30 October 2009

Mr Philip Weickhardt
Commissioner
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Mr Weickhardt

Draft Report on Australia's Anti-Dumping Submission

Please find attached Qenos Pty Ltd's comments in response to the Productivity Commission's recently published draft report on Australia's Anti-Dumping System.

Yours sincerely

Stephen Bell
General Manager Commercial

Qenos Pty Ltd
471-513 Kororoit Creek Road Altona Victoria Australia 3018 Private Mail Bag 3 Altona VIC 3018
Telephone 61 3 9258-7333 Facsimile 61 3 9258-7451 Website www.qenos.com

Introduction

Qenos Pty Ltd ("Qenos") provides the following comments in response to the Productivity Commission's ("the Commission") Draft Report on Australia's Anti-Dumping and Countervailing System.

The Commission has recognised that the use of Australia's Anti-Dumping System has been in decline since the early 1990s. Despite this decline the Commission considers the deficiencies with the current system can be broadly identified within the following categories:

- A lack of consideration of the wider impacts in applying anti-dumping measures;
- Infrequent adjustments to the magnitude of measures;
- Timeframes over which the measures remain in place; and
- An apparent lack of transparency in the decision-making process.

Qenos considers it appropriate to address the key recommendations raised by the Commission.

Public Interest Test

The Commission states that "*the highest priority for reform of Australia's Anti-Dumping System is to introduce consideration of the broader public interest test*". To address this priority, the Commission has proposed a 'bounded' public interest test based upon its analysis of similar broader community interest tests evident in Canada and the European Union.

The proposal will encompass apparent "system preserving benefits" which the Commission argues are essential to the public interest test.

Qenos has reviewed the Commission's rationale for the introduction of a bounded public interest test, including proposals to extend the investigation timeframes by an additional 30 days for specific consideration of the community interest in applying anti-dumping measures. Qenos also understands that the Commission has sought to model a proposed public interest test on similar considerations applied by Canada's International Trade Tribunal ("CITT") and the European Commission.

In addition to the system preserving benefit which requires provisional measures to be applied whilst the public interest test is examined (within the 30-day timeframe), the Commission has also recommended:

- General guidance on matters (both short-term and longer-term) and range of interests that could be considered in applying the test – with a directive that the analysis is limited to consideration of impacts on industries no more than one-step from the applicant industry; and

- A further directive which details six specific circumstances in which it is viewed anti-dumping measures are not in the community's broader interest.

Qenos' comments

Despite the decline in the number of anti-dumping investigations over recent times, the Commission considers that a public interest test is required within Australia's Anti-Dumping System otherwise calls for the retention for the system are diluted. Qenos does not agree with this point of view. Australia's Anti-Dumping System, when contrasted with systems operated by other jurisdictions, is transparent and encourages participation. Recent administrative changes have further enhanced the level of transparency of the investigation process.

Qenos considers that the Commission's proposals extend well beyond the public interest tests applied in Canada and the European Union. The proposal accompanied by additional "guidance" and "directives" are means by which anti-dumping outcomes will be severely restricted – delivering on the Commission's broader intention that anti-dumping measures only be applied in extremely limited circumstances.

The non-specific nature of the "directives" which include ambiguous terminology involving the exercise of discretion will further reduce the number of outcomes which have evidenced unfair trade. Contrasted with the extremely limited circumstances in which the public interest test is used in Canada and the European Union, the proposed test accompanied by the range of directives will ensure that the public interest issue will be a consideration in most, if not all, investigations.

In addition, the proposed timeframe extension combined with a further recommendation to permit extensions of time by request to the Minister (at any time in the investigation process) will result in a substantial blowout from the legislated 155-day timeframe. Timeframe extensions add further to the cost of the investigation process and invariably to the uncertainty of outcomes.

Qenos has previously identified that the Minister retains a discretionary power to impose anti-dumping measures. This power enables the Minister to decide whether anti-dumping measures are within the Australian community's broader interest. Qenos does not support the Commission's Recommendation 6.1 to introduce a public interest test. Consideration of the broader public interest is already available within the Minister's discretion to impose anti-dumping measures. The proposal accompanied by the identified general guidance and directives will impose further heavy workloads on Customs and Border Protection, as well as interested parties, further restrict access to anti-dumping measures to correct unfair trading practices, and delay access to relief from the injurious effects of dumping.

The prioritisation of the public interest test by the Commission highlights its desire for the issue to be a regular consideration in every anti-dumping investigation. This is not the case in either Canada or the European Union. The qualification of a "bounded" public interest test provides no solace to Australian industry – the proposal can only be perceived as a further means of denying manufacturers access to remedies which address discriminatory trading practices.

Qenos further notes that a key driver behind the Commission's express desire for the introduction of a public interest test relates to concerns associates with a potential lessening of competition following the imposition of anti-dumping measures. Qenos would point out that there are mechanisms in place to address competition within the *Trade Practices Act*, and there is a well established and robust agency in the ACCC administering the relevant provisions. Changes to the Anti-Dumping System that would replicate legislation already in place are considered unnecessary.

Comments on 'directives'

The Commission has identified six circumstances where it considers that the imposition of anti-dumping measures will not be within the public interest. Whilst Qenos does not support the public interest test, the proposed circumstances to be examined are flawed and will create high levels of ambiguity and uncertainty, namely:

- *The imposition of measures could eliminate or significantly reduce competition* – the interpretation of 'significantly reduce' is vague unless quantified;
- *....price of imported goods would still be significantly below competing local suppliers' costs to make and sell* – what can be interpreted as 'significantly below'?
- *Un-dumped goods are readily available at a comparable price* – what is considered a sufficient volume of un-dumped goods?
- *Dumped or subsidised goods are not the primary cause of injury* – the introduction of a new benchmark for material injury purposes which is not prescribed by the WTO Anti-Dumping provisions;
- *Reasonable profit margin* – what is considered a reasonable profit margin?

The broad nature of the directives combined with the proposed 'general guidance' reinforces Qenos' view that the key recommended change to Australia's Anti-Dumping System is intended to restrict access to relief mechanisms to prevent injurious dumping.

Architectural Changes

Continuation of measures

Qenos does not agree with the Commission's proposal limiting anti-dumping measures to a maximum eight years. The basis for the recommendation is drawn from the maximum coverage available under the Safeguard arrangements. The Anti-Dumping provisions are separate from the Safeguard arrangements and the two separate provisions should not be bundled together.

The Anti-Dumping provisions are specifically intended to address injurious dumping practices. If it is established (via investigation) that anti-dumping measures are required to correct the practice, access to the measures should not be denied. Applications for the continuation of measures should be considered on a case-by-case basis and not subjected to a uniform limitation.

Qenos supports retention of the current timeframes for the continuation of measures. The "sunset" period of 5 years is consistent with the expiry periods utilised by the WTO Anti-Dumping Agreement and other administrations. Qenos is opposed to the extension of measures which is limited to one further three-year period (i.e. to a maximum of eight years). Each continuation investigation is to be examined on its merits – it is important that the individual circumstances of the product, the industry, and interested parties, are all considered in arriving at a recommendation on whether to continue measures.

Qenos concurs with the Commission that continuation decisions which are presently not reviewable should be included as reviewable decisions by the Trade Measures Review Officer ("TMRO").

Reviews of measures

The Commission has proposed the scrapping of the current review of variable factors process. Currently, review applications may be made by an interested party at any time following the initial twelve months after imposition. As an alternative, the Commission has suggested that the variable factors be automatically reviewed every twelve months on the basis of 'self-assessments by the relevant parties'.

The notion of a 'self-assessment' approach to the review of normal values, export prices and non-injurious prices is unrealistic. Anti-dumping measures cannot be viewed in the same manner as taxation assessments. There are commercially sensitive issues surrounding the establishment of a non-injurious price – the exporter would not have access to the unsuppressed selling price (from which the NIP is determined) which can only be obtained from the Australian industry. It is also unlikely that the exporter would be willing to disclose confidential normal value information to the Australian importer – the importer is the party that is liable for the payments of interim duty (and therefore responsible for the self-assessment process).

Qenos is also concerned that the opportunity for reducing interim duty liabilities over the life of the measures would be significant.

Qenos considers that the present review of variable factors process which is based upon on an application received by an interested party demonstrating a material change in one or more of the variable factors represents an acceptable means to updating the variable factors. Qenos also considers that the opportunity must be afforded to all interested parties to participate in a review of the measures, as the Australian industry and Customs and Border Protection is not in possession of all the relevant information to effect new variable factors, and often requires the input of other interested parties to complete an effective review.

Administrative reviews

The proposed abolition of administrative reviews would further diminish the effectiveness of Australia's Anti-Dumping System. An administrative review does not involve the simple reconciliation of payments of interim duty amounts with the liability for interim duty. The exporter is required to demonstrate to the satisfaction of Customs and Border Protection that export prices over an administrative review period were not dumped.

This involves the exporter also demonstrating that any changes in the normal value throughout the administrative review period are also reflected in the export price(s) over the period.

An administrative review is not a simplistic refund of overpaid duty. It involves a shipment-by-shipment analysis of whether the correct amount of duty has been paid, taking account of changes to normal values and export prices that may have occurred throughout the administrative review period. Once this analysis is completed, Customs and Border Protection reconciles the amount of interim duty paid with the amount which is liable and refunds any excess.

The Commission's proposal for the administrative review process to be abandoned in favour of an "adjustment" process at time of import fails to recognise the information requirements necessary for assessing the correct amount of interim duty payable at time of importation. For these reasons a simplistic adjustment of the amount of interim duty required at time of entry would not be possible.

Administrative changes

Qenos welcomes the Commission's viewpoint that Customs and Border Protection, the Minister and the TMRO should retain their broad roles within the Anti-Dumping System. A number of specific administrative changes have been proposed. These include:

- *Removing the need for Customs to conduct a reinvestigation following a Trade Measures Review Officer recommendation to review certain matters*

  Qenos considers that this proposal will cause a dilemma for the Minister – upon which advice does the Minister rely – Customs and Border Protection or the TMRO?

- *Broadening the list of decisions subject to appeal to the TMRO*

  Qenos supports the inclusion of continuation decisions as subject to appeal to the TMRO.

- *Increasing scope for timeframe extensions*

  Qenos notes that timeframe extensions are the 'norm and not the exception'. Timeframe extensions should be limited – there have been too many investigations where the extension granted is as long as the initial phase of the investigation. Qenos also considers that where an extension of time is granted, provisional measures should be automatically imposed (and certainly no later than Day 110).

- *Recognition of overseas investigations*

  Qenos welcomes the Commission's suggestion that departures from overseas investigations should be explained by Customs and Border Protection.

- *Improved transparency*

  Qenos supports improved transparency in investigations, including improved disclosure of summary information of confidential omissions in exporter visit reports.

Qenos does not support the disclosure of details (commodity) of unsuccessful applications which have been rejected prior to initiation. The disclosure of this information will commercially disadvantage the applicant industry.

- *Feedback on impacts of measures*

  Qenos considers the feedback requirement on the impact of measures is a reasonable expectation. This will ensure the measures are operating as envisaged.

- *ABS Restrictions on import data*

  Qenos is opposed to the suppression of Australian Bureau of Statistics ("ABS") import data. The process followed by ABS in suppressing data lacks transparency and cannot be challenged. The Commission's recommendation is an urgent reform that is long overdue.

Concluding comments

The Commission's primary objective to introduce a public interest provision in Australia's Anti-Dumping System will place significantly limit the percentage of applications which result in final anti-dumping measures. The combined impact of 'guidance' and 'directives' which are generally ambiguous and unclear, will increase uncertainty with the proposal.

Importantly, however, the presumptions of a public interest test relied upon and quoted by the Commission as evident in Canada and the European Union indicate that the test is used on limited occasions. The Commission's proposal, however, will result in a public interest consideration in every anti-dumping inquiry.

The second ranking priority of limiting the continuation of anti-dumping measures to a three year extension, and then banning any new application by the industry for a further two year period denies the Australian industry natural justice. Uniform approaches for the extension of measures and prohibitions cannot be considered across the board – each extension must be considered individually.