CEMENT INDUSTRY FEDERATION

24 June 2009

Mr Philip Weickhardt
Commissioner
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

Dear Mr Weickhardt

CIF SUBMISSION: Productivity Commission Inquiry into Australia's anti-dumping system

The Cement Industry Federation ("the CIF") welcomes the opportunity to submit their submission to the Productivity Commission Inquiry into Australia's anti-dumping system.

1. Executive Summary

The CIF is a stakeholder of Australia's Anti-Dumping System. The CIF through its members is involved in the manufacture of cementitious products in Australia. The industry has previously been an applicant industry in an anti-dumping claim.

Cement is a globally traded commodity product. Australia has minimal barriers to cement imports and the market is relatively transparent. The industry therefore is reliant upon access to remedies which address unfair trading behaviours in a timely manner.

The CIF is supportive of an Anti-Dumping System for ensuring certainty of investment decisions. In the absence of a system, the industry would be exposed to marginally priced imports – most likely from China which accounts for more than 50 per cent of global production and produces more tonnes in a single day than the Australian industry does in a year.

Access to an effective Anti-Dumping System is critical. The CIF has identified some areas for improvement to the System to ensure access to measures in a timely manner along with improving certainty of process and outcomes. These include:

- Retention of Customs and Border Protection as the administrator and the Minister as the decision-maker in the anti-dumping process;
- Benchmarking of prices and costs of exporters from a country where a 'market situation' has been alleged with market economy prices and costs;

- Enhanced investigative probity in the examination of exporters;
- Adoption of profits forgone and loss of market share in a growing market as injury indicators in the overall assessment of material injury to the Australian industry;
- Improved clarity with regard to definitions on threatened material injury; and
- Early access to provisional measures.

The CIF has also included some general comments in relation to additional architecture and administrative aspects of the Anti-Dumping System as identified by the Productivity Commission.

The CIF does not support the introduction of a 'public interest' provision in Australia's Anti-Dumping System. The role of the Minister presently includes a discretion on whether (or not) to impose anti-dumping measures. This process has operated effectively over recent times.

The CIF does not support any attempt to diminish the effectiveness of the current Anti-Dumping System. Any proposed changes which limit or delay access to measures to redress unfair trading behaviour are not within the interests of Australian industry or the broader economy.

2. Introduction

The CIF is the national body representing the Australian cement industry manufacturers which includes Adelaide Brighton, Blue Circle Southern Cement and Cement Australia. Combined, the three manufacturers account for Australia's total integrated production of clinker and cement.

The operations of the three producers around Australia account for 15 manufacturing sites, 10 mines and 74 distribution terminals. Cement plants are located in regional centres or in small rural communities making it a significant regional employer. In 2008, the industry employed approximately 1850 people and produced in excess of nine million tonnes of cementitious materials, with an annual turnover of almost $2 billion.

The Australian Cement Industry is a stakeholder of Australia's Anti-Dumping System. In December 1999 the then Australian Customs Service published a notice commencing an investigation into the alleged dumping of ordinary portland cement ("OPC") exported from China, Indonesia, Malaysia and Thailand. The investigation – following a 120 day extension to the publication of the Statement of Essential Facts – was completed in September 2000. Briefly, Customs determined that exports from Indonesia, Malaysia and Thailand were dumped at margins greater than negligible levels and that Chinese exports were determined to be at dumping margins of less than 2 per cent (i.e. negligible). Despite the identified levels of dumping and the confirmation that the Australian industry had suffered material injury, Customs did not conclude that the dumping had caused material injury to the Australian cement industry.

At the time of the completion of Customs' Report (Trade Measures Report No. 20), the legislative provisions concerning 'price control' upon which the applicant industry had relied to assert dumping from China, were amended. The then Minister for Customs directed Customs to re-examine the issue of dumping from China, along with material injury to the applicant industry (following the issuance of Ministerial Direction on material injury).

In December 2001, following the Minister's acceptance of Customs' re-examination of dumping and material injury, Supplementary Report No.20 was released affirming Customs' original findings contained in Report No.20.

The process from the lodgement of the application in 1999 to the Minister's acceptance of the findings in Supplementary Report No.20 was in excess of two-and-a-half years. The preparation of the application prior to formal lodgement involved a period of up to six months. At minimum, the process from start to finish, was approximately three years.

The Australian cement industry has not made any subsequent applications for the imposition of anti-dumping measures. Despite its absence from the application process since 1991, the industry has maintained a watching brief over changes to the Anti-Dumping System, including via its membership of the Trade Remedies Taskforce.

3. Do we need an anti-dumping system?

Community support for an effective Anti-Dumping System (including both Dumping and Countervailing provisions) is viewed as broad given its objective of addressing unfair trading behaviour. With zero (or minimal) barriers to trade, Australia is an open market for the trade in goods. The Anti-Dumping System is a necessary tool that Australian manufacturers must be able to access at appropriate times – to ensure unfair behaviour (including predatory behaviour) does not hinder local industry.

Australia is a signatory to both the Anti-Dumping and Subsidy Agreements and has enacted the Agreements in domestic legislation. Many of Australia's trading partners have also enacted the Agreements into their domestic legislation, some only in recent times (e.g. China). Australia's Anti-Dumping System is not as punitive as that of some other administrations – the lesser duty rule ensures that only measures that are necessary to remove injury from dumping are imposed.

The application of the Dumping and Countervailing Agreements by WTO members is essential to achieving further trade liberalisation objectives. The reduction of tariffs in the Uruguay Round of negotiations was achievable in the full knowledge that member countries could rely upon the provisions within the Dumping and Countervailing Agreements to remedy unfair trading practices.

Similarly in Australia, access to an effective Anti-Dumping System for manufacturers is essential in ensuring certainty around investment decisions and to address situations where marginal pricing has significantly disrupted (or threatens) domestic markets.

The CIF does not view the Anti-Dumping System as impacting comparative advantage, rather, it provides a mechanism to relief from exporters seeking to secure an unfair competitive advantage. The CIF also does not consider that Australia's commitment to an Anti-Dumping System can be determined purely on economic terms. It is simply not sustainable that Australia should capitalise on the exporting country's willingness to export at a price or cost lower than on its home market, without full consideration of the impact in Australia on investment and employment in the importing industry. Australian manufacturing involves value-adding, employment and capital investment – all positive contributors to the overall Australian economy.

The long term benefit of value-adding manufacturing in Australia far outweighs the short-term opportunity for lower prices which are unsustainable over the longer term. To deny access to an effective Anti-Dumping System will significantly jeopardise investment in Australia's value-adding industries.

4. How can the current system be improved?

Cement is a globally traded commodity product. As indicated, the Australian Cement industry has previously requested anti-dumping measures against certain imports of cement (ordinary portland cement) and cement clinker. Since its involvement in the System over 1999 to 2001, the CIF has monitored actions involving exports from China where applicant industries have asserted a 'market situation' is evident on the domestic market of the exported goods.

It is apparent from the outcomes that the present provisions relating to 'market situation' which have been alleged by Australian industry applicants have been unsuccessful. This key issue and certain other matters require address to improve the effectiveness of Australia's Anti-Dumping System.

4.1 Retention of current system

The CIF does not support a return to a bifurcated investigative process that was protracted and provided little certainty on investigation outcomes. A single administration of the Anti-Dumping System is considered the most effective means of delivering timely outcomes and does not incur the additional resources involved in liaising with two separate administrative agencies. The CIF also considers the role of the Minister as the decision-maker is appropriate to the decision-making process. Proposals for the replacement of the Minister as the decision-maker would introduce time constraints as the alternative (whether it be an administrative panel or some other agency) would necessitate the body duplicating the Customs' investigative process.

In an environment of declining applications, a change to the current roles of Customs as the administrators of the legislation and the Minister as the decision-maker, is not supported.

4.2 Market Situation

The particular market 'situation' provision where domestic sales are considered unsuitable for normal value purposes may be applied to any exporting country that is considered a 'market' economy country for the purposes of Australia's anti-dumping provisions. This includes exports from Malaysia, China, Canada or the USA, as appropriate.

In recent times the provision has been used to argue that a particular 'market situation' is evident in China for goods the subject of an application. The assertion that a market situation is evident in China has been based upon an assessment that Chinese domestic prices are artificially low due to government influence on prices and/or costs in that industry sector. Despite the assertions of Australian applicant industries, Customs and Border Protection ("Customs") has not made a decision which rejects Chinese prices and/or costs for the exporting industry.

The Australian Cement industry holds concerns that the current provisions (both legislative and policy guidelines) do not adequately address what constitutes circumstances where "the

situation in the country of export is such that sales in that market are not suitable for use in determining a price" for normal value purposes.

Following the Australian government's recognition of China as a market economy country for Anti-Dumping purposes in April 2005, and the advice that Australian manufacturers would not be disadvantaged by Australia affording China market economy status, it is reasonable to observe that no action involving China has delivered the full return to a non-injurious outcome apparent prior to the commencement of injurious dumping.

The outcomes involving China in anti-dumping investigations under Australia's Anti-Dumping System is cause for alarm to the Australian Cement industry.

China is the largest producer of cement in the world. In 2010, China is projected to produce more than 1.25 billion tonnes of cement per annum and already accounts for more than 50 per cent of global production. Cement producers in China are relatively inefficient and do not possess any obvious cost advantage over non-China cement manufacturers. Electricity accounts for approximately 40 per cent of total production cost, with coal used as the primary raw material in electricity production.

The Australian industry's application in 1999 was then based upon the operative "price control" provisions. In the re-investigation, consideration was afforded to a new Ministerial Determination applicable to 'price control' situations where Customs was required to have regard to whether:

- decisions of the relevant Chinese producers or exporters relating to prices, costs, inputs, sales and investments were made in response to market signals and without significant government interference;
- accounting records were maintained by the relevant producer or exporter, are independently audited and maintained in accordance with generally accepted accounting principles in the country of export, or in line with international accounting standards;
- production costs and the financial situation of the relevant producer or exporter are not subject to any significant distortions carried over from the non-market economy system; and
- the relevant producer or exporter was subject to bankruptcy and property laws, which guarantee legal certainty and stability.

Four other considerations were also included in the Ministerial Determination which related to whether the industry was dominated by state-owned enterprises, were utilities supplied at market rates, whether contracts reflected proper commercial leases, and if the company had the right to hire and fire employees.

The new Ministerial Direction did not alter Customs' viewpoint in relation to its determination that there was no dumping of Chinese cement exported to Australia.

It is the CIF's observation that Customs' assessment of what presently constitutes government influence has not altered since the cement case of 1999. It would appear that subjective decisions about what evidences government influence are weighted in the exporter's favour such that any element of doubt delivers a result to the benefit of the exporter. The CIF is troubled by this policy approach. As indicated, electricity accounts for approximately 40 per cent of total cement production costs in China. In 2001, the WTO Working Party on China's

Accession[1] confirmed that the Chinese government exercised *control* over the price of electricity (along with gas and water). Customs' conclusion that the price of electricity is influenced by the market is incorrect – it was independently confirmed the Chinese government directly *controls* electricity prices.

The current guidelines are unlikely to alter in significantly different outcomes to that contained in Report No. 20. It is clear that the present level of discretion available to Customs in determining whether Chinese market prices are artificially low due to government influence is ineffective. The recent outcome in the toilet paper case involving China and Indonesia highlights this observation. Dumping margins for the major Chinese exporter was in the range 5-10 per cent, whereas dumping margins for the largest Indonesian exporter was 33-38 per cent. On the basis that actual export prices from both exporters were not too different, Customs must question the domestic price relativities of the two exporters in different countries.

It would appear that Customs is not independently testing artificially low prices in China with another market economy's selling price(s) for the goods under consideration. The current provisions are therefore flawed. The outcomes for applicant industries which access dumping measures is that the penalties imposed are less than is required to remove the injurious effects of dumping and that the Australian industry (unlike industry's in Canada, the EU and USA) is required to compete with artificially low Chinese prices (as the Chinese domestic prices have been determined as "fair" by Customs).

Outcomes of this type (and reflected in the recent toilet paper decision) diminish the effectiveness of the Anti-Dumping System and raise uncertainty about investigation outcomes.

The CIF does not consider that the current market situation guidelines are adequate for address the suitability of domestic sales in China in anti-dumping investigations. The CIF is concerned that recent investigations have failed to confirm the assertions of the applicant industry – thereby indicating that Customs' level of satisfaction in assessing what constitutes sufficient evidence (to confirm the existence of artificially low prices in China) is set an unrealistically high level.

4.3 Investigation probity

The CIF notes that certain products exported from China have been the subject of investigation by a number of administrations[2]. Investigations by other administrations can assist Customs with its investigations in respect of the same product (or similar group of products). It is understood that confidentiality will impact the extent to which an administration can disclose information about an exporter and the goods under investigation – although access to information in the public domain identified by an administration can assist Customs.

It has also been observed that investigations in the USA and EU have identified certain information relating to ownership details and company linkages which have not been made available in local investigations. The CIF believes that Customs would benefit substantially from an increased understanding of investigative processes and research methodologies in anti-dumping investigations as undertaken by other administrations (e.g. USA and EU). The CIF

[1] WTO, Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001.

[2] E.g. Certain welded pipe from China

would therefore encourage an interchange program for a limited period to improve investigative probity techniques in exporter investigations by Customs.

4.4 Material injury indicators

The Cement industry's experience with its investigation highlights the importance of material injury assessment. Whereas the Cement industry considered it had suffered material injury from dumping, Customs determined that there was injury although it was not material. For investigations involving a 'market situation' the assessment of material injury to the Australian is contentious. The subjective nature of this outcome is only made so due to the outcome of Customs' deliberations on dumping (and/or subsidisation) from the exporting country.

For example, had Customs assessed Chinese exports of cement as having been dumped in 1999, the outcome on material injury may have been different as China represented the largest source of exports to Australia during the investigation period.

Of relevance to the material injury assessment process are the issues of profit forgone and loss of market share in an expanding market. The CIF understands that both concepts were the subject of a proposed Ministerial Direction prior to the commissioning of the recent Joint Study[3]. Article 3.4. of the WTO Anti-Dumping Code includes consideration of "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity" and "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments" in the injury assessment process.

The profit forgone and loss of market share in a growing market are indicators which are not readily addressed in current investigations. One of the Joint Study recommendations[4] suggested that Customs "examine means of improving its analysis and reporting of material injury and causal link taking into account the approaches of other jurisdictions." This recommendation followed the observation that in examining material injury reports of other administrations, most "adopt the order of analysis set out in the WTO Anti-Dumping Agreement more closely than Australia when reporting injury and causal link".

It is the Cement industry's experience that Customs will examine what it considers to be the primary injury indicators which relate to price, sales volume, market share and profits and profitability. The remaining injury indicators it considers as 'secondary" indicators. The WTO Anti-Dumping Agreement does not differentiate between 'primary' and 'secondary' indicators. Nor should Customs.

The CIF supports the recommendation of the Joint Study for Customs to align its material injury assessment and reporting with other jurisdictions, consistent with the WTO Anti-Dumping Agreement. The CIF would also encourage a more open approach to the methodology which is in line with the WTO Anti-Dumping Agreement that the list of injury indicators "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[3] Joint Study of the Administration of Australia's Anti-Dumping System, August 2006.
[4] Recommendation 17, Joint Study, P.35.

4.5 Threat of material injury

An application based upon a threat of material injury is different to that which can demonstrate actual material injury experienced. The WTO Anti-Dumping Agreement[5] provides guidance on what authorities should consider when assessing an application based on a threat of material injury. The threat of material injury should "be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be foreseen and imminent." In particular, Article 3.7 requires regard to be made to the following factors:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
(iv) inventories of the product being investigated.

The WTO Anti-Dumping Agreement further states that "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered" will lead to an interpretation that the threat of material injury is imminent.

The CIF considers that evidencing the existence of each of the above factors to demonstrate an imminent and foreseeable threat of injury is not necessarily difficult. The concern to CIF, however, is the interpretation of "significant" and "substantial" in the first three identified factors. For example, given a situation where imports have been relatively stable over a period of time, would a sudden change in trends warrant consideration of an application based upon threat where import volumes doubled over a short period of time? Is a doubling of imports considered a 'significant rate of increase'? Over what period of time has the increased rate of imports occurred? The increase in import volumes into Australia may only account for a very minor proportion of the exporter's total production – can the increase be interpreted as suggesting the exporter will direct further export volumes to the Australian market?

In the absence of clear guidelines that may details what is required by Customs to satisfy the requirements of Article 3.7 of the WTO Anti-Dumping Agreement, Australian industry is unlikely to seek application for measures based solely upon a threat of material injury. It is CIF's understanding that in order for an application for threatened material injury to be successful, exportations must occur prior to the publication of a Statement of Essential Facts ("SEF") in order for an export price to be determined for the exporter. Without an export price, Customs would be unable to establish the extent of dumping on export sales to Australia.

The timing of an application alleging threatened material injury and the timing of the subsequent investigation must be appropriately aligned to ensure all relevant matters can be considered for anti-dumping measures to be imposed. It is CIF's view that it is unlikely that an application based upon a threat of material injury will succeed due to difficulties associated with:

[5] Article 3.7 of the WTO Anti-Dumping Agreement.

- satisfying the requirements of the WTO Anti-Dumping Agreement in evidencing "substantial" and "significant" changes in supply over a relatively short period of time; and
- aligning the timing of the application with actual import volumes to follow soon thereafter.

The CIF considers the current practice for assessing an application[6] based upon a "threat of material injury" does not adequately address how Customs will interpret the provisions contained in Article 3.7 of the WTO Anti-Dumping Agreement, and in particular, what constitutes a 'significant rate of increase' of dumped imports, and a 'substantial increase in capacity of the exporter'. These factors are likely to vary on a case-by-case basis.

4.6 Provisional measures

The CIF understands that the issue of the timing of provisional measures was considered in the Joint Study review. Presently, Customs practice involves the publication of an SEF, with a preliminary affirmative determination ("PAD") imposing provisional measures made sometime thereafter (usually 7-10 days).

The CIF welcomes the recommendations of the Joint Study for PADs to be issued "as soon as possible after Day 60 when appropriate circumstances exist..[7]" In the almost three years since the Joint Study, there does not appear to have been a change in practice by Customs to separate the publication of the SEF from the making of a PAD soon thereafter.

It is important for Australian industry to access relief from the injurious effects of dumping at the earliest opportunity consistent with the WTO Anti-Dumping Agreement. In this respect, provisional measures cannot be applied prior to Day 60 of an investigation. The current practice of delaying the PAD until after the SEF reflects Customs' unwillingness to impose provisional measures unless it is a forgone conclusion that interim measures will be recommended to the Minister. The separation of the PAD finding and SEF publication is essential to reducing the period to which the applicant industry is subjected to material injury.

The CIF supports the Joint Study Recommendation No.18 and questions why there has been a delay in implementing a change to Customs' practice of delaying a PAD decision until after the publication of an SEF.

4.7 Other matters

The Productivity Commission has identified numerous other matters where it has requested comments from stakeholders. The CIF would like to indicate its position in relation to some of the factors identified. These matters include:

- the current five year expiry period for anti-dumping measures is considered appropriate and consistent with the WTO Anti-Dumping Agreement;
- the length of time over which anti-dumping measures apply should not be limited to ten years – consideration on a case-by-case basis as currently applies is considered appropriate;

[6] Section 6.3 of Draft Dumping Manual, P.21-22.
[7] Recommendation 18, Joint Study, P.37.

- the basis for calculating a non-injurious price as detailed in Customs' Policy Advice 2004/01 is supported, however, Customs should take account of internal rates of return for the applicant industry when applying a level of profit in the constructed selling price methodology;
- the current practice of assessing normal values and export prices over a usual 12 month 'investigation period' is considered appropriate although the circumstances of any particular application may require a different period (i.e. 6 or 18 months, as appropriate);
- a freeze on re-application following unsuccessful applications is not supported as circumstances may alter significantly over a very short period of time, thereby exposing an industry to dumped (or subsidized) injurious imports;
- the Trade Measure Review Officer ("TMRO") process is supported, along with the limitation of no new information may be submitted during a TMRO review inquiry;
- the restriction of Australian Bureau of Statistics import data imposes a limitation on the applicant industry resulting in delays to formal lodgement of an application; and
- improved resources and skilled investigation teams is supported – skill levels consistent with Australian Taxation Office audit staff required for internal transfer and legal ownership investigations.

The CIF recognises that the circumstances of each anti-dumping investigation are different. The approach to managing the investigation process, the stakeholders, and the timing of decisions will also be different. It is not always practical to align each and every investigation with the legislated timeframe of 155 days (hence the need for timeframe extensions, from time to time). There is, however, a need to enforce deadlines for the receipt of information more prudently to ensure timeframes are not unnecessarily extended. Maximum extensions to exporter questionnaire responses, for example, should be limited to seven days. Feedback on draft reports (whether Australian industry, exporter or importer) should similarly be limited to seven days.

The CIF welcomes increased clarity surrounding deadlines and extensions to ensure access to remedies is achievable in a timely manner.

5. The benefits and costs of the current system

In pure economic terms, there are benefits and costs associated with an Anti-Dumping System. Despite the objective of anti-dumping measures to redress unfair export prices, the benefits are somewhat exaggerated.

The CIF considers that there exists a misunderstanding about the apparent benefits of the Anti-Dumping System. There is no huge windfall to the applicant industry following the imposition of anti-dumping measures. Anti-dumping measures imposed are tempered by the 'lesser duty rule' which imposes measures at the lower of the normal value and non-injurious price. High dumping margins do not translate into high levels of anti-dumping measures.

The absence of trade and tariff barriers on the Australian market ensures Australian industry remains competitive against imports.

Concerns with the assessment of the market situation provisions further detract from the effectiveness of anti-dumping measures. The present interpretation results in the acceptance of prevailing costs and prices which are considered artificially low by international comparison.

Any anti-dumping measures imposed, therefore, are less than they otherwise should be if normal values were based on market economy prices (and/or costs).

The costs of the system include the impact of the measures on consumers who may otherwise benefit from lower prices. However, the contribution to the economy of the manufacturing industry covered by any measures is likely to far outweigh any cost associated with the imposition of those measures.

The Productivity Commission Issues Paper has canvassed the introduction of a public interest provision in the Anti-Dumping process. The CIF considers that this proposal is likely to:

- Further delay access to measures to address unfair trading behaviour; and
- Will likely result in increased costs to the applicant industry should the industry be required to demonstrate that the measures deliver a net economic benefit to the economy.

The role of the Minister includes the discretion to impose (or not impose) anti-dumping measures. It is unlikely that the Minister would apply anti-dumping measures if it were not in Australia's interests to do so.

The EU has a 'community interest' provision in its regulations. Examination of the contribution to the Community economy by the applicant industry is contrasted with the cost of imposing the anti-dumping measures. This simple analysis is considered suitable for assessing whether measures are within the overall interests of the European Community.

The CIF does not support the introduction of a public interest provision in the Anti-Dumping process. The principal reason for this is that the concept remains undefined. The CIF similarly does not support the introduction of an additional phase to the anti-dumping process to separately address whether the imposition of measures is in the public interest. The CIF considers that the role of the Minister is adequate to take account of the public interest when deciding to impose anti-dumping measures.