Law Institute Victoria

Law Council of Australia

9 November 2009

Mr. Philip L. Weickhardt
Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr. Weickhardt,

Anti-Dumping and Countervailing Duty System – Inquiry – Public Hearings

We refer to the Productivity Commission's draft report into Australia's anti-dumping and countervailing system and to the public hearings held in Melbourne on 15 October 2009, at which a representative from the Law Council of Australia, Andrew Percival, together with Andrew Hudson, representing the Law Institute of Victoria as well as the Law Council of Australia, attended.

The Law Council and the Law Institute thank the Commission for providing the opportunity for their representatives to appear before the Commission and reiterate our strong support for the recommendations and reforms being proposed by the Commission to Australia's anti-dumping and countervailing system.

During the hearing, the representatives of the Law Council and Law Institute of Victoria furtherer assisted the Commission by providing information on a number of issues. Those issues are addressed below.

1.1 Balance between transparency and confidentiality

We understand that the Commission is concerned to understand the balance between providing greater transparency to Australia's anti-dumping and countervailing system and protecting the confidential information of interested parties.

In seeking greater transparency in the system, this must balance against acknowledging and protecting the confidentiality of information provided by interested parties. The Law Council and Law Institute believe that such a balance can be achieved by limiting access to confidential information to a

restricted class of people (eg. solicitors, barristers and, perhaps, other professionals) and that they be under a duty to keep such information confidential and to use it solely for the purposes of the investigation with appropriate sanctions for breach of confidentiality.

Professionals have been nominated where the profession is regulated because there are significant sanctions for unprofessional conduct. If a court enforceable confidentiality undertaking or something similar to the USA's administrative protection order attracting significant sanctions for breach, then the class of advisors to whom confidential information could be disclosed could be wider.

1.2 Cost of an scheme similar to the USA's administrative protection order scheme

We understand that the Commission is concerned to understand whether the introduction of a scheme similar to the USA's administrative protection order scheme would add significantly to an interested party's costs in an investigation.

As confidential information of parties to an investigation is not currently available to the other parties, it is not possible to advise with any precision the amount of additional cost reviewing other parties confidential information would entail.

However, the Law Council and Law Institute do not believe that it would for the following reasons. The most significant part of an investigation in relation to costs is:

- in relation to the applicant, preparation of the application and subsequent verification of that information and reviewing visit reports; and
- in the case of importers and exporters, preparation of responses to questionnaires and subsequent verification of the information in the response.

Reviewing the confidential information in an applicant's application or an importer or exporter's response to a questionnaire and, where appropriate, preparing a submission based on the information reviewed would incur some additional cost, it, in the opinion of the Law Council and Law Institute would not involve a significant amount of time or resources, although the amount of actual time and resources would necessarily vary from case to case.

1.3 Use of findings in other jurisdictions

The Law Council and Law Institute believe that the findings of an anti-dumping authority in another jurisdiction already is a relevant consideration that may be taken into account in an investigation being conducted by the Australian Customs and Border Protection Service (**Customs**). Further, it is understood that Customs already has regard to such findings in investigations. Accordingly, there would not appear to be a need to legislate to permit Customs to have regard to such findings.

The concern that the Law Council and Law Institute have in relation to this issue is not whether regard is had to such findings but what use is made of such findings. Each investigation conducted by Customs should be based on the evidence before Customs and, in this context, findings in another jurisdiction may identify possible lines of inquiry but no more.

Despite anti-dumping and countervailing regimes being based on WTO Agreements, there are differences between Australia's anti-dumping and countervailing regime and those in other jurisdictions, both in terms of legislation and administration. Consequently, undue reliance on a finding in another jurisdiction could invalidate a decision taken in an investigation conducted by Customs.

1.4 Timing of introduction of public interest test

As mentioned at the hearing, it is the view of the Law Council and the Law Institute that all of the reforms being proposed by the Commission, including the public interest test, are implemented at the same time without exception.

In relation to investigations being conducted at the time the reforms are introduced and applications that have been filed with Customs but not initiated, provision could be made in the legislation introducing the reforms to simply exempt those investigations and applications from the reforms so that they continue to be dealt with under the current legislative scheme.

Apart from the exceptions mentioned above, the reforms should apply to all future applications and to reviews of existing measures.

1.5 Update of table

Attached to this letter is a copy of the table previously submitted to the Commission that has been updated.

If you have any questions or require clarification on any of the matters addressed in the attached submission, please contact the Law Council of Australia's representative for this inquiry, Andrew Percival on (02) 9210 6228 and the Law Institute of Victoria's representative, Andrew Hudson on (03) 8602 9231.

Your sincerely,

Bill Grant

Secretary-General

Law Council of Australia

Law Council Of Australia – Law Institute of Victoria
Productivity Commission Inquiry into Australia's Anti-Dumping & Countervailing System
Draft Report & Recommendations

Set out in the table below are the Law Council of Australia's and the Law Institute of Victoria's comments on the draft recommendations of the Productivity Commission. In addition, the Law Council of Australia and the Law Institute of Victoria make the following comments:-

1. At section 8.4 of its Draft Report, the issue of increasing transparency in investigations was addressed and the Commission reached the conclusion the introduction of a system similar to the Administration Protective Order should not be addressed at this time apparently for reasons of increased costs. The Law Council of Australia and the Law Institute of Victoria believe that such a system should be introduced to provide increased transparency in the system as it would lead to a greater ability for parties to an investigation to challenge claims being made and thereby improve decision making by the relevant government authorities. Further, such improved decision making, in the opinion of the Law Council of Australia and the Law Institute of Victoria, would offset any increase in costs and increase confidence in the system.

2. In the submission to the Commission, the Law Council of Australia and the Law Institute of Victoria argued that the Commission should assess not only whether Australia's anti-dumping and countervailing duty system actually has provided assistance to those industries seeking assistance in the form of anti-dumping and/or countervailing duties but also whether the provision of such assistance has been beneficial to the Australian economy as a whole. That is, the Commission should undertake a "cost-benefit" of Australia's anti-dumping and countervailing system consistent with item 2 of its terms of reference. The Law Council of Australia and the Law Institute of Victoria note that the Commission has not undertaken any formal economic modelling and the reasons for not doing so are noted. However, the Law Council of Australia and the Law Institute of Victoria reiterate their previous submission on this matter, namely, that "there does not appear to have been any detailed analysis as to what effect, if any, the imposition of anti-dumping duties and/or countervailing duties has had and whether the imposition of such duties has had the desired outcome and, if not, why not. In short, it is of concern that Australia persists with an anti-dumping system in the absence of any systematic and detailed analysis of whether that system achieves what it is intended to achieve".

Draft Recommendations

	Draft Recommendation	*Comment*
1	Draft Recommendation 6.1 – the introduction of a public interest test	The Law Council of Australia (**LCA**) and the Law Institute of Victoria (**LIV**) support this recommendation.
2	Draft Recommendation 7.1 – convening of a working group to examine the close processed agricultural goods provisions	The LCA and LIV support this recommendation and note the difficulties in applying the existing close processed agricultural goods provisions. The working group should include not only relevant government officials but also stakeholders from the private sector, including legal practitioners with expertise in these matters. The LCA and the LIV would be pleased to recommend such practitioners. .
3	Draft Recommendation 7.2 – Australia should not adopt the practice of "zeroing"	The LCA and LIV support this recommendation as the practice of "zeroing" produces distorted outcomes in dumping investigations.
4	Draft Recommendation 7.3 – Preliminary Affirmative Determination to precede consideration of public interest test and be no later than day 110 in the investigation	The LCA and LIV support this recommendation.
5	Draft Recommendation 7.4 - retention of existing five period for imposition of measures but restrictions on extensions to that period to one three year period and two year freeze on re-applications following expiry of measures. Also continuation reviews should be comprehensive.	The LCA and LIV support these recommendations and, in particular, that continuation reviews must be comprehensive.
6	Draft Recommendation 7.5 – in place of the current review of measures provisions, variable factors to be updated annually by suppliers with spot audits by Customs. If this results in no duties being payable, measures to remain in place.	The LCA and LIV support this recommendation as providing a mechanism to enable exporters and importers with the opportunity to update measures to reflect changes in the market. The LCA and LIV propose that the updating of measures be optional so that only those exporters/importers who avail themselves of the option will be able to update measures.

7	Draft Recommendation 8.1 - the Minister and Customs and Trade Measures Review Officer to retain existing roles	The LCA and LIV note this recommendation and, in light of Draft Recommendations 6.1 and 8.2, do not oppose it.
8	Draft Recommendation 8.2 – following receipt of a report from the Trade Measures Review Officer, the Minister should base his decision on that report without referring it back to Customs. Also decisions to continue measures beyond the initial five year terms should be appellable.	The LCA and LIV support this recommendation.
9	Draft Recommendation 8.3 – Customs to be able to seek extensions of the investigation period at any time during an investigation and Customs to report on timeliness of investigations in its status reports.	The LCA and LIV support this recommendation.
10	Draft Recommendation 8.4 – Minister to make decisions within 30 days of receipt of advice from Customs or Trade Measures Review Officer	The LCA and LIV support this recommendation.
11	Draft Recommendation 8.5 – Minister to ensure that Customs and Trade Measures Review Officer are adequately resourced	The LCA and LIV support this recommendation and, having regard to Draft Recommendation 6.1, officers should have the expertise and experience to undertake an assessment of whether the imposition of measures would not be in the public interest.
12	Draft Recommendation 8.6 – Customs to advise on whether comparable cases have occurred in other jurisdictions and what the outcomes were. Customs also to provide reasons where it disregards the analysis and findings of a comparable case.	The LCA and LIV do not support this recommendation. The LCA and LIV do not object to regard being had to other comparable cases occurring in other jurisdictions but the outcome of such a case cannot be determinative or indicative of the outcome of an investigation in Australia. The outcome of each investigation must be based on the verified facts and proper application of the relevant provisions of Part XVB of the *Customs Act 1901*.
13	Draft Recommendation 8.7 – Customs to report annually on the number of applications that do not proceed to initiation	The LCA and LIV support the recommendation that Customs report on the number of applications that do not proceed to initiation. The LCA and

	and the products and countries the subject of those applications	LIV do not support the recommendation that the products and countries the subject of such applications also be disclosed. As the requirements for initiation have not been met, no useful purpose is served in identifying the products and countries in question. Also, the identification of products and, thereby, the local producers applying for measures may be commercially detrimental to those producers. That is, such disclosure could have trade chilling effect or trade distorting effect as importers seek to protect themselves against the possibility of future applications against the products and countries disclosed.
14	Draft Recommendation 8.8 – Customs to publish more information on the magnitude of the measures imposed and the basis of calculation of the underlying variable factors.	The LCA and LIV do not object to this recommendation in principle but a balance needs to be struck between such increased transparency and disclosure of information confidential to local suppliers, importers and exporters and the disclosure of information that could provide a person with a competitive advantage.
15	Draft Recommendation 8.9 – as part of the annual adjustment of measures, Customs to obtain feedback from local suppliers on the impact that measures are having over the preceding 12 month period	The LCA and LIV support this recommendation.
16	Draft Recommendation 8.10 – Australian Law Reform Commission to consider a change to legislation governing the operation of 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.	The LCA and LIV note this recommendation and do not oppose it. However, care would need to be exercised to ensure that the statistics collected by the Australian Bureau of Statistics are identical to those publicly available in the country of export.
17	Draft Recommendation 8.11 – all proposed reforms to take effect as soon as practicable except the public interest test, which should take effect two years later.	The LCA and LIV believe all reforms should take place at the same time and take effect immediately. Existing investigations and applications that had been filed but not initiated would be exempted from the reforms and be dealt with under the legislative regime that existed prior to the

		reforms.
18	Draft Recommendation 8.12 – Australia's anti-dumping and countervailing regime should be independently reviewed five years after the reform package is fully operative	The LCA and LIV support this recommendation.