OneSteel Ltd

Submission to

Productivity Commission

Australia's Anti-Dumping and Countervailing System

Draft Inquiry Report

November 2009

Executive Summary

OneSteel Limited ("OneSteel") welcomes the opportunity to comment on the Productivity Commission's ("the Commission") Draft Report on Australia's Anti-Dumping System.

OneSteel supports:

- the Commission's position which involves retaining the current roles of the Minister, Customs and Border Protection, and the Trade Measures Review Officer ("TMRO");
- the Commission's stance of not seeking to refine certain policy aspects as they relate to normal value and material injury assessments is also welcomed; and
- many of the Commission's proposals for administrative improvements.

OneSteel does not support initiatives which are aimed at reducing the effectiveness of Australia's Anti-Dumping System. Specifically:

- OneSteel is opposed to the Commission's proposed introduction of a public interest test. Having reviewed the rationale for the Commission's identified 'priority' area of reform, OneSteel considers that the Commission is seeking to limit Australian industry's access to anti-dumping measures by introducing directives which significantly surpass the public interest provisions referred to in Canada and the European Union ("EU");

- OneSteel does not support the Commission's proposed uniform changes to limiting the extension of anti-dumping measures to a maximum eight years, nor the proposed freeze on further applications by Australian Industry for a two-year period;

- OneSteel does not support the Commission proposal to abolish review of measures and administrative reviews - only to be replaced by styled self-assessment processes. The current review processes ensure the effectiveness of imposed measures, whereas the Commission's proposal will only encourage the evasion of interim duties and accelerate material injury to Australian manufacturing.

1 Introduction

In July of last year, the Council of Australian Governments (CoAG 2008, p. 4) agreed that anti-dumping should be one of the priority areas for further competition reform.

Against this backdrop, the Australian Government has asked the Commission to:

- Assess the policy rationale for, and objectives of, Australia's anti-dumping regime and the effectiveness of the current system in meeting those objectives
- Examine the economy-wide benefits and costs of the system

Make recommendations on the future role of an anti-dumping system with the aim of improving the performance of the economy, having regard to the interests of industry, importers and consumers

- Assess the administration of the system, giving consideration to the key decision-making steps in the investigation process ….. and advising on ways to improve administrative efficiency, reduce compliance costs and increase certainty for business.

The Productivity Commission issued a draft Inquiry report in September, 2009 for further public consultation and input.

The Productivity Commission is to issue its final report on 26 December, 2009

2. Rationale

In many ways the key issue in this report is the rationale for an anti-dumping system. With respect, OneSteel strongly disagrees with the Commission's twofold conclusion on this aspect. Briefly, it is OneSteel's submission that there is really a quite remarkable international consensus on this issue of rationale, but it is a consensus which is quite a deal more complex than the Commission's view.

Generally national governments across the world will allow price discrimination domestically (there are minor exceptions e.g. s.46 of *Trade Practices Act* 1974 (Cth)). Generally, however, national governments across the world will *not* allow price discrimination internationally (i.e. anti-dumping laws). The reasons for this are complex and numerous and include, but are not limited to, those raised by the Commission in Section 4 of its draft report. It is true that this consensus, in effect, can be seen to limit some consumer interests in favour of some national interests and is therefore, in general terms, a reversal of the approach in domestic competition policy. But the international consensus supporting strong anti-dumping laws remains, and OneSteel submits that it is a powerful, longstanding consensus. It is also not anti-competitive, in the same way that there is no suggestion that s.46 of *Trade Practices Act* is anti-competitive (indeed, in some respects it can probably be argued s.46 is more anti-competitive and restrictive than anti-dumping laws). Ignoring this international consensus can lead to error e.g. introducing a public interest test in this area will effectively re-open the international consensus rationale and then revisit it largely from a consumer perspective.

The importance of the rationale for anti-dumping laws also varies from country to country because of their own particular circumstances e.g. developing countries. Anti-dumping laws are particularly relevant to Australia which is a long distance from other major markets and does not have land access to them. This is one reason why the Commission's comparisons with the EU and Canada about the public interest test are not, in our submission, particularly probative to Australia's situation because those economies both have major markets adjacent to them which are accessible by land. As is noted in the draft report (pars. 4.2 and 5.2) the preservation of domestic supply options in Australia is important and has a market value.

3 Market situation

OneSteel is disappointed that the Commission has not viewed the current interpretation of "market situation" as deficient and that this is a common issue across numerous investigations and industries.

OneSteel observed a number of submissions to the Commission in respect of the ineffective interpretation by Customs and Border Protection to address circumstances where a particular 'market situation' is apparent.

The Commission has responded that it is not appropriate to address the procedural shortcomings associated with these provisions on the basis of individual concerns "whatever their particular merits might be", this is despite (as stated above) a number of applications (to Customs and Border Protection) having asserted a market situation due to government influence creating artificially low prices.

Reform of the policy approach and interpretation should be considered a high priority.
Clear direction is required on what constitutes a market situation and guidance is available from recent Canadian investigations that consider whether prices in a particular market are determined on a competitive basis.

OneSteel urges the Commission to reconsider its position on the interpretative aspects of a particular market situation. The Commission is requested to examine the provisions followed by the Canadian administration to aid in an understanding of the deficiencies of the current guidance contained in the Dumping Manual.

4 Public interest provision

The Commission has identified that its priority for reform of Australia's Anti-Dumping System is the planned introduction of a public interest test.

OneSteel re-affirms its position that it does not support the introduction of a public interest provision into Australia's Antidumping and Countervailing System, as previously outlined in its June 2009 submission.

Australia's Antidumping and countervailing system is already open and transparent. It encourages full participation from interested parties at all stages of the process and enables them to maintain a contemporary understanding of each and every development in an investigation.

The Commission has drawn from experiences in Canada and the EU to model a proposed public interest provision. In Canada, the Commission reports that the public interest provision has been examined six times across approximately 160 investigations, resulting in the imposition of the lesser duty rule in four cases (the lesser duty rule is invoked to ensure the public interest objective is delivered).

In the EU, the Commission states that the public interest test has 'led to the non-imposition of measures in about 10 per cent of cases' where it was generally observed that the applicant industry was likely not to benefit from the imposition of measures.

It is evident that in both jurisdictions the public interest test is considered only in a minority of cases.

The Commission's proposed public interest provision seeks to unnecessarily extend the limitations of the guidelines in each of Canada and the EU and apply more qualitative assessments. For example, the examination of the impacts of measures in the EU does not involve a cost-benefit analysis – whereas the Commission's draft report suggests that both short-term and long-term benefits will be considered no more than one step removed along the production chain, indicating that economic cost-benefit analysis will be considered.

OneSteel believes that the Commission's proposed public interest test in Australia would operate quite differently to that in Canada and the EC. The Commission's inclusion of circumstances in which the imposition of measures will prima facie not be in the public interest' are simply a catalyst for certain interested parties to seek each and every opportunity to oppose the imposition of measures, particularly where the proposed guidelines are non-prescriptive and vague.

The directives introduce a range of subjective factors which provide exporters and importers with the opportunity to deflect attention away from the dumping and material injury that has occurred.

OneSteel views the 'guidance' and 'directives' with trepidation. It is evident that unlike the public interest tests of Canada and the EU, the driving factor with the proposed public interest test in Australia is to restrict the imposition of measures. The motivation behind the introduction of the public interest test is the perception that the measures result in a lessening of competition. This perception is ill–conceived. The international community, in adopting Article VI of GATT and the Anti-Dumping Code, has already determined that the benefits of dumping to the wider economy must be modulated to safeguard the interests of domestic industry. Those benefits (which include not just price, but also diversity of product offerings, competition and consistency of supply) are modulated, not eliminated by anti-dumping measures. The products are not banned from the market and are not subjected to prohibitive pricing.

OneSteel would again reiterate its comment in the earlier submission – there is no evidence that Australia's Anti-Dumping System has been subject to blatant abuse by any parties or that it has been grossly mismanaged by Customs and Border Protection. Set against this, however, is the clear detriment to Australian manufacturing that would follow introduction of such a test – a detriment that is not required by international law or domestic necessity.

The need for a public interest test should not be driven by the perception that because other jurisdictions have one, Australia should also.

An examination of Australia's System suggests that the process already sufficiently addresses all the concerns of interested parties and that the Minister's discretion is exercisable in the broader community's interest if required.

5 Continuation investigations

The second area of priority for reform identified by the Commission is the length of time by which measures are in operation.

The Commission does not support the extension (or continuation of measures) for a further five year period as is contained in the WTO Anti-Dumping Agreement and administered by a significant proportion of member countries. The Commission has alternatively proposed that anti-dumping measures can only be continued for a single three-year period, thereby limiting the life of the applicable measures to a period not exceeding eight years.

The Commission has further proposed that applicant industries where anti-dumping measures have remained in force for the maximum eight-year period will be prevented from further accessing any anti-dumping measures for a two-year period.

Similar to the proposed public interest test, the Commission's proposal appears to focus on restricting the imposition of measures even in an environment where dumping and material injury can be proven.

The Commission's proposal denies Australian manufacturers from accessing remedies which are readily available to industries in other jurisdictions.

OneSteel considers that the current methodology for addressing the continuation of measures remains superior to that proposed by the Commission.

Customs and Border Protection currently assess requests for continuation on a case-by-case basis. In the event that material injury is threatened in the absence of anti-dumping measures, the Minister again has the discretion to ultimately decide whether the measures should be reimposed.

There should be no uniform grounds for limiting access to anti-dumping measures upon the expiration of the imposition period – each application for the extension of measures can be investigated by Customs and Border Protection in accordance with the legislative provisions.

6 Abandonment of administrative reviews

Administrative reviews are considered an integral element of the interim duty system. The administrative reviews ensure that refunds of interim duty are only made when the correct interim duty (fixed and variable) has been paid and the Australian industry has not suffered material injury (from the dumped exports).

The Commission's proposed abolition of the administrative review process (where export consignments are examined individually) cannot be replaced with a self-assessment duty payment system. The motivation of exporters and importers to minimise the liability to pay interim duty will always exist, again limiting the effectiveness of the measures following imposition.

The current administrative review process enables Customs and Border Protection to operate as adjudicator in assessing the correct interim duty payable, shipment by shipment, in the full knowledge of each of the applicable variable factors at the time of exportation. The current system caters for changes in one or more of the variable factors following imposition (or review). A self-assessment process at time of importation would not cater for subsequent changes to variable factors (and could not operate where the basis for the non-injurious price is commercially sensitive to the Australian industry).

OneSteel does not support the Commission's proposed abandonment of the administrative review process as it would significantly weaken the effectiveness of the interim duty system.

7 Abolition of 'review of measures'

The Commission has further proposed that reviews of variable factors also be abolished in preference to a self-assessment process similar to that of tax assessments. OneSteel recognises that one or more of the variable factors can change relatively swiftly due to a change in market dynamics, however this does not automatically mean that all variable factors are redundant.

OneSteel does not support initiatives that involve self-assessment of variable factors.

8 Other proposed administrative improvements

OneSteel supports the Commission on each of the following identified areas for enhancement:

- Expanding the list of appealable decisions to include decisions impacting the continuation of measures
    - This would include Customs and Border Protection's decision not to commence a continuation investigation or its decision not to recommend the extension of measures;
    - Minister's decision to further extend measures could also be appealed;
- Customs and Border Protection and the TMRO are adequately resourced;
- Requiring Customs and Border Protection to examine comparable recent cases in other jurisdictions;
- Requiring Customs and Border Protection to seek feedback on the impact of measures from interested parties; and
- Its proposal that the Australian Law Reform Commission (as part of the Australian Law Reform Commission's current review of the protection of Commonwealth information) give consideration to recommending that the Australian Bureau of Statistics should not suppress data on confidentiality grounds where the same or similar information is available from export statistics of other countries.
- Decisions by the Minister in response to advice from Customs and Border Protection, or from the TMRO, should be subject to a 30 day time limit.
- Australia's list of actionable subsidies should be aligned with the lists in the relevant WTO agreements.

OneSteel does not support the Commission's position on each of the following identified areas for enhancement:

- Where the TMRO finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to Customs and Border Protection for re-investigation.
- Customs and Border Protection be required to publish data (commodity and industry) where anti-dumping applications have not proceeded to initiation stage.