The Australian Dried Fruits Association

The Australian Dried Fruits Association ("ADFA") is the peak body that represents the interests of its grower members and provides services and initiatives of commercial benefit. The ADFA has processor and marketer members who participate on the ADFA Board of Management and the Australian General Meeting of members. The ADFA structure provides a basis for industry co-operation with the joint objective of maximising profitability to all industry stakeholders.

The ADFA was formed in 1907 as a federation of the Mildura Dried Fruits Association and the Renmark Raisin Trust (which were both founded in 1895). The ADFA was established for, and controlled by dried fruit growers, with representation from packers, marketing agents and merchants. The ADFA was formed to provide the organisation necessary to regulate the flow of dried fruits from the hands of the producers, through processors and marketers, into the hands of buyers. Some 100 years later the ADFA remains committed to ensuring maximum returns to growers from all markets.

The ADFA provides a forum for discussion and decision making in all matters relating to the conduct and management of the Australian dried fruits industry, and represents the industry to all outside parties including government.

Productivity Commission Review of Anti-Dumping System

Under its representation role, the ADFA welcomes the opportunity to provide input to the Productivity Commission's Review of Australia's Anti-Dumping System. The ADFA has participated in anti-dumping investigations on two occasions – initially in the 1980s as an applicant industry requesting anti-dumping measures against certain dried vine fruit exports to Australia and, more recently, in support of an application by Sunbeam Foods Pty Ltd against processed dried currants exported from Greece.

This later investigation provided ADFA with an insight into the Anti-Dumping System including the information burden on applicant industries, the timeframes involved in the investigation process and accessing provisional measures, and the policy framework impacting the stakeholders involved in the investigation.

The ADFA has drawn on this recent involvement to provide comments to this review.

Why have an Anti-Dumping System?

Australia's Anti-Dumping and Countervailing System (hereinafter referred to as the 'Anti-Dumping System') is based upon the WTO Agreements which address the concepts of anti-dumping and subsidization (or countervailing). The principles of the WTO Agreements that have been incorporated into Australian legislation ensure that international trade across Australia's borders is *fair* trade. The concept of fair trade is one that resonates with Australian industry and the community alike – unfair trading behaviour is harmful to all Australians in terms of employment and investment in economic activity.

The ADFA is supportive of an effective Anti-Dumping System which provides relief to an industry impacted by unfair trading in a timely manner. Recent changes to the administration of the Anti-Dumping System following the Joint Study[1] have improved transparency of the decision-making process for all stakeholders, along with increased certainty about minimum information standards. Further enhancements to ensure that access to provisional measures is timely, timeframe extensions are not unnecessarily lengthy, and the burden of proof is not solely weighted on the applicant industry, requires attention.

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

Recent anti-dumping activity

The apparent decline in the level of anti-dumping activity in recent years may be attributed in part to the difficulties of obtaining evidence of dumping and harnessing the appropriate resources to compile an adequately documented application. Obtaining the required information to establish 'reasonable grounds' for the publication of a dumping duty notice, is often onerous - particularly for an applicant industry with limited resources. Information pertaining to domestic selling prices and/or costs of production of the manufacturer in the country of export is difficult to obtain – even for the adequately resourced company.

The decline in anti-dumping activity may also be linked to the buoyancy of the economy over recent years.

A further consideration is likely to involve the screening process undertaken by Customs and Border Protection ("Customs") – the recently introduced 'deficiency notice' process conveys a perception of 'rejection' of an application, rather than a positive advancement to formal initiation. The process also involves an extension of the screening period from 20 days up to 40 days, further increasing uncertainty of the process. ADFA remains concerned that the level of satisfaction required by Customs to initiate an application far exceeds the legislated "reasonable grounds' requirement.

ADFA has observed the emergence of China as a source for processed foods in recent years. Historically, imported processed foods were sourced from the US or Europe, often with the support of subsidies to ensure competitiveness. Chinese exports of processed foods are increasing on global markets – raising concerns for Australian processors that a lack of transparency associated with government involvement in the Chinese agricultural industry could disadvantage Australian industry in accessing remedies from unfair trading practices. Evidence from recent anti-dumping cases involving China suggests that Australian industry is experiencing difficulties with artificially low prices (and costs) for Chinese goods.

Suggested improvements to the system

The ADFA considers that Customs is the appropriate agency to administer the Anti-Dumping System. Further, ADFA supports the role of the Minister as the decision-maker when imposing anti-dumping measures. The Minister has the power to issues "directives" to the administering agency and to assist it with interpretation of the legislation and the WTO Codes.

Suggestions that the legislative provisions of the Anti-Dumping System be incorporated into the Trade Practices Act ("TPA") and administered by the Trade Practices Authority are not supported. The *Issues Paper* intimates that the competition aspects of the Anti-Dumping System may be appropriately housed within the TPA – however, the legislative provisions on competition do not extend beyond Australia's borders.

Customs is well positioned with its border control responsibilities which permit it to access commercial transactions across the Customs barrier. Customs is also the appropriate agency to monitor the implementation of the measures – a responsibility that would necessarily remain with Customs (if Customs was forced to relinquish its current role).

ADFA believes that the Anti-Dumping System is effectively administered by Customs. Recent reviews (Willett in 1996 and Joint Study in 2006) have refined the Anti-Dumping System to meet the requirements of Australian industry. Some additional improvements to be considered are identified below.

(i) Access to provisional measures

It was ADFA's expectation in the recent processed dried currants investigation that provisional measures would be accessible at a time comparable with publication of the Statement of Essential Facts ("SEF") –

as is Customs' usual practice. Customs, however, sought an extension of time to the publication of the SEF by an additional 78 days, further delaying access to a preliminary affirmative determination ("PAD") required for the imposition of provisional measures.

The WTO Anti-Dumping Agreement does not permit for provisional measures to be imposed prior to Day 60 of an investigation.

The ADFA does not consider the processed dried currants case involved 'extenuating circumstances' to warrant excessive delays to the publication of a PAD. Greek exporters (and EU government agencies) were provided with numerous opportunities to cooperate with Customs' inquiries well beyond Day 40 of the investigation. The parties elected not to complete questionnaires provided. Requests For Information ("RFI") were also forwarded to exporters and the Greek government after Day 40 to entice some form of cooperation – with limited success. Customs eventually decided that no cooperation was forthcoming and published the SEF based on the information available to it.

A PAD was published 204 days following initiation of the investigation. The extension granted to delay publication of the SEF also significantly delayed the PAD. ADFA considers that Customs' current practice of delaying a PAD until sometime immediately following an SEF is unacceptable. Customs is in possession of sufficient information from Australian industry (following verification visits), exporters (receipt of exporter questionnaire responses), and importers (importer visits) by Day 60 of an investigation to make a decision as to whether to impose provisional measures (i.e. a 'preliminary' affirmative decision). For more complex cases, a delay of no more than an additional 30 days could be made available.

Where Customs requests an extension of time to publish an SEF, the Minister should only approve on the basis that a PAD be published immediately. There should be no lengthy delays to accessing measures – particularly as the industry has already experienced material injury from the dumped exports (as evidenced in the application resulting in initiation of an investigation).

(ii) Timeframe extensions

As indicated above, the recent processed dried currants investigation involved an extension to the SEF of 78 days. ADFA understands that timeframe extensions in investigations occur with regularity, with extensions of up to 120 days identifiable. ADFA considers that in many instances unnecessarily extensions can be avoided. Customs will grant extensions of time for the provision of a completed exporter questionnaire in certain circumstances. However, where it is clear that full cooperation is not possible, Customs should be directed to rely upon information obtained from the applicant industry and/or available in the public domain.

ADFA is concerned that exporters are too readily provided with opportunities post Day 40 to 'cooperate' in an investigation.

ADFA would welcome clear guidelines on timeframe extensions with a maximum 'cap' of no more than 60 days (with a PAD to be issued where an extension has been requested).

(iii) Prima facie domestic pricing information

This can be a significant hurdle in advancing an application to lodgement. Accessing price schedules at regular intervals over a given period of time in a country where the applicant industry has little knowledge is a difficult task. Commissioning of market surveys is an expensive exercise.

It has been ADFA's experience that government agencies in other countries do monitor prices and/or costs in competing export countries – for example, the US Department of Agriculture publishes a Foreign Agriculture Service report on dried fruits in Greece.

There are, however, problems with market surveys published by government agencies – they do not often detail the sale terms or period of application, making it difficult for such information to be relied upon. In many instances a fit-for-purpose market research document is required, detailing specifically prices and/or costs from a supplier at specified intervals over a given period. The cost of obtaining *prima facie* normal value information of this nature can be prohibitive.

ADFA considers that certain government agencies (e.g. Austrade, DAFF) could be tasked with assisting industry to monitor prices and/or costs of products in the country of export, once it has been identified that the exported goods are considered to be injurious to Australian industry. The agency would be requested to conduct research of the exporting country's industry following a formal approach from the Minister for Home Affairs.

(iv) Close processed agricultural goods

Dried currants were considered to be 'close processed agricultural goods' in the recent processed dried currants investigation. As dried currants met the legislative requirements of what constituted close processed agricultural goods, material injury to the dried currant growers could also be considered when assessing material injury to the Australian processors of dried currants.

The close processed agricultural goods are not inconsistent with the WTO Agreement. They are, however, specific to Australia's Anti-Dumping System. ADFA can envisage circumstances where its members could be prevented from accessing the anti-dumping provisions in absence of the application being launched by the relevant processing industry. Section 269T (4A) of the Customs Act states:

> "Where, in relation to goods of a particular kind first referred to in subsection (4), the like goods referred to in that subsection are close processed agricultural goods, then, despite subsection (4), the industry in respect of those close processed agricultural goods consists not only of the person or persons producing the processed goods but also the person or persons producing the raw agricultural goods from which the processed goods are derived."

S.269T (4A) includes for example, growers as part of the industry (along with processors) when close processed agricultural goods are the subject of an application. However, there are qualifications to eligibility as subsection (4A) is qualified by subsection (4B), namely:

> "For the purposes of subsection (4A), processed agricultural goods derived from raw agricultural goods are not to be taken to be close processed agricultural goods unless the Minister is satisfies that:
>
> (a) The raw agricultural goods are devoted substantially or completely to the processed agricultural goods; and
> (b) The processed agricultural goods are derived substantially or completely from the raw agricultural goods; and
> (c) Either:
>
> (i) There is a close relationship between the price of the processed agricultural good and the price of the raw agricultural goods; or
> (ii) A significant part of the production cost of the processed agricultural goods, whether or not there is a market in Australia for those goods, is, or would be constituted by the cost to the producer of those goods of the raw agricultural goods."

Unless the raw agricultural goods produced by the grower are 'devoted substantially or completely' to the processing function and it can be demonstrated that the processed goods are 'derived substantially or completely' from the raw agricultural goods and either one of the two pre-conditions of Subsection (4B)(c)

is also met, the growing industry will not be considered part of the Australian industry of the processed goods.

The ADFA considers that the legislative provisions of 'close processed agricultural goods' impose restrictions on access to the Anti-Dumping System for many produce growing industries within the agricultural sector. ADFA would encourage the Productivity Commission to recommend the removal of this limitation which denies access to the anti-dumping provisions for some growers of raw agricultural products.

(v) Subsidies

ADFA members (growers and processors) have been competing against European exports of processed goods which have benefited from subsidies for many years. In some cases, the subsidies were revised annually to ensure that benefits were maintained and not eroded by the effects of inflation.

In 2008, the EU altered its subsidy regime to include the majority of agricultural activities into the Single Payment System subsidy program. Flat payments were introduced which had little bearing to previously referred yields. The adopted changes meant that the subsidies could not be addressed in accordance with the WTO Subsidies and Countervailing Code provisions as the payments were non-discriminatory across industries.

ADFA is concerned that its members continue to encounter low priced European imports which benefit from subsidies (whether it is specific or not) which are unfairly priced. Australian growers and processors continue to be disadvantaged by the EU subsidy scheme, due to ongoing financial support received by EU farmers (whether it is a flat payment or specific subsidy). Such payments should be actionable under the subsidies and countervailing provisions.

(vi) Life of measures

ADFA supports the five-year norm for the application of anti-dumping measures. The current period provides the industry with a clear period over which it can anticipate recovery from the injurious effects of dumping. It should be noted that interested parties can access the review and revocation periods throughout the five-year period as appropriate.

The ADFA does not support a ten-year cap on the life of anti-dumping measures. Each case must be examined on its own merits. It would be short-sighted to apply a defined timeframe for anti-dumping measures when the conditions which led to the dumping and/or subsidisation remain in play at the end of a ten year period in the country of export.

Provisions are available to interested parties to seek a review or revocation of the measures throughout the periods to which the measures apply.

(vii) Material injury

The material injury provisions within S.269TAE(1) and (3) of the Customs Act which detail factors that Customs will take into account in its assessment of injury to the Australian industry are not exhaustive. It is noted that Article 3.4 of the Anti-Dumping Agreement provides for consideration of certain additional factors including profits forgone and a potential loss of market share (and 'potential negative effects' on various factors including growth). Australia's provisions do not specifically address profits forgone or reduced market share in a declining market.

ADFA supports the inclusion of profits forgone and reduced market share in a growth market as observable indicators that should be considered in the overall material injury assessment of the Australian industry.

Reference is also made in the *Issues Paper* to whether 'threatened' material injury is sufficiently considered by Customs. Claims of a 'threat' of material injury versus actual material injury are two different factors. ADFA understands that applications for measures which are based upon a threat of material injury are required to demonstrate factors relevant to highlighting that the threat is 'real and imminent'. The circumstances of being able to demonstrate a 'real and imminent' threat of material injury is considered difficult in contrast to demonstrating actual injury incurred, and perhaps reflects why applications based upon threat are uncommon.

System administration

The *Issues Paper* has encouraged discussion on a number of items relating to the administration of the Anti-Dumping System. ADFA provides the following brief comments:

- ADFA supports the retention of the Minister and Customs in their respective current roles;
- The change to current rules by allowing new information to be considered by the Trade Measures Review Officer during a review inquiry would undermine the original investigation and result in parties withholding relevant information from Customs. The ADFA does not support a change to the current rules;
- ADFA would encourage improved access to ABS import data; and
- ADFA encourages enhanced skills training to ensure professional staff undertaking verification visits with Australian industry, exporters and importers are sufficiently equipped with the knowledge and expertise required to adequately perform these tasks.

Public interest

The ADFA notes that a public interest provision is considered by some other administrations including the EU and Canada. Whilst the Australian Anti-Dumping System does not explicitly include such a provision, the discretion of the Minister to impose anti-dumping measures is at least an implicit provision which exists under the current system.

The ADFA would also highlight that Australia applies the 'lesser duty rule' when considering the imposition of anti-dumping measures. Under Australian legislation anti-dumping measures are applied on the basis that the measure will only be applied at a level that is sufficient to remove the injurious affects of the dumping. The lower of the normal value and the non-injurious price is applied s the basis for interim dumping duties.

The inclusion of the 'lesser duty rule' as a component of the measures that apply following investigation ensures that the broader community interests are not eroded by affording the affected industry any level of protection from unfair trading beyond that required to remove the injurious effects of dumping.

The combined effects of the Minister's discretion and the operation of the lesser duty rule within Australia's Anti-Dumping System are considered by ADFA to be adequate measures that presently operate to cater for the 'public interest'. ADFA does not support the extension of timeframes to include an assessment of broader economic impacts from the imposition of anti-dumping measures, nor does it support any additional costs to be borne by applicant industries to address the economic impact in the context of further investigations.

Summary

The ADFA supports timely access for its members to remedies against unfair trading practices through an effective Anti-Dumping System. The ADFA also supports the retention of the roles of the Minister and Customs in the anti-dumping process. Improved effectiveness of the Anti-Dumping System could be achieved by:

- separating the PAD from its present alignment with the SEF;
- limiting the period of timeframe extensions;
- assisting industry with access to international pricing information in competitive markets;
- reviewing the definition restrictions on 'close processed agricultural goods';
- recognition of profits forgone and loss of market share in a growth market as legitimate material injury indicators;
- addressing broad industry subsidies as actionable under the countervailing provisions; and
- ensuring Customs is resourced with adequately qualified and trained staff on all aspects of the dumping investigation.