1 July 2009

Philip L. Weickhardt
Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr. Weickhardt,

Anti-Dumping and Countervailing Duty System – Inquiry

We refer to the Productivity Commission's inquiry into the effectiveness and impact of Australia's anti-dumping and countervailing duty system (**anti-dumping system**) contained in Part XVB of the *Customs Act* 1901 ("**Act**") following a request from the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs pursuant to Parts 2 and 3 of the *Productivity Commission Act* 1998.

We understand that the Productivity Commission has been requested to:-

- report on the policy rationale for, and objectives of, Australia's anti-dumping system and to assess the effectiveness of the current system in achieving those objectives;
- examine the economy-wide costs and benefits of the anti-dumping system;
- make recommendations on the future role of the anti-dumping system with the aim of improving the performance of the economy, having regard to the interests of industry, importers and consumers; and
- report on the administration of the system and advise on ways to improve administrative efficiency and reduce compliance costs.

We note that the Productivity Commission has invited submissions from interested parties and the Law Council of Australia welcomes the opportunity to participate in this inquiry. The Law Council of Australia ("**Law Council**") makes this submission together with the Law Institute of Victoria ("**LIV**"). The LIV is a constituent member of the Law

Council. The LIV has made a variety of submissions and commentary on behalf of its membership, both on its own account and in conjunction with the Law Council.

While not expressing a view on whether Australia should continue to operate an anti-dumping and countervailing duty regime, the Law Council and the LIV:

- note that there is no obligation at international law for Australia to have an anti-dumping and countervailing duty regime but, if it does have such a regime, it must comply with Article VI of the General Agreement on Tariffs and Trade 1994, the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures; and
- are concerned that an anti-dumping and countervailing regime is transparent and impartial, with appropriate opportunities for administrative and judicial review. This is especially important at the time of an economic recession where anti-dumping and countervailing measures may be used as a means to offer undue protectionism to local industries against imports.

In this context, attached is the submission of the Law Council of Australia and the LIV, which also addresses a number of the issues raised in the Productivity Commission's Issues Paper dated April 2009 ("**Issues Paper**").

If you have any questions or require clarification on any of the matters addressed in the attached submission, please contact the Law Council's representative for this inquiry, Mr Andrew Percival on (02) 9210 6228 and the LIV's representative, Mr Andrew Hudson on (03) 8602 9231.

Yours sincerely,

John Corcoran

President
Law Council of Australia

Danny Barlow

President
Law Institute of Victoria

Law Council of Australia's Submission to the Productivity Commission in its Inquiry into Australia's Anti-Dumping and Countervailing Duty System

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1 Executive Summary

In this submission the Law Council and the LIV make the following recommendations concerning Australia's anti-dumping and countervailing duty system (anti-dumping system):

(a) the Productivity Commission should assess not only whether Australia's anti-dumping and countervailing duty system actually has provided assistance to those industries seeking assistance in the form of anti-dumping and/or countervailing duties but also whether the provision of such assistance has been beneficial to the Australian economy as a whole ;

(b) the responsibility for the anti-dumping system and decision-making should ideally be undertaken by a government agency (or agencies) rather than through elected Parliamentary Representatives;

(c) consideration should be given to introducing a "national interest" requirement; and

(d) consideration should be given to making the system more transparent by permitting solicitors of interested parties to have access to confidential information;

(e) consideration should be given to setting out in legislation the methodology for determining matters such as 'like goods" and "causation";

(f) internal transfers of goods within a corporation should not be taken into account in assessing whether the Australian industry in question has incurred injury;

(g) conclusions reached in a anti-dumping and/or countervailing duty investigation in another jurisdiction should have no bearing on and be irrelevant to an investigation in Australia;

(h) there should be regular 12 month reviews of anti-dumping measures to monitor the effect on Australian industry. Where the anti-dumping measures are not found to have remedied the difficulties expressed by the applicant then the measures should be removed (subject to a right of merits review by the Australian industry);

(i) procedures and conduct of accelerated reviews should be reviewed to ensure compliance with relevant statutory provisions and international legal obligations;

(j) that if the TMRO concludes that one or more of Customs' findings was flawed and the Minister agrees that those findings were flawed, then either:

- Customs should proceed in a re-investigation that those findings were flawed and reassess its recommendations to the Minister on that basis; or

- the TMRO be empowered not merely to determine whether Customs' findings were flawed but also to recommend substitute findings for the flawed findings and, where appropriate, a change to the Minister's decision to impose measures.

(k) consideration should be given to allocating those aspects of a dumping and countervailing investigation to those Commonwealth agencies having relevant expertise; and

(l) a review of a decision to impose measures should be a merits review and be conducted be a Commonwealth agency independent of the entity that imposed the measures. That Commonwealth agency should have the power to substitute its own decision for the original decision to impose measures.

2 Does the anti-dumping system have the desired effect and achieve the desired outcomes?

Whether the anti-dumping system benefits local industry ultimately depends upon whether the imposition of antidumping duties and/or countervailing duties has the desired effect of counteracting the "unfair" trade practices of dumping and subsidisation and translates into improved pricing and sales volumes for the local industry.

The Law Council and the LIV are not in a position to advise one way or the other whether the imposition of anti-dumping and/or countervailing duties has the desired outcome. However, of concern to the Law Council and the LIV is that there does not appear to have been any detailed analysis as to what effect, if any, the imposition of anti-dumping duties and/or countervailing duties has had and whether the imposition of such duties has had the desired outcome and, if not, why not. In short, it is of concern that Australia persists with an anti-dumping system in the absence of any systematic and detailed analysis of whether that system achieves what it is intended to achieve.

For this reason the Law Council and the LIV welcome the Productivity Commission's inquiry into Australia's anti-dumping system and, specifically, its inquiry into the objectives of Australia's anti-dumping system and the effectiveness of the system in achieving those objectives.

In undertaking this inquiry, the Law Council and the LIV recommend that the Productivity Commission assess not only whether Australia's anti-dumping and countervailing duty system actually has provided assistance to those industries seeking assistance in the form of anti-dumping and/or countervailing duties but also whether the provision of such assistance has been beneficial to the Australian economy as a whole.

3 Who should decide to impose anti-dumping and/or countervailing measures?

3.1 Discretion to the Minister

Section 269TG(1) of the Act provides that where the Minister, currently the Minister for Home Affairs, is satisfied that the export price of goods exported to Australia is less than their normal value and because of that material injury is being caused or threatened to an Australian industry producing like goods the Minister ***may***, by public notice, declare that section 8 of the *Customs Tariff (Anti-Dumping) Act* 1975 applies to those goods. Section 269TG(2) of the Act provides similarly but in respect of future exports of the goods in question to Australia, whereas section 269 TJ(1) and (2) of the Act enable the Minister to impose countervailing measures in respect of subsidised exports to Australia causing or threatening to cause material injury.

The issue here is whether the use of the word "may" confers on the Minister a discretion as to whether or not he/she will impose anti-dumping and/or countervailing measures upon being satisfied of the relevant criteria for the imposition of such measures and, if a discretion is so conferred, what considerations the Minister can take into account in deciding how to exercise that discretion. If, on the other hand, if these provisions do not confer a discretion on the Minister but, rather, confer a statutory duty on the Minister to impose anti-dumping and countervailing duty measures upon being satisfied of the relevant criteria for the imposition of such measures, then why impose this duty on the Minister? It is not a political decision requiring judgement but, rather, an administrative decision that could be exercised by an appropriate administrative officer.

The issue of whether the Minister has a discretion to impose anti-dumping measures was considered in *Hyster Australia Pty Limited and Others v The Anti-dumping Authority and Others* [1993] FCA 36. His Honour, Justice Hill, in relation to this issue stated, at paragraph 35, that:

"*However, I believe there is room for an argument that once the Minister had reached the appropriate state of satisfaction referred to, the publication of a notice is mandatory rather than discretionary; or, in other words, that the word "may" is not used in the section in such a way as to confer a further discretion upon the Minister. However, it does not follow that if there is a discretion, the Minister exercising that discretion is obliged as a matter of law to take into account the economic effect on Australian industry caused by the imposition of dumping duties, as counsel for Hyster submitted*".

If His Honour's contention is correct, namely, that upon reaching the appropriate state of satisfaction, the imposition of measures is mandatory, then this should be clearly reflected in the legislation. Further, as noted earlier above, if, upon reaching the appropriate state of satisfaction, the imposition of measures follows as a matter of course, the issue arises, as noted above, why confer the obligation to impose measures in such circumstances on the

Minister. It is more of an administrative function similar to the publication of a tariff concession order, which is conferred upon the Chief Executive Officer of Customs. Accordingly, why not confer it on an appropriate administrative official?

3.2 Remove the Minister from the decision-making process

Based on the comments in the preceding paragraph, the Law Council and the LIV are firmly of the view that the anti-dumping system should be removed from the political agenda. At the moment, nearly all of the significant decisions in the anti-dumping system are conferred on the Minister for Home Affairs (or other minister responsible for Customs matters from time to time). It is the view of the Law Council and the LIV that this creates doubts as to the process and leaves issues as to transparency of the process. Often, full details of the reasons for decisions of the Minister are not published. Further, in many cases, no time limits are imposed on the Minister in making a decision through the anti-dumping system.

It is the view of the Law Council and the LIV that the responsibility for the anti-dumping system and decision-making should be undertaken by a government agency (or agencies) rather than through elected Parliamentary Representatives.

3.3 Retention of the involvement of the Minister

If, on the other hand, the decision of whether or not to impose anti-dumping and/or countervailing measures is to remain with the Minister, then it should be clearly reflected in the legislation that the Minister has a discretion as to whether to impose measures notwithstanding having the requisite state of satisfaction. The legislation should set out what additional matters the Minister may take into account in exercising that discretion, including the issues described in section 5 below.

For these purposes, the Law Council and the LIV support the importance of time limits on Ministerial decisions.

4 Should a public interest test be included?

The Issues Paper does not expressly address in detail the issue of "national interest" in the context of dumping actions. Put simply, there are recognised economic benefits to consumers from the fact that goods are imported at a "dumped" price as that makes those goods cheaper than would otherwise be the case. There is certainly a utility for consumers to be paying less for goods regardless of their origin or the circumstances of their importation. These benefits need to be balanced against the interests of local producers.

In addition, imports often are inputs to manufacture being sourced by Australian industry to provide an alternate source of the relevant input to manufacture in the event that there is a disruption to local sources of that product. The imposition of anti-dumping duties can preclude imports from

entering the Australian market at other than prohibitive prices and, this, in turn, can place Australian industries that use of imports such as inputs to manufacture at risk where they are unable to source sufficient quantities of those products locally.

Accordingly, consistent with the approach taken in some overseas jurisdictions, the Law Council and the LIV believe that some consideration should be given to ensuring that "national interest" is taken into account when making a decision as to whether any dumping-measure should be imposed.

In the adoption of a “national interest” test as part of the administration of Australia’s anti-dumping regime, consideration could be given to introducing some of the procedures used by the Canadian International Trade Tribunal in assessing the “public interest” in dumping investigations in Canada. In Canada, there is provision for a request to be made for a ’public interest’ inquiry. That is, such an inquiry does not take place automatically. Australia might consider a similar approach pursuant to which interested parties might request that the ‘national interest’ be investigated and in such a request provide similar information to that required in Canada.

The Law Council and the LIV consider that an evaluation of whether the imposition of anti-dumping measures is in the national interest should be similarly undertaken as in the Canadian regime but that, unlike the Canadian system:

- that such an evaluation not be undertaken after the finding of injury but, rather, that it be undertaken at the outset of an investigation; and
- that it be undertaken within its own discrete timeframe before any findings of dumping or injury.

If it is concluded that the imposition of measures would not be in the national interest, then there would be no need to proceed any further with the investigation.

5 Should anti-dumping and subsidy investigations be made more transparent?

5.1 Confidentiality of submissions

Under the current regime, interested parties to an anti-dumping and/or subsidy investigation have access only to information placed on the public file maintained by Customs pursuant to section 269ZJ of the Act.

However, information placed on the public file does not include information claimed to be confidential by the party providing it. Where a party claims that certain information it is providing is confidential, section 269ZJ(2) of the Act requires that party to provide a summary of the information that contains sufficient details to allow a reasonable understanding of the substance of the confidential information without breaching confidentiality.

In practice, what is provided is a non-confidential version of the document, which is a copy of the document containing the confidential information but with all confidential information blacked out or otherwise removed.

The effect of this approach is that only Customs has access to all information collected during the course of a dumping investigation upon which it bases its findings and recommendations to the Minister. Interested parties have access only to what is on the public file and to the confidential information that they have provided. This severely disadvantages interested parties, whether they are importers, exporters or local manufacturers, in that they are not fully informed as to all of the facts and, consequently, are not in a position to fully respond to issues from a position of knowledge.

In other jurisdictions, notably the USA, lawyers to interested parties, on providing appropriate undertakings, have access to all information including confidential information collected by the relevant authorities during an investigation. The Law Council and the LIV recommend that a similar system be included in Australia's anti-dumping and countervailing measures regime to render that regime more transparent. Specifically, the Law Council and the LIV recommend that:

(a) the legal representatives for each interested party be provided with access to the confidential information provided to Customs by all other interested parties during an investigation;

(b) access to confidential information be conditional upon the giving of a legally enforceable undertaking to keep all confidential information confidential and not to disclose such information to any other person, including client's, without the prior written consent of the person providing the confidential information and that such undertaking be given in favour of Customs and each other interested party to the investigation; and

(c) access to confidential information be facilitated by a requirement that each interested party file the confidential information not only with Customs but also with the legal representatives of each interested party who has given the undertaking referred to in paragraph 6.1(b) above. There should be strict timeframes within which such information is to be filed with those parties.

The Law Council and the LIV submit that increased transparency in the anti-dumping and countervailing duty investigative process could improve that process as procedural flaws and errors would be readily identifiable and would provide greater accountability throughout the process.

5.2 Public hearings

The Law Council and the LIV note that many of the stages of the anti-dumping investigation are conducted solely between the parties with much of the information subject to confidentiality and only limited information available to the general public. However, much of the information is relevant to other parties including those who are affected (ie consumers) and those who cannot afford themselves to be involved in the proceedings or are not immediately

involved. Many affected parties may not qualify as "interested parties" and, therefore, are precluded from being involved more directly in the process. Further, the anti-dumping process is unique in that so much of its process is conducted without substantive public scrutiny as with other legal remedies. For these purposes, the Law Council and the LIV recommend that some stages of the inquiry be subject to public hearing and debate in accordance with US practice. The Law Council and the LIV believe that this would be consistent with WTO practice.

6 Determination of “like goods”

The Law Council and the LIV are concerned that the determination of ”like goods” in investigations has been too broad with the effect that goods that are not ‘like goods’ to the allegedly dumped goods are being included in dumping investigations.

The term ‘an Australian industry producing like goods’ is defined in section 269T(4) of the Act to mean that if, in relation to goods of a particular kind, there is a person or persons who produce like goods in Australia, then:

- there is an Australian industry in respect of those like goods; and
- the industry consists of that person or those persons.

The term “like goods” is, in turn, defined in section 269T(4) of the Act to mean, in relation to the goods under consideration (i.e. the goods being exported to Australia and subject to the dumping application), goods identical in all respects to the goods under consideration or, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

If, for example, there is no one in Australia producing goods identical in all respects to the goods under consideration but it is possible that one or more persons in Australia is producing goods having characteristics closely resembling those of the goods under consideration, then it would be necessary to identify the characteristics of both the locally produced goods and those of the imported goods under consideration (eg. physical, functional, technological, chemical, performance and other characteristics), compare those characteristics and determine whether the characteristics of the locally produced goods “closely resembled” those of the goods under consideration.

While matters such as whether the locally produced goods are substitutable for the goods under consideration, whether they compete in the same market or are functionally equivalent may indicate that the locally produced goods have characteristics that closely resemble those of the goods under consideration, such matters are not determinative. For example, a milk bottle and a milk carton perform the same function, are substitutable and compete in the same market but their physical, technological, performance and a number of other characteristics do not closely resemble one another. Arguably, they are not ‘like goods’.

The Law Council and the LIV consider that a more rigorous assessment, with a clear and consistent methodology should be used in determining whether locally produced goods are 'like' the allegedly dumped imports. In this regard, where necessary, the advice of experts with detailed knowledge of the goods being investigated should be sought as part of the investigation, whether in the assessment of the dumping application or during the investigation. Further, the methodology for the determination of "like goods" should be set out in legislation in the interests of certainty.

7 Determination of "material injury" and "causation"

In order for anti-dumping measures to be imposed the Minister must be satisfied that the goods under investigation are being exported to Australia at dumped prices and because of that material injury to an Australian industry is being caused or threatened.

7.1 *What constitutes "material injury" and "causation"?*

While section 269TAE of the Act sets out a range of matters that the Minister may have regard to in determining whether material injury is being caused or threatened to an Australian industry by exports of the dumped and/or subsidised goods, it is not uncommon in a dumping investigation for there to be a finding that the Australian industry has incurred material injury in the form of:

- lost sales volumes;
- lost market share;
- price undercutting;
- price suppression;
- price depression;
- reduced profits and profitability; and return on investment, and

assuming a finding of dumping, that the dumped exports caused that injury.

There are in such an analysis two main issues of concern to the Law Council and the LIV, namely:

(i) what constitutes 'material injury' to an Australian industry; and

(ii) how is it to be determined that it was the dumped exports and not some other factor that caused such material injury.

The Law Council and the LIV do not consider that loss of sales volumes, loss of market share, price undercutting, price suppression or price depression of themselves constitute injury. Rather, they are simply observable events occurring in a market. They might or might not result in injury but of themselves do not constitute injury.

Entities engaged in commercial undertakings do so primarily, if not solely, to make profits. Accordingly to cause or threaten injury to such entities, the profits of the entity must be adversely affected or threatened.

In this context, price undercutting by dumped imports is relevant because:

- if the dumped imports undercut the prices of the goods sold by the Australian industry, this may cause the Australian industry to reduce its prices (price depression) or prevent it from increasing its prices to recover increased costs (price suppression) which, in turn, may result in reduced revenues and reduced profits (i.e. injury); and
- if the dumped imports undercut the prices of the goods sold by the Australian industry, this may result in the Australian industry losing sales and sales volumes which, in turn, may result in reduced revenues and reduced profits (i.e. injury).

The Law Council and the LIV consider that:

(a) a finding of injury can only occur where there is evidence that the Australian industry has incurred reduced revenues and, consequently, profits and other resultant forms of injury; and

(b) a finding that the allegedly dumped goods caused that injury if there is evidence that the allegedly dumped goods, by virtue of being exported at dumped prices, are able to undercut the prices of goods sold by the Australian industry and thereby reduce the revenues and profits of the Australian industry as set out above.

Of course, it is possible for dumped goods to cause injury to an Australian industry without undercutting the prices of the Australian industry. For example, if the dumped goods were superior to the goods produced in Australia, then they may compete with the Australian goods at a price point higher than the Australian industry's prices. Whether the imported goods are superior and are competing with the Australian produced goods at a higher price point and whether it is the fact that they are being exported at dumped prices that enables them to compete at that higher price point would need to be determined and be supported by evidence. However, it would still need to be demonstrated that the effect of this was to reduce the revenues and profits of the Australian industry. In other words, that the dumped imports were causing injury to the Australian industry, through the effects of dumping, in the form of reduced revenues and profitability.

Such an analysis of the effect that allegedly dumped imports have had on the Australian industry should be clearly set out in any findings of fact, together with clear reference to the evidence that supports those findings in order that they may be tested. Further, the criteria for this kind of analysis should be clearly set out in the legislation.

Support for the above approach can be found in Article 3.1 of the Anti-Dumping Agreement which provides that:

"*A determination of injury for the purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a)*

the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

It is clear from this Article that the focus is the effect that the allegedly dumped goods are having on the domestic producers of like goods, that is, on their revenues and profits through the price and volume related effects that dumped imports may have, as outlined above.

7.2 Internal transfers treated as sales

On occasion internal transfers of goods within a corporation (i.e. a transfer of goods from one cost/profit centre to another within a corporation) has been treated as a sale for injury analysis purposes: see, for example, Trade Measures Report No.92 – Greyback Cartonboard from the Republic of Korea.

It is unclear to the Law Council and the LIV how internal transfers of manufactured goods within an entity are relevant to an injury analysis. An internal transfer does not involve a sale and, consequently, does not involve any exchange of revenue for legal title to the goods such as occurs in a sale. Consequently, an internal transfer cannot have an actual financial impact on an entity resulting in any injury.

If a manufactured good, being a "like good" to the allegedly dumped imports, is produced by the domestic industry as an input to manufacture for another product produced by that industry and it is that finished product that is sold, then it is the sale of the finished product, not the internal transfer of the input to manufacture, that has financial impact on the entity. However, because the finished product is not a 'like good' to the allegedly dumped imports, the finished product does not compete with the dumped imports and, therefore, it also is irrelevant to the injury analysis.

If internal transfers were to be included in an injury analysis, a detailed explanation would need to be provided, supported by evidence, as to how those internal transfers caused any actual injury to the industry or entity in question given the absence of any actual transaction or any exposure to competition from imports.

It is the view of the Law Council and the LIV that internal transfers of goods within a corporation should not be taken into account in assessing whether the Australian industry in question has incurred injury.

7.3 Caution in use of overseas information

The Law Council and the LIV have reservations as to the use of the results of overseas inquiries in support of the imposition of anti-dumping and countervailing measures.

It is noted that goods the subject of Australian inquiries have often previously been the subject of inquiries overseas. However, Customs should be precluded from reference to those overseas inquiries when making decisions as to whether there has been dumping in Australia, whether there is likely to be dumping in the future or whether there is likely to be material injury to Australian industry.

This is not to say that evidence produced before anti-dumping and/or countervailing investigations in other jurisdictions should not be taken into account if re-tendered in an Australian investigation but, rather, an independent approach, free from the conclusions reached in another jurisdiction, must be adopted given the nature of anti-dumping and/or countervailing duty investigations and the fact that the circumstances of one investigation may not be the same or even similar as that in another jurisdiction.

In short, the conclusions reached in a anti-dumping and/or countervailing duty investigation in another jurisdiction should have no bearing on and be irrelevant to an investigation in Australia.

8 Reviews of anti-dumping measures and continuation inquiries

8.1 Nature of review

The Law Council and the LIV understand that the practice in the conduct of reviews under Division 5 of Part XVB of the Act and continuation inquiries under Division 5 of Part XVB of the Act has been:

(a) in the case of reviews of anti-dumping measures, to review only the variable factors, that is, the export prices, normal values and non-injurious prices; and

(b) in the case of a continuation inquiry, to examine only whether the removal of the measures would lead to, or might lead to, a continuation or recurrence of the material injury that the measures were intended to prevent but without necessarily reviewing the measures themselves.

It is not clear why this has been the practice. The legislative provisions are clear.

For example, in the case of a review of measures, regardless of the reasons for the review, the review to be undertaken is a review of the 'anti-dumping measures', which is defined to be the 'publication of a dumping duty notice'. Accordingly what is to be reviewed is the publication of a dumping duty notice.

In order for a dumping duty notice to be published it must be found that the goods under consideration have been exported at dumped prices and, because of the dumped prices, material injury has been caused or is threatened to an Australian industry producing like goods. Accordingly, what is required to be reviewed is whether the goods under consideration have been or, in the absence of the anti-dumping measures, are likely to be exported at dumped prices and, because of that, material injury is continuing to be caused or is likely to recur in the absence of the measures.

This requires consideration of tww aspects set out below.

8.2 Continuation of exports at dumped prices

The Law Council and the LIV also note that, in reviews that have been conducted, it was found that either:

- the goods under consideration had continued to be exported at dumped prices; or
- the goods under consideration had not been exported at dumped prices during a period when the anti-dumping measures were in effect; or
- the goods under consideration had not been exported at dumped prices during a period when the anti-dumping measures were not in effect.

Apart from the review involving copper tube from the Republic of Korea, in no case was it recommended that anti-dumping measures be revoked notwithstanding findings that the goods under consideration were not being exported at dumped prices and there being no evidence that they would commence to be exported at dumped prices if the anti-dumping measures were to be revoked. In the copper tube case, the anti-dumping measures were revoked because other like products were significantly undercutting the prices of the dumped product and, therefore, any injury being incurred by the domestic industry could not be causally linked to the dumped product.

It is the Law Council's and the LIV's understanding that anti-dumping measures should remain in place only for so long as is necessary to offset the injurious effects of dumping. Accordingly, if, in a review, it is found that the goods under consideration are not being exported at dumped prices and there is no evidence that, if the anti-dumping measures were revoked, it is likely that the goods under consideration would resume being exported at dumped prices, then the anti-dumping measures must be revoked as they are no longer necessary to offset the injurious effects of dumping.

8.3 Monitoring of the effect on the Australian industry

The Law Council and the LIV note that it is a fundamental aspect to an anti-dumping system that the domestic industry must establish material injury has occurred due to dumping or is likely to occur from dumping. However, the Law Council and the LIV are concerned that there is rarely any monitoring as to whether the imposition of measures has the effect of reducing that material injury by eliminating the types of damage and injury referred to in submissions from parties seeking the imposition of anti-dumping measures. Presumably, once the anti-dumping measures have been imposed, the damage and injury to the Australian industry should cease or would not arise at all. At the moment, there is little provision for review of the effect of the anti-dumping measures to be addressed in terms of review of the injury to the Australian industry. There is the right of the Minister to seek review together with sunset reviews. However, these appear to be inefficient and do not really comprise a substantive review of the effect of the anti-dumping measures and whether they deliver the results and benefits claimed by the applicants.

The Law Council and the LIV note that there is an economic cost to consumers to pay more for goods subject to anti-dumping measures. Similarly, there is a cost to importers who pay the additional duty on goods subject to any anti-dumping measures, which then flow on to consumers.

Accordingly, it is the view of the Law Council and the LIV that the effect of the anti-dumping measures should be reviewed on a more regular basis to assess injury to Australian industry. If the injury is not remedied by the measures or occurs in any case despite the measures, there may be good arguments that the anti-dumping measures are not required and the measures may constitute an unfair subsidy in favour of the Australian industry. If the review demonstrates that injury has not disappeared then anti-dumping measures should, prima facie, be removed unless the domestic industry can show why the anti-dumping measures should remain.

The Law Council and the LIV consider that such reviews should occur on a regular 12 month basis and if the measures are not found to have remedied the difficulties expressed by the applicant then the measures should be removed (subject to a right of merits review by the Australian industry).

9 Accelerated reviews

The Law Council and the LIV note that, in an accelerated review of a dumping duty notice on application by a new exporter, Customs practice is to notify all interested parties of the review, open and maintain a public file in connection with the review and calculate a non-injurious price. It is not clear to the Law Council and the LIV why this practice has been adopted.

An accelerated review of a dumping duty notice under Division 6 of Part XVB of the Act is a review of a dumping duty notice in so far as it applies to a new exporter. The purpose of such a review is to determine whether exports of goods by the new exporter covered by the dumping duty notice are or have been at dumped prices. If they have not, then exports of such goods by that exporter are to be excluded from the anti-dumping measure. If, on the other hand, they have been exported at dumped prices, then the anti-dumping measure should continue to apply to such exports by that exporter but it may be necessary to vary the dumping duty notice by including an ascertained export price and ascertained normal value for that exporter. This is reflected in s.269ZG(1)(a) and (b) of the Act.

Neither Division 6 of Part XVB of the Act nor any other provision of Part XVB of the Act makes mention of issuing a public notice notifying the commencement of an accelerated review or of notifying interested parties of an accelerated review, nor of maintaining a public file in respect of an accelerated review. In this regard, the procedure for conducting an accelerated review is analogous to a dumping duty assessment under Division 4 of Part XVB of the Act, as opposed to the conduct of a review of anti-dumping measures under Division 5 of Part XVB of the Act or a continuation inquiry under Division 6A of Part XVB of the Act.

Further, it is not apparent why a non-injurious price is calculated in an accelerated review. If, in an accelerated review it is found that exports by the new exporter have been or will be at dumped prices, the options under s.269ZG of the Act are to leave the relevant dumping duty notice unaltered or to alter the dumping duty notice in so far as it applies to that new exporter. Accordingly, if a non-injurious price is calculated and it is determined to be the operative measure, then it will apply only to exports by the new exporter as, under s. 269ZG of the Act, the dumping duty notice may be altered only in so far as it applies to the new exporter. The result, therefore, would be two non-injurious prices, one applying to the new exporter and one applying to all other exporters. This would seem a curious result and, the Law Council and the LIV, submit one not intended by the legislation.

The Law Council and the LIV, therefore, recommend that the procedures and conduct of accelerated reviews be reviewed to ensure compliance with relevant statutory provisions and international legal obligations .

Finally, it is noted that a 'new exporter' who commences to export during the investigation period is precluded from taking advantage of these provisions even if that exporter only commenced to export to Australia the day before the publication of the statement of essential facts. This would seem inequitable.

10 Re-investigations

The Law Council and the LIV note that, in a so-called reinvestigation of Customs' finding the subject of a successful appeal to the Trade Measures Review Officer (**TMRO**), there have been a number of occasions when Customs has disagreed with the conclusions reached by the TMRO. The effect of this can and has been as follows:

- Customs conducts a dumping investigation and makes certain findings in that investigation concerning whether the goods under investigation have been exported at dumped prices and whether, because of that, material injury to an Australian industry is being caused or threatened;
- Customs finds that the goods under consideration have been exported at dumped prices and have caused or threatened to cause material injury to an Australian industry and recommends to the Minister that dumping duties be imposed;
- the Minister accepts Customs' recommendation and publishes a dumping duty notice;
- an interested party applies to the TMRO for a review of all or some of Customs' findings that led to the publication of a dumping duty notice by the Minister;
- the TMRO reviews those findings and concludes that one or more of those findings were flawed and require reinvestigation;

- the TMRO advises the Minister that certain findings by Customs were flawed and recommends to the Minister that he direct Customs to reinvestigate those findings;
- Customs reinvestigates those findings, disagrees with the TMRO that the findings were flawed and so advises the Minister.

The effect, therefore, is that:

- two arms of the Executive of the Federal Government advising the Minister reach different conclusions on the same set of facts, information, evidence and law; and
- the Minister originally concurs with Customs' findings but, following a review by the TMRO, agrees with the TMRO's conclusion that those findings were flawed and require re-investigation by Customs and then, following a re-investigation of those findings by Customs, agrees with Customs' conclusion that the findings after all were not flawed.

This, in the Law Council's and the LIV's opinion, undermines the review process with Customs, in substance, reviewing the TMRO's analysis.

The Law Council and the LIV believe that if the TMRO concludes that one or more of Customs' findings was flawed and the Minister agrees that those findings were flawed, then either:

(a) Customs should proceed in a reinvestigation that those findings were flawed and reassess its recommendations to the Minister on that basis; or

(b) the TMRO be empowered not merely to determine whether Customs' findings were flawed but also to recommend substitute findings for the flawed findings and, where appropriate, a change to the Minister's decision to impose measures.

Of course, if the person who decides whether or not to impose measures was an administrative official and not the Minister, then the TMRO, or other reviewing authority, should be empowered not only to review the findings and decision of that official but also to substitute its findings and decision for that made by the official where appropriate to do so.

11 Residual exporters

A "residual exporter" is defined in section 269T of the Act to mean an exporter of goods the subject of an application for measures or like goods other than:

(a) a selected exporter, that is, an exporter whose exportations were investigated for the purpose of determining whether to impose a measure; and

(b) a new exporter, being an exporter who did not export goods at any time during the investigation period and at any time before publication of the statement of essential facts.

In other words, a 'residual exporter' is any exporter who exported goods either during the investigation period or at any time prior to publication of the statement of essential facts but whose exports were not investigated to determine whether to impose measures.

Article 9.4 of the Anti-Dumping Agreement stipulates that, where the authorities have limited their investigation to a select number of exporters, any anti-dumping measures applied to the residual exporters shall not exceed the weighted average margin of dumping established for the selected exporters. This requirement is reflected in section 269TG(3B) of the Act.

Notwithstanding these provisions, it is routinely the case in dumping investigations that where there are residual exporters, the dumping margin for the residual exporters exceeds that of the selected exporters.

Further, to simply apply an average margin to residual exporters can operate unfairly. For example, of twenty exporters, only ten are investigated and of that ten only two are found to be dumping. No dumping duties are applied to the eight found not dumping, individual dumping duties are applied to the two found dumping and an average dumping margin is applied to the ten exporters who were not investigated. The two exporters found to be dumping are not representative of the ten not investigated whereas, arguably, the eight found not dumping are and, therefore, no dumping duties should be imposed on exports of the ten exporters not investigated. There should be, in the opinion of the Law Council and LIV, clear legislative direction to safeguard against the inequitable treatment of exporters, such as in the circumstances outlined above.

12 Allocation of responsibilities for the administration of the anti-dumping system

The Law Council and the LIV believe that responsibility for the anti-dumping system should be allocated among Federal Government agencies with expertise in the particular subject matter being investigated. That is one Federal Agency should have responsibility for determination of dumping and another for injury.

There is significant overseas experience of there being two agencies responsible for two different aspects of decision-making. The Law Council and the LIV have no difficulties with the use of two different government agencies to determine the imposition of anti-dumping measures, although the Law Council and the LIV acknowledge that this could lead to additional cost. Nevertheless, the Law Council and the LIV are of the view that it would aid transparency and fairness to have two such agencies, with each agency focusing on its particular area of expertise (that is, either dumping or injury).

In this context, the Law Council and the LIV believe that Customs should continue with its role in determining whether dumping and/or subsidisation is occurring as clearly this is an area in which it has expertise. Having found the occurrence of dumping and/or subsidisation, the matter could then be referred to an agency with expertise in economic matters, such as the ACCC or the Productivity Commission, to undertake the injury analysis. It also would have the role of determining whether to impose measures assuming all of the necessary requirements for the imposition of measures had been made out.

13 Initial screening

The Law Council and the LIV have previously recommended that any decision whether to impose measures should be subject to an ultimate assessment whether it is in the national interest for the measures to be imposed. Consistent with this approach, the Law Council and the LIV believe that part of the preliminary screening stage undertaken should entail an assessment of the balance between Australian industries' domestic and export interests and those of consumers.

14 Timings and additional resources

In many publications, Customs reports that Australia has one of the most efficient and speedy anti-dumping systems leading to a decision in 155 days. However, the Law Council and the LIV believes that the focus on this timeframe is not, of itself, useful. The reality is that on a number of occasions, the 155 day deadline is extended due to difficulties in securing evidence, especially in complex matters. The Law Council and the LIV appreciate that some of changes proposed in this submission may lead to a longer processing time before a decision on whether to impose anti-dumping and/or countervailing measures is made. However, the Law Council and the LIV believe that the longer period is warranted to deliver an improved system. To this effect, it is noted that the US, Canada and the EU all have longer periods in which to make decisions.

The Law Council and the LIV recommend that the Productivity Commission should carefully scrutinise existing timeframes within the anti-dumping system and assess whether those timeframes are consistent with what is commercially feasible for all parties. In this regard, account should be taken of the frequency of applications for extensions by interested parties and the frequency with which they are given.

The Law Council and the LIV believe that sufficient resources need to be provided to the government agencies responsible for administering the anti-dumping system to ensure the due and proper administration of the anti-dumping system within the timeframes provided.

15 Access to merits review

One of the most significant features which adversely affect those involved in anti-dumping matters is the cost of litigation and the limited value of the outcomes achieved. In many cases, the TMRO does not have jurisdiction to review decisions. Even where the TMRO has jurisdiction to review decisions, the subsequent reinvestigation of decisions by Customs and the Minister leave aggrieved parties with recourse only to Federal Court litigation. Such litigation is, obviously, expensive and time-consuming. Further, in addition to the cost of such litigation to the party initiating the action, there is the significant risk of costs being ordered against that party if they are unsuccessful, even if their concerns or complaints have merit. This constitutes a significant disincentive to pursing the interest of aggrieved parties who may have legitimate concerns as to the nature of an investigation. Further, in any such judicial review, a court is only empowered to order that the decision be made and/or the process undertaken again. Having been through an entire investigation process, a potential review by the TMRO and a reinvestigation, it would be appropriate for any subsequent review body to be able to both review the decision made and the process adopted **and** also to implement an alternative decision based on the merits of the matter rather than purely directing that the decision be made again.

Accordingly, the Law Council and the LIV would recommend the following review to the litigation aspect:

(a) that any subsequent litigation (whether in the Federal Court or in the Australian Competition Tribunal) be on the basis that each party bears their own legal costs, except in extraordinary circumstances where there is evidence of abuse of the process; and

(b) the further review (whether by way of the Australian Competition Tribunal or Federal Court) be undertaken on the basis that the decision maker can substitute a new decision "on the merits" in a manner consistent with the reviews undertaken by the Administrative Appeals Tribunal.

Ultimately, the Law Council and the LIV believe that it is in the interests of all parties to have access to review on the merits without the risk of financial penalty. Too often, parties are dissuaded from taking further review proceedings given that any such review proceedings do not constitute the ability to substitute a new merits review of the decision and will expose the parties to significant legal costs.