suspect in some cases they'd say their customers do access dumped imports but there's nothing they can do about it. At that stage, they're sufficiently differentiated and small scale that it's almost impossible to mount any dumping protection. So this is where, when you look at different ends of the telescope, you sometimes get different views.

MR LATIMER (PATC): To me, if you've got dumping, if you've proved dumping, the injury is proved, the causal link is proved, the dumping is proved, and a public interest decision comes and rescinds that in the public interest, you're just giving a green light to the continuation of further dumping; therefore, further affecting the local manufacturer. It's a green light to any imports in that case, so you're really tying the noose around that company's neck.

MR WEICKHARDT: If we get over the hurdle of the fact that you don't like a further test there, can we talk about whether there are any particular aspects of the public interest test that we suggested might apply that you find particularly egregious?

MR LATIMER (PATC): We've probably got to develop our arguments further on this and put in further submissions, but even to say that 20 per cent - holding 20 per cent market share - would cut you out of being able to take a dumping case - I mean, 20 per cent when? Before the dumping took? Before you've lost 30 per cent of your market? At what point is 20 per cent considered to be your proportion of the market share or the local industry's proportion of the market share? After the injury has already commenced and it's set in place? Beforehand?

MR WEICKHARDT: What do you think would be a fair threshold and a fair way to - - -

MR HOGG (PATC): Les made the point before, we need to help each other. But the thing is, let's say there's a market in Australia for 1000 tonnes of polyurethane. One company has 85 per cent, assume. The rest, 15 per cent, is other companies. These guys target the big baby: fantastic prices, low prices, throw away your costing book, we've got to get that business. I've heard these guys talk. "It doesn't matter what, we've got to get that business." This is the way they think, so they can ride roughshod over all sorts of things, but, "We've got to have that business." We, in that situation, would be left with 150 tonnes, and it could be over 30 companies. Where is this 20 per cent thing?

We represent the majority. In that case, we would represent the majority of users but the market share which is targeted by these predators, which a lot of these import - let's be honest about it, a lot of them are, these importers. There are good

and bad ones, but in that field, they are predators. They look for opportunities and they don't give a continental about local industry. It's just their own interests that they take into account. They're not employing Australians, they're not doing R and D in Australia, they're not servicing customers. Half these guys don't have guys on their staff who could go round and trouble-shoot. But, as you know, if you're selling plastic raw materials in Australia, you have to have troubleshooters and people that can deal with technical issues. You know, they'll go back to Germany. That's what happens. So 15 per cent could represent 99 per cent of the customers. So where's that?

MR WEICKHARDT: I guess, going back to your question, if you'd started off with 85 per cent of the market and you'd lost that 85 per cent through dumping, I think that would be a situation where the public interest test should look at a position before you lost that share due to dumping rather than afterwards. But is there a science about 20 per cent? The answer is no. It was a judgment call and if you think that answer is wrong or it ought to be judged some other way - what we were trying to do, as the Europeans have done, is simply say, "When does the cost of measures being imposed disproportionately affect a whole range of downstream customers with only a very small benefit to the manufacturer?"

If I go to the extreme point, if you've got a manufacturer with 1 per cent market share, 99 per cent of the customers are paying an inflated price to help that 1 per cent market share manufacturer survive. That's a pretty inexact way of helping that manufacturer.

If that manufacturer is important - strategically or economically or from an innovation point of view - surely, from a government point of view, it would be better to target that with a rifle rather than a shotgun.

MR HOGG (PATC): You could argue, though, that the poor bugger hasn't had a chance to get off the ground because there are fellows dumping wholesale all around him - and that the tariffs are all - - -

MR WEICKHARDT: Well, we did say if it was a start-up case or a new facility, then there should be some exception made.

MR HOGG (PATC): Yes.

MR WOODS: It would certainly help us - we're having a sort of difference of opinion at the principle - and I take your earlier point of you fighting that principle, but if you could then look at the various tests we have proposed and cast a sort of marketwise eye across them and look at any opportunities where people might gain from them or where you can identify ways of constructing them that better reflect where we're coming from - and as I say, as a matter of principle it may not be where

you're coming from - but where we're saying, "Are there situations where the imposition of a duty manifestly has greater cost for the economy as a whole than it provides a benefit for the particular affected company", then we would appreciate that input.

MR HOGG (PATC): Okay, we just see it as another hurdle for local manufacturing.

MR WOODS: Yes, I understand that.

MR HOGG (PATC): And it sort of sits there like Damocles' sword, that's just ready to strike you at any time they feel like using it.

MR WOODS: I don't think we're going to resolve that one today.

MR HOGG (PATC): No, I know we're not.

MR WOODS: But we do understand your view and it's on the record.

MR HOGG (PATC): Because it's going to happen, isn't it, the way that things are even - - -

MR WEICKHARDT: Well, whether it happens will be a matter for others to judge.

MR HOGG (PATC): Yes, well, we think it's going to happen.

MR WEICKHARDT: Some people who are participants in this inquiry have said "It's fantastic if you suggested it" and others have said it's terrible, and we're trying to understand and unpack the reasons behind those feelings so that we can assess whether we've got this right or not.

MR HOGG (PATC): Yes, well, in our opinion, you need industrial segment skill base people available to Canberra - like when we went up there to Canberra, for example. We went there a couple of times and sort of presented our case. We sat down there, and there was Les and I and there were a couple of the fellows - or one of them - - -

MR LATIMER (PATC): Two investigating officers.

MR HOGG (PATC): Two investigators, and the rest of the room was full of about seven or eight other blokes. What were they? Lawyers. So they're stacked with lawyers in that place, and they're all sitting there and they didn't say anything, but they were all lawyers. So there we were, two of us - so they were worried about

maybe what we were - you know, a loose cannon type of thing - which we may have demonstrated today that we are capable of. So they had the room stacked with lawyers in case we said something or whatever so they could contest it, because they decided on - whatever they did. So they're stacked with lawyers up there. They're not stacked with people that are capable of interpreting industry or doing this sort of thing. It's lawyer business. We had the WTO thing slammed up us more times than you could poke a stick at, and so the lawyers were there to be able to do just that.

And everybody hides - even you guys - behind this WTO business. But what about Australia? What about manufacturing Australia, giving it a chance to survive in a very hostile environment - and it is hostile out there. We preside over issues every stinking day about competition, domestically - in PolyPacific particularly - but also import competition. It's our day-to-day consideration. We're getting the FTAs, and all we've got - with 90 per cent of these countries these days - is dumping. That's all that's left. It's gone from 60 per cent duty, plus support if you want it, plus the fantastic dumping thing to a dumping situation that's got more holes in it than a sieve. So it's crazy.

So we're really here just saying this because somebody has to say this to you. Somebody has to be able to go on the public record as saying this is not right, this is not fair, this is not the reason why dumping is here. Dumping is there to be able to recognise Australian enterprise and where it's fair - and as I said before, we export materials - but to give us a fair go in our own country, because the other guys do that.

What I was going to say before - getting information, this whole idea - this is what I forgot to say - so we've got to provide information. So when the investigators come to your place they really want to know what you had for breakfast four years ago. And it's very hard for us to remember some of these things. They also want to know - don't dare show - a little company, or a company like ours is making a profit. "You're making a profit. What are you whingeing about?" So that was that sort of connotation, that "If you're making money, what are you talking about?"

So you go, say to Germany, for example. I keep on using Germany, because they're the major polyurethane producers in the world. So you go to Germany and they've got all these sort of clever little things that they can do and they can sort of "Must, must, must." Now, the threat is going to come from China. So we've got to get information on normal values from Germany for it. Are you kidding? How are we going to do that? Because the statistics - polyurethane is all bundled into this bloody great big mishmash of all items, and you can't see - this Bureau of Statistics thing, it's such a mishmash that it has no - it's useless to us, in terms of establishing or - so we go to Germany.

So we use the Australian Trade Commission over there to try and help us to try and get some normal values. We got some, but it's that arduous and it's that sort of -

it's not really objective. It's very subjective as to what the numbers are. But we got them, after months and months, six months - or more than six months - and getting somebody over there. Try and get normal values in China. Say you send somebody over to China and say, "We'd like to be able to establish some normal values up here". I mean, forget it! So we're going to be swamped with this situation even from Chinese imports. That's coming. It's already on our doorstep. How do we deal with that?

So you've got what we think again is a flip-floppy - we've got duty free - if they do an FTA with China, you've got a flip-floppy dumping legislation in place and you've got to defend yourself against Chinese imports. Forget it. We'll just become a Walmart. That's the reality of it. And somebody has got to stand up for - somebody in your place, in your position, or in Canberra or in a position in government - and stand up for local manufacturing, because it needs it. It needs recognition and it needs somebody to say, "Yes, we like you here and what can we" - you know, we don't want any help. We're happy with 5 per cent, we're happy with the FTAs, but this is the only thing that exists that can recognise an enterprise that's doing its goddamn best and can compete and supply overseas markets. That's the important thing. We export. So we're exporting against these fellows sometimes in very highly competitive markets, but why should they be allowed to dump their arse off here in Australia?

MR WEICKHARDT: Has anyone ever threatened to take action against your exports?

MR HOGG (PATC): Never.

MR WEICKHARDT: Okay.

MR HOGG (PATC): We're probably not that big to do that. We're probably not that sort of - no, nobody ever has, in answer to your question.

MR WEICKHARDT: Do you think you ever export at less than normal values in Australia?

MR HOGG (PATC): To be honest with you, we watch that. You know, our little business thinks about those things. We say to ourselves, "Should we be doing this?", taking into account "Are we dumping?", and we can say no.

MR WEICKHARDT: All right.

MR HOGG (PATC): We ask ourselves that question. That's a very important sort of moral question you have to ask yourself - and we have done that. We've been in three or four dumping cases over the years. One was against a Japanese company

about 20 years ago, something like that. This is strange. This was the strangest thing to us. We took on this Japanese company that was importing a polypropylene, a modified polypropylene - major, major company, a household name company in Australia - and they were supplying a local - and after all this time we lost - lost. Clearly they were dumping, but they lost - and do you know what happened? The next day the end user rang us up and said, "We want your material, because the others have walked from the market."

Now, what we interpreted there was that there was a political thing. They said, "We're not going to find you guilty because you're such a worldwide name." This is 20 years ago so - but we've got the records. We think that they went along to them and said, "You're dumping. We're not going to find you guilty because that's - how can we have your name, and that sort of thing - but stop." That's what the consequence was, but the actual dumping - we lost that case, but we won it.

MR WEICKHARDT: You won it?

MR HOGG (PATC): Yes, we won it.

MR WEICKHARDT: Lost the battle but won the war.

MR HOGG (PATC): Exactly right, but the process was interesting, if we are right on that.

MR WEICKHARDT: Okay. Lindsey and Les, thank you very much indeed. You've made your point powerfully. We understand it's from the heart and if you want to make a further submission, obviously we'd be very interested in any comments you've got to make about the draft report and how we think you could improve it.

MR HOGG (PATC): Yes, we might comment on the draft report. We would certainly like you to reflect on the things that we've had to say today.

MR WEICKHARDT: We will, and thank you for appearing. We're going to adjourn for 15 minutes now.

MR WEICKHARDT: Richard, it's Philip Weickhardt speaking, and Mike Woods.

MR WOODS: Yes, Mike Woods here.

DR WHITWELL: Right. Hi, Mike.

MR WEICKHARDT: Richard, also I should make the point that there's a transcript being taken of these proceedings. Okay, Richard, perhaps if you'd just give, for the basis of the transcript, your name and the position under which you're appearing at these hearings, and then perhaps you can move on and give us a brief outline of the points you want to make.

DR WHITWELL: Yes, sure. My name is Dr Richard Whitwell and I'm a private practitioner, a lawyer. I operate by myself. I sometimes do a little bit of work in the area of anti-dumping but most of my work at the moment, because I'm located up in Port Hedland, happens to be more basic than that. But I still have a serious interest in anti-dumping activities and policy. Is that enough introduction?

MR WEICKHARDT: Yes, that's fine.

DR WHITWELL: I've read the report and I'm going to read it again and probably again after that before I make my final submission, but basically I think that the report is good. It stays pretty much in the area where it's needed - in other words, it looks at trying to not tackle too much in the anti-dumping area but basically to try and get the framework right and in particular issues to do with injury and public interest are interesting because one of the big issues there is, depending how you measure them, but we can have very concentrated industries in Australia, in terms of not an overall category of industry but in terms of the industry that's defined in terms of the Anti-dumping Act; so we actually end up in situations where we have people who are basically vying for market power, in that instance - or some deal has broken down where they actually have to re-establish themselves and be more aggressive in the market.

With that background, you've really got to look at some form of competition assessment of the effects of the anti-dumping measure that you're likely to impose if you don't consider them. That means that you end up perhaps in some instances leaving the market at a fairly non-competitive level if you impose the duty, whereas it might in fact be quite appropriate for that market to be softened up a bit so that we could let at least some other people come in to compete, not necessarily at the manufacturing level but at the distribution level and selling level. I suppose that's something I saw as really good about the report, that it does look at trying to bring into the public interest concept that competition.

The area I thought was also good in the competition area was where you indicated that a company which had a very small share of the market, a minute share of the market - that's probably an exaggeration, but had a small share of the market - that company could not use the legal influence of having effectively a legislated monopoly to capture a large degree of economic profit. I thought that was good. The thing I don't understand, though, was where you went further with the national interest and you indicated that to some extent it was like a national priority to do something and therefore that should be taken into account.

I have difficulty with that because I think the criteria are always going to be difficult. It's difficult enough to get criteria relating to effective competition, but when you introduce something else which is a little bit in the imagination of the politicians, I suppose, you tend to have a variable outcome.

MR WEICKHARDT: Sorry, Richard, I'm lost. What's this issue of national priority?

DR WHITWELL: Sorry, perhaps you call it something different in the thing, but what it is - the way I read it, and perhaps I've got it wrong. That's why I indicated that I was a bit lost - but I thought that what you were trying to say was that in some instances you would actually think that the overall benefit to the Australian economy would much outweigh the benefit to the part of the economy that was damaged by dumping. I thought that's what you were trying to say.

MR WEICKHARDT: But we identify a number of tests for that, and one of them is not strategic selection of particular industries.

DR WHITWELL: Yes, I understand that; I can understand competition and the relevance of competition policy but I'm finding it difficult to make that bridge between the concept of competition policy and this other issue to do with the effect on the economy as a whole, because it may require in a sense a different solution. Just to target that sort of approach at anti-dumping measures doesn't seem to me to be concrete enough - that is, that you need to really look at - if you're looking at an Australia-wide economic problem, then there are more things usually than anti-dumping that are going to be affecting that.

MR WEICKHARDT: Richard, we're not trying to use anti-dumping to achieve some sort of market restructuring. What we're trying to do is ameliorate any significant adverse effects of anti-dumping on the broader community. So it's completely the reverse perspective and it would be helpful to us, when you're contemplating a final submission, to go through the actual tests, the six tests, that we're proposing and give us some guidance on your views as to where they may be misleading or unhelpful.

DR WHITWELL: I will have a look at that because it's just something which I think - anyway, we've been over that; but I will do that and I'd be very pleased to do it.

MR WEICKHARDT: Thank you.

DR WHITWELL: The other issue involves this assessment of what we call variable factors or the elements making up the equations in terms of pricing and costing and so forth. It does seem to me that, if the industry wants to use anti-dumping, then I cannot understand why industry doesn't want to provide all the information - in other words, provide it in a way which is more akin to the sort of information you provide to an alternative dispute resolution process, so that people - within certain constraints, obviously - can look at the information provided by both parties and can say, "All right, you say the cost of production is this but all of our international research shows it's not," and to actually get to a position where there may be, in a lot of instances, agreed outcomes; not totally agreed outcomes about the extent of duty but agreed outcomes in terms of facts.

At the moment what happens is that this is actually done by customs and they in fact are the only people who have got the list of agreed facts, in a sense. So what's happening, you're getting a lot of chatter going on because people presenting their case are presenting against something they don't know. They don't know - they've got no idea, basically - what the other side says because everything is kept totally confidential, which it has to be to some extent; but it's actually extreme. So you're sort of arguing against - I'll give you an example. You're arguing against numbers which aren't numbers. We see graphs in reports which don't have any proper axes qualification on them, so it's just impossible to interpret.

MR WEICKHARDT: From that point of view, Richard, are you in favour of administrative protective orders that would allow, say, legal or accounting representatives of both sides to confidentially view data?

DR WHITWELL: I think in general, yes, but I wouldn't like to just say we adopt willy-nilly a solution from the US. I think we have to see it within the context of the way we're developing our own law in that area, and that's the reason why I've pointed in particular to the area in ASIC where the takeovers panel have similar issues. They're trying as much as they can to get disclosure between the parties so that they can form a view. The problem we've got at the moment is that, as I said, people are just shadow-boxing. I think that's very unprofitable and therefore I do actually think there should be some form of protective access to information and debate about it.

MR WEICKHARDT: So if you piggyback on the ASIC idea, how would that

work in an anti-dumping context?

DR WHITWELL: I would like to give a bit more thought to that because they're still developing their policy in that area. I'm prepared to put that into the final submission I make.

MR WEICKHARDT: That would be useful.

DR WHITWELL: I think there must be better ways of solving these sorts of issues than actually using what I'd call - I mean, I'm exaggerating, but what I'd call a clandestine approach; not that people are using that but it's just the way it appears.

The other thing I'm concerned about is when we get a finding, everything is hidden. We don't know what products are able to be imported unless we're a special sort of person and we are actually some form of importer or potential importer and we've convinced somebody that we've got a case to see these numbers. I find that, together with the ABS hiding - you know, confidentiality issues et cetera, very difficult to cope with because it is a public body. It's producing a tariff of a type and that's imposing extra costs on the community but it's also assisting manufacturers. It just seems to me that we need to open that up so at least people can understand what's going on.

MR WEICKHARDT: Again, in your final submission you might like to elaborate on where you see the balance there. Others have expressed a degree of concern about the confidentiality of some of the information but I think everyone virtually who's commented on this area has agreed in principle that it would be good to have more disclosure. The question is where you draw the line in getting the balance right.

DR WHITWELL: Yes. I suppose that the only other aspect I wanted to speak about was the Trade Practices Tribunal, rather than having a separate tribunal or separate body assessing anti-dumping from a review perspective. I think that you've already got a body that's set up there as an economic evaluator or economic assessor. It's got somebody, for example, that chairs it from - I believe it's an ex-member or a member of the Federal Court. Also in the make-up of that tribunal we've got economists and accountants and a mix.

So you've already got something set up to do it and it seems to me that the process and the procedures that they adopt are really good because they actually do open up the data and they do actually allow people to have a proper discussion about the merits. This is similar to, if you've gone to the Federal Court, its elaborate discovery process, which is what you're stuck with in the anti-dumping area at the moment if you want to see anything. You've got to go that far whereas, it seems to

me that if we had something like the Trade Practices Tribunal where information could be shared, we'd be getting a lot further in terms of the veracity of the process. That's really all I wanted to contribute.

MR WEICKHARDT: Okay, thank you for that. Mike, do you have questions?

MR WOODS: No. I was interested in your thoughts on the tribunal and it certainly gives us some cause for thought as to the benefits of that model, so I appreciate that input. I still remain a little unclear about your views on the public interest test but as you said, you'll explore those for us.

DR WHITWELL: Yes, I'll come back to those.

MR WOODS: And the idea of not taking the APO model as such but of looking to the Australian legal culture and see if there's some other way of dealing with it, I think that's also helpful. It would help me put into context your views if you were able to give some indication of your background to this topic. Clearly it doesn't relate to iron ore exports at Port Hedland.

DR WHITWELL: No. I used to work in anti-dumping for many years.

MR WOODS: Very good.

DR WHITWELL: That's where I did the academic work later on. I did my PhD in this particular area, so a lot of these - it's not repetition but some of these aspects became obvious when I did that work on the Australian anti-dumping system quite a few years ago. They're still there but I'll put it this way: I'm very happy to contribute further on this.

MR WOODS: That's helpful. I think it's a fascinating area.

DR WHITWELL: That's right, it's pretty hot. It's probably a bit more than that. I think it's about 35 today - and there are many, many ships sitting out there waiting to get loaded with iron ore, I can tell you.

MR WOODS: Yes, I've been there a few times.

DR WHITWELL: Yes.

MR WEICKHARDT: Richard, in your first paragraph you make a comment, "Early deliberation on injury and national interest could lead to a redirections of assistance, which have proved fruitful for the complainant and the economy as a whole. Quick and intelligent intervention is a preferable option to a regulated dead

hand". I understand the words, but "quick and intelligent intervention", I assume you're suggesting this is via some government body, and quite frankly, some people would suggest it's doubtful whether governments in these regards can be either quick or intelligent.

DR WHITWELL: I take your point, and I think I was being a little bit too sort of extreme in that, but what I want to say is that we employ, in government, some very highly paid executives, and they actually are, a lot of them, involved in industry and some in consumer areas, and if we've got this - we must have this expertise if we're - sorry, I'm putting it a different way - but if we're paying so much, we must have expertise there which is able to contribute, from a policy perspective and in a practical sense, to whether, in fact, we need to go down this anti-dumping route with every inquiry.

I can see how the private sector likes the idea of having something with just - you know, like arm's-length, in a sense, to government, which it, to some extent, is, but really, when we're trying to look at issues to do with resource distribution - and particularly in the sort of industry context - it is possible to make decisions reasonably quickly, because we collect a huge amount of data about it and we've got expert bodies - like yourself and so forth - I'm not saying you'd be involved, but we've got expert bodies, we've got a lot of information. So I would think it would be better for us to put a lot of effort into the beginning rather than, in a sense, dragging it out through the whole process, where we can get a better solution.

MR WEICKHARDT: Yes, well, I understand the sort of sentiment behind that, but making it work in practice might be a bit harder.

DR WHITWELL: That's right.

MR WEICKHARDT: The other comment you make later on in this report is around the idea of mediated or arbitrated process for their resolution. Given the fact that you're, in the main, talking about two companies that are competitors - an importer that's competing with a local manufacturer - is a mediated or arbitrated resolution actually the right way of going? It sort of would sound anti-competitive in one sense.

DR WHITWELL: Yes. Just a correction. It's actually the exporter and the local producer that are the parties. The importer is just a person in the middle who's doing the distribution. So they're the two parties we've got to look at. And the thing is that, yes, they do have - once the deal breaks down between them, they do have different views about market share and access.

MR WEICKHARDT: Which deal is this?

DR WHITWELL: Well, we don't get dumping unless something goes wrong. It doesn't come out of nowhere. Something goes wrong with the market for one of the parties.

MR WEICKHARDT: I think, arguably, in some cases dumping takes place because a company either is blissfully unaware of the rules, or becomes a bit over-exuberant in terms of their competitive desire. Now, normally we would say that's healthy competition. In the case of imported competition, there are times when we say, "Well, it's transgressed the line and it's become a dumped import and it's caused injury and, therefore, it's subject to any dumping action" - but, again, I'm struggling with the idea of mediating that sort of thing.

DR WHITWELL: Right. I struggle with it too, and I must admit I've thought about it a lot over the period of time, and I've only really become, I suppose, interested in it since I've been doing commercial mediation myself - not in this area, but in others, and the thing is that I think that, provided that you - everybody obviously is going to promote their particular position, and as Adam Smith said, if you've got two people in a room and they're producing, they'll try and fix the price.

But the issue is really a bit more than that. These people have all got a vested interest in driving up what they can get out of the market by one way or another. The customs - or the person who's doing the public interest aspect - need to take that sort of competitive market issue into account. In other words, they might agree on the - we might mediate on the facts and get the facts right, but customs, in the end, have to make a decision as to whether those facts, in terms of the normal value, are appropriate - that is, they're not extreme, in the sense that they're not going to give huge benefits, but sufficient - and they have to make judgments - really that's their job - about the national interest, effectively.

I know we're introducing the national interest now, but, effectively, that's what they've been doing within some constraints. So we've got to have a national interest element there - and my view is that that could easily be the arbitrator. So the arbitrator makes a decision, not simply on the facts before him for the two parties, but also involving - we could put in quotes - "public interest".

MR WEICKHARDT: That's not a mediated outcome though, is it? That's a judgment based on evidence brought before them.

DR WHITWELL: It's an arbitrary outcome in the sense that - but it does rely on, in a sense, it's hardly - these words are a bit indistinguishable - the process of getting the primary information would be, effectively, very much sort of a mediated solution, where people sit around the table and make compromises.

MR WEICKHARDT: How do you see that fitting in with WTO rules?

DR WHITWELL: I can't see any difficulty with that. The only thing that would actually prevent that would - sorry, the only issue would be whether the arbitrated position was appellable or not, because I think under the WTO rules, as I remember, you actually have to have a court in the country which can actually look at the issue. But it might be just a procedural issue that they're looking at, rather than an issue of fact. So if you had the issues of fact decided in the first instance by the direct administrator, on appeal by somebody like the Trade Practices Tribunal, and then you've got a final decision of facts, the only thing left for the Federal Court is really a question of law or a question of, in the arbitrated sense, whether the arbitration process had been right.

MR WEICKHARDT: Okay. Well, if you want to develop those arguments a bit more in your final submission, we'll look at those carefully.

DR WHITWELL: I'd like to do that, thanks very much, yes.

MR WEICKHARDT: In your final sentence, you say, "Need to elevate the review process to a level of a judicial tribunal so the integrity of the anti-dumping system can be preserved". Does that suggest you think it has integrity today, but it risks not having integrity? Or do you worry about its integrity today?

DR WHITWELL: I think we've got the issue where we've got a review taking place - and one of your recommendations is to try and not have the investigator reinvestigate - but the thing is that I just think that you need a wider group of people to look at it. In other words, you need like a tribunal: somebody with commercial experience in the law, an economist and an accountant, which is how the tribunal is made up. That will give a lot of benefit to people practising in the area - I don't mean lawyers necessarily, but people who - the administrator themselves - because they'll get very valuable feedback, and that seems to me to be important, to actually have a body with considerable experience. It's not used very often, because we don't get that many appeals, but the thing is that if you've already got something set up in the bureaucracy which does that sort of thing, then you don't need to have another one.

MR WEICKHARDT: So under that scheme, if I'm understanding you correctly, you would have customs make an initial finding, the Minister would be taken out of the equation, and any merits appeal would go to the Trade Practices Tribunal. Is that right?

DR WHITWELL: That's correct.

MR WEICKHARDT: Okay, Mike, have you got anything else?

MR WOODS: No, that's fine for me.

MR WEICKHARDT: All right, Richard, thank you very much indeed for your input, and we look forward to seeing your final submission.

DR WHITWELL: Thank you.

MR WEICKHARDT: And thank you for your participation.

DR WHITWELL: Thanks very much.

MR WEICKHARDT: Okay, ladies and gentlemen - I think it's just gentlemen - that concludes today's proceedings. Is there anyone who wishes to make any statement before we adjourn these hearings? No? In that case, I close these hearings. Thank you very much indeed.

AT 3.44 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY