1.0 Introduction

Orica is an Australian-owned, publicly-listed global company headquartered in Melbourne, Australia. The company has evolved from a supplier of explosives in the 19th Century to a multi-billion dollar company currently listed in the Top 40 companies on the Australian Stock Exchange.

Orica has four key platforms from which it operates: Orica Mining Services, Minova, Orica Consumer Products and Orica Chemicals.

Orica Mining Services is a global business which offers commercial explosives, initiating systems and blast-based services to the mining, quarrying and construction industries.
Minova is a global leader in providing specialist chemical products to underground mining and civil engineering activities.

Orica Consumer Products is the leader in decorative, preparation, and lawn and garden care products in Australia and New Zealand. Key brands include Dulux, Berger, British Paints, Levene, Walpamur, Cabot's, Feast Watson, Intergrain, Acratex, Selleys, Rota Cota, Poly, Turtle Wax, Yates, Thrive, Zero and Dynamic Lifter.

Orica Chemicals is a major supplier and trader of chemicals, services and technology to the water treatment, mining chemical and industrial chemical markets.

Orica considers that it is a stakeholder in the Productivity Commission's Review of Australia's Anti-Dumping System. The company has previously been involved as an applicant company for anti-dumping measures against exports of ammonium nitrate ("AN") from Russia. The company has also been involved as an importer of certain chemical products that have been the subject of anti-dumping investigations.

Orica therefore considers it is well positioned to provide comments in respect of the current Productivity Commission Review.

2.0 Rationale for an Anti-Dumping System

As a member of the World Trade Organisation ("WTO"), Australia has enacted a number of the WTO Agreements into domestic legislation, including the Anti-Dumping, and Subsidies and Countervailing Codes. Australia is not obliged to enact this legislation – it chooses to do so to ensure that local industries are not subjected to unfair trading practices. Similarly, other WTO members that are also Australia's trading partners have enacted the WTO Anti-Dumping, and Subsidies and Countervailing Codes into domestic legislation – the US, EU, Canada, China and Korea, to name a few.

The question as to why Australia should have an Anti-Dumping and Countervailing System was examined by Professor F.H. Gruen in his 1986 review of the Customs Tariff (Anti-Dumping) Act 1975[1]. At that time, Professor Gruen quoted the then Bureau of Industry Economics ("BIE") that the "notions of *fairness* in the setting of export prices are deeply entrenched in the Australian community" (emphasis added). Professor Gruen further quoted the W.A. Government and the then Primary Industries Association which stated "the necessity of anti-dumping legislation to safeguard the interests of local producers against *unfair* competition" (emphasis added).

The notion of fairness in international trade is a basic tenet of the movement to "free trade". An effective Anti-Dumping and Countervailing System does not penalise comparative advantage – only those with an unfair advantage. The principle that Australian manufacturers should only have to compete with exports that reflect full cost recovery is a principle embodied in the WTO Anti-Dumping Code.

Professor Gruen's assessment of the community's viewpoint on the fairness of international trade has not diminished over time. In the present economic climate the principle of fair trade remains prominent, to guard against predatory behaviour.

In the period since Professor Gruen's Report, Australian tariffs have reduced significantly. This has resulted in the restructuring of many sectors of Australian industry (as previously high tariffs declined from approximately 25 per cent to levels between 5 per cent and zero). The rationalisation of the manufacturing sector throughout the periods of phasing tariffs delivered internationally competitive Australian businesses. In the absence of tariffs, the only effective remedies available to Australian manufacturers from unfair trading practices are those contained within the Anti-Dumping and Countervailing System (which reflect the WTO Anti-Dumping, and Subsidy and Countervailing Codes).

The importance of Australia's Anti-Dumping and Countervailing System to Australian manufacturing cannot be assumed. In the absence of an *effective* system, intermittent and predatory pricing behaviour reflected in export prices would flourish. It is therefore imperative that access to an *effective* system that addresses unfair trading behaviour in a timely manner is available to Australian manufacturing.

Having a fair basis to world trade is seen by all Australians (companies and individuals) as essential to the Australian economy. In particular, this fairness aspect is strongly endorsed by Australian companies and workers in relation to the retention of core skills and capabilities of Australian industry and the security of Australian jobs. Australian companies seek to invest in capital, skills and resources in developing their industries in Australia for their companies to grow and become internationally competitive. This investment needs to be underpinned by a strong Anti-Dumping System which provides for remedies against unfair trading practices and subsidies in some countries.

It is noted that in some emerging economies, the central government continues to play a significant role in the setting of pricing for key inputs to the economy, such as gas and energy pricing. This is certainly the case in China and in many countries of the Former Soviet Union, such as Russia. This form of government intervention may be direct or through government controlled bodies. It may cover direct price setting as well as financial subsidies, loans and land grants through the central and/or provincial governments. In the case of Russia, energy policy and the setting of gas prices is used as a lever in foreign trade and political negotiations on the global stage. It is clear that some countries, such as Russia,

[1] Gruen, Prof F.H., Review of the Customs Tariff (Anti-Dumping) Act 1975, March 1986, P.24.

have for many years been prepared and continue to provide subsidies for domestic industries and key inputs relative to the commercial value of those inputs in WTO jurisdictions. An effective Anti-Dumping System is required to provide Australian industry with remedies for unfair trade in this regard.

Conclusions on Rationale

An Anti-Dumping and Countervailing System is a necessary remedy for Australian manufacturers to compete against unfairly priced imports on the Australian market. The need for an effective system reflects the community's expectation identified by Professor Gruen in 1986 that a "notion of fairness" in export prices reflecting full cost recovery is a reasonable presumption upon which Australian manufacturers can rely and compete. This expectation has not altered since Professor Gruen's review. Access to an effective system is perhaps more important now than in 1986 following the restructuring of Australian industry as tariffs declined to minimal levels.

Australian manufacturers require access to the Anti-Dumping and Countervailing System to address circumstances where exporters marginally cost goods and/or government intervention provides an unfair advantage. The Australian Anti-Dumping and Countervailing System has provided the available remedies to Australian manufacturers to address unfair trading practices – and should continue to do so into the future.

3.0 Orica's experience with the Anti-Dumping System

In recent years, Orica was a co-applicant company for anti-dumping measures on AN exported from Russia in 2000. The application was made following an increase in import volumes from Russia. Similar actions had also been taken by the US and EU industries against Russian exports, also resulting in measures.

In May 2001, following an investigation by the then Australian Customs Service ("Customs") the Minister imposed anti-dumping measures for a five-year period on AN exported from Russia. In July 2005 Customs published a notice advising that the measures against Russian exports of AN were due to expire and that the applicant industry could make a request for the continuation of the measures. Within the required timeframe, the Australian industry made an application that the measures be continued for a further five year period. The industry also requested that Customs review the measures already in place.

Customs commenced investigations into the continuation and review of measures applicable to Russian exporters of AN. Customs determined that the Russian government regulated the price of gas sold in Russia and that the price was below market determined prices. Prices and costs of AN manufactured in Russia are heavily influenced by the price of gas – hence Customs considered it inappropriate to determine normal values in Russia. As occurred in the original investigation, Customs used surrogate information to determine normal values for Russian AN.

Russian exports of AN to Australia were evident throughout 2004 and 2005. Customs' concluded that in the absence of anti-dumping measures on Russian exports of AN, it was likely that the Australian industry would again experience material injury. Customs recommended, and the Minister accepted – that the measures be continued for a further five-year period until May 2011. Anti-dumping measures on Russian AN were also extended in the US and EU.

In terms of Orica's experience as a stakeholder of the Anti-Dumping System and on the basis that Orica considers that the present administration of Anti-Dumping System is well suited to the needs of Australian industry, Orica has identified some refinements to enhance the System to the benefit of stakeholders which are made later in this submission.

Orica has also been involved as an applicant industry requesting anti-dumping measures in the early 1990s – including on behalf of its sodium cyanide operation.

Orica as an importer

Orica has also been involved in anti-dumping investigations as an importer (silicon, sodium bicarbonate and sodium meta-bisulphate) through its Chemicals Trading business.

4.0 Comments on Usage of the System

Orica has observed a noticeable decline in the number of new investigations commenced annually since the early 1990s. In part, the decline may be attributed to the rationalisation of Australian manufacturing. In the early 1990s tariff rates were in the middle of a phasing program through until 1996. A number of manufacturing sites which were relatively small on a world scale basis were closed and imports replaced local production.

Australia's Anti-Dumping System at the time was a bifurcated process – Customs was responsible for the investigation until the preliminary finding stage, with the Anti-Dumping Authority ("ADA") completing the final phase of the investigation. The ADA had introduced a "warning" system to some exporters – that is, anti-dumping measures were not imposed but the exporter was warned not to increase export volumes or anti-dumping measures would be imposed (following a further request from the applicant industry).

The introduction of the "warning" approach was not a pronounced policy in the legislation or guidelines – rather, it was an initiative of the ADA which increased uncertainty of outcomes and contributed to a perception by applicant companies that the system was slow and ineffective.

Following the Willett Review of 1996[2] Australia's Anti-Dumping System was returned to Customs as the single administrator of the Anti-Dumping and Countervailing legislation. The uncertainty created by the former bifurcated process and the timeframes involved (245 days for a normal investigation) were major considerations for an applicant industry in electing whether to proceed with a formal application.

Following the government's decision to provide Customs with sole responsibility for administering the Anti-Dumping System, clarity emerged in relation to standards that applied to the initiation of an industry application. The streamlined timeframes and changes that followed the Willett Review returned a level of certainty to the application process. By this time, however, further restructuring of Australian industry had occurred (since the early 1990s) and the number of applicant industries (and companies) continued to decline. By the end of the 1990s the Anti-Dumping System was available to those manufacturing industries that survived the industry restructuring process brought on by the reductions in tariff barriers – a smaller volume of industries and companies than prior to the Professor Gruen review.

Consequently the number of new anti-dumping applications declined throughout the 1990s.

In recent years, the number of new investigations initiated on an annual basis has declined further. There are many potential reasons for the reduction, including:

- the difficulty in obtaining *prima facie* evidence concerning dumping and/or subsidisation;
- the lack of transparency concerning prices and costs associated with exports from certain countries (e.g. China and Eastern bloc countries);
- concerns associated with the resource commitment to prepare the necessary financial and causal link information required for an application;
- restricted access to Australian Bureau of Statistics ("ABS") import data due to confidentiality embargoes;
- the timeframes involved in preparing an application;
- the timeframes before access to provisional measures – particularly where extensions of time are also granted prior to publication of the Statement of Essential Facts;
- the reluctance by Customs to accept injury or threat of injury in a growing market;

[2] Willett, L – Review of Australia's Anti-Dumping and Countervailing Administration, September 1996.

- difficulties in securing support and participation from other Australian industry members;
- concerns that Customs will only initiate an investigation where anti-dumping measures are likely to be imposed (as distinct from assessing whether the application demonstrates 'reasonable grounds'); and
- uncertainty associated with differences in interpretation of what constitutes "material" injury between the applicant industry and Customs.

The above reasons are not exhaustive. Additional reasons may also be evident however the above listing is intended as a guide.

In terms of the concentration of anti-dumping activity in a few key industries, it is not surprising that the larger industries (e.g. chemicals and plastics, paper, steel, cement) are also capital intensive industries. Manufacturers in these industries are volume-dependent producers and any decline in production utilisation rates increases unit output costs and erodes profits and profitability. These industries are more sensitive to price fluctuations as changes can occur on a weekly basis (most commodity industries publish weekly price movements). Shifts in the regional supply and demand volumes can be substantially impacted through capacity expansions and new on-line production, displacing traditional suppliers with marginally-priced goods.

Capital intensive industries therefore may be more susceptible to intermittent dumping when supply is long. Nevertheless, an incumbent industry with significant capital invested should be able to rely upon the presumption that it should not have to compete with unfairly priced imports. In the absence of this presumption, manufacturers in capital intensive industries would not be able to commit to significant re-investment decisions (often with long lead-times of several years) which value-add to Australia's resources.

4.1 International comparison

When contrasting Australia's Anti-Dumping System with that of other WTO member administrations, relative timeframes inevitably arise. The timeframe for Australian investigations (155 days for a dumping investigation, 175 days for a countervailing investigation) is shorter than that in other countries. The timeframe for investigations conducted in New Zealand is not dissimilar to Australia – a maximum 180 days from initiation applies.

The timeframe for investigations in Australia is commensurate with the number of applicant companies involved in an Australian industry application, along with the size of the domestic market in Australia. In most cases the number of applicant companies is often no more than two, and perhaps a maximum of three in limited circumstances. Unlike the US where there are numerous domestic producers across the United States, and the EU where many of the 27 country members have producers which comprise the EU industry, the administrators must conduct verification visits with each of the industry members. Investigation timeframes of more than 155/175 days is evident in the US and EU – consistent with the greater level of interested party participation and the size of markets in the US and EU.

In Australia, current timeframes permit visits to be completed at one or two Australian industry companies (along with importers and exporters) within the scheduled 110 days to the Statement of Essential Facts ("SEF"). In certain circumstances, Customs can request an extension of time prior to the deadline for the SEF – particularly when the number of importers and exporters is excessive and Customs is required to 'sample' exporters. Requests of this nature have been granted by the Minister where appropriate. The present timeframes are considered appropriate to the circumstances reflective of Australian industry and the size of the Australian market.

Conclusion on Usage of the System

The decline in the number of new investigations over recent years may be attributed to any number of factors. Some of these matters were addressed in the recent Joint Study inquiry (e.g. standard of

evidence for initiations). There exists a viewpoint that applications against China are difficult – thereby impacting the number of actions taken against Chinese exports.

Current timeframes are considered appropriate for investigations in Australia – a shorter timeframe than that of the US and EU is considered commensurate with the size of the Australian industry and domestic market.

5.0 How might the current system be improved?

5.1 System architecture

Orica considers that the current Anti-Dumping System administered by Customs and Border Protection is effective and has timeframes which are appropriate to the circumstances of the relative size of the Australian market and the number of industry participants. A larger market with significantly higher industry participants would likely warrant extended timeframes (as apparent in the US and the EU). The recent Joint Study[3] review examined a number of issues relating to improving the operation of the Anti-Dumping System. The initiatives enacted are welcomed and appear to have been positive in improving stakeholders' understanding of requirements for process and access to the System.

There are a number of further considerations which could assist in enhancing the Anti-Dumping System. These matters relate to Anti-Dumping policy and are likely to reflect the circumstances of certain investigations (of which Orica has been involved). Further consideration is required in respect of:

- The burden of proof in anti-dumping and countervailing applications rests with the applicant Australian industry to demonstrate the existence of dumping and/or subsidisation
    - Insufficient weighting is given to independent information substantiating the applicant's claim of dumping and/or existence of subsidies;
- Increased recognition is required of investigations by other administrations (e.g. EU, Canada and the USA) in respect of goods exported by the same exporter (or related party) the subject of the Australian industry's application
    - For example, the EU and USA have anti-dumping measures applicable to AN exported from Russia – non-confidential information available from the EU and USA investigations could assist the Australian investigation. Similarly, investigations by other administrations into related products to AN could also assist – e.g. EU and USA investigations into urea and urea ammonium nitrate solutions would provide insight into normal value considerations;
- The apparent ready acceptance of information supplied by exporters as being true and correct – despite conflicting information available from independent sources
    - Customs is unwilling to reject information furnished by an exporter where evidence has been obtained which contradicts that information supplied by the exporter;
    - Information supplied by an exporter is rarely challenged and, in some instances, often not followed up and/or checked for validation;
    - The rejection of information provided by an exporter has rarely occurred – supporting the assertion that what is provided by an exporter is readily accepted;
- The investigative process of other administrations (particularly, USA, Canada and the EU) appears far more inquisitive and detailed, with inquiries evidencing greater understandings of, for example, the exporter's corporate ownership, recent taxation status and product cross subsidisation issues. It is noted that other jurisdictions second specialist investigative skills for

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

Anti-dumping investigations from other key government areas, such as foreign affairs, finance and tax;

- Concerns held by Australian industry that common business practices in the exporting country (e.g. China) are not recognised – documentary evidence is the only basis upon which assertions can be proved/disproved

  - It is a well known but undocumented fact that Chinese industry players constantly change their legal entity to enable them to continue to qualify for government subsidies;

- Non-injurious price ("NIP") determination based upon constructed selling price methodology

  - Customs has a documented hierarchy for non-injurious price determination which identifies a constructed cost plus margin as the second preferred alternative for NIP determination[4]. In the absence of the applicant industry being able to demonstrate an appropriate rate of profit to be applied to costs, Customs will determine an appropriate rate of profit to be applied, often without due reference to capital re-investment decisions in that industry. This is of particular concern to industry where capital costs for new plants in Australia have surged in recent years;

- Recognition that reduced market share and profits forgone in an expanding market are economic indicators that may be considered in assessing whether an industry has experienced material injury;

- Insufficient consideration is exercised in respect of the "threat" of material injury in investigations

  - No recent applications have been initiated on the basis of a threat of material injury alone;
  - No recent investigations have determined that material injury has not occurred, however, there is a future threat of material injury from dumped (or subsidised) exports;
  - Arguments of a threat of material injury will only be recognised if supported by clear evidence that significant volumes of dumped and/or subsidized imports are imminent;
  - Due consideration is required of what constitutes "significant volumes" in the context of recent import volumes and the size of the Australian market;

The PC's *Issues Paper* also seeks comments in relation to specific policies that currently apply in anti-dumping investigations. These include:

- Should the current five-year period for measures be changed, and should related revocation and sunset procedures be amended?

  - Orica believes that the current five-year period of measures should stand. In some jurisdictions conditions giving rise to dumping have been in place for some time, (e.g. measures on AN exported from Russia) and the levels of government intervention which give rise to dumping do not appear to be falling away.
  - The five year "sunset" provision is contained in the WTO Anti-Dumping Code[5];
  - Following the initial 12-month period after imposition, interested parties can request a review or revocation of applicable measures based upon appropriate grounds;
  - Current procedures and processes are consistent with WTO Anti-Dumping Code and do not require amendment;
  - Australia's "Sunset" or "Continuation" process is different to that of other administrations in that the continuation application, investigation and decision to extend measures all

[4] See Trade Measures Policy Advice No. 2004/1.
[5] Article 11, Paragraph 3 of the WTO Anti-Dumping Code.

occur before the five-year expiry period. Sunset investigations in other administrations (e.g. EU) only require acceptance of application prior to expiry date (with investigation to follow);
- Australia's "sunset" provisions are presently less than the periods applied by other administrations;
- Australian industry needs access to remedies under the WTO rules whilst dumping conditions are demonstrated as continuing to exist

- Should a ten-year life span apply to anti-dumping measures?

  - A case-by-case approach is required;
  - A pre-determined expiry period is not supported;
  - Dependent upon circumstances, the reasons for the imposition of measures may continue to exist over the life of the measures and beyond;
  - This is highlighted with measures applicable to AN exported from Russia – the central Government role in setting gas prices in Russia highlights a circumstance where measures are warranted over the period where the government continues to control gas pricing;
  - If measures continue to be applied by other administrations (as is the case with AN measures imposed by the EU and USA on Russian exports) Australian industry should not be penalised by a pre-determined expiry period of ten years;

- The imposition of provisional measures at a date earlier than the SEF

  - It is Customs' recent practice to only impose provisional measures following publication of the SEF (in recent years, there has been one exception to this practice);
  - The WTO Anti-Dumping Code[6] makes it clear that a preliminary affirmative determination is required prior to the imposition of provisional measures;
  - As Customs' practice is to conduct verification visits with Australian industry prior to Day 40 of an investigation and, by this date, exporter questionnaire responses are also required, Customs is well positioned to assess whether material injury and dumping has occurred on a "preliminary" basis;
  - A preliminary affirmative determination and the imposition of measures can apply from Day 60 in many circumstances (although it is recognised that this may not be achievable in complex cases);

- Consideration to retrospective measures where provisional measures not imposed

  - In the absence of provisional measures, consideration of retrospective measures is required;
  - Long held concerns evidencing intent have prevented the use of retrospective measures;
  - Further examination required as current practice of imposing provisional measures is delayed to the point where final measures will be recommended to the Minister.

5.2 Improving administration of the current system

Orica supports the ongoing roles of the Minister and Customs in the administration of the Anti-Dumping and Countervailing System. Current timeframes and processes are considered appropriate and well understood by Australian parties. The number of industry members, the size of the Australian market when contrasted with global markets (in terms of individual company and industry scale), and the number of new investigations commenced annually, support administration by a single agency. Customs and Border Protection is well positioned at the commercial barrier to continue to undertake this function.

[6] Article 7, Paragraph 1 of the WTO Anti-Dumping Code.

Orica also welcomes Customs' introduction of the electronic public file system. This was a long overdue facility that was identified as assisting all interested parties throughout the investigation process.

Comments relating to certain other matters identified by the PC on the administration of the system are as follows:

- TMRO arrangements
  - The present process does not permit new information to be furnished during TMRO review process;
  - The current policy encourages interested party participation in Customs' investigation – particularly in the initial 40 day response period;
  - Any recommendation to alter this practice would undermine the investigation process of Customs, resulting in a significant increase in appeals to the TMRO and subsequent reinvestigations;
- Better resourcing of skilled investigation teams
  - This was identified by industry as an important issue during the Joint Study review;
  - A concern of industry is that investigators require well developed inquisitive and research skills;
  - Customs requires access to greater language translation, legal and accounting skills to support investigations in exporting countries to elicit information on company structures, accounting practices or other material relevant to its investigation ;
  - The lengthy lead-times in training of Anti-Dumping investigation personnel requires examination of appropriate retention periods within agency;
  - The Joint Study outcome of resourcing of Beijing Office not fully utilised – access to resource by Australian industry is limited;
- Minister as decision-maker
  - The current role of the Minister as decision-maker is supported and should not alter;
  - The current system is a single agency system with clear processes and time frames for all participants, which avoids the possibility of gaming by some parties.
  - Replacement of the Minister with either a statutory officer or panel would open the decision-making process to merit review – a further additional process that would increase the cost and uncertainty of the process;
  - The Minister's role is considered appropriate to the current administrative process;
  - The Federal Court recognises the key role of the Minister in the decision-making process (range of discretions available);
  - The Minister ultimately can provide directions on policy and process.

5.3 Conclusions on architecture and administration

Orica considers that the current timeframes and roles of the Minister and Customs and Border Protection are appropriate, given the number of new investigations annually, the size of the Australian market, and the likely number of industry members making an application.

Suggested improvements to the Anti-Dumping and Countervailing System include:

- A more equitable approach to the burden of proof is required;
- Increased recognition of investigation decisions by other administrations;
- Increased circumspection concerning the ready acceptance of information supplied by an exporter;
- Enhanced investigative processes and procedures are required to obtain more information about ownership of the exporting entity (and related parties);

- Greater recognition of business practices in exporting countries (which may be different to those in Australia);
- Contemplation of an industry's required rate of return for NIP determinations based on constructed selling prices, including a fair return on reinvestment capital;
- Recognition of loss of market share and profits forgone in an expanding market as injury indicators in the material injury assessment process;
- Appropriate recognition of "threat" of material injury in investigations;
- Imposition of provisional measures at the earliest opportunity following Day 60 of an investigation;
- Clarity on key metrics from the investigation, such as the actual NIP, the dumping margin;
- Consideration to the application of retrospective measures in the absence of provisional measures, as appropriate to the circumstances of the investigation; and
- Retention of the current five-year 'sunset' provisions on anti-dumping measures, which are assessed on a case-by-case basis (i.e. no introduction of a ten-year limit on measures).

The administration of the system as operated since the Willett Review is considered appropriate to Australia's circumstances. The roles of the Minister and Customs and Border Protection should not be altered. In terms of improvements to the administration of the Anti-Dumping and Countervailing System the following initiatives are required:

- Retention of the current appeal mechanism to the TMRO, including the provision restricting new information to the review process;
- Improved resourcing of investigators to ensure verifications undertaken at exporters involve a more comprehensive analysis of financial records and legal structures (than would occur in a 'desk audit'); and
- Increased access by Australian industry to resources of the Beijing Office in applications involving China.

6.0 Public Interest

The PC has sought comments on whether a public interest provision is required in the Anti-Dumping and Countervailing System. The role of the Minister requires a decision as to whether or not to apply anti-dumping measures. This decision is made on the basis of the recommendations made by Customs to the Minister, and any additional information that the Minister may take into account, including any broader industry and community concerns. It can therefore be argued that the Minister's decision-making process already involves a broader consideration of public interest as to whether to impose measures.

The operation of the lesser duty rule also ensures the broader community interests are protected. Anti-dumping measures are rarely imposed reflecting excessive measures as the lesser duty rule operates to ensure measures are only applied at a level which is sufficient to remove the injury from dumping.

Professor Gruen examined the concept of a "National Interest" provision in his review of 1986[7]. Concerns about definitions and the administration of such a provision could significantly extend the investigation process and impose considerable additional costs on the applicant industry. Professor Gruen did not support the introduction of a national Interest clause. Professor Gruen considered it more appropriate to make the "criteria for the granting of anti-dumping duties less easily satisfied and more objective".

Changes to the Anti-Dumping and Countervailing System since Professor Gruen's review have resulted in a more transparent and considered approach to the assessment of applications, the investigation process and the imposition of measures (i.e. the "objective" criteria referred to by Professor Gruen). The standard levels required for a correctly documented application, and Customs' assessment as to whether 'reasonable grounds' exist for the publication of a dumping duty notice, are just two of the key "criteria" to which Professor Gruen refers.

[7] Gruen, Prof F.H., Review of the Customs Tariff (Anti-Dumping) Act 1975, March 1986, P.32-36.

Any specific public interest provision would involve considerable economic analysis of the issues associated with a particular application. This would burden industry with a significant additional cost and delay to the investigation timeframe. In many cases, it would inhibit cases being initiated, particularly by small and medium sized enterprises.

It is not clear how a public interest test would be used and assessed in an anti-dumping investigation. Currently, injury review periods are based on three years of historical data. How is a long term economic analysis to be balanced against this? What is the public interest if an importer uses low pricing for a period to damage Australian industry and reduce its capability, potentially shutting it down with the consequent loss of jobs and skills, then increases prices unacceptably to Australian consumers in the long term?

How is the public interest to be assessed against the parochial interests of one consumer party or group? In many consumers eyes, pricing of products ranks importantly in any procurement or sourcing decision. But it is not the only important criterion. Other factors such as product quality, reliability and security of supply are equally and, at times, more important. In the case of ammonium nitrate, major customers, [ ] have voiced opinions to Orica Mining Services that they want supply from secure local manufacturing to underpin their mining expansions which provide jobs and economic wealth for Australian based companies. Import based supply options do not, in their stated view, offer the capability, quality or supply security desired by these large corporations, who have all had experience of lower priced, poor quality and interrupted supply from importers. How would a public interest test take these longer term and important issues into consideration, where these issues vary in consumer importance according to the stage of the economic cycle and over a longer time frame than the specifics of a review period?

Pertinently for the chemicals based industries, to what extent is the public interest best served by having hundreds of thousands of tonnes of dangerous goods and chemicals imported into Australia?

6.1 Conclusion on Public Interest

Orica concurs with Professor Gruen's viewpoint of 1986 and considers that this position remains valid today. Orica does not support the introduction of a public interest provision as part of the Anti-Dumping and Countervailing System as to do so would increase the uncertainty of process and impose unnecessary administrative complexity to the current process.

In addition, the System includes provisions which permit the application for the review and revocation of measures as appropriate – thereby ensuring access to the review of measures as required.

7.0 Other Matters

7.1 ABS restriction of data

An area of concern to Orica is the relative ease by which an importer can request the suppression of import data on the basis that the publication of the data discloses confidential business interests. Importers can apply to the Australian Bureau of Statistics ("ABS") requesting the suppression of the data if the data is likely to be used by the Australian industry in an anti-dumping application.

The willingness of the ABS to promote the availability of suppression of data to be used in anti-dumping applications would appear to be contrary to the government's support for an effective anti-dumping system. In addition to inhibiting the ability of an Australian industry to assess the impact of allegedly dumped imports, the suppression of data prevents an Australian industry from accurately assessing the volume of import competition when examining re-investment decisions.

The ABS policy on import data suppression diminishes an Australian industry's ability to accurately assess the impact of allegedly dumped imports on its market and detracts from future investment opportunities for the subject industry.

Orica encourages the PC to examine the impact of the restriction of import data on the Australian industry's ability to access the anti-dumping provisions.

7.2 Market Situation

Orica understands that changes to the 'market situation' test were included in the Customs Anti-Dumping Manual in May 2005. These changes followed Australia's recognition of China as a "market" economy country for anti-dumping purposes.

The changes introduced were intended to permit an Australian industry to assert that domestic prices (and/or input costs) in the exporting country are the subject of government influence. Prices and/or costs could therefore be determined as 'artificially low'.

In the four years since the introduction of the changes to the manual, no Australian industry has succeeded in demonstrating artificially low prices exist for goods the subject of an investigation which involves China. Whilst Orica recognises that anti-dumping investigations require examination on a case-by-case basis, it would appear that Customs' expected level of satisfaction far exceeds the level of evidence available to an applicant industry to adequately substantiate artificially low prices.

Having business operating experience in China, Orica understands that local Chinese producers can gain access to incentives worth a considerable value, which may render prices for goods artificially low compared to a WTO rule based assessment. These incentives cover such factors as land grants, environmental allowances, relocation allowances, tax incentives, raw material input price concessions and export rebates. Similar practices are also prevalent in countries of the FSU where government subsidies for gas, gas transmission and rail freight are in place, Customs' lack of recognition of these local business practices needs to be addressed as part of the PC's review into the Anti-Dumping System

The position in relation to artificially low prices is made even more frustrating by the Canadian Border Services Agency ("CBSA") preparedness to rule market prices for certain goods in China as not having been determined on a 'competitive basis' which conflicts with Customs' assessment that the same market prices are not artificially low.

It is clear, in Orica's view, that the concepts of 'market situation', and what renders prices 'artificially low', require clarification (whether through the issuance of guidelines or amendments to legislative provisions).

8.0 Summary of Key Points

Orica supports access to an effective Anti-Dumping System that addresses unfair trade in a timely manner. Orica considers that Customs and Border Protection is the appropriate agency to administer the Anti-Dumping System, with its access to the commercial barrier and expertise in anti-dumping matters. Orica also supports the ongoing role of the Minister as the decision-maker in applying anti-dumping measures.

Orica's submission has outlined its position on matters raised in the *Issues Paper*, including:

- Retention of the five-year norm for the application of measures;
- No specific time limitation on measures;
- Early access to provisional measures;
- recognition of investigation outcomes by other administrations on same or similar products from common exporter;
- recognition of independent information in support of applicant industry claims;
- consideration of industry's internal rate of return in non-injurious price calculations;
- inclusion of profits forgone and loss of market share in a growth market as relevant injury indicators.

The suggested inclusion of a public interest provision within the investigation process will increase uncertainty and extend timeframes to accessing remedies to injurious dumping and/or subsidisation. The likely costs and subjectivity associated with the concept will likely detract from the objectives of the System.