I. Executive Summary

Qenos has been involved as an applicant for two products in the polymer industry over the last decade (linear low density polyethylene and high density polyethylene). The company has successfully applied for anti-dumping measures to address unfairly priced imports.

Qenos is supportive of the current investigative arrangements with Customs and Border Protection as the administering agency and the Minister as the decision-maker. Qenos does not support a change to the present arrangements.

In the absence of tariffs in an open market such as Australia's, access to remedies to address unfair trading practices is considered essential. As a signatory to the WTO Anti-Dumping Code and the WTO Countervailing and Subsidies Code, Australia has elected to enact fair-trade provisions in its domestic legislation. Qenos fully endorses Australia's application of the provisions within the Customs Act and considers that access to the available remedies is essential to underpin investment in Australia by manufacturers.

The recent decline in access to anti-dumping measures reflects both the consolidation and decline of manufacturing in Australia since the early 1990s. This only makes it more critical that the remaining manufacturers are able to access remedies to address unfair prices and correct injury that has occurred.

Qenos considers that some fine-tuning is required to enhance the effectiveness of the current System. In particular, Qenos would encourage the clear separation of a decision to impose a preliminary affirmative determination from that of the publication of the Statement of Essential Facts. Further, Qenos supports the introduction of clear guidelines to address country hopping, closer scrutiny to limit lengthy timeframe extensions, examination of the justification for confidentiality restrictions of import data, and the examination of the pre-screening process. Qenos has also included comments about certain aspects of the Anti-Dumping System in response to the Productivity Commission's *Issues Paper*.

Qenos does not support the introduction of a public interest test that would contribute to increased time delays in accessing measures, increased costs associated with the anti-dumping investigation process and elevated uncertainty around outcomes. Questions would arise as to how the community interest should be measured, over what timeframe and how would such an analysis be conducted? Qenos considers that the Minister is currently well positioned to assess whether any measures are within the Australian community's interests.

Qenos believes that access to an effective Anti-Dumping System is important for long term investment by manufacturing by enabling investment decisions to proceed with a level of certainty. Qenos does not support any moves to diminish the effectiveness of the Anti-Dumping System.

II. Introduction

Qenos Pty Ltd ("Qenos") is Australia's largest plastics manufacturer and the sole domestic producer of polyethylene. The company has integrated manufacturing facilities located at Botany, New South Wales and Altona, Victoria.

The company is owned by ChemChina (80 per cent) and the Blackstone Group (20 per cent).

Qenos markets and supplies polymers to virtually all sectors of the Australian economy, with customers ranging from large multi-nationals to small and medium sized processors. The company has an annual turnover in the range of $800 million to $1 billion, and employs approximately 800 people.

Qenos' Botany and Altona facilities involve capital intensive, high value-adding manufacturing processes, that convert raw material ethane gas to ethylene, which is then further processed to produce a range of polymers. Qenos' polymer production includes low density, linear low density, and high density

polyethylene. Qenos aims to maximize production utilisation rates, to minimize unit operating costs and compete with fairly priced imports.

Qenos' supplies approximately 65 per cent of the Australian market from local production of low density, linear low density, and high density polyethylene. Imports supply the remaining market volumes.

Qenos is a stakeholder of Australia's Anti-Dumping and Countervailing System. The company has been involved as an applicant industry in recent anti-dumping investigations for linear low density and high density polyethylene. Measures presently apply to linear low density polyethylene exported from Thailand (and until recently, Korea). Measures recently expired in respect of high density polyethylene exported from Korea, Malaysia, Singapore and Sweden.

Anti-dumping applications in the 1990's on low density and high density polyethylene were targeted at exporters in the USA and Europe, however, since that time large scale investment has occurred in Asia, resulting in a change in the balance of supply for certain petrochemicals in the Asia-Pacific region. During this period, the Australian polymer industry has undergone significant rationalisation – in some instances there were three polymer producers (for example, high density polyethylene) – with Qenos now remaining as the sole local manufacturer.

Qenos' ongoing role as a local manufacturer is predicated on the assumption that it will compete with fairly priced imports – that is, imports that reflect full absorption costing in prevailing export prices. As most polymers are commodity products, dependent upon high production utilisation rates, the scale of Australian facilities are akin to the relative size of the Australian market. Unfairly priced imports that erode Qenos' share of the local market jeopardise the ability of Qenos to commit to long-term capital re-investment, and to grow with an expanding local market.

An effective Anti-Dumping and Countervailing System that addresses unfairly priced imports in a timely manner underpins a competitive local polymer manufacturing industry. In the absence such a system, Qenos would be unable to manufacture low-cost polymers which are key raw materials to many sectors of the broader Australian economy.

III. Rationale for an Anti-Dumping System

Qenos has emerged as the sole Australian manufacturer of polyethylene in Australia following substantial restructuring of the industry brought about by reductions in tariffs. This decline in tariffs was the catalyst for the polymer industry to rationalise and address its cost competitiveness. The road map to a single entity has been painful and deliberate – Qenos now competes against imports from a competitive cost base with plants that have scale consistent with the size of the Australian market.

Emerging from the restructuring process, Qenos is entitled to access remedies where it can demonstrate that imports are unfairly priced (or subsidised).

Professor Gruen in his Review of the then Customs Tariff (Anti-Dumping Act) 1975 addressed the need for an Anti-dumping and Countervailing System[1]. Qenos does not consider that any of the pertinent factors identified by Professor Gruen have diminished over time. For example, the notion of fairness in export prices remains an ongoing expectation within the Australian community today, along with a view that local industry should not be subjected to unfairly priced imports. There is also the long held perception (whether correct or not) that dumping is predatory in nature, although as Professor Gruen identified this may be difficult to distinguish from mere aggressive pricing behaviour (or as the Productivity Commission has suggested it may be just 'intermittent dumping').

[1] Professor F.H. Gruen – Review of the Customs Tariff (Anti-Dumping) Act 1975 Report, March 1986, p24-26.

The identified reasons for an effective Anti-Dumping System are as valid today as they were prior to the steep tariff reduction program that commenced from 1987 – perhaps more so, given that what remains is internationally competitive in the absence of any tariff barriers (major competing sources for polymers attract a zero rate of tariff). Qenos' circumstances demonstrate how a company has emerged through industry restructuring and continued to invest to value-add to Australia's resources in the full knowledge that it is able to seek out remedies to address unfair trading behaviour.

Qenos therefore considers it is absolutely critical for it to be able to access a robust and effective Anti-Dumping System to address dumped (or subsidised imports) – particularly against the backdrop of an increasing number of bilateral and free trade agreements. Qenos also agrees with the suggestion that an effective Anti-Dumping System aided tariff reform by enabling access to relief from marginally priced goods during the industry rationalisation period.

IV. Recent Anti-Dumping Activity

Qenos' experience with the Anti-Dumping System since 1998 confirms the observation that there has been a noticeable decline in the number of new investigations over the intervening period. The issue of initiation standards for new applications was raised in the recent Joint Study[2]. Applicants identified that the pre-screening process prior to initiation went beyond the "reasonable grounds" test required in the legislation. This may have been a contributory factor to the decline in the number of applications over recent years – however, information on new applications lodged for consideration are not published by Customs and it is therefore only possible to speculate on the likely reasons for the decline.

Qenos can only comment on recent anti-dumping activity based upon its experiences in the polymer industry (which is considered to be unique when contrasted with applications from industry members in the food processing or textiles industries). Key observations include:

- The supply/demand balance in the polymer industry is often in imbalance due to the impact of new world scale investments influencing supply – particularly on a regional basis;
- The supply imbalance can alter randomly in response to economic conditions;
- An oversupply of product (i.e. product is long) often leads to intermittent dumping where product is marginally priced to ensure volume flow-through on manufacturing facilities;
- The Asian crisis of the late 1990s resulted in significant reduction in domestic demand in key Asian economies forcing manufacturers to export markets to achieve sales – intermittent dumping at the time was prevalent;
- The number of anti-dumping actions is therefore likely to increase in periods of market contraction (whether domestic, regional or even globally driven);
- Exporters should be conscious of exporting at injurious prices;
- There does appear to have been a shift in target countries involved in anti-dumping actions – in the early 1990s USA and Europe were often involved, however, recent history suggests that there has been a shift to producers in Asian countries;
- Changes in countries the subject of applications has followed the shift in investment in the polymer industry (away from USA and Europe) to Asian countries where high incentives were provided to attract new, world scale investments to the larger, growing markets;

[2] Joint Study of the Administration of Australia's Anti-Dumping System, August 2006.

- The Polymer industry is a global industry involving commodity products, high capital costs, with manufacturing assets required to operate at high utilisation rates to cover high fixed costs – when products are long there is an increased likelihood that marginal tonnes will be sold at dumped prices;

- The Australian polymer industry is a price taker. Market pricing is transparent and is set by regional and global pricing – the industry does not operate on cost-based pricing.

The polymer industry in Australia has experienced a shift in sources of competition from certain Asian economies. These countries, however, do not possess a comparative advantage in raw materials used in polymer production. Qenos is competitive (on a cost basis) with manufacturers throughout Asia – however, due to the relative scale of manufacturing assets and the size of the Australian market, it is more susceptible to shifts in supply from larger scale suppliers that elect to unfairly price into the Australian market from time-to-time.

It is Qenos' view that the number of applications (in the polymer industry) over any given period of time is more to do with the circumstances of the industry at that particular time, and the demand/supply balance in the region.

V. How might the current system be improved?

Qenos' participation in the Anti-Dumping System over the last decade has influenced its understanding of what is required for a successful anti-dumping application. The company has also observed certain *specific* areas for improvement which it considers require attention.

Country Hopping

The emergence of a new source(s) of supply following the imposition of measures against exporters in one country significantly undermines the outcomes of a successful anti-dumping application (i.e. 'country hopping'). The preparation of an application for anti-dumping measures can involve the resources of the applicant industry for 3-6 months prior to formal lodgement (as prima facie normal values, requisite financial data and causal link information is obtained). The period to completion of an application from lodgement is a minimum 175 days (not taking into account any extensions of time granted by the Minister).

It is therefore almost a year from the commencement of application preparation to the Minister's decision to impose interim duties.

Following commencement of an investigation, it is not uncommon for importers to source new supply options. This invariably involves sourcing the goods under investigation from suppliers (including related companies to original exporter e.g. Dow Chemical switching from Thailand to Canada[3]) in another country. The intention is to ensure that future imports (from the new source country) will not be subject to anti-dumping measures. It is therefore unlikely that actual volumes from the new source country will be imported until approximately the time of publication of the Statement of Essential Facts ("SEF"). Once the applicant industry becomes aware of the change in supply source, the onus of proof is again on the applicant industry to re-establish dumping. Any subsequent application nominating a new source of supply is unlikely to be formally lodged before the Minister imposes interim dumping duties on exporters the subject of the original application.

In the country hopping scenario indicated above, the current application process involves the applicant industry submitting a new application involving the goods from a new exporting country, for consideration by Customs. It is Qenos' view that Customs has already established material injury to the Australian

[3] Refer Trade Measures Reports No. 67 and 88.

industry from dumping in the original investigation, hence, further re-examination of material injury is not warranted. What is critical to the applicant industry is timely access to provisional measures to imports from the new source country.

Qenos is seeking changes to Customs' approach to instances of country hopping. Presently applicants are advised that Customs can 'accelerate' its decision making process in country hopping cases. This viewpoint has not been reflected in practice. Qenos considers the following changes are required:

- 'Country hopping' to be recognised as a change in supply source from the time lodgement of an original application is made;
- A country hopping application to include updated financial information from original application, along with details confirming the change in source(s) of supply;
- Accelerated inquiry processes particularly in instances where related parties are involved;
- Clarification that country hopping does not necessarily require the same importers as original investigation – circumstances may be a new opportunistic importer has emerged;
- Consideration of an appropriate passage of time to be considered for a new application to be considered a country hopping application (e.g. within 12 months of Minister's decision);
- As material injury to the Australian industry has previously been verified in original investigation, analysis in country hopping application is therefore limited and unlikely to identify any change. On this basis, access to provisional measures should be available from Day 60 in country hopping cases;
- The usual 155 day investigation period for country-hopping cases to be truncated (as Australian industry visits and importer visits that previously occurred only require updating);
- Customs manual to be reviewed to include provisions on process of investigation for country hopping cases.

An accelerated investigation timeframe with early access to provisional measures (consistent with WTO requirements) is essential for country hopping cases. In the absence of appropriate procedures, the Australian industry's access to remedies in a timely manner is diminished (due to lengthy timeframes associated with the present process). Recognition is required in respect of the specific circumstances associated with a country hopping application, noting in particular that it is not necessary for one or more of the same interested parties to be involved from the original investigation (e.g. importer).

Provisional measures

Access to provisional measures in a timely manner has long been an issue of concern to Qenos. Current practice is that preliminary affirmative determination ("PAD") is published some time following the SEF at Day 110 of the investigation. The PAD usually follows the SEF by approximately seven days.

In many circumstances, however, Customs has sought an extension of time from the Minister to publish an SEF. In Qenos' LLDPE and HDPE cases in 2003, extensions of time were granted of approximately 120 days to the SEF, thereby further delaying access to provisional measures. The LLDPE and HDPE investigations were initiated on 11 October 2002. On 29 January 2003, the investigation timeframes were extended by a further 120 days. Provisional measures were imposed on 11 June 2003, some 243 days following the commencement of the investigation.

Qenos strongly urges a change to the current practice of announcing a PAD at or around the time of the SEF. The separation of decisions to make a PAD from the publication of the SEF is considered essential to ensure the Australian industry is not subjected to material injury over any extended period of time than is necessary. Qenos concurs with broader industry views that a PAD should be made at a time closer to Day 60 of the investigation process – by this time Customs has already verified material injury experienced by the Australian industry and has received exporter information confirming whether dumping has occurred over the investigation period.

There does not appear to be any reasonable basis to unnecessarily extend the time to a PAD when the information available to Customs is reasonably evident by Day 60 (or soon thereafter).

Qenos does not agree with sentiments that it is not possible to consider a PAD close to Day 60 for investigations involving multiple countries – the same information is readily available to Customs to make a PAD decision.

Current practice on the timing of PAD decisions requires urgent review, with a PAD to be imposed at a time from Day 60 (and certainly no later than Day 90).

Pre-screening of applications

The legislated timeframe for the pre-screening of applications prior to initiation is 20 days. Customs has recently introduced a "deficiency" notice system whereby the applicant industry is notified of certain shortcomings with the application. The applicant industry can remit additional information to Customs which is considered "new" information and the pre-screening time-clock recommences its 20-day countdown.

This approach extends the 20-day pre-screening period out to 40 days.

It is Qenos' experience that some of the items identified as "deficiencies" with an application can be readily addressed via direct communication between Customs and the applicant(s). The introduction of the deficiency notice is a disincentive for Customs to liaise with the applicant(s) to ensure it fully understands the content of the application. Qenos is encouraging full interaction of the Customs' pre-screening team with the applicant company during the application assessment process.

Timeframe extensions

As indicated above, Qenos' experienced significant timeframe extensions in two investigations in 2003. Extensions granted were approximately 120 days, thereby delaying access to provisional measures (for businesses that had already experienced material injury) for a further four month period.

Timeframe extensions should only be granted on the basis that a PAD is appropriately considered.

Further, timeframe extensions should not be granted for periods of greater than 5-6 weeks. Extensions of up to four months create significant uncertainty around the investigation process and outcomes.

ABS Confidentiality Restrictions

Certain imports of polymers in which Qenos is a manufacturer have been the subject of recent confidentiality restrictions imposed by the Australian Bureau of Statistics ("ABS"). Qenos understands that the ABS responds to an application for the suppression of import data where the applicant can demonstrate that its "business confidential information" will be otherwise be disclosed.

It is further understood that parameters concerning the level of trade of the applicant company contrasted with total trade is considered.

Qenos is opposed the suppression of import data. As a local manufacturer that has invested substantially in value-adding to indigenous raw materials for supply to the local and export markets, Qenos considers it is entitled to be able to understand:

- What volume and value of imports it is competing against;
- Whether the imports are fairly priced; and
- The size of the Australian market to permit future investment decisions.

ABS guidelines to accessing confidentiality restrictions presently identify "anti-dumping actions" as a basis for applying for goods to be suppressed. The ABS policy of promoting import data suppression due to those goods likely to be the subject of an anti-dumping application is inconsistent with Federal government policy to provide access for Australian industry to remedies against unfair trading practices.

The suppression of import data is in conflict with the reasons for providing access to an effective Anti-Dumping System. The Productivity Commission is encouraged to recommend as an absolute minimum the publication of import volumes by ABS.

Other improvements

Qenos provides the following brief comments in relation to other areas of improvement to enhance the Anti-Dumping System, namely:

- The information burden on applicants is onerous and requires proof almost beyond reasonable doubt;
- "threat" of material injury is available to Customs as a consideration as to whether to recommend the imposition of provisional measures – however, evidence is difficult for applicant to demonstrate;
- The current Non-Injurious Price methodology[4] is considered transparent and rigorous;
- The availability of 'price undertakings' to exporters should be identified as an available option only following full cooperation in the exporter verification process;
- The present five-year timeframe for measures is consistent with the WTO Anti-Dumping Code, with continuations available to applicant industries on a case-by-case basis;
- Limiting anti-dumping measures to a ten-year life is not supported – assessment of circumstances on a case-by-case basis is required;
- Limiting access to the anti-dumping application process following unsuccessful application is not supported – application may have been terminated on a technical basis (e.g. dumped volume was below 3 per cent negligible level);
- Profits foregone and reduced market share in a growing market are considered valid injury indicators that should be assessed in the context of other identifiable injury indicators;
- Current processes surrounding review, revocation and sunset requests are considered acceptable with applicants provided the opportunity to press individual cases as appropriate;
- Inclusion of a decision to reject an application for the continuation of measures as a "reviewable decision" by the Trade Measures Review Officer;
- Current organisational roles of Customs and Border Protection and Minister work effectively – no reasons exist to alter this process;
- Expertise of Customs' investigators is an ongoing challenge for the agency – recognised difficulties involved in attracting and holding quality staff with relevant skills and expertise in forensic accounting and investigation techniques;

[4] Trade Measures Policy Advice 2004/01.

- Suggestion that an exchange arrangement be considered for a Customs' investigator with either the relevant Canadian, EU or US administration to encourage exposure to new and different investigative techniques; and

- The present Anti-Dumping (and Countervailing) System is an appropriate means of addressing unfair competition from imports across international boundaries – domestic competition issues are appropriately addressed within domestic competition law.

VI. Benefits and costs of current system

The Productivity Commission's Issues Paper includes discussion surrounding misconceptions of outcomes of anti-dumping investigations. In particular, the PC states "..the ensuing impacts on the various stakeholders are similar to those that result from tariffs and other measures which raise the price of imports or otherwise restrict import levels". Qenos disagrees with this proposition.

Tariffs artificially raise the price of imports; Anti-dumping (and Countervailing) measures correct an internationally recognised and condemned practice of illegal (i.e. unfair) pricing behaviour.

There exists a misconception that prices are maintained at artificially high levels. This is incorrect. The impact of the 'lesser duty rule' (or non-injurious price concept) ensures that the measures applied in any anti-dumping investigation are no more than is necessary to remove the injurious effects of dumping. Whilst dumping margins determined may be high (in percentage terms), the actual penalty applied is based upon the lower of the normal value and the non-injurious price.

Anti-dumping measures do not afford high levels of protection – rather, the measures ***correct*** a discriminatory practice and return import prices to normal competitive conditions.

As a local producer, Qenos views an effective Anti-Dumping System as a means to providing some certainty over investment decisions so that in times of dumping, the local industry has an avenue of redress of unfair practices. Qenos is open to competition from fairly priced imports; however, when the imports are unfairly priced it is entitled to access relief.

It is Qenos' experience that the costs of the System to Australian industry include the difficulty associated with accessing measures in a timely manner, the lengthy timeframes over which uncertainty of outcomes prevail, and the commitment of considerable resources throughout the investigation process. In particular, delays in accessing measures thereby extending periods of ongoing material injury is a considerable cost to the business. Qenos has highlighted that early access to provisional measures is an essential reform of the present system to ensure it remains effective. Qenos does not support any reforms to the Anti-Dumping System that will diminish the intended outcomes or cause further delays to accessing remedies.

The Productivity Commission Issues Paper has sought comments on a 'public interest' provision to be considered prior to the imposition of dumping measures. Qenos does not support a proposition of this nature. The Minister presently has the power not to impose measures if this is considered appropriate, however, the lengthy process which an Australian industry subjects itself to should deliver respite where dumping, material injury and causal link are upheld. The introduction of an additional phase in the anti-dumping inquiry process to examine whether the imposition of the measures is in the broader public interest is likely to generate:

- Significant additional costs to the applicant industry;
- Cause further delays (above those from inquiry timeframe extensions) in accessing measures; and
- Increase the level of uncertainty associated with outcomes.

The decision to undertake an anti-dumping application is not one taken lightly. There are considerable interests to weigh up, including the impact on customers. The process is complicated and involves

considerable resources, and there already exists considerable uncertainty on outcomes. The addition of a public interest provision would add further delays, costs and uncertainty to a process that operates according to well documented processes and procedures. There are, however, numerous discretionary decisions required throughout the process and the inclusion of a non-defined 'public interest' requirement would create increased levels of uncertainty. Further subjectivity would arise, including:

- Who would determine what is in the community's interests?
- What is meant by "in the community's interests"?
- How would the public interest test be objectively measured, and over what period of time would such an assessment be made?
- How does the decision-maker decide what benefits are more important in one industry sector versus the costs to another industry sector?
- Were the stakeholders provided ample opportunity to input to the community interest issue?

It is therefore likely that the inclusion of a public interest provision would result in delayed outcomes from the Anti-Dumping process. The present approach involving Ministerial decision-making has operated effectively to date.

Qenos disagrees with suggestions that anti-dumping measures restrict competition and contribute to reduced innovation. However, Qenos observes that it is usually only one or two exporters and a similar number of importers that are the subject of the application – with the majority of importers of the product not implicated and therefore continuing to supply the market. It is Qenos' experience that imports have continued following the imposition of the measures, at levels reflecting non-injurious prices.

Qenos, similarly does not support the inclusion of the Anti-Dumping System within the Trade Practices Act ("TPA"). The TPA is concerned with domestic competition policy and how that is administered in Australia. The TPA does not address behaviours across Australia's borders

Finally, Qenos would like to highlight the following observation. Anticipated outcomes of the Anti-Dumping System are mostly always discounted – adjustments to normal values result in lower than expected normal values. It appears from the Australian industry's perspective that final dumping margins determined for exporters verge on a 'negotiated' outcome, and a return to pre-dumping levels is often not observable.