POLYPACIFIC PTY LTD

ABN 44 005 728 709

TOWNSEND CHEMICALS PTY LTD

ABN 26 005 074 073

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Email to: **antidumping@pc.gov.au**

WRITTEN RESPONSE TO THE DRAFT RECOMMENDATIONS OF AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM INQUIRY, SEPTEMBER, 2009.

POLYPACIFIC PTY LTD

(ABN 44 005 728 709) AND

TOWNSEND CHEMICALS PTY LTD

(ABN 26 005 074 073)

SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION DRAFT INQUIRY REPORT SEPTEMBER 2009 – AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM.

In opening our response submission to the draft recommendations proposed by the Productivity Commission embodied in its September 2009 Draft Inquiry Report, PolyPacific and Townsend Chemicals want to restate our most fundamental belief. The Australian economy is an open economy, a low tariff economy, an economy that is increasingly embracing Free Trade Agreements and an economy that refrains from the use of non tariff barriers. It is therefore imperative Australia has an anti-dumping system that is rigorous, effective, transparent, user friendly and accessible and that the expressed intent of the system is to redress, in the words of Minister Bowen, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, in his Terms of Reference to the Productivity Commission, "the injurious effects on Australian industry caused by imports deemed to be unfairly priced..... by goods 'dumped' in Australian markets".

Our personal and direct experience in a dumping inquiry has led us to believe that the current system has serious inadequacies. In our opinion, the investigation following our application for dumping measures failed on many counts to deliver an informed well researched final report. The reality is that once an SEF has been released, further relevant input no matter what will alter the mind set of the ACBPS. By including the ACCC in the process (a recommendation of this Commission Inquiry) the hurdles local industry will have to jump to get measures imposed when dumping and injury to Australian Industry is proven, will be increased. We see this inquiry as a de facto method of getting the "Public Interest Test" included in Australia's Anti Dumping System because in our opinion, it has done little to address the concerns of "free to act" Australian Industry.

The key and overriding recommendation made by the Productivity Commission in its Draft Inquiry Report is the introduction of a "new" bounded public interest test (Draft recommendation 6.1).

Draft Recommendations

The new public interest test

Draft Recommendation 6.1

The imposition and continuation of anti-dumping and countervailing measures should be subject to a 'bounded' public interest test, embodying:

- *a starting presumption that measures will be imposed if there has been dumping or subsidisation, which has caused, or threatened to cause, material injury, unless it would demonstrably be against the public interest to do so*
- *general guidance on the matters (both short-term and longer-term) and range of interests that could be considered in applying the test - but with a directive that assessments are to be generally limited to consideration of effects one step up or down the production chain from the goods involved*
- *a further directive that the imposition of measures will prima facie not be in the public interest, even where there is found to be dumping or subsidisation which has caused, or threatened to cause, material injury, if any one of the following circumstances are met:*
  - *the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned*
  - *the resulting price for the imported goods concerned would still be significantly below competing local suppliers' costs to make and sell*
  - *un-dumped or non-subsidised 'like' imported goods are readily available at a comparable price to the dumped or subsidised imported goods*
  - *the dumped or subsidised imports are not the primary cause of the injury being experienced by the local industry*
  - *the local industry's share of the domestic market for the goods concerned is less than 20 per cent*
  - *the imported goods in question are being exported at price which covers the overseas supplier's costs and a reasonable profit margin (plus the value of any identifiable input subsidies).*

Where public interest considerations are determined by the Minister (see draft recommendation 8.1) to outweigh the benefits from removing injury for the applicant industry, measures would not be imposed. And where

public interest considerations do not overturn the starting presumption in favour of measures, the existing 'lesser duty rule' arrangements should then apply as appropriate.

Assessments against the test should be undertaken by the Australian Customs and Border Protection Service (ACBPS) and generally be completed within 30 days. Provisional measures should be imposed in all cases where a finding that there has been injurious dumping or subsidisation provides the basis for moving to application of the public interest test.

In giving effect to these requirements, the ACBPS should:

- ***clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures***
- ***give interested parties the opportunity to comment on its assessments against the public interest test through detailing those assessments in the Statement of Essential Facts***
- ***include a synthesis of that commentary from interested parties in its final report***
- ***routinely consult with the Australian Competition and Consumer Commission at an early stage of each investigation on whether the imposition of measures might give rise to significant competition issues in the market for the goods concerned.***

PolyPacific and Townsend Chemicals under any circumstances oppose the introduction of a bounded public interest test. We wish to remind the Commission that in order to have dumping measures imposed, it must first be proved by the Australian Industry through an exhaustive and potentially flawed investigative process, that imported "like goods" have been dumped on the Australian market; that the dumping has been proven to be "significant", that the local industry has suffered "significant" injury and the injury sustained by the Australian Industry has been caused by the dumped goods. In such circumstances dumping has been established ~ "the injurious effects on Australian Industry caused by imports deemed to be unfairly priced" - again Minister Bowen's term, has therefore been proven.

In our opinion measures imposed against dumped imports is not an argument for protectionism. This is an argument about redressing an unfair, injurious trade situation. Measures using the lesser duty rule should be imposed to redress the unfair injurious trade situation. A public interest test that reverses or overturns the imposition of measures is, in fact, assistance to exporters who are dumping and have been found, through an investigation, to be dumping and the cause of injury to an Australian Industry. Based on the Commission Draft Report recommendation the Australian Industry will have an additional hoop through which it has to jump, the outcome of which could allow the continuation of dumping and consequential injury to also continue. How perverse is this?

What is the public interest anyway? Who defines the public interest? The Draft Recommendations in advocating a public interest test uses language such as "demonstrably", "generally limited", "significantly reduced", "readily available", "reasonable profit margin". These are all words or terms that are open to interpretation regarding meaning – they are not prescriptive and so they would undoubtedly be the subject of ongoing argument. Is this the intention of this recommended public interest test because as long as there is still some manufacturing industry left in Australia it will happen. Our experience is that the ACBPS is already brimming with lawyers. Is the continuation of this the intention? And can it be argued this is improving and streamlining the process? Does it improve transparency?

Furthermore the inclusion of routine consultation with the ACCC involves yet another body into the already elongated process. Does the ACCC have an ideological position on anti-dumping law that puts it at odds with the mandate given by Government to the ACBPS and how it administers anti-dumping law? Will the ACCC attempt to subvert the anti-dumping law with its own ideological views on competition policy?

Consider the comments of Professor Allan Fels, the then Chairman of the Trade Practices Commission (later ACCC) when on 28 September 1995 addressing the 24th Conference of Economists in Adelaide he said on anti-dumping:-

"There has been a great deal of research on antidumping law indicating that only a few of the decisions made under antidumping law are compatible with the principles of competition policy normally applied domestically in a country. For example under competition law, there are some restrictions on predatory pricing but very few of these would prevent pricing which fails the requirements of dumping law. Dumping law fails most competition policy tests.

What should be done in this situation? The options are first to "dump" antidumping law and simply leave the matter to competition policy".

Should the ACCC be again headed by someone with Allan Fels ideology, in our opinion it would be a disaster for Australian Industry suffering as a consequence from the injurious effects of imports deemed to be unfairly priced, if the ACCC was given a legislated role in anti-dumping investigations and outcomes. If the inclusion of the ACCC is a "fait accompli" then its involvement should not commence in the early stages of the investigation and certainly not before the publication of the SEF, so that the process and final outcome is more transparent as to the ACCC's involvement.

As recommended by the Commission Draft Report, the public interest test would be utilised when the following circumstances are met:-

- ***the imposition of measures could eliminate or <u>significantly reduce</u> competition in the domestic market for the goods concerned.***

* We say that should the lesser duty rule be applied where dumping is proved, competition would not be eliminated or reduced – it would be redressed to a fair and level playing field.

- ***the resulting price for the imported goods concerned would still be significantly below competing local suppliers' costs to make and sell.***

* We say the same principal applies as for previous answer above, i.e. dumping is dumping.

- ***un-dumped or non subsidised 'like' imported goods are readily available at a comparable price to the dumped or subsidised local goods.***

This would create a distortion if the dumped goods were not considered dumped and measures not imposed on those dumped goods and the market is still being serviced by Australian Industry and non dumped imports. This would be in fact aiding and abetting dumping and therefore could only be assisting the practice of dumping.

- ***the dumped or subsidised imports are not the primary cause of the injury being experienced by the local industry.***

We say that the dumping investigation would uncover this and will dismiss the application for dumping duties on the basis that the dumping and injury experienced by the local industry are not causally linked.

- ***the local industry's share of domestic market for the goods concerned is less than 20%.***

We ask when is the 20% measured? Is it after the Australian Industry have suffered large loss of market share as a result of proved dumping? Is it where the Australian Industry has invested in productive capacity and its market share is in the growing curve but not yet having reached 20%? Consider a market situation whereby the local industry has 20% of the market volume, but 80% of the customer base but cannot tap into the dominant users (which may be 1 or 2 purchasers) leaving the 'rats and mice' to a competent Australian Industry because of dumped imports – predatory pricing aimed at preventing the Australian Industry from participation. What does the Commission say of these circumstances?

- ***the imported goods in question are being exported at a price that covers the overseas suppliers costs and a reasonable profit margin (plus the value of any input subsidies).***

We ask what is the definition of reasonable profit margin, who determines the level and by employing what process? Isn't it the case that exporting goods under what you would normally charge for equivalent goods in your home market fundamentally dumping? Given that in the real world the exporter under investigation has many ways of disguising/minimising normal values in their home market, so why on earth should they be granted a "free punch" at legitimate Australian Industry. We strongly disagree with this concession to exporters and reaffirm our belief "dumping is dumping". We also say that the same principal applies as for the first two circumstances provided in the Commissions Draft Report as to the use of the Public Interest Test, refer *.

Should a public interest test be introduced and again we say it should not be , we make a possible consequential scenario. An Australian Industry successfully prosecutes an investigation that finds dumping (with significant dumping margins), the injury suffered is significant and the dumping is the cause of the injury. By using the lesser duty rule, the ACBPS determine measures be put in place. However, the public interest test is employed and it overturns the imposition of measures. The Australian Industry eventually suffers further injury (as it inevitably must) as more of its sales are lost to dumped imports, ultimately leading to the demise of the Australian Industry. The Industry closes, the capacity to produce is lost, the employment is lost, skill sets are lost. Then at some later time, the exporter loses interest in the Australian market – maybe the exporter finds a more attractive market elsewhere, or runs out of capacity, or goes through management change and adopts different principals. Where does that leave the customers for the goods in question – as we no longer have an Australian Industry! Where is the public interest in this! As an example, New Zealand is an economy that suffers from the feast to famine syndrome because it doesn't have the breadth of local manufacturing infrastructure that presently exists in Australia.

Other architectural changes

Daft Rcommendation 7.1

The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:

- ***whether the provisions have had a meaningful impact on the outcomes of any past cases***
- ***if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances***
- ***whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements***
- ***what arguments would justify such changes and special treatment for primary producers more generally***
- ***what changes, if any, should be made to the provisions in light of the above.***

In preparing its report, the working group should consult with interested parties.

We make no comment on this recommendation as we are not involved in close processed agricultural goods.

Draft Recommendation 7.2

Australia should not adopt the practice of zeroing when calculating normal values.

Having perused comment from the U.S.A. e.g. "United States – Laws, Regulations and Methodology for Calculating Dumping Margins (zeroing)", we do not believe that zeroing is an appropriate or fair method for calculating normal volumes and therefore we agree with this recommendation.

Draft Recommendation 7.3

In combination with the introduction of the new public interest test (see draft recommendation 6.1), the arrangements governing the imposition of provisional measures should be modified as follows:

- ***The Australian Customs and Border Protection Service should, without exception, be required to release a Preliminary Affirmative Determination (PAD) and impose provisional measures prior to the commencement of any assessments against the public interest test.***
- ***Unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation.***

We do not agree with this recommendation as it is linked to the introduction of a public interest test (6.1).

Draft Recommendation 7.4

There should be no change to the current five-year default term for anti-dumping and countervailing measures.

However, extensions of anti-dumping and countervailing measures, following a continuation review, should be limited to one three-year term. Following expiry of a measure, there should also be a two-year freeze on reapplications for new measures.

Continuation reviews should, in all cases, comprehensively examine and recalculate the relevant variable factors.

We support the recommendation with reservations that the two year freeze on re-applications could present dumpers with a two year "free hit".

Draft Recommendation 7.5

The Current "review of measures" provisions should be terminated.

Instead, the Australian Customs and Border Protection Service (ACBPS) should update normal values, non-injurious prices (if applicable) and applicable dumping duties, or the floor price in undertakings, every 12 months. These adjustments should be based on self-assessments by the relevant parties (subject to spot audits by the ACBPS and the possibility of penalties for false reporting), or some other cost-effective mechanism specified at the time that measures are imposed.

For measures that are currently in place, and have more than 12 months to run, the ACBPS should consult with the overseas suppliers and local industries concerned to determine what adjustment mechanisms should be used for the remainder of the terms of the measures.

Where this new adjustment process leads to a zero duty rate, measures should still remain in place for the original term. However, measures should be automatically revoked if domestic production by the initial applicant or applicants ceases.

We support the recommendation of reviews but have reservations with a process that allows self assessment by exporters (even with the inclusion of penalties for false reporting). This is a matter of trust and as a consequence should Australia Industry be reliant on exporters who have already demonstrated their lack of trust worthiness? We believe an ACBPS audit of the applicant's accounts to be fair and reasonable and simple to arrange because of proximity. Correspondingly the exporter should undergo the same scrutiny if even handedness is intended.

Draft Recommendation 7.6

Adjustments to anti-dumping and countervailing duties, down as well as up, should occur when a consignment is entered into the Australian Customs and Border Protection Service's import clearance system, based on the applicable variable factors. Once these arrangements are in place, the administrative review arrangements should be terminated.

We support adjustments to measures based on changing circumstances (both up and down) but only if the assessments are conducted thoroughly and fairly with transparent reporting of the methodology employed in determining the adjustments..

Draft Recommendation 7.7

Australia's list of actionable subsidies should be aligned with the lists in the current relevant WTO agreements.

We have no comment on this recommendation.

Administration of the system

Draft Recommendation 8.1

The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission's other draft recommendations.

These roles and responsibilities should be reconsidered at the time of the next review (see draft recommendation 8.12) in the light of experience with the new system.

We have indicated, in our initial submission, that we have serious reservations regarding the independence of the TMRO – fundamentally a member of the ACBPS seconded to the Attorney General's Office. We see them in the same light as police officers investigating police officers or army officers investigating army officers – hardly independent, and open to "mate ship". We don't believe that the TMRO should be a seconded ACBPS person. Our considered opinion, based on experience, is that whoever conducts a review, should be empowered to review the content and evidence (including accepting and investigating new evidence) and not be limited to just examination of the process – as is the case today.

Draft Recommendation 8.2

The following changes should be made to the current appeals arrangements.

- ***Where the Trade Measures Review Officer 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 the Australian Customs and Border Protection Service for reinvestigation.***
- ***Decisions to continue anti-dumping or countervailing measures beyond the initial five-year term should be appellable.***

We support this recommendations without comment.

Draft Recommendation 8.3

Provision should be made for the Australian Customs and Border Protection Service to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.

This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the time of the next review (see draft recommendation 8.12), having regard to experience in the intervening period under the new system.

Through its 'Anti-Dumping and Countervailing Actions - Status Reports', the Australian Customs and Border Protection Service should provide an annual, consolidated, summary of the timeliness of its investigations in the preceding 12 month period.

We support this recommendations without comment.

Draft Recommendation 8.4

Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit.

We support this recommendations without comment.

Draft Recommendation 8.5

The Australian Government should ensure that the Australian Customs and Border Protection Service and the Trade Measures Review Officer are adequately and appropriately resourced to undertake their functions under the new system.

We support this recommendation and it should apply to both the current and any new system. We see this as an extremely important and significant recommendation worthy of more detailed comment than the 3 lines afforded it in the Recommendations. In our opinion the Recommendation should include that the ACBPS and TMRO source outside impartial expert advice; e.g. academic opinion. This impartial expert advice should be canvassed prior to the publication of the SEF. The involvement of impartial expert advice is even more critical when resolving disputes on matters such as "like goods".

Our experience has been one where ACBPS officers were basically incapable of determining "like goods" in circumstances where it was a contestable issue. They relied upon and were influenced by the customers of the goods under investigation, who had serious self interest in the finding of what constituted "like goods". Therefore the misinformation basically led to the collapse of our application until such time it was resurrected at the 'eleventh hour' with the assistance of academic input. Unfortunately at that point of the investigation we were already 'dead in the water'.

This is not a recommendation from us – it is a fundamental imperative because in our case justice was not done to the Australian Industry.

Draft Recommendation 8.6

In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate whether there have been any comparable recent cases in other countries and what the outcomes were. Where it disregards the analysis and findings in any identified comparable cases, it should indicate in its investigation report the reasons for doing so.

We disagree with this recommendation. We see dumping cases in Australia as having circumstance peculiar to the Australian market and therefore distinctly separate from circumstances applicable in other markets. Decision should only be made based on the merits of the information, data and arguments, as presented in Australia. To introduce arguments as a result of outcomes in other countries will only add complexity and further avenues of appeal of decisions made in Australia.

Draft Recommendation 8.7

Through its 'Anti-Dumping and Countervailing Actions - Status Reports', the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.

We do not support this recommendation. We would much rather have the resources required for this activity be redirected to ensure rigorous and proper investigations. This recommendation is not seen as providing any value to the system and who would use this information anyway.

Draft Recommendation 8.8

The Australian Customs and Border Protection Service should publish more information on the magnitude of anti-dumping and countervailing measures actually imposed and the basis of the calculations of the underlying variable factors. The precise nature of this more transparent reporting regime should be developed having regard to the further input from inquiry participants on this matter (see information request below).

We don't fully understand what is being recommended here. If it is the case that the outcomes and the extent of anti-dumping measures imposed is more accessible to non participants, then we see no reason why it should not happen.

Draft Recommendation 8.9

The Australian Customs and Border Protection Service should, as part of the annual adjustment of measures (see draft recommendation 7.5), seek feedback from local suppliers of the goods concerned on the impacts of those measures - including on market prices - over the preceding 12 months, and investigate further if appropriate.

We support this recommendation provided the Australian Industry competing against proven dumped imports is given the opportunity to have its input considered seriously.

Other matters

Draft Recommendation 8.10

As part of its current review into the laws and practices relating to the protection of Commonwealth information, the Australian Law Reform Commission should give consideration to proposing a change to the legislation governing the operation of the Australian Bureau of Statistics to preclude the suppression of import data when the same or similar information can be publicly accessed from the export statistics of other countries.

We support this recommendation. In our industry, one which is fundamentally involved in the manufacture of "niche product" as distinct to mass volume commodities, it can be extremely difficult to access export prices in the first instance without having to contend with data that is suppressed by exporters/importers. In the case of all products produced by Townsend Chemicals (RE-PLAS, RE-POL, RE-ADD and RE-FLEX), the tariff item numbers under which all competing imports entered are "catch all" i.e. a vegetable soup, and thereby rendering the import statistics valueless to us.

Implementation of the new requirements

Draft Recommendation 8.11

All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see draft recommendation 6.1) and the changes to the continuation and reapplication provisions (see draft recommendation 7.4). These should take effect two years later.

We support the recommendation that reforms should take effect as soon as possible with the exception of the reforms we disagree with. Conversely, recommendations that we have made in our submissions should be accepted and made to take effect as soon as possible.

Draft Recommendation 8.12

There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:

- ***the impacts on decision-making of the public interest test and whether that case history points to: any gaps or deficiencies in the test that should be addressed; or the need for supporting changes to other aspects of the legislative architecture***
- ***the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, and what more might be done in this regard***
- ***the performance of the current decision-making entities within the new environment***
- ***the need for any 'fine tuning' of the system separate from the public interest test requirements***
- ***changes to overseas anti-dumping regimes, or reform options emerging from Doha discussions, that could be relevant to the Australian system.***

We support the recommendation expressed with the exception of recommendations regarding, in particular the public interest test, which we continue to oppose.

In closing our comments on the Commission Draft Recommendations, we believe some fundamental questions need to be asked of Government and answered by Government, after all it was Government that sought the inquiry and established the terms of reference.

- Is a vibrant and healthy SME manufacturing sector something that is wanted in Australia?

- Is it desirable to have a rigorous, effective, transparent, user friendly and accessible anti dumping regime, designed to redress injury to (ALL) Australian Industry – not just big industry – caused by imports deemed to be unfairly priced.

If the answer to these two questions is "yes", those SMEs who care enough about such issues, who take the time and trouble and go to the expense of availing themselves of a system that is supposedly there to be used in cases where imports are deemed to be unfairly priced, must be provided with a system that gives them the same opportunity for success as big industry. Clearly the vast majority of SMEs do not have the financial and legal resources as do big industry. This fact should not prejudice SMEs capacity in obtaining a fair and just outcome in an anti dumping case.

The Australian economy, whilst being highly developed, has a relatively small population ranking at number 52 globally with a population of approximately 22 million. The domestic market available to Australian Industry is, by definition, also relatively small. The Australian market is vulnerable in circumstances where exporting countries with much greater production capacity of "like goods" to those producers in Australia, dump in Australia what in their home markets would be considered relatively small volumes, but in the Australian market context may represent a very significant proportion of the market. Due to the openness of the Australian market, we believe that Australia can represent an easy target for discretionary (dumped) selling by exporters of "like goods".

SME's are more likely to be 100% Australian owned business with no overseas parent dictating policy. Multinationals have and will continue to shy away from dumping applications in Australia because, in our opinion, they can't tolerate the scrutiny and they themselves may be actively dumping in other markets.

We believe the end result of the absence of any dumping action on dumped cars into Australia initiated by the Australian Automotive Industry could lead to the demise of the entire automotive industry in Australia. This may not be the current state of play if an automotive company had their head office here in Australia and in consequence had the health of the automotive industry and jobs for Australians as it's number one priority.

We have welcomed the opportunity to participate in this inquiry which we initially hoped would be the "inquiry to end all inquiries" into dumping and countervailing duties. In our opinion the Commissioners have not given sufficient consideration to the real concerns of Australian SMEs and as we have said before conducting their business in a transparent, low tariff regime economy. Should, without dramatic changes, the Draft Recommendations become the "final" Recommendations and ultimately accepted by Government, Australian Manufacturing Industry and in particular SMEs will encounter even greater difficulty in actually running a successful dumping case. Under such circumstances we would conclude that very little has been achieved as a result of this inquiry.