1. Introduction

CSR Limited would like to respond to the Productivity Commission's Draft Inquiry Report into Australia's Anti-dumping and Countervailing System on behalf of our Viridian™ glass division. Viridian is a member of the Trade Remedies Task Force and supports the position taken in their response. It is the company's view that the combined impact of the draft recommendations is to significantly water down applicants' rights under WTO provisions and Australian legislation and to create significant barriers through increased risks to successful outcomes.

It is pleasing to note that some of the recommendations in our original submission have been recommended in the draft report.
Specifically:

7.2 Zeroing not supported
8.1 Retention of the scheme within Customs
8.4 Ministerial deadlines
8.6 Reference to comparable cases
8.10 Availability of ABS data.

There are a number of matters on which we would like to respond further.

2. Further Matters for Consideration

a) Public Interest Test – Draft Recommendation 6.1

Notwithstanding the presumption in favour of measures where there has been injurious dumping or subsidisation, CSR does not regard even a bounded test for public interest as workable. It would be unfair to ask Customs to make judgements about overall public interest. This is a subjective measure in anyone's estimation and not readily appellable. Suggestions by some parties that this could be determined by economic modelling are even more problematic. In Senate Estimates on Oct 19, 2009, Dr Parkinson, Secretary of the Department of Climate Change in response to whether Government had modelled the small business sector or the rural sector responded that "fine detailed modelling of small geographic areas is quite problematic in Australia, and the ABS does not support efforts to do that." Sub segments relating to a narrow window of the value chain is likely to be even more problematic.

Arguments around public interest will devolve into the usual claims from manufacturers about the value of the industry to Australia, and the importers about the value of accepting foreign subsidies or corporate subsidies for the Australian consumer (if in fact such subsidies ever get passed down the supply chain to the consumer). In essence, Customs, or in the case of appeal the TMRO, will be asked to be judge and jury for industry sectors of which it has little knowledge or understanding. To counter this it is likely that a public inquiry will be required to justify the case based on the value of the industry, which in the case of a sole producer means revealing publicly confidential information regarding a companies financial data – another deterrent to undertaking an anti-dumping action. The lack of resources, business depth and lack of subject matter expertise in determining anti-dumping cases provides no comfort that Customs can or

even should be asked to make the right call on a far more judgemental Public Interest Test. The boundary approach does not make the decision any easier for Customs. Another series of debates and rule making will be inevitable as parties argue over what constitutes the elements of a boundary test.

Furthermore citing the EU and Canadian tests is interesting, but not necessarily relevant to the Australian system. The fact is that ***most countries that have enacted legislation under the WTO rules DO NOT have a public interest test***. In the examples referenced it is rarely used. No comfort should be taken from this experience that this would apply in Australia. If we were confident this was the case then there is no reason to have the test. The use of a Public Interest Test in those jurisdictions has to be seen in the context of how the full program of antidumping is conducted, along with the resourcing and approach of those administrations. The EU test for instance is set favourably towards applicants where the value add ascribed to importers is low. Cherry picking a PI test based on those experiences out of context does not justify applicability for Australia and are not justifiable grounds for introduction of a test.

The right to take antidumping action was confirmed by Professor Gruen in his 1986 review. This should not be diminished by the added risk of a PI test for a company, having spent significant resources to mount a case. The Draft Report confirms that the anti-dumping provisions should be retained, but the proposed nature of the PI test would lead to a significantly diminished outcome for Australian Manufacturers. In other words it removes the notion of fairness in trade which underpins free trade.

The biggest issue with a Public Interest Test, however is that it discourages industry from undertaking an antidumping case. The cost of running a case is high. Industry does not bring cases lightly today and will only do so generally where the aggrieved party has a strong view about the outcome. However in theory at least, with appropriately resourced investigations, industry can, with the data available to it, have a reasonable idea about the prospective outcome of launching a case. Having a PI test at the end of an investigation reduces the prospect of success, and will discourage parties further from undertaking such action. This further disenfranchises smaller companies from the process.

Competition Issues

The antidumping regime has been confirmed as being in the Customs domain. Introducing the ACCC serves no purpose. The WTO rules are designed to deal with unfair pricing – they are not designed as competition policies. Competition policy is designed to promote fairness in commerce, to encourage competition and protect consumers. It is not designed to deal with fairness in international trade – it is designed to remove injury. Yet this recommendation can bypass the original intent of the antidumping legislation. This test is another way to dilute the impact of the anti-dumping legislation.

Local Suppliers' cost to make and sell

The trade remedies are in place to remove the injurious margin of dumping. Such remedies may lead to an increase in the local producers' selling price which when combined with other measures or market structures may see volume and profitability return. A simple test on price alone is not feasible as other non-price measures may be

at work in the market place. Other factors are at play in buying decisions as indicated in Customs PAD sect 13.1 of the Capral Aluminium extrusions case.

Like Goods

CSR in its original submission shared concerns about experiences with Customs ability to determine like goods. Until Customs incorporates subject (industry specific) expertise into its investigations there can be no confidence that correct assessments of like goods will be consistently sound. This test, based on grounds that can be contentious reduces the integrity of the anti-dumping process. The test as suggested overlooks the possibility that with measures like goods might also increase in price.

Primary Cause

Provisions dealing with dumped or subsidised imports not being the primary cause of injury should be redundant in that Customs have to determine the causal link. It would seem this is a test upon a test and is therefore redundant. Dumped or subsidised goods do not have to be "primary cause" – merely a cause.

Market share

Furthermore a PI test is an open invitation for offshore producers to dump in Australia and to take predatory action. Importers can openly test the public interest hurdles. For instance if a manufacturer has less than a 20 percent market position then that is an open invitation to take predatory action to try to remove that manufacturer from the Australian market place should an importer so desire. Market share tests are arbitrary and discriminatory against small, possibly start up manufacturers. There should be no consideration based on market share. It might well be that the public interest is well served by smaller companies operating in Australia, but a simple clause such as this could rule it out in a rules based culture of determination. Knowing that protection is unavailable the incentive for start up and re-investment in Australia is reduced, which in itself will work against the public interest. Importers will know the Australian manufacturer has no defence. Similar hurdle type rules will have the same effect. It is not clear that an adequate set of boundary rules can be written, but tests such as this are an invitation to dumping activity. We can only think that such a clause would only be introduced if there was a view that Australia should have no manufacturing industry.

Reasonable Profit Margin

Reasonable profit margin is almost impossible to define. It needs to take into account the circumstances of each individual competitor, their appetite for risk and return and capital structures. Customs can impose an amount of profit of zero when establishing a normal value.

Supply Chain

The limits on supply chain investigation are confining and arbitrary. There is no way of knowing whether lower costs at one point in the supply chain get passed down to the consumer at the final point of consumption and Customs are not well placed to make those judgements. Only examining the impact one step up or down the value chain does not constitute a public interest test and may simply shift profit from one step in the value chain to one other, but in the end the consumer or general public is no better off.

The inquiry has presented no evidence based or an historic analysis of previous or existing cases to determine what the impact of a PI test might have been on the outcome of those cases or whether they would have been undertaken at all. The bounded rules would suggest that certain industries that met those categories need not apply. This is disenfranchising those industries from access to anti dumping. If this is the objective of the test then why not simply specify those industries who are not allowed to make anti-dumping cases? In effect, this is what the rules mooted in the draft report will achieve – it is just a slower, more costly and more painful way of getting there.

The person best placed to make judgements in the interest of the Nation is the Minister. This is what politicians are elected and paid to do. In this respect we disagree with the draft report's conclusions. Ministers have in the past acted in the national interest and nothing prevents them from doing so in the future.

b) Draft Recommendation 7.4

The extension of anti-dumping measures should not be limited to one three year term. Existing provisions for continuation for another 5 years should be retained. It is difficult to see how a full review can be undertaken at the expiry date as dumping cannot or at least if measures were working should not be found. Continuation reviews are based on an assumption or prior evidence that dumping is likely to continue if measures are removed.

In particular the two year freeze on applications is completely unacceptable. There is a long history in certain segments whereby as soon as measures are removed, dumping re-commences. In certain circumstances where data is manipulated by affected parties or whereby reviews for whatever reason find a lessening of dumping when all the commercial evidence and further investigation finds dumping has actually increased, aggrieved parties should not have to wait another two years before lodging another case. Furthermore it can take 12 months to prove the new case, leaving applicants to tough it out for another 3 years. The Productivity Commission provides no adequate justification as to why this is reasonable and once again it defeats the purpose of remedies.

c) Review of Measures – Draft Recommendation 7.5

A considerable effort goes into the preparation and assessment of cases by industry and Government. CSR supported ***annual adjustments where data is transparent and obvious eg exchange rates, duties, subsidies*** etc. The proposals to have self assessment determine adjustments flies in the face of the commitment by parties to obtaining the best outcome in the first determination. It would not be unexpected to find that parties are unwilling to cooperate with spot audits and that it is not possible to prosecute overseas parties. This provision is wide open to abuse. The complexities of establishing normal values and export prices make self assessment problematic and is not supported.

Our experience with continuation cases suggests that the rigour which applied to the initial determination will get lost in annual adjustments as proposed under this

recommendation. Furthermore it seems to be based on the assumption of a perfect world where all parties act in the spirit of cooperation. This world does not exist.

The apparent ready acceptance of exporter data without subject matter expertise or highly skilled forensic evidence gives no comfort that self assessment will have any integrity. Giving exporters the power to provide information on their own behalf and have this accepted by Customs without scrutiny and no real provision for penalties or obligations on exporters to cooperate, significantly weakens the remedy for applicant parties. This is akin to putting the fox in charge of the chickens. Under these provisions the only people likely to be audited are the local producers. There may be a case for adjustment where there are ***globally*** recognised markets, but for many products price is not so easily transparent.

Annual adjustments should be limited to where there is open transparent data which is of sound integrity. Self assessment would in CSR's view be unacceptable.

Administration of the System

d) Appeals arrangements Draft Recommendation 8.2

CSR supports the proposed change to the TMRO review, not going back to Customs would seem to speed up the process of determination.
An automatic appeal right at the continuation phase would seem unnecessary – a Minister can undertake a review at any time and an accelerated review for a new exporter can be taken at any time after publication of the original notice. Other reviews can be requested by an affected party when one or more variable factors have changed. Provisions exist for revocation claims. It would seem that the suggested provision is unnecessary.

e) Extensions of Investigation Period Draft Recommendation 8.3 and 8.5

The existing process is lengthy and rarely follows the prescribed timetable. No analysis of the exact time taken by Customs for investigations has been offered. There is no reason to increase the statutory period for investigations. In our own experience Customs have been able to obtain whatever extensions they need to conduct their investigations and stay within the guidelines. We have experienced delays of four months by re-setting the start date.

If the Productivity Commission sees a clear need to extend the time frame for Customs then it should consider a two stage process whereby the first step is a less extensive initial application which results in more timely interim measures and a final application requiring the same level of detail as existing applications. An extension in time should not be granted per se.

We would suggest investigating barriers to achieving the statutory periods and re-dressing those, rather than simply extending the time frame. In particular more attention should be paid to the adequate resourcing of inquiries. More productive use of personnel available to the inquiry, improved planning which takes into account industry advice, the ***mandatory inclusion of industry expert resources on investigative teams and access by Customs to forensic financial investigators***. Customs should not be limited to resource investigations with its own personnel, but must include outside expertise on its

teams. This should enable faster, more informed decisions by the agency and fairer outcomes for all parties.

f) Implementation of New Requirements - Draft Recommendation 8.11

Applications submitted before the implementation of any changes should be grandfathered from the provisions of a public interest test. In some instances case preparation was underway before the Productivity Commission released its draft recommendations. It is a long journey from this to final acceptance of the report by the Minister and the usual processes which bring new regulation into enactment. It is unreasonable for companies to be delayed from seeking measures to determine the new level of risk associated with the anti-dumping regime. They must therefore be exempted from the most controversial element of the draft recommendations.

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