20 Queens Road
MELBOURNE VIC 3004
PO Box 7622
Melbourne VIC 8004
Australia

ABN 76 369 958 788

Tel: 013 9867 0111
Fax: 0312 9867 0199
www.aigroup.com.au

4 November 2009

Messrs P Weickhardt & M Woods
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

by email: antidumping@pc.gov.au

Dear Commissioners

TRADE REMEDIES TASK FORCE COMMENT ON THE PRODUCTIVITY COMMISSION'S DRAFT REPORT ON AUSTRALIA'S ANTI-DUMPING & COUNTERVAILING SYSTEM

Thank you for the opportunity to provide additional comment on the Productivity Commission's draft report on Australia's Anti-Dumping and Countervailing System.

Introduction of a Public Interest Test

The Trade Remedies Task Force (TRTF) continues to strongly oppose the recommendation to introduce a public interest test. The imposition of such a test would not greatly improve the existing anti-dumping system in Australia. Further, the TRTF asserts that the introduction of a new public interest test is unnecessary, as there is already an existing mechanism for the Minister to intervene in line with the public interest. Therefore there is no need for this additional requirement.

Under the proposed test, where an industry does not account for more than 20% of the local market, it will be denied access to measures. By contrast, if an industry holds a significant proportion of the market, it would also be denied measures due to proposed "lessening of competition" provisions.

For any industry which overcomes either restriction, it must also be a globally efficient producer, as measures will also not be imposed if:

- the export price of the allegedly dumped goods recovers all costs and some contribution to profit; or

- the resulting non-dumped price (after imposition of measures) is significantly below the Australian industry's cost-to-make-and-sell.

The Commission's recommendations are based on a theoretical economic perspective, where markets work effectively towards the expansion of free trade over the long term. However, recent global economic events have proven that this is not always the case.

Despite the commitment made by G-20 Leaders in Washington in November 2008 to battle against a return to protectionist policies of the past, a recent World Bank report found that 17 of the G-20 economies had implemented new trade-restrictive measures following the Washington meeting.

The proposed public interest test is designed to limit access to the anti-dumping system by Australian industry and will trade off industry specific interests against the broader national interest. The broader national interest requires an environment that fosters investment, innovation and an on-going commitment to existing manufacturing. The test will represent the interests of a narrow section of the community who want to avoid the imposition of anti-dumping measures due to perceived cost benefits.

An anti-dumping system incorporating a public interest test will discourage future investment in Australia in large scale manufacturing. It may also see more manufacturing move offshore. The proposed public interest test is also likely to expose smaller niche industries to unfair competition. A small company facing dumped imports in its niche market would be denied protection because it fails to meet the market share requirement and because generic versions of the same product are imported at lower prices.

Therefore the TRTF asks the Commission how, in practice, a fair public interest test can be devised? How can the public interest even be defined? If a public interest test is unfairly imposed and local industry is unable to access protection against predatory behaviour, then what incentive do local producers have to maintain a presence in the market?

When reviewing the use of such provisions in other jurisdictions, that is Canada and the European Union (EU), this test is rarely used. In the EU, on the very rare occasions that the test is applied, it often fails when the local industry accounts for a greater volume in sales than imports.

The cost of preparing anti-dumping cases is high, and industry does not bring cases without significant consideration and research. Applying a public interest test at the end of an investigation could reduce the prospect for success, and will discourage parties further from undertaking already resource intensive anti-dumping actions. There would also be a lengthening of investigations because application of a public interest test would lead to protracted debates on the effects of the measures.

With regard to the proposal that Customs should, as part of the annual adjustment of measures, seek feedback from local suppliers on the impacts of those measures and investigate further if appropriate – does the Commission intend that the public interest test will also be reviewed annually? Such a provision would add considerable additional burden on industry and would be another prohibitive factor for local manufacturers in accessing the anti-dumping system.

The introduction of a public interest test would also add time, cost and uncertainty to the existing process and create a disadvantage to Australian industry through the application of a test which is not readily used by other countries' administrations. This would also further disenfranchise smaller companies from the process. Such a test would not deliver significant benefit to the public interest. Accordingly, the TRTF opposes the introduction of a public interest test as this would only add unnecessary complexity to the current system.

Should the Commission, in its final report, recommend a public interest test be applied, there should also be accompanying legislation which should make provision for the payment of just compensation to those denied a remedy through application of the test. Those with existing investments have a legitimate expectation that a remedy would be available to them should they establish dumping/subsidy, injury and causal link. A decision not to protect those investments on the basis that there is some greater national interest should not be made to the detriment of existing investors.

Other Recommendations

Regarding the recommendation to restrict the imposition of measures where it could be demonstrated there is a lessening of competition seems to be contrary to the underlying rationale behind the anti-dumping system. Anti-dumping measures are internationally recognised as a remedy to unfair competition. Measures do not lessen competition. They simply ensure that competition is conducted on a fair basis, therefore measures should be viewed lessening unfair competition. Also, it is very likely that any affected overseas supplier would argue a "lessening" of competition if this was seen as a way to prevent measures from being imposed. Could such a provision lead to the possible argument that an overseas supplier dumps, therefore it is competitive?

In this circumstance, there could also be ambiguity about how to define the market. Would it be based on current suppliers only (where in some cases there may be a predominant Australian producer and one dumping overseas supplier) or would it be based on the potential suppliers to a market (where other overseas suppliers have not yet decided to enter the local market but could choose to do so, without dumping)? There is also concern that the technical nature of a "lessening of competition" test may also further stretch the resources and expertise of Customs. In light of these concerns, the TRTF opposes this recommendation.

The proposal that there be no measures if the export price plus dumping margin is below the Australian industry's cost-to-make-and-sell does not take into account that all sectors of the economy cycle up and down. In the ordinary ebb and flow cycle, a business may endure periods of loss in anticipation of the return to the profitable part of that cycle. This is particularly relevant in industries involving large capital outlays. To suggest that an industry would be denied a measure at the low part of the cycle is unreasonable. Protection of fair market prices is particularly important at this stage.

Also, exchange rate fluctuations would significantly influence this analysis. Indeed, it is likely to add increased pressure on Australian manufacturers at times when the $A is trading high. At the present time, Australian manufacturers are finding it difficult to compete in international markets and domestically against lower priced imports due to the rise in the value of the $A. If accepted, this recommendation would exacerbate the difficulties faced by Australian industry at times like this. Therefore, the TRTF opposes this recommendation.

Regarding the proposal to restrict measures if a lower price is available from a non-dumped source, the TRTF asks how would this work for manufactured goods? For example, an American exporter of a reputable brand of machinery or equipment can avoid a dumping measure in Australia because someone imports a cheap Chinese

version of the same product. They may be like goods under the anti-dumping rules but compete in entirely different segments of the market. In this circumstance, should the proposal be implemented, an Australian producer of a niche or premium product would be denied protection against its true competitors.

This also raises questions on how the Commission proposes that reasonable profit be defined. Where state-owned-enterprises are involved, profit may be a secondary concern. Given the difficulty of winning an action against China in the Australian anti-dumping system, this proposal could allow suppliers from other countries to dump down to the Chinese price when making sales to Australia, as they would not face any sanction for doing so. Therefore, the TRTF opposes this recommendation.

The recommendation on self-assessment fails to recognise that if an overseas supplier is continuing to dump in Australia, it would have little incentive to admit that. There must be checks and balances to ensure that there is an incentive for providing accurate information during review of measures. Should an overseas supplier be found to have given fraudulent information during a self-assessment process, under what jurisdiction would the Commission suggest action be taken? If the company has no legal identity in Australia, would the Commission suggest action be taken off-shore? Or would the Commission suggest a system similar to that of the United States, where authorities calculate what should have been paid at the end of the year? If there is a short fall, the importer pays more. The TRTF opposes this recommendation and supports retention of the present system.

The TRTF would urge the Commission to carefully consider the balance of the need for transparency to ensure rigour of the anti-dumping system with the need for confidentiality of commercially sensitive information. A company who is already suffering injury from predatory dumping practices should not have any additional injury caused by the passing of information to its competitors. The effectiveness of the anti-dumping system relies on its ability to ensure that both local and overseas suppliers have confidence in the protection of the sensitive information provided in the course of any investigation.

Continuation of Measures

The Commission's recommendations regarding the continuation of measures are of great concern to the TRTF, namely:

- that the extension of anti-dumping measures should be limited to one three-year continuation term (beyond the initial five-year term); and
-
- that there should be a two-year freeze on reapplications for new measures following the three-year continuation term.

The TRTF supports the Commission's recommendation to maintain the current five-year default term for anti-dumping and countervailing measures. However, it rejects the Commission's recommendation that anti-dumping measures already in place be limited to a maximum eight-year term. The Task Force favours retention of the existing system, which accords with the WTO Agreement and is consistent with the practice in the EU and the United States.

The TRTF asserts that it is essential any review of measures is assessed on a case-by-case basis, and if dumping is still occurring, measures should not be terminated or restricted arbitrarily. The Task Force rejects the recommendation that there be the option only to impose one three-year extension of measures beyond the initial five-year term.

The TRTF also strong rejects the recommendation that there should be a two-year freeze on reapplications for new measures following the three-year continuation term. This recommendation does not duly consider the speed and the impact of dumping and the degree of injury to an industry that can be inflicted in a short amount of time.

There is a long history in certain industry segments whereby as soon as measures are removed, dumping recommences. This approach would effectively give overseas suppliers permission to dump for the two-year period, when Australian industry would then have to compete against dumped products, without any remedy available to them. In such circumstances, the effect on Australian industry could be very serious indeed.

This recommendation also does not duly consider other effects of dumping on Australian industry, including preparation costs and time to make an application and the amount of injury suffered prior to and while preparing an application, before an investigation is initiated. This recommendation is unnecessary as the system already affords the opportunity for nominal review at any time, through which measures may be revoked or amended.

Should the Commission see it necessary to review measures following the continuation of initial measures, it may wish to consider when finalising its report, other provisions alternative to the two year freeze. If the Commission must proceed with a sunset review, then it should be benchmarked against other countries' anti-dumping system of a five-year term.

Thank you for this opportunity to provide further comment.

Yours sincerely,

Innes Willox
Chairman
Trade Remedies Task Force