AUSTRALIAN STEEL ASSOCIATION INC.
A0020339V ABN 24 762 435 928

PO Box 4303, Geelong Retail, Geelong Vic. 3220
Registered Office: Suite 4, 259 Whitehorse Rd., Balwyn, Vic. 3103
Telephone: +61 3 5277 2822 Fax: +61 3 5277 2855
E-mail: info@steelaus.com.au Web: www.steelaus.com.au

FURTHER SUBMISSION

to

PRODUCTIVITY COMMISSION INQUIRY

into

AUSTRALIA'S

ANTI-DUMPING AND COUNTERVAILING SYSTEM

NOVEMBER 2009

The independent voice for a truly competitive Australian market for steel users
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AUSTRALIAN STEEL ASSOCIATION

FURTHER SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM

INTRODUCTION

1. The ASA is strongly supportive of the Productivity Commission Draft Inquiry Report (PCDIR) recommendation to include a public interest test.

2. The ASA is also supportive of the analysis and conclusion by the Commission that an anti-dumping regime does not provide a net benefit to the Australian economy.

3. If the system is to be retained in some form, the Commission is urged to make a comprehensive analysis of the anti-competitive effects of an anti-dumping system and the mechanisms by which such effects can be minimised as is contemplated in the Terms of Reference. This is particularly so given the Commission's findings that the bulk of anti-dumping actions are taken against key input goods. A key related fact is that such actions are commonly taken by monopolistic or oligopolistic industries.

4. A related element is that the Commission should take the opportunity to consider how best to properly integrate anti-dumping and competition policy. This has never been done to date, notwithstanding concerns raised by the ACCC and the Gruen Review. This is to the detriment of the Australian economy where the bulk of the applicants for duties are in monopoly or oligopoly industries.

5. The ASA would also urge the Commission to recommend improvements to the balance of the system that would be consistent with and supportive of the public interest test. The submissions to date have raised a number of important concerns about key elements of the process. In particular, there are a range of accounting and economic matters calling for improvement which would have a significant impact on the fairness and efficiency of the system.

6. Furthermore, without improvements to key economic elements, there would be a serious incongruity between the intended economically robust public interest test and the balance of the system. The core system and a public interest test go hand in hand and ought to be based on similarly high quality economic analysis.

7. In any event, the analysis to date does not support retention. Without further cost/benefit analysis, there should not be a recommendation in favour of maintenance of the system on political economy grounds. At most that would be a strategic decision for government. While the Commission can advise government, it has not determined whether the potential political economy benefits outweigh the possible annual costs, which it estimates could be $250,000,000 per year.

PUBLIC INTEREST

(Draft Recommendation 6.1)

8. To the extent that the system is to remain, the Commission's recommendation to introduce considerations of the broader public interest is strongly supported.

9. In particular, the Commission is to be commended for having articulated certain express situations where it should be presumed that anti-dumping measures would not be in the public interest.

10. Notwithstanding the ASA's strong support for these proposals, it remains vital to ensure that the appropriate skills are evident in the relevant bureaucracy and that a public interest test and the analysis of it are appropriately integrated and consistent with the inherent economic analyses in other aspects of the anti-dumping process. Each of these issues is dealt with below.

The need for economic skills

11. Without appropriate economic analysis and economic skills a public interest test is unlikely to meet the Commission's laudable aspirations. This becomes obvious when considering the articulated situations proposed by the Commission, such as cases where a duty would significantly reduce competition or where dumping is not the major cause of injury.

12. Importantly, these economic skills are necessary for other key elements of the anti-dumping process, in particular causation and the lesser duty option. If Customs already has appropriate economic resources to undertake the relevant analyses in these areas, they can also adequately consider public interest criteria. Conversely if they do not, one could not be confident that appropriate determinations will be made as to public interest.

Concurrent analysis

13. If additional economic expertise is needed, a point made by a range of otherwise conflicting submissions, identical high quality skills should be applied to both causation and public interest. If that is not to occur, there is too high a risk that there will be contradictory conclusions about the same or similar issues. This can only undermine respect for the system as a whole, create false expectations, and place undue pressure on the Minister or other ultimate decision-maker to resolve conflicting bureaucratic determinations.

14. Illogical inconsistencies between the primary anti-dumping determinations and the public interest analysis will also lead to wasted time and expense. Consistent economic conclusions between causation, public interest and lesser duty will obviate the need to spend further time resolving any conflict.

15. Developing appropriate economic skills and utilising these from the outset is therefore in the ASA's view a necessary precondition to a worthwhile public interest test.

16. The Commission is to be commended for suggesting that information on public interest should be sought at the outset of the assessment process. It rightly notes that much of this information would be necessary to examine issues of dumping and injury (p 88). Application forms should be amended to ensure that this results.

Use of ACBPS powers to extract or use facts available

17. Allied to the general need for appropriate economic skills, there is a need to ensure that key information is provided to allow for an effective economic assessment. To this end it is important that the bureaucracy uses available powers to ensure that this is obtained. For reasons articulated in the previous section, the information should be obtained from the outset and should be looked at concurrently for both public interest, causation and if necessary, lesser duty analysis.

18. ACBPS needs to use its statutory powers to extract information in appropriate circumstances. As noted in the ASA's original submission, while ACBPS has such powers, it has fettered its discretion and effectively resolved never to use them. The Commission should investigate this important evidentiary issue. Economic assessments on inadequate information are hardly likely to be optimal. If Parliament has given a bureaucrat powers to obtain necessary information, there is no justification for the bureaucrat to resolve as a policy matter never to do so. There should be a clear direction that this is both improper and likely to undermine the system.

19. Thus it is not only important to call for relevant information at the outset as is recommended by the Commission, but to also ensure that the appropriate information is actually to hand, notwithstanding the disincentive for some interested parties to provide it.

20. This is not a matter of mere administrative minutiae of a type that the Commission might wish to avoid. Systemic economic inefficiency that could undermine the whole system is the type of issue that a body with the Commission's expertise should be highlighting in an inquiry with such broad Terms of Reference. Importantly, some of the key factors that the Commission would like to see considered, such as significant reduction of competition in the domestic market and relative causes of injury, will be very dependent on what information is provided, often from the applicants themselves. If Customs is too reluctant to demand more fulsome information, there is no disincentive to self-serving applications.

21. Furthermore, to the extent that the Commission has relied on political economy perspectives as the sole justification for maintaining an anti-dumping system, similar considerations should alert it to the need to establish the system in a particular way to ensure that it is not merely captured as a protectionist device. Overseas experiences and literature point to the political economy problem where a public interest contest pits domestic producers who have high incentives to make submissions, with relative ease in organising these, against downstream and consumer interests who often lack sufficient information, find it hard to coordinate their interests, and generally have more diffused potential benefits as compared to the direct benefits from protection afforded to domestic producers.

World's best practice

22. A number of studies have looked at the application of national interest in the EU and Canada and have made suggestions for reform. Such studies include Bronckers 1996; Davis 2009; Didier 2001; Gay 1997; Kommerskollegium 2005; MacLean and Eccles 1999; Mickus 2002; Stevens 2006; Stevenson 2005; and Wellhausen 2000.

23. Some of the important insights from these analyses include the need for the assessing authority to conduct its own investigation and analysis and not rely solely on information provided by the parties. (Wellhausen, 2000:1081) Political economy considerations would suggest that this is vital. As has been shown, it is easy for a domestic producer, particularly a monopolist, to provide information that is at times self-serving. End users and consumers are both disparate and generally ignorant of the cost impacts upon them. The system has to be set up in a proper way that there will be adequate proxies for those sectors of the economy that can be predicted will be under-represented.

24. A related issue is the evidentiary burden. While the Commission has made comments about a presumption in favour of application of a duty, the key question is what level of evidence would lead to a contrary conclusion? Again foreign literature rightly suggests that a lack of evidence should not be taken to prove a lack of negative effect. (Wellhausen, 2000:1081; Bronckers, 1996:29)

25. It is also important that the public interest test should apply in reviews of existing duties as well as in new investigations. (Wellhausen, 2000:1082; Bronckers, 1996:29). The EC applies the community interest test in expiry reviews.

26. It is also important to consider whether a public interest inquiry should follow a Gazette notice to try and engender interest from parties not already party to the anti-dumping actions. (See Canada, s 45, Special Import Measures Act) The bureaucracy should actively seek the input of key parties and not allow their failure to expend the funds on making submissions to lead to automatically adverse results.

27. It is also important to consider the standards to be incorporated in any statutory enactment. Section 45 of the Special Import Measures Act Canada requires the tribunal to notify the Minister of Finance where in its opinion application of a measure "would not or might not be in the public interest …". This is an appropriate standard where it is ultimately a question of political discretion. If instead it is to be an objective determination removed from political lobbying, it ought to be an on balance standard as to whether the public interest would be best served by either the application or non-application of a measure. This would also properly integrate with review rights which naturally look at on balance determinations.

28. While the criteria articulated by the Commission are laudable, save for some specific comments noted below, it is important that they are not seen as an exhaustive list of the matters to be considered. Attention might be given to articulating more broadly the kinds of criteria as found in Regulation 40.1 of the Special Import Measures Regulations of Canada. Here there is an important difference between articulating the matters which are relevant (a broad category as articulated in the Canadian Regulations) and specific

scenarios where one could presume a priori that a measure is not in the public interest (which is the broad nature of the criteria identified by the Commission).

29. The Canadian provisions consider that one significant scenario is where imposition of full duties is likely to cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services or significantly impairs competitiveness by limiting access to goods that are used as inputs in the production of other goods and in the provision of services. This is crucial given the Commission's findings that most actions in Australia are taken against input goods and should be incorporated into the final list.

30. Another important factor is suggested by McLean and Eccles (1999:134) who argue that one appropriate reason to refuse to impose anti-dumping measures is if this would encourage anti-competitive practices. While one of the Commission's criteria deals with substantial lessening of competition, that is phrased in the context of results already found to have occurred. The McLean and Eccles formulation should also be included as it is important to prevent situations arising which would encourage anti-competitive practices in the future. Of course the evidentiary standards might naturally be higher in such a scenario.

31. In that sense it is important to undertake an appropriate examination of the applicant's market position and behaviour. The ASA supports the view of Aggarwal (2004:13) who suggests that the investigating authorities ought to "examine the competitive behaviour of the domestic producers who are petitioning for the anti-dumping measures and determine whether these producers were engaged in restrictive business practices and enjoying undue market domination and setting price cartels. If they were, anti-dumping petitions from such 'anti-competitive' industries should be rejected as the anti-dumping measure would only reinforce the company's market dominance in the importing country in an undesirable manner, through raising prices and limiting competition from imports." Again, this might look like it could be covered within the criterion looking for significant reductions in competition but that is not the case. This suggestion would allow exclusion for behaviour that is an abuse of market power whether the abuse itself causes modest or significant reduction in competition. It is certainly not in the public interest for one government regulation, namely anti-dumping, to shield violation of another piece of essential regulation, namely the trade practices abuse of market power provisions.

32. To similar effect, an EC Paper submitted to the WTO Doha negotiations notes that "(t)he question whether anti-dumping measures could reduce effective competition arises if the Community industry only consists of a limited number of producers with a significant market share. In such situation the danger of reducing competition, creating or strengthening an oligopolistic/monopolistic market structure or a dominant position on the market, must be assessed and taken into account." (European Commission note to all the members of the anti-dumping committee and to all delegates of the Council Working Party on Trade Questions, 13 January 2006:17)

33. Other factors might also be considered. The Swedish National Board of Trade (Kommerskollegium) made suggestions for a better assessment of the community interest, including "estimating static costs of anti-dumping duties;

… evaluating the size and importance of the total community industry; … assessing the risks associated with dumping; … assessing the interest of the concerned parties which have not contacted the Commission; … improving access to the Commission's services for interested parties."

34. Development of an optimal test should also take note of world's best practice and WTO trends to be ever more comfortable with utilisation of economic methodologies where appropriate in WTO disputes. (WTO Trade Report, 2005: Thematic Essays – Quantitative Economics in WTO Dispute Settlement) Because the Australian system is giving effect to international legal obligations under the WTO Agreement, our approaches should take note of and integrate where appropriate with these WTO developments. The ASA believes that the commission should give as much guidance as possible as to the kinds of economic methods that should be applied to its recommended criteria. The key aim should be to promote an objective economic assessment and diminish discretionary and political considerations.

35. Another question is whether a national interest test should be subject to judicial review. Because the criteria proposed by the Commission match up so logically with key elements of the causation and lesser duty analysis, review rights should be identical in relation to each element. Once again, the more objective the methodology, the more justifiable review rights. Conversely, The more political the assessment, the less justification for review but also the less justification for the reform in any event.

36. Even if the anti-dumping system is to remain, it is important that there be an appropriate policy for dealing with key user industries. This was recommended as far back as the Gruen Review which suggested that the IAC examine the viability of such industries. This could be a mechanism to provide such industries with more appropriate support, including adjustment assistance. The Commission has not addressed ASA Recommendation 36 (paragraph 837) that suggests that a national interest test could be used to redirect appropriate cases to suitable and more general assistance mechanisms that look to sustainability. To the extent that the Commission has been concerned with political economy perspectives in supporting retention of an anti-dumping system, similar considerations would suggest that engendering their support for a public interest test would be aided if it was not an all or nothing analysis but instead was at worst a means to redirect local producers to an industry support stream.

The Commission's recommended factors

37. Subject to the above suggestions, the ASA strongly supports the Commission's approach to listing scenarios where the public interest would suggest that a duty not be imposed. The ASA also strongly supports the general thrust of the factors as identified. As noted above, the ASA urges additional criteria relating to input goods and abuse of market power that may not itself substantially reduce competition. In some of the Commission's criteria, either amendments or clarifications would be highly desirable. These are articulated below.

38. *Reducing competition* - The Commission has suggested that one circumstance where it would not be in the public interest to impose a duty is where there is advice from the ACCC that the imposition of measures could

eliminate or significantly reduce competition in the domestic markets “for the goods concerned”.

39. This should also be broadened to include situations where it would eliminate or significantly reduce competition in the economy generally. The concept of public interest cannot be limited to the particular markets for the goods concerned.

40. It is also not clear how such advice would be sought or provided. If the ACCC is to give this kind of advice, it is not clear why it does not do the whole national interest analysis as opposed to Customs. At p 90 the Commission indicates that Customs should be requested to routinely consult with the ACCC at an early stage of the assessment process. There should be a legislative mechanism requiring the ACCC to undertake the analysis within a defined time period upon formal request. Anything less than a legislative mandate would be likely to lead to resourcing problems and difficulties in meeting statutory deadlines.

41. *Breadth of analysis* - The Commission is proposing limiting the public interest assessment to one step up or down the production chain. (p 88) At p 90 the Commission says that the interests considered “would not normally” extend beyond one step up or down. As these words imply, this should not be a blanket prohibition. At most it should be a recommendation in normal circumstances, but even then it is again the case that public interest if properly assessed must encompass all aspects of the public. The public interest should be the sum of all individual affected parties’ interests and for that reason should not be limited in terms of the production chain.

42. While the EU also generally limits consideration to one step up or down in the chain of economic operators (within a system that all commentators note is flawed), it allows consumer organisations to be involved in relation to goods not commonly sold at retail levels if they can demonstrate an objective link with the product concerned by the investigation. (European Commission note to all the members of the anti-dumping committee and to all delegates of the Council Working Party on Trade Questions, 13 January 2006, trade.b.1/as D (2005) B/568)

43. *Non-major causes* - Another situation where public interest would not support a measure identified by the Commission is where dumping may be a contributing factor but is not the major cause.

44. It is necessary to consider how this analysis will actually be conducted by Customs if the causation and lesser duty procedures are not optimal. The Commission itself notes that the lesser duty rule is applied less than might otherwise be expected. As indicated at the outset, if the bureaucracy does not have the appropriate skills to do adequate lesser duty and causation assessments, it will not be able to properly employ this very laudable criterion.

45. *Non-dumped price setters* - The ASA strongly supports the Commission recommendation that it is not in the public interest where like goods could be readily obtained from an un-dumped source at a comparable price.

46. The detail will need to ensure that the strategic response from local industry will not simply be to target all countries so that cheap suppliers cannot be considered as part of the national interest analysis.

47. *Market share* - The Commission suggests that if the applicant industry's share of the domestic market is low, it would not be in the public interest to impose measures because the impost on users would be large relative to the benefits to the industry producing locally.

48. The steel sector shows that the converse is also a problem. The larger the applicant industry's share of the domestic market, the more there is a need for imports to keep the domestic economy efficient. The more that a monopolist can use anti-dumping to destroy competition in a particular market, the more likely that the national interest will be adversely affected. The guide notes should make it clear that this situation comes within the lessening of competition criterion.

49. The Commission also recommends a 20 per cent minimum local market share threshold. This is also likely to lead to strategic behaviour in identifying like products for those manufacturers who may otherwise be below that threshold.

50. *Profitable exports* - Another desirable criterion is where the dumped product is being exported at a price which covers the overseas supplier's costs and a reasonable profit margin plus the value of any identifiable input subsidies.

51. Here the key issue is to set a proper methodology for calculating a reasonable profit margin. It is important that the test looks at the realistic market situation and not aspirational profits. This should be the case wherever hypothetical profits are used in all elements of anti-dumping cases. This includes constructed value and lesser duty as well as public interest. While submissions on behalf of applicants for anti-dumping duties will typically call for aspirational profits, including targeted returns on capital, that is devoid of commercial reality and would ensure that anti-dumping will be a protectionist device when the economy experiences downturns.

52. It also flies in the face of the essence of the system. Anti-dumping action can only be legitimately taken where dumped goods truly cause injury to local industries. Authorities are encouraged to apply a lesser duty where they can be confident that this will remove the injury. Both the plain meaning and purpose of this provision would demand that the assessment be made within the conditions that prevail in the economy. For example, where lesser duty is concerned, the questions should be, but for the dumping, to what extent would the injury be reduced and what level of dumping duty would meet that target. Where public interest criteria are concerned, it is similarly necessary to look at a profit level that could be legitimately expected under the prevailing market conditions. The Commission should note and recommend utilisation of the principles identified in the European case of *European Fertiliser Manufacturers Association (EFMA) v Council of the European Union*, Case T-210/95 (European Court Reports 1999 Page II-03291) which held that under lesser duty analysis, the profit margin must be limited to the profit which the Community's industry could reasonably count under normal conditions of competition in the absence of the dumped imports.

53. There will also be a need to determine how identifiable input subsidies will be determined. Here the ASA remains of the view that issues of subsidy and dumping should not be too readily mixed.

54. *New technology* - The Commission argues that the Canadian criterion where imposition of measures could deny access to new technology, would have little practical value because of the types of products that have been subject to measures in Australia (p 87).

55. If the criterion is theoretically relevant, the fact that Australia has not seen actions in those areas should not prevent a comprehensive list of criteria. Furthermore, much may depend on how broad a like goods analysis is to be. The ASA has previously submitted that the test is too broad, encompassing differences in quality make up that should otherwise be segmented. An important national interest concern could arise where attacks on a broadly defined product prevent access to technologically improved versions of that product.

56. *Burdens and presumptions* - The Commission has also suggested that there should be a presumption in favour of a duty. The Commission recommends that "there is to be a starting presumption in favour of measures if there has been injurious dumping or subsidisation" (p 90).

57. It is important to consider what a starting presumption actually means. Once one of the specific criteria are demonstrated, e.g., exporters selling at cost recovery plus a reasonable profit, what is the meaning of the presumption?

58. This presumption is only acceptable if it simply means that there is not an onus on the local manufacturer to show that a measure is in the public interest. The real issue is not the presumption but the evidentiary standards and the framing of the test. The ASA is also urging that the analysis between public interest and core economic issues of causation and lesser duty be conducted concurrently and have to be consistent in their logic and rigour. Over concentration on the language of presumption might undermine the educative value if this coherence was achieved.

59. *Ministerial role* - At p 88 the Commission indicates that where "public interest considerations were judged by the Minister to outweigh the benefits from removing injury for the applicant industry, measures would not be imposed (the EU approach)."

60. It is not clear from the Draft Report whether this is what the Commission is actually proposing. It implies a cost/benefit comparison vis-à-vis the removal of injury for the applicant. Yet the Commission's outlined criteria where public interest is presumed to prevail do not call for such a balancing exercise.

61. Secondly, should it be something to be judged by the Minister in a political environment, perhaps not open to challenge, or should it instead be based on a conclusion by an independent economically expert assessor? The ASA strongly supports the latter. In particular the Minister should be shielded from ex parte lobbying if there is a residual discretion.

62. The Commission has queried whether such a change, which it generally supports, might be left until the system is bedded down. The ASA strongly opposes this view. A public interest test should be based on robust and objective economic analysis from the outset, otherwise it will quickly lose any respect it might otherwise have gained from participants. The more the reports of the bureaucrat carefully articulate the objective economic analysis,

the more apparently political any contrary decision by the Minister might be seen to be.

ASA response to other submissions with respect to public interest

63. TRTF opposes a public interest test. Its key arguments are that it would politicise the process and cause considerable delays (p11). It also asserts that it is too difficult to find what the public interest is. Other criticisms are that it is used infrequently, insufficient regard is given to the interests of consumers and end users, no real cost/benefit analysis is undertaken and better economic modelling would be more appropriate (TRTF p18). TRTF asserts that too much reliance is placed on the respondents to the application to provide evidence (TRTF p19). EU experience is that cooperation is poor from persons whose views are sought on national interest and often only unsubstantiated information is provided (TRTF p16).

64. These arguments, which all predated the Commission's Draft Report, should either not be accepted in their own right or are properly dealt with by the Commission's intended list of objective criteria.

65. NFF opposes emphasis on economy-wide impacts (p7). BlueScope suggests that a national interest test would of necessity be subjective and discriminatory (p23) which again was a comment made without knowledge of the Commission's objective criteria. It wrongly asserts that the lesser duty rule already works to "mitigate any adverse impact of the anti-dumping action on Australian purchasers of the dumped goods." (p24) This argument is also made by Orica (p13); ADFA (p6); and CSBP (p10). This is wrong because it only works on the producers, not the purchasers.

66. BlueScope suggests that if contrary to its preference, a national interest test was included, it should probably be taken by the Prime Minister following discussion in Cabinet (p48). A number also argue that the Minister already has a discretion whether to apply a duty which includes national interest considerations. The LCA submission shows that this is an uncertain issue of law (LCA p5-6). PACIA also opposes a national interest test as does CIF (p11) and CSR (p6). It erroneously suggests that such a test would not consider reliable supply throughout the supply chain. It also believes it would be subjective.

67. LCA supports a public interest test (p16) as does ACCI NSW. Both LCA and ACCI are naturally neutral organisations and their support should carry weight for that reason alone. Huntsman simply says that such a test needs to be even handed (p2).

68. BlueScope suggests that calculating economy-wide impacts would be complex, time-consuming and difficult (p50). It also suggests that there would be an arbitrary tipping point and uncertainty based on the time periods to be considered for national interest analysis (p50). For reasons articulated above, that should not be so as the Commission's laudable criteria logically integrate with the key aspects of causation and lesser duty that an optimal system should promote.

69. Most importantly, those who argue that it is impossible to calculate public interest should explain how it is still possible to show what truly causes injury and how to ensure non-attribution of non-dumped causes.

70. BlueScope asserts that the Canadian system adds a full six months to the process (p51). That will not be a problem in Australia under the Commission's model. A well set out system giving the bureaucrat appropriate skills and demanding concurrent consideration of causation, injury and public interest should add no additional time to the process.

71. The Canadian factors are listed at TRTF p20. TRTF argues that simply listing the factors would leave too much in the way of discretion (TRTF p21). This should be rejected as the Commission's criteria are not discretion-based. The most important way to minimise discretion is to remove any political determination.

72. Questions in Canada include whether the industry is viable, whether price increases can be passed on, and effects on employment. Importantly, TRTF notes that if market share of dumped imports will be taken over entirely by non-dumped but equally low priced imports, then measures would not be justified (TRTF p17). This is the exact situation in the steel sector. This could certainly be taken account of under the lesser duty rule as well as, or instead of a public interest regime. In any event, it is one of the Commission's criteria.

73. DFAT's original submission says it opposes mandatory national interest but does not say anything about discretionary national interest by the Minister. DFAT's submission predated the articulation of the Commission's criteria. It would be hoped that DFAT would support an excellent Australian initiative to put objective rigour into an important policy element of an anti-dumping regime. This is particularly so when the Commission's key factors effectively support existing Australian obligations under both anti-dumping and competition law. Once again it is hard to argue against the merit of factors that should be considered in any event.

ANTI-DUMPING AND COMPETITION LAW

What are the key competition issues?

74. One of the most significant remaining issues of concern for the ASA is the need to minimise the anti-competitive effects of anti-dumping procedures if they are to remain. The Commission's Draft Recommendations rely primarily on the introduction of a public interest test to minimise anti-competitive effects. While the ASA strongly supports such a test, other reforms are vital to ensure that the system is not unduly welfare-reducing and further, that the public interest test will operate in a harmonious way.

75. In that sense, the ASA suggests that the Commission's ultimate recommendations should better align with the Productivity Commission Inquiry Report No 33, 28 February 2005, in the Review of National Competition Policy Reforms. This was alluded to in the ASA submission at para 182 where the 2005 Commission Report was quoted for indicating "the potential for the inappropriate application of anti-dumping arrangements to jeopardise the benefits that wider trade and competition reform have

delivered, makes this one of the more important remaining trade policy issues to be addressed." The Commission is urged to make a comprehensive analysis and report on this issue. It is also crucial that the Commission gives full attention to the various suggestions of the ACCC from time to time in relation to the inter-relationship between mergers, anti-dumping and competition as cited in ASA submission paras 183-7.

76. The Gruen Review effectively concluded against the application of a national interest test, believing that substantive reform's key issues would suffice. In essence, the Commission's Draft Report does the converse, arguing that a public interest test means that significant reform of the details of the system may not be as important as it would otherwise be. For reasons articulated throughout, those conclusions are suboptimal, particularly in light of the Commission's laudable criteria which overlap strongly with the core elements of the existing system.

77. As indicated throughout our original submission, anti-competitive effects operate in a range of ways. First the applicants can be selective in the way they identify like products and relevant timeframes. Once an investigation is initiated, there is already a chilling effect as importers have to make an assessment as to the likely outcome and determining what if any part of the alleged injurious dumping margin they should seek to pass on to customers. Studies have also shown that the mere announcement of a possible application operates in a similar manner. The relevance of these studies is addressed below. ASA experience has identified instances where there are refusals to supply by local producers who nevertheless then bring anti-dumping complaints against the imports that must then be made as a result. The Commission has been invited to follow up these allegations.

78. Other examples include applications by producers who also import like products and ensure that their supply country is not included in the investigation. The Commission has been advised that this is the very thing that happened continuously in the steel sector.

79. A most significant anti-competitive element is the way non-injurious prices are set. To fail to give adequate attention to the market impact of non-dumped imports as price setters is wholly disadvantageous to the Australian economy when dumping duties are applied on inputs to further Australian manufacture as is the case with steel. A further significant distortion occurs when aspirational profits are included in setting non-injurious prices.

80. Another competition law issue is misleading and deceptive conduct where for example a local producer says one thing to ACS and another thing to the share market. The problem was articulated in great detail in an appendix to the ASA's original submission.

81. Another anti-competitive concern relates to who actually bears the burden of any anti-dumping duty. The greater the market power of the exporter, the more it will contractually direct that potential liability is the responsibility of the buyer.

82. An examination of the literature would show an abundance of arguments and data on the need for a proper interface between competition and anti-dumping policy. Again, the relevance of this literature is discussed below. Competition authorities in other jurisdictions tend to have a greater

involvement in monitoring anti-dumping activity. The ACCC has made submissions to the Productivity Commission which in turn calls for a broad review of the anti-dumping regime in Australia.

83. Each of these elements is addressed in specific sections below, but at the outset there is a need to urge the Commission to analyse these issues fully and recommend appropriate policy responses. In order to do so, the Commission is asked to complete a more fulsome analysis of the anti-competitive elements of the system. Even if it was legitimate to limit attention to "framework" issues, all of the matters considered in this supplementary submission should be seen in that light.

84. Returning to general notions of the anti-competitive effect of anti-dumping regimes, here it is important to break up the analysis into sub-elements.

85. The first aspect is the generally negative effects on the economy of anti-dumping activity. The original submission pointed to a range of studies showing that significant negative impacts arise not only from positive findings but also negative findings, mere applications and even the mere presence of the system. While the Commission's Draft Report concluded that there was a generally negative effect on the wider economy from anti-dumping activity in Australia, it considered this to be relatively small and not worthy of any attempt at computation. Such a conclusion should not be supported analytically, is not consistent with foreign literature that should be seen as being at least relevant to Australian policy formulation and is not consistent with the Commission's express terms of reference where final government decisions could only be expected to be based on full use of the Commission's investigative and research abilities.

86. Appendix A to this supplementary submission includes an expert opinion from a leading Australian international trade economist, Professor Pasquale Sgro, that supports the ASA contentions in that regard and which would justify the Commission in undertaking a detailed analysis. This is particularly important given the Commission's ultimate conclusion that the system should be maintained, simply because it presumed that the political economy benefits might well outweigh modest welfare losses. If there are only guestimates at the level of losses, and no analysis of the level of benefits, the welfare conclusions cannot engender sufficient confidence in government decision makers.

87. The second aspect relates to the potential for strategic behaviour by those with market power in their use of the anti-dumping system.

88. While the Commission accepted the potential for this to occur, it alluded to a number of reasons why it believes this would not be prevalent. This no doubt is the reason why the Commission made no recommendations to minimise strategic misuse.

89. This approach is problematic for a range of reasons. First it is not consistent with the Australian experience. As far back as the Gruen Review, Treasury was reported to have pointed out that there are "grounds for concern that anti-dumping action which restricts import competition can remove or weaken the constraints on the abuse of market power by domestic monopolies….(Gruen 1986: 7.1.5) Second it is not consistent with intuitive logic about the likely behaviour of those with market power. Third it is not consistent with foreign

literature which both analytically and empirically confirms the presumptions about the likely behaviour of those with market power. Fourthly, it is not consistent with the experiences and impressionistic observations of key ACCC office bearers from time to time.

90. For the foregoing reasons, if the system is to have a well thought out economic framework, it should dissuade such strategic behaviour wherever it may arise.

91. Once again, Professor Sgro's expert report in Appendix A addresses these issues.

92. The Appendix to the ASA's original submission sought to further elaborate on ASA experience in this regard. It should be recalled that the ASA submission urged the Commission to use steel as a case study and offered ASA time and resources in support of this. While Commission staff have spoken to ASA officials for which we are grateful, it is disappointing that a case study was not undertaken. As previously noted, examining all aspects of the three HSS steel anti-dumping cases provides for an excellent case study. We have a monopolist local supplier who has the vast majority of the total market, controlling dedicated distribution chains, in some cases refusing commercial supply and then bringing repeated unsuccessful actions against ASA members, with in some cases residual duties primarily for those who did not get involved in defending the application, on a product where at times the local producer operates at close to full production capacity, where it produces to a higher standard, and where it imports exclusively from certain jurisdictions and does not target them with anti-dumping applications. The product category is also one of the few where the ACCC did not call for undertakings as to damages as a condition of the OneSteel and Smorgon Steel merger.

93. While the Commission at the public hearings was perfectly justified in urging interested parties to present direct evidence of the Australian experience, it is hard to identify what the Commission could legitimately expect from ASA members. It is important to understand how difficult it is for the target of alleged strategic behaviour to produce direct evidence of it besides outlining the events in individual cases. The only direct evidence is conscious decisions taken by those bringing applications. Such persons will hardly provide evidence to their targets.

94. Nevertheless, strong inferences can be drawn from the repeated unsuccessful HSS cases within the above described scenario. It must be seen as an appropriate cost/benefit strategy by the company, otherwise why would they keep bringing actions? This confirms comments made elsewhere about the relative cost imbalance between monopolistic applicants and dispersed respondents to anti-dumping applications.

95. An examination of the applications in those cases shows how wild the allegations of dumping margins often are. Whether this is consciously strategic or mere poor quality analysis makes little difference to the anti-competitive impact and the need for a policy response.

96. The earlier Appendix also articulated some of the key examples where OneSteel provided comments to the Australian Stock Exchange that are hard to reconcile with comments made to Customs authorities as part of the anti-

dumping investigation. Analytically, there are obviously some incentives for this to occur. If the problem already exists in one key sector of one key industry which regularly uses anti-dumping laws in Australia, and if that behaviour is consistent with analytical logic and foreign experiences, then the Commission should only conclude that there is a legitimate problem worthy of a solution. Just because other industries have not chosen to embark upon such behaviour or have not yet rationalised to similar monopolistic levels still means that the problem is a real one, albeit one of potential rather than eventuation. We should not wait for systemic abuses to eventuate before considering disincentives to them occurring.

97. The third element of the anti-competitive effect is where key settings within the system lead to anti-competitive biases. Examples alluded to in the ASA original submission include setting of non-injurious prices based on applicants' profit aspirations rather than realistic market conditions.

98. Here it is most disconcerting that the Commission has taken the view that many of these elements are simply matters of judgment where reforms would possibly lead to increased complexity and uncertainty. Firstly, all of the literature shows that much can depend upon the way a particular system is implemented, both in terms of its rules and regulations and also its administrative processes and resourcing. After all, the Commission rightly rejected the introduction of the American zeroing methodology which is an inherent protectionist bias. Anti-dumping regimes are riddled with other features where there is a vast difference between optimal and suboptimal drafting and processes. Such a conclusion, if permissible, should at least be evidence-based. (Banks, 2009) Banks (1993:196) noted at the time that most of the international debate was focused on the rules and procedures with the concern being "to tighten up the rules and procedures to prevent or limit the use of anti-dumping activities as a protectionist, instead of a fair trading, device." Economists may at times suggest that amendments to the detail are not the first order of priority but tend to do so in the context of overall criticisms of the system per se. If the presumption is that the system is to remain "(t)inkering with the procedures and criteria for taking anti-dumping action can help reduce its protectionist tendency …" This was also discussed t the Gruen Review.

99. Furthermore, there is no reason to consider that changes would lead to complexity and uncertainty. Quite the contrary. Many of the suggested changes made by the ASA would greatly simplify the process. A most important one where strategic behaviour is concerned is to simply recommend that Australia adopt what is already permitted in the WTO Anti-Dumping Agreement, and which is applied in the European Community, to allow Customs authorities to exclude producers who also import. That is a simple and effective reform option addressing a clearly observable legitimated abuse of market power problem in the steel sector.

100. A further example relates to the crucial area of causation analysis. The ASA's submission (paras 33-4) points to clear and compelling reasons why domestic producers are able to command a significant price premium in certain industries. That ought to have raised the most significant policy concern for the Commission. It is perfectly natural, because of such advantages as the absence of the need for foreign shipping, closer geographical proximity to customers and the like, that competitive imports will have to be priced significantly lower just to be in parity with those price premium advantages.

Yet the Commission is aware that Customs looks at mere price undercutting as the key proof of causation of injury in many cases. The Commission should not allow the system to be maintained in this manner.

101. In addition, a proper and comprehensive analysis of even one key industry as a test case would show that pricing decisions are often not truly undercutting by imports, but instead, involve local manufacturers keeping abreast of import prices and simply adding a premium that would still meet their market share targets. This is particularly important as the Commission has found that the key industries affected are those dealing with important input goods for further manufacture where those industries are typically monopolistic or oligopolistic industries.

102. The Commission should not let the opportunity slip to address such important systemic concerns.

103. Finally, a very important related question in terms of the anti-competitive effect of the system is to integrate it properly with Australia's competition law regime, including its market abuse and merger situations.

104. This Commission Inquiry is a once in a generation opportunity to consider optimal anti-dumping policy. Furthermore, experiences in the competition arena have led key personnel at the ACCC to consistently comment about the need for better integration. Whatever the Commission's ultimate conclusion, the matter should be addressed in a properly researched and reasoned way. That is the only way effective advice to government can emanate from this inquiry.

105. For the foregoing reasons, the only reasonable conclusion is that these are important framework elements of a well-drafted system and the Commission is urged to make an appropriate analysis and conclusion on each of these issues.

Historical governmental and ACCC concerns

106. The chilling effect of a mere initiation of an investigation has long been acknowledged by economic researchers in other jurisdictions and has been expressly acknowledged in the Australian Parliament by the relevant Minister in second reading speeches. For example, in the second reading speech introducing the Customs Legislation (Anti-Dumping Amendments) Bill 1998, the Minister said:

> "… the government recognises that anti-dumping and countervailing investigations and reviews can be disruptive for all interested parties. Investigations may give rise to trade chilling effects, which are to the detriment of exporters, importers and consumers alike. Australian industry views such investigations as creating uncertainty within the marketplace which may delay investment decisions thereby retarding their economic development and overall efficiencies."

107. That view has been reiterated by DFAT in submissions to Doha Round negotiations.

108. The Treasury comment to the Gruen Review is again noted.

109. The ACCC has taken an active role in trying to prevent companies from using anti-dumping claims for frivolous or vexatious anti-competitive purposes.

110. In October 2005 the ACCC stated when not opposing Capral Aluminium Limited's proposed acquisition of Crane Group Limited's aluminium business that "The ACCC will continue to monitor import levels in the aluminium extrusion industry and any anti-dumping claims in relation to aluminium extrusion imports."

111. In 2004 the ACCC lodged a further submission to the Productivity Commission's inquiry into the national competition policy (NCP). The ACCC suggested that competition law reform encompass "allowing the ACCC to appear at anti-dumping hearings where the competitive effects of imports were cited in merger applications".

112. In 2002 ACCC accepted court-enforceable undertakings from Nufarm Australia Limited and Monsanto Australia Limited (and later Monsanto Company) that prevented the two companies from making an application for a review of the Minister for Customs' decision February 2002 to not impose a dumping duty on glyphosate imported from China.

113. Professor Allan Fels said "the ACCC's market inquiries revealed that Monsanto's failed anti-dumping application had already had a negative effect on import competition and that any review of the Minister's decision would be likely to cause further disruption to competition, especially given the length of the review process… The ACCC was concerned that any review would undermine the competitive constraint imposed by actual and potential import competition."

114. The Undertakings stipulated that for the next three years Nufarm and Monsanto had to obtain an opinion from an independent adviser regarding the prospect of success of any proposed glyphosate anti-dumping application prior to lodging such an application. There was also a stipulation that the independent adviser must certify that the proposed anti-dumping application is made bona fide and not frivolously or vexatiously. The independent adviser must be approved by the ACCC and consult with the ACCC in forming their opinion.

115. In 2001 the ACCC accepted court-enforceable Undertakings form PaperlinX Limited. PaperlinX agreed in the undertakings to a process for assessing the merits of future anti-dumping complaints PaperlinX proposed to make under Part XVB, Division 2 of the Customs Act 1901 in the three years from the date of the divestiture.

116. In making its decision to include a provision in the undertakings for independent assessment of PaperlinX's anti-dumping applications, the ACCC had regard to concerns in the industry that previous anti-dumping applications lodged by PaperlinX had had a negative effect on competition. The undertakings provided that for the next three years PaperlinX must obtain an opinion from an independent adviser regarding the prospect of success of a proposed anti-dumping application prior to lodging such an application. The undertakings also stipulated that the independent adviser must certify that the proposed anti-dumping application is made bona fide and not frivolously or vexatiously.

ASA experience in the steel sector

117. The ASA involved itself in the voluntary assessment of the merger between OneSteel and Smorgon Steel. It argued that there needed to be appropriate undertakings in relation to the anti-dumping activity before the merger should be allowed to proceed. While the ASA was successful in obtaining valuable undertakings in relation to a wide range of steel products, unfortunately the merger parties made a strategic decision to have a preliminary determination made about pipe and tube. For a range of understandable political economy reasons, the ASA was unable to muster sufficient evidence of anti-competitive impacts absent import protection to engender an undertaking in relation to that product. Importantly, the ACCC conclusion was based on its assessment that there were sufficient alternative exporters regardless of how unfair or abusive anti-dumping action might conceptually be. In due course the ASA explained why that was a simplistic conclusion, in particular given the small size of the Australian market, the peculiar specifications in relation to some products calling for special tooling or other equipment and the lead time problems in developing a reliable long term relationship with a quality supplier. Regardless of whether the ASA was right or not in its assertions to the ACCC, the point to note for the Commission's inquiry is that in the most recent relevant merger, the ACCC considered this a vital matter and made the ultimate merger conditional on anti-dumping undertakings.

118. In this regard it is particularly important to understand that the ACCC, unlike the Commission, is not trying to identify optimal anti-dumping policy. It is only concerned with anti-dumping activity where it would substantially lessen competition in the context of a merger. No matter how little respect the ACCC might have for anti-dumping as a regime, if it does not conclude that there is a substantial likelihood of lessening of competition, perhaps because individual importers and exporters will suffer greatly but alternative suppliers will readily present themselves, it takes no interest because it has no statutory mandate to do so, unlike the Commission in relation to this inquiry.

119. These are thus all important considerations for the Commission in this inquiry and matters as to which it is in a unique position to address. This is particularly so given its ultimate concern for political economy questions.

Foreign literature and transferable economic logic

120. Once again the literature provides adequate proof that unmeritorious applications are often brought for strategic reasons based on the knowledge that they immediately provide market benefits to the applicants. While detailed studies have not concentrated on the Australian system, the adverse impacts are likely to be higher in Australia than in other key anti-dumping user countries. This is because we are a relatively small target market in those fields where most anti-dumping action is taken. It is commonly the case that once an application is accepted, foreign exporters simply cease to supply to Australia, being unwilling to be dragged into such a time-consuming and expensive process when such a small part of their production is involved.

121. Once again, reference is made to the expert opinion of Professor Sgro in Appendix A and the importance of giving proper attention to foreign literature and considerations as to why it may or may not be a pointer to likely implications in the Australian economy.

122. Consideration of foreign experiences should also indicate necessary concerns of the Commission. Importantly, where competition law issues are concerned, the incentives for anti-competitive behaviour would operate in any market economy.

123. There are a range of issues to consider. This supplementary submission is not intending to be comprehensive as the primary aim is to convince the Commission to undertake the analysis in this arena.

124. One issue is whether self-serving assertions made to Customs authorities can or ought to give rise to competition law liability for abusive behaviour or misleading or deceptive conduct.

125. In the early sixties, two rulings by the U.S. Supreme Court established the Noerr-Pennington doctrine, which afterwards became the defining feature of the interaction between antidumping and antitrust in the U.S. legal system. (*Eastern Railways Presidents Conference v Noerr Motor Freight, Inc*, 365 U.S. 127 (1961); *United Mine Workers of America v Pennington*, 381 U.S. 657 (1965)) This doctrine is based on the First Amendment right of citizens to petition the government and to participate in the legitimate processes of government (Jones, Lee and Shin, 2001). Accordingly, the Noerr immunity protects private actors from antitrust liability for lobbying and other attempts to influence government action, even when those efforts are intended to eliminate competition or otherwise restrain trade (Von Kalinowski, 2001). However, as Davidow (1999) noted, "… the Court has also stated that this privilege may be lost if the antitrust plaintiff proves it was injured competitively by means of a pattern of knowingly baseless litigation motivated by a desire to injure rather than to prevail on the merits" (p. 2).

126. These issues are just as important in Australia, but without the treble damages of US antitrust law, there are not the same incentives to bring cases. Indeed there is a greater disincentive to doing so given the uncertainty of the law in Australia. This inquiry could add clarity, not confusion, by making a direct assessment of the problem and providing an appropriate solution.

127. Another situation arises where anti-dumping actions are a means to abuse a dominant position, perhaps to promote a cartel.

128. Cases such as the abuse of dominant position by soda ash producers in Europe and the ferrosilicon cartel in the United States show that the primacy of competition policy is undisputed whenever the authorities detect illicit practices fostered by antidumping measures. In December 1990, the European Commission imposed a series of fines on soda ash producers that varied from ECU 7 million to ECU 20 million, as a result of an investigation started in March 1989. Those firms were involved in concerted practices that restricted the distribution of soda ash in the European market. One instrument supporting such practices was an antidumping duty that blocked import competition from the U.S. and Eastern Europe. During the investigation, the Commission initiated a review proceeding of that antidumping measure, which was suspended in September 1990 (see Bourgeois and Demaret, 1995). The ferrosilicon case was similar (see Pierce, 2000). In 1996, the three largest U.S. producers of that metal were convicted of conspiring to fix domestic prices. At the time, the American ferrosilicon industry was composed of only six firms, which were enjoying the benefits of several antidumping measures enacted since 1993 against exporters from Brazil,

China, Kazakhstan, Russia, Ukraine and Venezuela. In August 1999, the ITC finally realized that these measures were taken under “the erroneous belief that the U.S. ferrosilicon market was competitive and price sensitive” (ITC, 1999, p. 3), and revoked them.

129. Once again in the Australian situation where there would be the same incentives for abusive behaviour but far less in the way of bureaucratic resources to police cartels, unless there are strong incentives for individuals to bring actions or divulge collusive information, this inquiry is an ideal and unique context to consider this important issue and try and promote a solution before inevitable problems arise.

130. Creighton et al (2005) provide a compelling case for policy-makers to be concerned at areas described as “cheap exclusion” where those having market power can seek to unilaterally exclude competitors with relatively cheap means, as opposed to expensive price predation.

131. A number of submissions confirm the need for Australia’s anti-dumping policy to work in tandem with our merger policy that now allows sole producers of key input goods. In addition to the steel industry, similar results are being found in chemicals and plastics, e.g. Qenos submission which indicates that it is now sole local manufacturer of polymer products (p2). The same is true with CSBP Limited, owner of Australian Vinyls Corporation, the sole Australian manufacturer of PVC resin (CSBP p1). Huntsman also suggests it is the only local producer of certain chemicals.

132. Given that the Commission is concerned to promote competition within Australian industry, in any situation where there are important input goods made by a sole local manufacturer, viable imports competitively priced, are a necessary element of the economy and are a precondition to efficient value-added industries using those input goods.

The need for import competition with monopoly and oligopoly sectors who also import

133. At p 30 the Commission notes that it is common in many of the industries using anti-dumping for producers to also import products to complement their locally manufactured ranges. The Commission notes our concern that this increases the scope for strategic use of the system but concludes “it may more generally have discouraged recourse to anti-dumping measures.”

134. There is no compelling evidence for the Commission to make such a conclusion. It would only be logical in cases where the producer imports from a country that it would have to target with an antidumping application. This should be the least reform recommended by the Commission but it is not presently the case. Because importers such as OneSteel can target countries other than those that they import from, the analytical potential for strategic use is consistent with the reality, being OneSteel’s repeated attacks on HSS. The Commission is urged to address this contention with a proper evidence-based inquiry and form a conclusion based on its investigations.

135. The Commission has also not addressed the ASA submission paragraphs 195 to 202, 310 to 341, and 303-4.

Solutions to competition issues

136. There are a number of possible solutions that the Commission should consider. At this stage the ASA does not seek to rank these solutions but merely seeks to deal with the primary requirement being to convince the Commission that there is a significant policy issue that requires some response. Brief details are provided as to each and the ASA would be delighted to have an opportunity to give ongoing assistance to the Commission in exploring the alternative options.

137. *Apply TPA to anti-dumping actions (eg abuse of market power, section 52 etc)* - Here the Commission ought to give consideration to liaising with the ACCC about the optimal means of doing so. Australia should follow the lead of other jurisdictions that are beginning to ensure that competition authorities and competition principles take precedence over anti-dumping actions.

138. *Exclude manufacturers who import* - The WTO Agreement allows customs bureaucrats to exclude from consideration, applicants who also import the goods under consideration. This should be recommended.

139. The application forms should try and draw out all of the important information that could reasonably be asked of the applicants. This is not the case at present. The Australian form does not ask complainants whether they import like products or whether they are affiliated with corporations that do.

140. That information is also highly relevant for other aspects of the analysis. A local manufacturer that also imports may need to explain why its loss of manufacturing market share is not caused by its own import behaviour. Another possibility is that its own imports should set a non-injurious price. Questions might need to be asked whether its own imports are also dumped and why in some circumstances an application is brought against other countries and not the country from which imports are made. In some circumstances, this could raise issues as to whether the anti-dumping regime is intentionally or accidentally being utilised in an anti-competitive manner.

141. *Require manufacturers who import to also target countries they import from* – Alternatively, local producers might be required to include their own supplier countries in any application.

142. *Alternatively make manufacturers who import set price ceiling via import prices (e.g. cap NIFOB)* - Another alternative would be to ensure that the import prices set by the manufacturers bringing applications for anti-dumping duties set the ceiling for non-injurious prices. It is decidedly suboptimal if the anti-dumping system allows them to force other importers to price significantly higher than their own imports.

143. *Moratoria and penalties after unsuccessful applications* – An examination of the historical data on how many applications are brought from time to time in key sectors is likely to demonstrate a particular problem with multiple applications and their disruptive effect on the Australian economy. As suggested above, there ought to be some procedure to limit repetitive unsuccessful applications.

144. The ASA submitted that there should be a 12 month ban on new applications and further there should be sanctions for inappropriate applications along the lines of the damages undertakings given in the OneSteel/Smorgon merger.

145. During the Doha Round, a suggestion was made at Seattle that “no investigation shall be initiated for a period of 365 days from the date of finalisation of a previous investigation for the same product.” (Didier, 2001:33, footnote 1). Such a reform would help prevent abusive applications and allow certainty of investment decisions. It would also provide greater equity with the time limits on review of imposed measures.

146. The Commission has rightly suggested a moratorium after a revocation of a duty. If a duty which was originally found to be justified should have this policy element, a matter on which the ASA strongly agrees, the logic should be even stronger with unsuccessful applications.

147. TRTF argued against freezes on reapplication. It suggests that if a new application was made on the same substantial grounds then Customs would be able to have regard to the information from the previous application and reject the new one (p36). This is not accurate as a new application, for example, six months later, has different time periods.

148. Careful consideration also needs to be given to using statutory penalties in relation to false and misleading information to ensure applications and indeed submissions by all parties are accurate and open about all relevant data necessary for consideration. Here again it is appropriate to consider the integration of the anti-dumping processes with trade practices penalties.

CORE REFORMS

149. As noted throughout this supplementary submission, even if the system is to remain, the Commission should at least recommend that the system be comprehensively revised to minimise the most significant protectionist tendencies.

150. The Commission suggests that it would be possible to amend the legislation to deal with some of the situations but given the way the WTO Agreements are structured, the public interest test offers greater flexibility in making those changes (p 87).

151. These are not mutually exclusive. Changes to causation analysis and lesser duty rule policy would support the recommendations they have made in relation to national interest. Absent changes, there will be inefficient clashes between primary analysis and public interest analysis.

152. The Commission notes that participants have suggested a large number of changes to the current assessment criteria and administrative arrangements (p 94).

153. Notwithstanding that common view in the submissions, the Commission concluded that there are a number of reasons for limiting the number of changes beyond the introduction of a bounded public interest test. The Commission suggested (p 94)

(a) the very nature of the current assessment requirements mean that their application will inevitably involve considerable judgment. In its view it was “far from clear” whether there would be a material payoff from many of the suggested requirements. It suggested that “adding more layers of complexity to assessments” may result in little real improvement.

154. That conclusion should not be supported without a detailed analysis. In most cases we were not advocating adding more layers of complexity. We were advocating making the existing law clearer and more consistent with good economic or accounting sense. For example, a sensible causation analysis is to be preferred to one that is unjustifiable in economic theory. Excluding applicants who import is simple and good policy.

155. Such an indeterminacy hypothesis could only be correct if there were no differences in systems depending on the way the laws are written or the administration is established. That goes against the findings in a whole range of studies.

156. For example, as noted in the ASA original submission, Lindsay and Ikenson (2002) found extremely high dumping margins based on excessive use of facts available. A bureaucrat who adopts this approach in an unconstrained manner would accept self-serving assertions from the local applicants. The point being made is not that this is a particular problem in Australia but rather, that the way the system is established is crucial to its ultimate level of fairness and efficiency.

157. A failure to recommend changes to remove ambiguities or protection of biases within the system goes against the conclusion of the Gruen Review (cited ASA submission para 204) that changes were needed to “discourage too extensive use of the anti-dumping system as a more readily available system for restricting imports.” (Gruen, 1986:iv)

158. Conclusions that there would be little significant benefit from detailed changes also go against Banks (1990) who noted that incidence figures may be impacted upon by changes in legislation or interpretative practice.

159. The fact that judgment is required also does not mean that different models will not have different cost/benefits.

160. Making significant improvements in the public interest arena without significant improvements in the balance of the system would be a classic second-best scenario whose value could not be presumed without a rigorous cost/benefit analysis.

(b) Constraints by WTO agreements. PCDIR p 3 asserts that some reforms which might otherwise offer the prospect of better outcomes for the community are prevented by Australia’s obligations under the WTO Agreements.

161. If that is the case, the Commission should articulate just which reforms it would otherwise recommend. At the very least that would provide guidance to DFAT about desirable aspirations during the Doha Round. In any event, the WTO agreements do not constrain any of the submissions seeking to remove the protectionist biases within the system. All of the reforms recommended by

the ASA were fully WTO compliant. At times reform bodies might query whether something may be inappropriate but proper legal analysis would show that reforms can be concluded in a way which fully meets Australia's international obligations. Further advice could be sought from DFAT in relation to any of these reforms that would otherwise be desirable.

(c) The Commission also asserts that a large number of changes to the detailed requirements would make it harder to simultaneously bed down the new public interest test and discern its impacts at the time of the next review (p 94).

162. That should not be a concern. As noted, other changes need to be made to improve the system and to make the existing provisions consistent with the economic methodology and rigour of their proposed public interest test, otherwise one will undermine the other. As noted, doing one without the other creates a classic second-best scenario. There is no compelling logic to the view that a public interest test is so unique and difficult to bed down that it needs to be made a distinct priority. For reasons articulated throughout this submission, the reality is to the contrary, with the public interest test as proposed by the Commission being a natural corollary of key elements of an optimal system.

The role of past inquiries

163. It is also not the case that other inquiries dealt with details adequately and that the Commission should therefore take a more limited framework approach. PCDIR at p 15 notes that there has not been a root and branch examination of the system for more than 20 years and a comprehensive review has subsequently been called for.

164. The Gruen Review urged reforms of the detail but did not engage in a comprehensive analysis, presumably hoping that improved normal value calculations would be a major improvement. Over 20 years on from that Review, many of the concerns in that report are still prevalent, not the least problems of injury and causation analysis. The Willet Review was concerned with speeding up the process and should be seen as having inappropriately skewed the system towards speed over economic and accounting rigour. Again it did nothing to deal with improving the economic rigour in essentially economic questions or dealing with the general anti-competitive and competition law integration issues. The Joint Study was not mandated to consider any policy issues. That was also a flawed process that did not follow the open inquiry and comprehensive analysis of a typical Commission reference.

165. The ASA thus invites the Productivity Commission to complete its mandate under Point 3 of its Terms of Reference and consider the most important elements of the system, namely, determination of dumping/existence of subsidies, assessment of injury, establishment of a connection between dumping/subsidisation and injury and determination of appropriate measures. These are addressed below.

CORE ECONOMIC CONSISTENCY REFORMS

Like product

166. The Commission suggested that it did not see these requirements as contributing to materially flawed decision making (p 95). Hence the Commission does not specifically address ASA Recommendation 19 that the like goods test should limit the analysis to truly competitive goods and the related elements of ASA Recommendation 20.

167. The Commission has only addressed issues of alleged inflexibility but has not sought to address the central economic question namely, what should the general policy approach of a like goods test be? Given that the only way a dumping duty can validly be imposed is if dumped goods cause material injury, to investigate goods that are not competitive is a waste of resources and will be highly problematic if mechanistic assessments lead to findings of injurious dumping from some parts of the product category. Overly broad like goods tests waste resources and/or provide protection where it is not desirable.

168. Conversely, overly narrow tests might at times be a basis for strategically inflating the dumping margins.

169. Customs should thus be directed to take a narrower and more market based approach to the determination of what are like goods. That is the position proposed by Hoekman and Mavroidis (1996:49) who suggest that there is a general "need to apply economic analysis and concepts, including basic factors such as cross-price demand elasticity … A proper definition of the relevant market in accordance with economic considerations should be a starting point of anti-dumping investigations."

170. The problem is best explained by the *HSS* cases. Structural grade pipe and tube does not truly compete with non-structural grades. A customer that has no need for structural grades, has no reason to pay the premium that they command. Yet Customs has lumped all of these together in a number of anti-dumping investigations. We have made this point strongly in submissions and have invited the Productivity Commission to use the steel industry as a case study. Our offer has not been accepted to date.

171. The issues were important to a range of submissions. TRTF calls for more consideration of "actual end use" in determining like goods (p24). DCAL also supports this (p3), as does Hudson Trade Consultants (Hudsons) (p3). CSR also refers to an instance where Customs considered products to be like products when an industry would have differentiated based on production processes (p4). It also believes end users should be canvassed. Hudsons suggest that Customs use panels of experts to assist them.

172. TRTF supports Customs' approach of putting out policy papers calling for submissions before individual like product decisions are taken. Far more important is the need to have justifiable and narrowing criteria.

173. Another point is that cumulation becomes easier if broad notions of like goods are utilised. In turn such cumulation makes findings of material injury more likely.

Normal value

174. The Commission suggested that there was agreement that calculations of the variable factors have insufficient regard to established commercial trading convention and that the black box nature of the calculation process is of significant concern (p 101).

175. In dealing with the allegation about established commercial trading conventions, the Commission only alluded to manufacturing interest submissions and not our submissions about more robust economic and accounting approaches.

176. The Commission suggested that the criticisms "have intrinsic merit". Nevertheless, it concludes that changes could introduce considerable new uncertainty and complexity and have offsetting effects.

177. For the same reasons as articulated above, that is the kind of question that the Commission should test as against particular reform suggestions. There is no reason to presume that insights from cost accounting and other fields would lead to uncertainty and complexity. The converse is almost certainly to be expected.

Adjustments

178. Article 2.4 of ADA requires due allowances for differences which affect price comparability, including differences in level of trade. Article 2.4.1 ADA also allows for adjustments where there are "sustained movements in exchange rates …".

179. Once again there will be a trade-off between fairness and simplicity. It would be more desirable to promote fair estimates even on modest information, rather than to impose dumping duties in the absence of consideration of commercial factors worthy of adjustment.

180. Appendix B contains a case study in relation to adjustments for differential hot rolled coil prices in the steel sector. A failure to make such adjustments will significantly flaw an anti-dumping analysis. Once again, while there may be differences of opinion about questions of policy, legal interpretation and factual analysis in individual instances, the key point is that absent fair and efficient adjustment mechanisms in an anti-dumping regime, its negative welfare effects are likely to be significantly increased and the incentives for strategic misuse rise significantly. Clarifying the basis of adjustments based on appropriate reference to cost accounting and world's best practice can only aid in removing uncertainty and complexity. The very need to make submissions such as that contained in Appendix B from time to time, proves the current system contains significant uncertainty and complexity.

Currency exchange and conversion

181. The Commission is urged to give attention to the problems of exchange rate fluctuations that will inevitably lead to technical dumping. The ASA submission alluded to the study by Knetter and Prusa (2000) that showed the statistically significant impact of real exchange rates on anti-dumping filings in

a range of countries including Australia. The Gruen Review also alluded to this concern. Optimal policy should not lead to people being caught up in an anti-dumping system simply because of currency fluctuations over which they have no control. This is hardly an example of unfair trade. Furthermore, such a system should not allow local manufacturers seeking to make strategic use of anti-dumping provisions to merely wait for likely exchange rate fluctuations and time their applications to maximise the chances that an anti-dumping duty will be imposed.

182. Currency issues arise in two broad ways. The first is to make the actual conversions necessary so that comparisons of export price and normal value can be made. Where calculations are concerned, key unresolved questions include what is the appropriate date of sale? Is it the shipment date or the contract date? This is still being debated within the Australian system. If the Commission does not take the opportunity to address these issues in this inquiry, it will be left for someone to litigate the matter, perhaps at the very least to the Full Federal Court, to engender a ruling. Even then the parties adversely affected may lobby the government for legislative amendments. A more ideal solution is for the Commission as a neutral assessor, to recommend optimal policy.

183. The second key issue relates to the appropriateness of adjustments for currency fluctuations to make comparisons a true reflection of whether there is any unfair price discrimination. In *US Stainless Steel Plate and Strip from Korea* (22 December 2000) the Panel considered that the depreciation of Korea's currency meant that pre- and post-evaluation sales were not comparable (Para 6.109). An overriding policy question is whether anti-dumping action should be permissible if dumping only arises from cyclical currency fluctuations beyond the control of interested parties.

184. Allowances for currency exchanges can also be a problem where corporations have forward cover over a broad range of transactions and where it is not easy to link to particular shipments. (Didier, 2001:43)

Dumping margins

185. The Commission has not responded to ASA Recommendation 26 in relation to the calculation of residual margins for exporters not investigated.

186. The Commission has not responded to ASA Recommendation 27 that exporters should not be branded unco-operative simply because they have tried but failed to meet the time and evidentiary standards in questionnaires and the related recommendation that WTO provisions as to residual dumping margins should be complied with.

187. Once again these are important systemic concerns where independent economic analysis could ensure that the system minimises its protectionist tendency. Yet again if political economy considerations are the only basis for retention of the system, the imbalances between applicants and foreign suppliers in being able to respond effectively to the administrative processes must be acknowledged in setting key policies and procedures.

Material injury and causality

188. As noted throughout, causation analysis needs to be looked at alongside the lesser duty rule and the specific factors recommended by the Commission in relation to a national interest inquiry if the latter reforms are to be coherent and respected. If high quality causation and lesser duty analysis are not prevalent, this will conflict with and probably undermine the public interest test.

189. The Commission concludes that the assessment of injury and causality is an area "where judgment is paramount" (p 107). It believes that "at best, legislation … can shape and somewhat constrain the degree of judgment required …" It considered some of the criticisms of Customs assessment as not particularly compelling but only alludes to criticisms made on behalf of domestic manufacturing interests. It concludes that it is not intending to make any explicit recommendations in regard to the assessment of injury and causality.

190. As a result the Commission has not addressed ASA Recommendation 31 that it should develop an appropriate economic causation test and consider the best adjudicatory system within which it should be employed.

191. It cited two submissions that opposed domestic manufacturing interests, namely the Law Council of Australia and the Law Institute of Victoria stressing that loss of market share and price undercutting or suppression do not of themselves constitute injury and the ASA submission that Customs too readily relies on two-dimensional correlations that do not prove causation.

192. Each of these submissions should have had economic analysis from the Commission to either confirm or refute them. If confirmed, there is no reason for the Commission not to recommend changes. Either appropriate changes would remove judgment or at least make the judgment consistent with good economic logic. It would also make the domestic legislation and administrative practice consistent with Australia's international obligations which indicate that there must be a causation analysis and factors other than dumping that cause injury should not be attributed to the dumped goods.

193. The Commission concludes that for the time being the preferable approach is to increase the accountability of those involved in the assessment and decision making process through better public reporting on the outcomes of investigations and the basis for findings and recommendations (p 108). It is not clear why better reporting of flawed economics will help.

194. Even then this is problematic given the real concern with claims to confidentiality. How does the Commission envisage improved reporting, ideally prior to decisions being made in the hope that increased transparency will improve the quality of those decisions?

195. In any event the quality of the judgment would be improved if a person with sufficient economic expertise was the one asked to make the judgment.

196. One of the weakest aspects of Australia's regime when compared to world's best practice is the ease with which causation of injury is found, where there is evidence of both dumping and injury already existing. ASA members have not generally faced this problem, simply because of their success in

defending allegations of dumping and injury. Nevertheless it is vital to have a proper causation analysis in the event that adverse findings are made on dumping and injury.

197. The Commission noted that in recent years almost all products subject to new anti-dumping measures have ostensibly faced competition from other imports as well as from local production (p 33). In this environment it is vital to follow the legislative mandate and only attribute to the dumped goods the injury truly caused by them. In most cases, an understanding that there is non-dumped competition from imports in any event would mean that no duty should be imposed.

198. Our submission called for increased economic expertise in the bureaucracy handling anti-dumping cases and use of appropriate modelling techniques. Many submissions generally call for increased skills and expertise in ACBPS including CSBP (p12); Qenos (p7); ADFA (p6). Qenos also suggested that bureaucrats go on exchange to improve their expertise (p8). In Australia, the bureaucracy often simply looks for price undercutting and presumes that this leads to causation of injury. Customs certainly looks at a range of other factors but this is the easiest to demonstrate without economic analysis. Given that local manufacturers price slightly above imports because of their comparative advantage through factors such as relative transport costs, this means they will always win a causation debate on such a poor methodology as they can easily make it appear that imports are undercutting domestic prices. The fact that local manufacturers have a comparative advantage in certain sectors is borne out by BlueScope's submission (p9) which refers to ready access to high quality raw materials and Australia's historically enjoyed low energy costs. It also notes access to modern manufacturing facilities, strong distribution networks, high quality products, shorter lead times, reliable delivery and strong technical and product support (p9). PACIA also confirms that in the plastics and chemicals industry, the domestic industry is generally looking for import replacement capacity based on market proximity, client service and comparatively low asset costs of aged plant (Part 3).

199. TRTF criticises economic modelling (p19), first in the context of National Interest but the criticisms are then made in relation to injury and causation (p38). It make somewhat inconsistent comments at p38 where it suggests that "in cases where the question of injury may be less clear, modelling may be useful after having regard to the prescribed injury factors;".

200. Given BlueScope's articulation of the reasons why locals have comparative advantage, the Commission would benefit from asking BlueScope what kind of a price premium they think they could command simply because of these advantages and what should occur if price undercutting, is as would be expected, equal to the level of the price premium that should naturally occur? Should the dumping system apply to that situation? If so, how does that adequately prevent a monopoly arising for Australian manufacturers?

201. Attention is again directed to the expert opinion of Professor Sgro. Overseas jurisdictions have led the way in relation to employing causation analysis although none are as yet ideal. Reference has already been made to the *Bratsk* decision in the US and the World Trade Report essay on Quantitative Economics in WTO Dispute Settlement. In addition to material previously cited and the comments of Professor Sgro, other useful commentary includes general analysis of Granger causality, and the comments about regression

and modelling in Sapir and Trachtman (2008). There is also the leading study on causal parameters in Heckman (2000).

202. Obviously the ASA is not in a position to be able to critically evaluate the competing methods that have been used or suggested elsewhere. Furthermore, it is perfectly acceptable for the Commission to consider both the intellectual rigour and the practical utility of various tests. At the very least, however, the array of foreign experiences and studies and the inherent transferability of economic logic of causality means that the Commission should not conclude that these are mere matters of judgment not worthy of reform.

203. Australia's bureaucracy tends to lead the world in its general even-handedness. We lag badly in areas of economic and accounting analysis, not because of lack of will but because of lack of expertise and direction.

204. A proper consideration of causation would also draw attention to work applicable in other areas. For example, Keck, Malashevich and Gray (2006) looks at a probabilistic approach to the use of econometric models in sunset reviews.

How is a determination made as to the impact of injury from non-dumped sources?

205. Article 3.5 ADA indicates that injury caused by factors other than dumping "must not be attributed to the dumped imports". It provides an inclusive list of such non-dumping factors being "the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." (Para 86) Article 3.5 ADA, in drawing attention to other known factors besides the dumping that may be causing injury, expressly refers to the requirement to consider "trade-restrictive practices of and competition between the foreign and domestic producers …". Thus issues of competition and competition policy must be considered by Customs administrators even though they do not have a direct mandate under TPA.

206. ASA experience is that this is one of the most flawed aspects of the current process. As noted, this flows in part from a reluctance of the administering authority to use statutory powers to call for evidence from those with vital information. A key example was the *Galvanised Pipe* case. The TMRO demanded that Customs reinvestigate because they had failed to consider imports from a country that was not subject to the investigation, to determine the extent to which this led to the injury claimed. The administering authority was told by importers from that country that they were unwilling to provide information. The administering authority apparently did nothing further in the circumstances and reiterated its view on the merits.

207. The problem compounds itself because it first leads to an increased chance that a measure will be improperly imposed and secondly, prevents the best evidence being available to determine a realistic non-injurious price where some measure is justified.

208. Proper attention needs to be given to other issues that could account for the injury such as differences in quality, brand recognition and reputation, reliability of meeting deadlines, lower costs of exporters and even importers "betting" on favourable currency returns through their foreign trade.

209. One aspect of the identification of injury caused by factors other than dumping concerns the nature of the products in issue. The broader the administering authority's approach to determining like products, the more there will be some differences between the products being compared. It is then possible that the injury was caused by those differences and not by any price discrimination. (Moulis and Gay, 2005:78) This also relates to issues of appropriate adjustments as discussed above.

210. A key aspect of the causation determination is to ensure that the administering authority has an accurate picture of the state of the particular market. For example, in the steel industry, it is necessary to consider the various distribution chains and the refusals of local producers to supply competitors of their own related distribution arms. Other cases would have other examples of underlying market distortions that need to be taken into account.

Lesser duty and non-injurious prices

211. The Commission is recommending a three part test: has there been injurious dumping; are there public interest reasons for not imposing measures; if measures are to be imposed and if public interest does not prevent imposition, would a lesser duty be sufficient to remove the injury? (p 88)

212. It is important to properly integrate these steps. Step 1 must include causation analysis which in appropriate cases should show that at the very least, a lesser duty would be appropriate in any event. Indeed in many cases it would show that no duty at all should be imposed even before a public interest analysis.

213. Secondly, the economic basis of making each of the determinations should be consistent and should be undertaken by those with appropriate expertise.

214. Australia, like the EU, takes a flawed and effectively protectionist approach to lesser duty. When trying to determine what the local industry would have been able to sell for in the absence of dumping, (that is identifying the local industry's unsuppressed selling price), it commonly constructs a local price by looking at costs and adding a hypothetical profit building in a determination of a reasonable rate of return.

215. There is no policy justification for relying solely on local manufacturers' costs plus hypothetical profit to determine a non-injurious price. The biggest problem with this is that it ignores completely whether such a return could be achievable in the conceivable market circumstances. (Didier, 2001:45) In any industry with a robust market with adequate competition, there will be a range of suppliers both imported and domestic. If there are imports with a significant share of the market that are not dumped, they will set the standard of what could be achievable by the local industry even in the absence of dumping. It means that in some instances, imports found to be dumped and which are sold at prices higher than undumped imports, are faced with a further anti-

dumping duty. The calculation is particularly disconcerting when the local manufacturer itself imports like products. To ignore these factors is to simply provide a protectionist bias towards local manufacturers. That would be so whether intended or not.

216. This approach cannot be justified on the basis that ADA and the legislation merely give a discretion to have a lower level of duty. Once a discretion is exercised, (which is invariably the case), it should be exercised on a fair and unbiased basis. A failure to apply a reasonable methodology of determining such an amount is an undue restriction on that discretion which can only operate in a protectionist manner. Ignoring other non-dumped price setters in the domestic market is also not mandated by the Australian approach to identifying an industry's unsuppressed selling price. If administrators are truly trying to find the price the industry may achieve in the absence of dumped imports, it simply cannot ignore the price setting power of undumped imports. Again attention is given to the EC case of *EFMA v Council of the European Union* which restricted the profit margin calculation to that which the industry could reasonably count on under normal conditions of competition in the absence of dumped imports.

217. The Commission should recommend that the administering authorities should first consider what the exported price of the goods subject to the dumping duty would have to be to avoid there being dumping. It ought then to consider whether such sales would be likely and if so, on what likely quantities. The authorities would then consider all other sales in the relevant market either from non-dumped imports or from manufacturers who are not claiming protection or who have not demonstrated injury. Consideration might be given to the capacity of such suppliers to take up any available market share that would be lost by the dumped imports. That can be compared to the capacity of the local industry. An assessment can them be made as to the likely arm's length competitive and fair prices that will be set in the market. This can then lead to identification of a non-injurious price.

218. There should be no objection to administering authorities being cautious in making these determinations to ensure that the local industry is not inadvertently harmed. That is quite different to simply ignoring these factors and pretending that the local industry could achieve profit levels that simply are not possible on evidence readily available to administering authorities.

219. Another advantage of this approach is that it overcomes the bias against importers through issues of confidentiality. If an unsuppressed selling price is only based on the local producers' figures, obviously those opposing the application will not be given access to this data. A related problem is the way the representative profit level is identified. Once again any level identified should be realistic in the context of the current market circumstances. To simply use established profit levels from related industries or historical figures at an earlier stage is not an accurate reflection of what is likely to be the case in the absence of dumping. Once again the most significant factor is the presence in the market of undumped imports.

220. This also relates to the issue as to whether confidential information should be released to lawyers and licensed customs brokers under appropriate protective orders. The ASA strongly supports this. If appropriate changes are not made both to unsuppressed selling price methodology and release of confidential information, this aspect will remain highly protectionist. The

Commission has not expressly addressed ASA Recommendation 33 (paragraph 765) that non-injurious prices should be set by reference to realistic factors in the market under consideration.

221. This is of crucial significance when as is commonly the case, an anti-dumping investigation involves input goods vital for other Australian manufacturing industries. Setting the final duty level in accordance with information about undumped imports, helps ensure that there is adequate protection for the local industry at the same time as there being proper commercial protections for those industries utilising the inputs.

222. To date, Customs does not take enough regard of undumped imports when setting USPs. Its practice has been to rank consideration of undumped prices third after two others, a price in a period unaffected by dumping (which may be removed from current market realities) and a cost plus profit bases (which will get the profit level wrong if it ignores the way non-dumped imports set market prices).

223. The Commission has not addressed ASA Recommendation 32 that it should recommend that Customs use its powers to gain all relevant evidence including that pertaining to non-dumped causes of injury.

224. Lesser duty has been used by local producers to also argue against a national interest consideration. For example, TRTF argues (p12) that the needs of consumers and downstream users are fully accommodated by the lesser duty rule in Australia. This cannot be right as it only applies if injury to the industry can be fully removed with a lesser duty. There is never a separate consideration of end user interests.

225. TRTF refers to EU practice re price underselling and asserts that Customs does not follow this properly (p34). Because local producers set prices slightly above imports, creating an impression of undercutting, this is crucial if a useful lesser duty system can be achieved. DCAL also refers to import parity pricing in the chemicals industry (p6).

226. TRTF makes contradictory statements about the level of profit in a constructed non-injurious price. It calls for a level of profit needed to meet the level of return. Yet it refers to EU practice which more properly has a target price which is the price the goods should have sold for if not for the effect of dumping. As TRTF footnote 12 p34 notes, that should include a “reasonable profit margin that would have been achieved in a market unaffected by dumped imports”. If non-dumped imports would have kept local profits low, then that is the figure that should be used.

227. OneSteel argues for a nominal profit level to ensure ongoing investment and market participation (p13). Orica (p9) makes a similar argument. CSR also believes that historical profit levels are not sufficient and instead Customs should use levels of profit required to meet required rates of return or even weighted average cost of capital (p3). This should be strenuously opposed. All of these approaches go against the policy behind the WTO Agreement. It is the level that removes the actual injury and not the level that meets the aspirations of local industry that should matter. This should be so regardless of whether, as is currently the case, there is merely a discretion to apply a lesser duty. If local industry wants government protection to shield its investment decisions from normal market forces, (of which non-predatory

dumping is an example as found by the Commission), it should do so directly and explain the justification for special treatment. If instead local industry is simply trying to identify the optimal approach to a profit calculation under the existing law and policy, there is simply no possible justification to do other than what is the essence of a lesser duty rule, namely to seek to remove the actual injury and not provide protection equal to aspirational profit levels.

228. Dow argues for a moving formula to account for currency and other changes (p3). DCAL also supports this (p3). The ASA agrees. This should apply to undertakings as well.

229. DCAL also notes a particular case where an analysis of a non-injurious price showed that costs to make were higher for the local producer than foreigners. This should be taken into account in assessment of causation of injury and also determining a non-injurious price that removes the injury from dumping and not from other factors (p5).

230. The DFAT submission notes that some WTO Members are proposing a mandatory lesser duty rule. DFAT does not seem to indicate whether Australian government policy is in support of this but ASA strongly supports this result. If a duty can only be applied where material industry is caused, it should cut out when the injury is alleviated. Anything more is pure protection.

231. From a policy perspective, it is also important not to conflate issues of whether to *mandate* an analysis with *evidentiary* burdens. Lesser duty should be considered in all cases as this gives effect to the structural basis of anti-dumping support. Nevertheless, it is permissible for benefit of the doubt to be given to local industry where the conflicting arguments are relatively balanced. That would simply be an example of a precautionary approach to risk.

Analysing injury before normal value or concurrently with it

232. ASA members have been successful in two cases through arguing that the time and expense of foreign country site visits should not be undertaken unless there is sufficient evidence of injury as presented by the local industry. The system should enshrine this in order to minimise transaction costs. World's best practice supports this.

233. While TRTF does not specifically address the idea of considering injury before normal value, it at least suggests that a person at Customs manager level should be appointed to specifically consider the injury side so that proper consideration of injury does not occur too late in the investigation (TRTF p38).

PROCESSES AND REVIEW RIGHTS

Decision making responsibility (Draft Recommendations 8.1 and 8.5)

234. The ASA notes the recommendation to maintain Customs as the administrative body. The ASA considers that the key issue is expertise regardless of the particular body selected.

235. The Commission notes the theoretical value in having appropriate expertise for assessing material injury and causality but believes the small number of current cases may not justify the costs (p 124). Yet it indicated reservations about Customs' capacity to undertake assessments of the wider impacts under a proposed public interest test. While draft recommendation 8.5 indicates that there should be appropriate resources (p 133) the Commission goes on to suggest that detailed changes to Customs' analytical skills and investigation approaches are not a high priority (p 133).

236. It considered "it would obviously be open for Customs to seek advice from entities more experienced in the analysis of such matters."

237. The system should not rely on informal advice being sought and/or able to be given. Either the decision making power should be given to a body with the appropriate expertise or the Commission should recommend that Customs hire at least one dedicated economist to support causation and material injury and public interest in all cases. That officer could be a resource for individual case officers. As noted above, without appropriate expertise, there can be no confidence in the value of the reforms proposed. Either public interest analysis will be as flawed as current causation and lesser duty analysis or there will be a significant imbalance between the two. Neither is a desirable policy outcome of this inquiry.

238. Finally, where the bureaucracy is concerned, OneSteel argues that teams should only work on two cases in the one industry to get fresh ideas. Rigid rules of this nature are likely to be sub-optimal. At the very least there would be a need to do cost/benefit analysis of the benefits of fresh ideas as against the loss of ongoing experience and understanding of the nuances of a particular industry.

239. The next key issue is the Minister's involvement in the process. This raises two issues, whether the Minister has a discretion and questions of timing.

240. The Commission considered that the Minister might well be removed from the process but recommended a cautious approach while the public interest test was bedded down (p 125). The Minister should definitely be removed if a public interest test is to be applied otherwise there might be undue political pressure on the Minister to reject public interest applications.

241. TRTF notes the Labor Party's A Fair Go For Australian Industry December 2006 proposal to remove the Minister as the decision maker. That policy also recommended giving the investigations to ACCC. Huntsman contemplates a joint ACCC, PC panel.

242. TRTF contemplates as an alternative, a statutory officer within Customs having a similar role to the Minister; or a tribunal (p39). It does not indicate a view although it notes that additional resources and extra time would be required with a tribunal system.

243. A number of submissions raise serious concerns about how long it takes for a Ministerial Decision. TRTF suggest that the Minister should be given a statutory time limit. CSR suggests 90 days (p5). These submissions contemplate that the Minister has a discrete discretion (e.g. TRTF p38-9). It suggests that while no new information can be provided, "submissions could be made as to the weight of evidence or to raise legal issues that have been

ignored or inadequately considered during the investigation." Conversely, BlueScope believes that the Ministerial Decision should be automatic (p48). This is implied in CSR (p2). CIF (p11) assumes the Minister has a discretion and that it would be applicable if measures were not in Australia's interests as does ADFA (p3); Orica (p13); ADFA (p6).

244. Again, the preferable approach is to follow the way the ACCC makes determinations in competition matters and shield the Minister from overtly political pressures.

TMRO and review

245. The system needs to have meaningful review processes. These will commonly occur at two stages, the first being administrative review, the second being court or tribunal review.

246. Where administrative review is concerned, a range of submissions pointed out that there is too much ambiguity in the provisions relating to the TMRO's rights and obligations. In some instances the TMRO's powers are merely advisory. In other situations it appears that a decision of the TMRO has automatic effect. The TMRO has no investigative power.

247. A number of questions might be considered in this context. What opportunity is there to meet and discuss issues with the TMRO? At present there is no clear guidance. It is not clear just what written and oral submissions interested parties can make to the TMRO and what rights, if any, they have to review and respond to submissions of other interested parties. Many people make submissions and indeed speak to TMRO officers.

248. Another problem with the recommendatory powers is that the Minister who makes the ultimate decision may call on the customs bureaucracy to advise him. That provides for a conflict given that the TMRO has reviewed the behaviour of that very bureaucracy. (Moulis and Gay, 2005:82) The Commission recommends that to reduce the time, if the TMRO takes a different view to Customs the best approach would be to require the Minister to make a final decision based on the original advice from Customs and the advice from the TMRO (p 129).

249. There is uncertainty as to whether the TMRO is exercising a merits style review or is or should be adopting a more deferential style as is the case with judicial review. At the very least, the more the TMRO is expected to undertake a merits style review, the more resources that ought to be appropriated for such purposes.

250. Review by the TMRO also raises the problem of secrecy. Importers do not get to make input to the TMRO review of a rejection. Until an application is accepted, there is no public notification of it. There seems no justification for keeping importers and exporters in the dark, thus preventing them from bringing relevant information to ACS or the TMRO. As indicated above, it further exacerbates the tactical disadvantages to them in terms of timing.

251. The Commission has not addressed the ambiguities alluded to in ASA submission paragraphs 847 to 857. The Commission merely recommended that the role of the TMRO should be considered at the time of the next review.

If a range of participants highlight these uncertainties, there is no reason to leave reform in abeyance. If the matter is not addressed, some innocent parties will be forced to engage in litigation to create rulings simply because of the inadequate statutory drafting in the first place.

Court review – what is the appropriate standard of review?

252. Where court review is concerned, judges must balance the competing policy aims of allowing valid complaints about behaviour to be made and not unduly restricting the ability of administrators to process the large volume of import and export transactions. Rights of court review are limited to questions of law and will generally only lead to a reconsideration of a matter by the administrative officers. There can be debate about what are appropriate questions of law.

253. There also seems to be a mismatch between the standard set by Australia's Federal Court on review and on the other hand the standard set by the WTO jurisprudence.

254. There needs to be an expedited process for prompt court review as mandated by Article 13 ADA.

255. Consideration might be given to the establishment of a specialty court or specialty division within the Federal Court. It has been suggested that the specialty courts in the US have fostered more critical analysis of claims. (Horlick and Vermulst, 2005:70)

256. Another possibility is to consider merits review. The Administrative Review Council considered this issue some time ago and recommended in favour of AAT jurisdiction. (Administrative Review Council, Report to the Attorney-General, Review of Customs and Excise Decisions – Stage 3 Anti-Dumping and Countervailing Duty Decisions, Report No 28, AGPS, Canberra, 1987) Its reasoning is compelling and is not repeated here. The Gruen Review also raised this possibility. The issue should at least be addressed by the Commission.

257. The Commission is also recommending broadening the list of appealable decisions and is seeking views about whether proposed annual adjustments should be appealable (p 128). The ASA agrees that this should occur.

Confidentiality and release to advisers

258. LCA argues for a US style system of providing access of confidential information to lawyers. Whether it is given merely to lawyers or independent consultants as well, a system should allow importers to know what arguments are being put on such matters as injury and non-injurious prices, key areas where they find themselves shooting in the dark on important matters where they may deserve to win but simply cannot because on balance of probabilities they do not know what to refute and hence cannot provide evidence needed to do so.

259. The Commission on balance considered that APO arrangements should not be introduced "with the emphasis instead being on more rigorous application

of the non-confidential summary arrangements and better public reporting on the outcomes of investigations" (p 138).

260. The Commission does not indicate in what way non-confidential summaries should be improved. That is a highly desirable reform in its own right but is a significant flaw in the current process. It should also not be seen as exclusive of the need for an APO system. A non-confidential summary is never likely to go into enough detail to allow identification of key evidence required in response.

261. An APO system is supported and is not likely to raise costs, as absent adequate access, advisers must spend more time trying to get information by other means or conjecturing about its contents.

262. Once again this overlaps with other policy concerns. As discussed further below, the Australian system is unduly protectionist in concentrating on local producers' costings in determining non-injurious process and giving little if any attention to other important price setting influences such as other non-dumped imports with significant market share.

Use of foreign findings (Draft Recommendation 8.6)

263. The Commission suggests that Customs should be less cautious in drawing on overseas experiences (p 134). Draft recommendation 8.6 indicates that the Minister should be advised whether there have been any comparable recent cases in other countries and what the outcomes were and should indicate the reasons for disregarding the analysis and findings in any identified comparable cases.

264. This would be improper from an evidentiary perspective unless handled by someone with a clear understanding of presumptions of innocence, relevant evidence and the ability to differentiate in different markets. It would be an imposition on the Minister to have to analyse these factors.

265. The Commission rightly points out that such considerations would be particularly appropriate where information on subsidies is concerned but that is because we are dealing with the same countries and their laws. In a dumping case how could attention be given to findings on normal value with different suppliers or even the same suppliers over different time periods? What about variations in like goods? What confidentiality issues would arise? What would be the relevance of foreign injury determinations for completely different companies at different times and under differing market conditions? This recommendation would be likely to be challenged before the WTO as a failure to follow the evidentiary obligations under the Antidumping Agreement.

266. Perhaps the gestation for this suggestion is an assertion that Customs refuses to consider some classes of otherwise relevant evidence. If that is the allegation, it should be properly tested and if found to be true should be responded to with a direct reform. Here it is vital to distinguish between evidence and findings based on that evidence. Certainly if it could be shown that Customs refuses to even receive documents engendered in other jurisdictions to test the veracity of contentions in Australian cases, that would be a problem, but unless that was demonstrated to be so, there is no need for a Commission recommendation.

What information is sought from third parties?

267. Here we again note the need to compare the practice with the statutory powers, the latter which seem never to be used. This should be compared with the role of other government agencies such as ASIC and ACCC. ACS is too reluctant to use their statutory powers. While we can understand that administering officers do not wish to appear threatening in their investigations, the statutory powers have been incorporated by parliament for a reason and ought to be considered in appropriate circumstances. Furthermore, they can readily be used in a non-threatening manner. Those with relevant information ought to be able to be made to understand that full information helps administrators come to decisions that optimise the efficiency of the Australian market. The only people who are unlikely to be sympathetic to this policy aim are those who would wish to use anti-dumping procedures to gain unjustifiable competitive advantages. There should be little reluctance in using statutory powers to promote assistance from such sources.

268. Once again this is not a question of mere administrative minutiae. On key issues of causation of injury and lesser duty, and many of the elements in the proposed public interest test, the local applicant has all of the information and currently relies on confidentiality to withhold it from other interested parties. Key aspects of the public interest test, such as whether injury is caused by other factors and whether non-dumped imports set market prices cannot be adequately considered without information from third parties who would often systemically not wish to cooperate, preferring to see dumping duties imposed on their competitors.

Provisional measures (Draft Recommendation 7.3)

269. While the law allows for provisional measures after 60 days, the Commission notes that it has tended to have been applied around day 140 and as late as day 210. It is recommending the imposition of provisional measures no later than day 110 thus concurrently with the SEF.

270. There is no necessary reason why imposition of provisional measures should predate consideration of public interest and further that it should be advanced simply so that the public interest analysis does not unduly delay final determinations. It is a separate issue as to getting the right balance between early support for deserving manufacturers and sufficiently rigorous determinations before importers' rights are interfered with through provisional measures.

271. If measures are to be imposed earlier, there should be in transit provisions for goods ordered before the investigation is publicised.

272. At the public hearings, the Commission quite properly raised the question of how such a proposal would work and whether it would be too easily "gamed" through such mechanisms as dummy long term supply contracts. Gaming is certainly an aspect to be considered in any comprehensive policy analysis but it is only one consideration and usually not the primary one.

273. Just as the Commission is concerned to provide some delays in the implementation of new measures to allow applicants who have begun the process of considering seeking redress to do so under current laws and

regulations, the same considerations should support only prospective application to persons who have ordered goods in good faith without knowledge of an investigation being started.

274. Concerns with gaming can be dealt with in a number of ways. Significant penalties are already in place for false and misleading conduct and Customs' penalties and prosecution procedures are already very strongly biased in favour of the bureaucracy and against defendants in relation to averment powers and burdens of proof. Other approaches could include setting time limits for in-transit provisions and only applying them to discrete contracts which in substance are first negotiated within that timeframe.

Adjustments and sunset review (Draft Recommendation 7.4)

275. The ASA supports Draft Recommendation 7.4).

276. At p 114 the Commission considers that an extension application is "necessarily a less searching process than the initial investigation."

277. That should not be so. There is certainly less evidence and more of a need to engage in a hypothetical, but the standards of analysis should be as rigorous.

278. The Commission has also recommended a two year freeze after a duty expires. There is no policy reason why the same should not apply for an unsuccessful application. The Commission is asked to address ASA Recommendation 13 that a combination of moratoria and damages undertakings is needed to counter the demonstrable incentives in favour of abusive cases and the harm they clearly cause.

279. The Commission notes that on continuation reviews, it would not be relevant to consider whether un-dumped imports are the primary cause of injury. Nevertheless, on a continuation inquiry there ought to be a consideration of what is likely to be the case. If some injury is likely to occur, but un-dumped imports are likely to be the primary cause, then continuation should not be supported. A continuation inquiry is not dissimilar to a consideration of threat of injury and hence these factors should again be relevant. The need to hypothesise as to possible injury and causality considerations is expressly noted by the Commission at p 113. Public interest should also be considered at this stage.

Review of measures (Draft Recommendation 7.5)

280. If a duty is imposed, the next question is how it is paid and how quickly it can be reviewed based on changed circumstances. The issue also arises in relation to undertakings.

281. The ASA supports the reversion to a system that seeks to properly assess the correct duty at the time of importation.

282. The system should be revised to have regular reviews of any duty assessment on at least a six monthly basis to take into account shifts in hot rolled coil prices and currency movements. DCAL also supports regular adjustments (p3), as does CSR (p4).

China

283. While the Commission has rightly rejected the use of anti-dumping as a particular China trade policy, it does refer to taking account of various forms of indirect support that are "seemingly available" to Chinese producers (p 102). It also refers to Customs indicating how it takes account of input subsidies and other government support in calculating normal values (p 104).

284. The system allows for actual normal values to be rejected in certain circumstances. One is where the government has undue influence on the market in question. The recent *HSS* case shows that this is going to be an ongoing issue where China is concerned.

285. It is important to ensure that countervailing is the proper approach to subsidy behaviour and not anti-dumping.

286. In considering participants' views on issues concerning China, the Commission cites the ASA submission in relation to Steelforce (p 103). The point being made there was not a China point, but simply that anti-dumping laws can be a disincentive to foreign direct investment by Australian companies. The example given was of a company that has no interest in selling domestically in its foreign production host country yet is forced to go through an anti-dumping hypothetical analysis. To the extent that the Commission is concerned to add anecdotal anti-competitive problems to the analytical logic and foreign literature, it is again urged to consider Steelforce's unique situation and the implications in general for Australia's foreign direct investment.

287. Numerous submissions make unsubstantiated claims about Chinese exports, e.g. ADFA (p2); CSBP (p12). Some refer to subsidy situations which as noted above should not be bundled into anti-dumping actions (e.g. Orica p14).

288. A number of submissions take issue with the way ACBPS actually treats China in anti-dumping cases. OneSteel takes issue with Customs paper on market influence (p6). CIF (p4) also criticised Customs' behaviour in not readily concluding that China has undue influence on prices and/or costs. CIF (p5) wrongly asserts that any doubt about government influence is resolved in favour of the exporter. Instead it is simply a normal evidentiary burden placed on the applicant.

289. CIF (p6) argues that Customs should independently test artificially low prices in China with another market economy's selling prices for the goods under consideration. This should not be sufficient in cases where China is simply a more efficient producer.

Statistics and confidentiality (Draft Recommendation 8.10)

290. The ASA agrees that aggregate statistics should be readily available.

Time of implementation Draft Recommendation 8.11)

291. A two year freeze on introduction of the recommended reforms is inappropriate during a global financial crisis. There is no better time to prefer the national interest than when the economy as a whole is struggling.

292. The Commission was concerned to protect local manufacturers who might have already begun considering an anti-dumping application at the time the government will make its final decision on the Commission's Report. As a general principle, there is nothing wrong with being concerned to ensure a minimum of retroactive effects as long as this is balanced for all interested parties.

293. On this issue, two years is an excessive timeframe. When an investigation is commenced, respondents have very little time to prepare all the work in responding. Applicants have no time limit but any moratorium should not try and favour the least efficient. Customs could probably give advice as to a reasonable time period even for small to medium enterprises to consult Customs Dumping Liaison Branch and prepare an application to the appropriate degree. There seems no logical basis for a period in excess of six months. In addition, the time should run from the date of the Commission's Report and not from that of the government's decision. Once the Commission's Final Report is made public, everyone is aware of the Commission's aspirations and should naturally factor this into their business decisions.

294. Finally on this issue, the Commission should be even more concerned about gaming or at least strategic incentives if key reforms are delayed. The strongest incentive will be for local industry to bring a plethora of anti-dumping applications prior to the new provisions with the hope of locking in at least five years of ongoing protection.

295. Finally, the Commission proposes a broad and independent public review of the revised arrangements five years after the reform package is fully operational. While that is fully supported it should follow a broad review of all key issues as alluded to in this submission within the context of the current inquiry.

SHOULD THE SYSTEM BE RETAINED?

Costs/benefit (Term of Reference 2)

296. To this point the submission has dealt with necessary changes on the assumption that the system is to be maintained. The balance of this submission deals with the logic underlying the Commission's conclusion to that end.

297. As previously noted, in the ASA's view, the Commission has rightly noted that there is no net economic benefit to retention of the system. The ASA disagrees with the Commission's ultimate conclusion that the net welfare losses are likely to be low and may well be outweighed by political economy benefits. The balance of this submission argues that no compelling case has been presented to that end. Without further analysis, the most the

Commission should do is leave the matter for political assessment by the government.

298. An appropriate cost/benefit analysis of whether the system should be retained would fully comply with Point 2 of the Commission's terms of reference, which calls for it, in undertaking the economy-wide benefits and costs, to do so:

> "taking account of, and where possible quantifying, the impact of the arrangements on:…
>
> (b) importers and domestic industry, including small businesses … firms at different stages in the supply chain …"

299. The Draft Report merely makes conclusions about the economy-wide costs without undertaking crucial analysis at the firm level. As the ASA submission pointed out, and as the Productivity Commission has noted, anti-dumping actions are taken against key input goods into further manufacturing. The Commission notes at p 27 that the majority of measures worldwide apply to a relatively narrow range of basic industrial chemicals and plastics, metal products and food and beverages.

300. That analysis would not only quantify the impact but would also be able to form an evidence-based conclusion about the ability of the anti-dumping system to be manipulated in an anticompetitive way as is suggested by foreign literature and is more analytically likely in Australia with closely held domestic manufacturing interests, often with monopoly positions in the domestic supply arena and which cover key input goods into further manufacturing. That will have a dual function. Not only would it assist the government in making its policy decisions in due course as to retention or otherwise, but would also help show whether other key systemic reforms as alluded to previously ought to be made.

301. At p 64 the Commission notes that "the costs of particular anti-dumping measures for downstream industries, other stakeholders and the community, can be significant relative to the benefits for recipient industries."

302. This further supports the view that the Commission should look to the industry-specific implications just as it does with an industry-based inquiry such as its review of parallel importing laws. In that review it is not saying that nothing should be done simply because there is no economy-wide excessive cost of maintaining an economically-flawed system. It should have undertaken an analysis of the impact on those manufacturing endeavours by the uncertainty, cost and volatility of the anti-dumping regime.

303. The Commission considers that several factors appear to explain the increased concentration of anti-dumping activity (p 31). It argues that industry rationalisation, export-oriented foreign production facilities and the history of successful applications leads to concentration.

304. The Commission has not made the important point that industry rationalisation has made it very easy for individual companies to satisfy the industry test and get an application accepted without the need to confer with competitors.

305. The Commission does not explain why overseas export-oriented production facilities in other product categories than those subject to dumping, have not also led to anti-dumping activity.

306. The Commission states at p 3 that it has not undertaken any formal economic modelling because all the indications are that the economy-wide effects of the system are very small and because such modelling would not provide guidance on the merits of different policy options.

307. Previous sections and the expert report of Professor Sgro have explained why that should not be accepted.

308. It would be desirable for the Commission to expressly and clearly conclude after its very proper analysis in sections 4.1 and 4.2, that there is simply no economic rationale in favour of anti-dumping regimes.

309. All the Commission has done in section 5.2 is to conclude that the net disadvantages to certain key stakeholders would outweigh the benefits to others. The Commission should attempt to quantify this or at least identify the likely detrimental effect on Australian manufacturing.

Impact of Measures on the Availability of Goods

310. The Commission concludes that because substitutable goods are commonly available from a number of overseas suppliers, measures on certain countries are not likely to decrease the availability of like products (p 55).

311. This depends on a number of factors. Firstly, more and more applications are targeting a wide range of countries.

312. Secondly, for many of the key input products it takes time, effort and money to establish an appropriate importer-supplier relationship that will satisfy the needs of domestic manufacturers using the imported goods as inputs.

313. Thirdly, in some cases foreign suppliers must make to particular Australian standards and will not readily do so without long-term relationships.

314. Even the most basic analysis would show that the broad assertion that importers can dump with impunity and merely shift sources of supply when caught is wholly unrealistic. An importer has to develop a long term relationship with a high quality and reliable supplier. It must do so as a commercial entity from a relatively small market in the context of the broader global economy. In a range of key import sectors, imported goods must meet specific Australian standards. The most efficient international suppliers may be reluctant to tool up to meet those requirements. If an application for dumping duties is brought, the importer has to take a gamble as to the outcome. Even if it was easy to change suppliers at the drop of a hat (which is not the case), there would be some transaction costs in shifting which would be unnecessary if the importer formed a view that the application will not succeed. If the application certainly would succeed, elasticity of demand issues would be relevant in terms of whether potential costs could be passed on. If not, efforts would need to be made to find alternative suppliers. If the importer is forced to shift supply from one application, why would it not be concerned with future applications that make it do so again? If it is continually

shifting suppliers, why will it have any kind of credibility or be a long term prospect that could best be able to engender lower prices?

315. In reality it will never be black and white as to whether an importer can assess the likely outcome of an anti-dumping application, not the least because of the various elements of judgment and discretion that the Commission alludes to. Inevitably the chances of success will be somewhere between zero and 100% with the commensurate need to consider passing on a similar percentage if permissible. Unless dumping naturally leads to excessive profits for the importer there is no strategic reason to engage in that activity and engender all of these uncertainties.

316. That kind of an analysis must also consider the different perspectives of importers, normally Australian citizens and enterprises, and foreign suppliers. Where the steel sector is concerned, virtually all imports are made as against prior orders. There is no question of stockpiling of specific goods with unique Australian standards. That would be foolish activity on behalf of foreign suppliers who generally are not excited by the size of the Australian market.

317. The Commission should also test some of the assertions about the benefits of higher prices alluded to in that section as most would not seem borne out by economic analysis. For example, a suggestion that anti-dumping measures give people greater confidence to invest would be suspect given the time limit on the measures themselves.

Recent usage

318. At p 29 the Commission notes that while the number of measures has declined, their duration has extended.

319. The significant hypothesis from this and from their noting that it is a small number of key sectors that are engaged, is that over time the domestic monopoly suppliers will have an incentive to keep attacking key competitor product categories until they get a duty and once obtained, try and maintain it for as long as possible. The better conclusion should be that the decline in broad numbers is not as important as the fact that it gravitates to an effective and ongoing non-tariff barrier for key input commodities vital to Australia's manufacturing sector.

320. While the Commission has noted that Australia's usage has fallen dramatically, it should also be recalled that it has fallen from an excessively high point where at one stage we had the highest actual number of actions notwithstanding our relatively small size in the global economy.

321. The Commission notes at p 29 that the cyclical strength of the global economy has an impact on anti-dumping activity.

322. This is supported in the literature but in some industries such as steel, the applications tend to be reasonably steady and targeted.

Fairness

323. As the Commission notes, anti-dumping is often supported on supposed grounds of fairness. The Draft Report p 3 suggests that fairness is a multi-faceted and sometimes nebulous concept hard to translate into specific policy settings.

324. While people may at times legitimately debate the meaning of fairness, in the anti-dumping context the notion is wrongly used to signify some kind of economic unfairness, i.e., it is supposedly unfair to expect local manufacturers to be able to compete profitably against dumped imports. The Commission, like other economic experts, should be able to easily refute such arguments and help educate industry against a protectionist disposition.

325. In its analysis the Commission conflates notions of fairness with the political economy arguments (p 46-8).

326. It is certainly true that those seeking protection may do so based on their belief that the protection is fair as well as for more self-interested reasons. It is important however for the Commission to segment its analysis and negate the inappropriate fairness arguments.

327. At p 46 the Commission quotes Gruen (1986:24) that “fair trading practices – both nationally and internationally – command widespread Australian community support.”

328. What should also have been cited from Gruen was the observation that dumping is not unfair and that there is an imbalance between domestic and international perceptions of trade unfairness.

329. A once in a generation opportunity to engage in a comprehensive policy analysis should have helped those who are misguided by fairness concerns to understand that this is simply not the case. For example, the Commission notes (p 38) that marginal or differential costing is another term for dumping and is widely accepted. It notes that AusTrade (2006) has previously issued advice to prospective exporters about the benefits of marginal or differential costing.

330. Similarly it is not clear why AIG, a key participant in TRTF, would see dumping as unfair when it also advises its members to export on a marginal costing basis. If the government and key industry bodies think that dumping is unfair, the very least the Commission should point out is that they each propose that very activity when it suits them. Double standards can never be fair even if inadvertent.

Political economy

331. The Draft Report at p 3 suggests that there are broad political economy rationales for having an anti-dumping system which transcend the system’s more immediate and readily identifiable impacts.

332. This should not be accepted. The Commission is urged not to make political economy assessments. That should be the role of government. It is of course the proper function of the Commission to make strong recommendations to

government from time to time. Nevertheless, these should be fully evidence-based. It is also preferable that the Commission concentrates on highlighting economic factors and does not attempt to assess political economy benefits without any kind of methodological analysis. At most the Commission should identify the arguments for and against retention of a system based on political economy grounds.

333. At the very least, it cannot conclude that the political economy rationale transcends the negative economic impact (which it notes could be $250 million per annum) without some attempt to quantify the need for misguided protectionism.

334. The Commission's overall conclusion in favour of maintaining the system based on political economy considerations is also not supported by its analysis to date or even some of its other queries in its Draft Report. For example, at p 48 it makes the point that the significance of any system preserving benefits is questionable. It concludes that it is difficult to find other concrete examples of reform initiatives aided by the presence of an anti-dumping safety valve. It rightly notes that because of the tariff reforms over the last two decades, in a prospective sense the situation is different to that pertaining at the time of the Gruen review. Nevertheless, the Commission goes on to say that while the system preserving benefits are not large "they cannot be dismissed as inconsequential" (p 49).

335. The Commission cites a number of arguments in support of the overall conclusion to retain the system based on political economy considerations. These are:

(a) The Australian government's ability to point to an appropriate anti-dumping system "may be helpful in dealing with … protectionist sentiment domestically."

336. That is not analytically reasonable given the resurgence in protectionist sentiments such as governmental buy - local policies alluded to by the Commission. Furthermore, anti-dumping is itself protectionist, with some studies suggesting that it more than fully undermines tariff liberalisation in certain key sectors.

(b) The current difficult economic climate would mean that if anti-dumping was removed it could make it more difficult to address remaining tariff and related reform issues.

337. No indication is given as to what these key tariff and related reform issues are and why the very small number of manufacturers who benefit from anti-dumping would otherwise be able to stop industry-wide reforms. If that hypothesis was likely, one would expect to see differential support for liberalisation between those industries benefiting from anti-dumping and those which do not.

338. In addition, concern about the current economic climate is less relevant given the Commission's view that changes should be delayed for two years, a timeframe within which the current climate is likely to significantly improve, although as noted above, the ASA does not support that delay.

339. The Commission concludes overall that because "the direct economic costs to the nation as a whole from the application of anti-dumping measures are … small" then "even modest system preserving benefits may provide a reason for Australia to retain an anti-dumping system."

340. As noted above, the Commission should not have only looked at the net economic cost to the nation as a whole but should have crucially looked at the impact on manufacturing industries using key input goods subject to anti-dumping actions.

341. The Commission should also not have limited itself to "direct" economic cost to the nation as a whole.

342. The Commission should have compared like with like. Because only certain industries benefit from anti-dumping measures, looking at the political economy situation from their perspective, but only looking at cost/benefits from the nation-wide perspective is grossly unfair. Instead, the Commission should compare the benefits to those helped by anti-dumping regimes to the costs imposed on their competitors. A policy analysis will almost automatically find a net benefit if one is comparing the benefit to limited domestic manufacturers against the detriment to the wider economy.

343. There are a number of other reasons why the political economy consideration should not apply. As noted, only select industries benefit from anti-dumping. Why would political economy considerations not apply to the broader economy? In particular, what about the local manufacturers who use input goods subject to anti-dumping duties? What would political economy say about their willingness to live with future tariff decreases and other necessary reforms if non-tariff barriers such as anti-dumping regimes make it even more difficult for them to compete with foreign suppliers with lower labour costs when input goods are a key part of their total manufacturing cost?

344. Why does the rest of the Australian economy go along with reforms even though they do not benefit from an anti-dumping safeguard?

345. Here it is important to understand that domestic manufacturers using such input goods have just as many concerns for certainty of supply in support of their investment decisions as the manufacturers of the input goods themselves. A discretionary system based on judgment, only applying to a small number of small industries where dumping margins fluctuate and greatly exceed historical tariff levels must be a strong disincentive to investment. As the labour studies alluded to in Professor Sgro's report show, the magnitude of downstream user industries will greatly outweigh the magnitude of input producers.

346. The ASA reference to the Steelforce situation in its original submission also shows the disincentive to foreign investment by Australian entities if anti-dumping becomes a barrier to imports of their intended production.

347. The Commission quotes Bhagwati at p 47 in support of the political economy justification. Bhagwati is also quoted in other submissions (TRTF p8; BlueScope p32).

348. Bhagwati's comments are about the need to have countervailing and perhaps anti-dumping laws to keep local industry happy when being asked to operate

under lower tariff barriers. In particular, he supports laws that "regulate artificial subversions …" (Jagdish Bhagwati, "The United States and Trade Policy: Reversing Gears" *Journal of International Affairs* Volume 42 (1988)). In the extract quoted by TRTF and BlueScope, he merely refers to artificial distortions where firms engage in "destructive" dumping "designed to destroy cheaper producers and then stick it to consumers with higher prices by more expensive suppliers." This would refer to predatory dumping alone. This should not apply to most dumping scenarios. TRTF (p9) alludes to responses to that quote that challenge Bhagwati's reasoning. One should also look at his other writings. For example, his contribution on the topic of "protectionism" to the Library of Economics and Liberty Concise Encyclopaedia of Economics states that:

> "protectionism recently has come in another form more insidious than voluntary export restraints. Economists call the new form 'administered protection'. … In practice … when protectionist pressures rise, fair trade is misused to work against free trade. Thus CVD and AD actions often are started against successful foreign firms simply to harass them … Practices that are thoroughly normal at home are proscribed as predatory when foreign firms engage in them. … Much economic analysis shows that, in the 1980s, fair trade mechanisms turned increasingly into protectionist instruments used unfairly against foreign competition."

349. Furthermore, Bhagwati was writing in 1988 and primarily about the United States system. In the United States, anti-dumping is so important that it is inconceivable that the US would support a WTO Negotiating Round outcome without getting enough of what it seeks in the anti-dumping negotiations. It currently has a number of highly protectionist proposals before the Doha Round. The Uruguay Round was held up at the eleventh hour because of the US's concerns about anti-dumping.

350. Bhagwati was also not attempting to discuss the political economy situation in Australia which has had long-standing unilateral tariff reforms.

351. Ultimately it should be for the government to make the political assessment. Only the government is aware of its intentions vis-à-vis future industry policy, its confidential discussions with key industry sectors and its views about the cost/benefit of various options for support. As noted, at most the Commission should provide the government with the competing arguments after clearly indicating that there is no economic rationale for anti-dumping regimes and a demonstrable net cost for the economy as a whole.

APPENDIX 'A'

EXPERT OPINION PROFESSOR PASQUALE SGRO

My name is Pasquale Sgro and I live at 98 Wellington Street, St Kilda in the State of Victoria. I am a Professor of Economics at Deakin University and have 30 years experience research and teaching in all aspects of International Trade. I have been asked to provide my opinion on certain aspects of the Productivity Commission's Inquiry into Australia's Anti-Dumping and Countervailing System.

What use should legitimately be made by the Commission of foreign literature?

I have been advised that at the public hearings, concerns were raised as to whether participants could legitimately cite American evidence, or whether such evidence could be said to be "highly misleading and not relevant to the Australian situation …" It was further queried whether, in spite of there being a lot of academic writing and a lot of experience in America, it might not be an entirely different system" that "works in different ways …"

I have been asked to consider a range of foreign articles, reports and studies outlined in the enclosed bibliography with a view to address that challenge. My views as to the utility of the literature are as follows.

The proper approach with each foreign study would be to first look at its methodology and conclusions and consider whether it is of merit in its own right. If not, it obviously can have no bearing on foreign jurisdictions. I have reviewed the methodology and conclusions of all of the papers noted in the bibliography to this Report and believe that none appear unsound on their face.

The second step would be to then consider whether the findings or hypotheses thrown up by the literature may or may not naturally apply to the situation in Australia. Here the key question is whether the situation in Australia is so different that the conclusions in the literature would be expected to be inapplicable. I cannot think of any reason why the Australian economy is so different to the US and EU economies, to suggest that the conclusions would be wholly inapplicable. It is of course the case that empirical studies dealing with different data sets could not expect to lead to identical numerical findings in each jurisdiction. Nevertheless, the broad implications in empirical studies should at least be working hypotheses in other similar jurisdictions.

In considering the applicability of foreign literature, I have tried to identify reasons why the American situation might be different. The only significant factor that might make the costs in the US higher than in Australia is that it is commonly conceded that the US anti-dumping laws are drafted in a more protectionist way. Thus a higher percentage of applications are likely to be successful, hence having both ultimately greater impact and in the interim, greater chilling effects.

Even then I have been advised that it would be inaccurate to describe the American situation as uniformly more protectionist than Australia. I have been advised that the US uses a bifurcated system where one bureaucracy determines whether there is dumping and another considers questions of injury and causation. The literature asserts that the bureaucracy that determines whether there is dumping present, almost always finds in the affirmative, which would hence be seen as more protectionist than in Australia. On the other hand, the bureaucracy dealing with

issues of injury and causation uses more sophisticated economic analysis than I am advised is applied in Australia. Hence the net outcome is not as easy to presume.

Conversely, I would imagine that in those sectors where anti-dumping actions tend to predominate worldwide, such as chemicals, steel, plastics and some foodstuffs, the Australian production industry is more closely controlled and is more likely to be monopolistic or at least oligopolistic in nature. That would suggest to me that it is easier to bring cases in Australia. Furthermore, because imports then become a more important precondition to a truly competitive domestic economy, the value in strategic use of anti-dumping as an exercise of market power is more likely. These factors would make it a more serious concern in Australia.

Another factor which would be of more concern to Australia is that we are not as desirable a foreign market as the United States for third country suppliers. Given that there are transaction costs and uncertainties for a foreign exporter being involved in an anti-dumping action, such as the need to compile a very lengthy and complex questionnaire within a very tight timeframe and being available for an on site visit that usually takes one week to verify all accounting records, it is more likely that an action brought from Australia will discourage a supplier from continuing supply than would be the case with the US. Thus we are less likely to see trade diversion with the US than with Australia. Similarly, it would be easier for American import interests to find alternative sources of supply when traditional sources are made non-viable as a result of anti-dumping activity.

These factors do not make the foreign literature inapplicable. In the main they suggests some reasons why the negative impacts might be worse in the US and EC and a greater number of reasons why the converse would be true. The broad implications of the foreign studies should still be relevant to any analysis of the Australian scenario and policy options.

The negative impacts of Australia's anti-dumping system

I am advised that the Commission did not seek to model or otherwise quantify the negative impacts of retention of the anti-dumping system. While the Commission has articulated a range of potential benefits and costs, it concludes that while there is a net detriment, this "is likely to be very small in an aggregate sense." This conclusion was then an important aspect of its ultimate recommendation to retain the anti-dumping system on political economy grounds by reason of the fact that only small political economy gains would be necessary to outweigh the suggested small net economic detriment.

I would not agree with those presumptions about the likely small magnitude of the net economic effects in the absence of analysis of the Australian scenario and in the light of the foreign literature and studies. As noted above, a range of foreign studies are sufficiently meritorious in their methodology and likely to raise at least rebuttable presumptions for the Australian scenario that would suggest a contrary conclusion.

In terms of the impact on employment, I note the study by Mankiw and Swagel (2005) that considered for every job saved by steel tariffs, three jobs were lost in steel using industries. While the levels of protection in the steel sector would differ between the US and Australia, the ratios between steel producers and end users are likely to be similar. Similarly Mankiw and Swagel suggested that there were nearly thirty times the employees working in firms that manufacture metal products than workers within the steel producers themselves who seek anti-dumping protection. Because the Commission has found that anti-dumping action in Australia is largely

taken against input goods such as steel, plastics and chemicals, I think the best working hypothesis would be that retention of a protectionist anti-dumping system would have significant adverse employment effects.

The next question thrown up by the literature is whether there is an asymmetry in the cost-benefit to firms in bringing and defending anti-dumping applications. I am advised that at the public hearings, the Commission sought responses to the fact that "there are lots of people who have put the … point to us, that to an importer there is a zero cost of behaving in a manner that dumps and once dumping is found, simply to withdraw from the market. There is no cost to them. So the counter point of view is there is nothing that stops them continuing to behave the way they want until measures are imposed. So we need to find the truth between these two positions."

I have been advised of the following facts in relation to the Australian Steel Association (ASA) and its defence of three recent dumping actions in relation to HSS steel. I am advised that the ASA is a group of disparate importers and distributors of various commercial sizes who are often otherwise natural competitors and might enjoy temporary advantages when an anti-dumping action is brought against some countries and not their primary suppliers. Basic principles of political economy would suggest that it should be very hard for such a group to organize itself to defend actions. Furthermore, I am aware that in determining whether there is dumping, there is a need to consider the normal value in the export country. Each supplier must complete a questionnaire to a sufficient degree of quality to satisfy the bureaucracy and must do so, within a stipulated time period. Any supplier that does not meet these obligations faces the risk of a residual dumping margin. Furthermore, any foreign supplier who meets this hurdle must be prepared to devote up to a week of staff time hosting a site visit by Customs bureaucrats. Once again political economy would suggest that many suppliers will simply fail to meet these obligations or choose not to do so, particularly owing to the small size of the Australian market.

Conversely, when looking at the strategic value to domestic producers, given the Commission's finding that the key applications come in the fields of plastics, chemicals and steel, these are typically oligopoly or even monopoly industries in Australia after significant mergers and acquisitions now generally supported by the ACCC. A domestic monopolist would find it very easy to bring anti-dumping applications and would have a natural inclination to do so or threaten to do so. A monopolist would naturally consider inviting an existing employee to monitor imports with a view to considering when to bring dumping cases. If there is a need to use outside consultants the likely fees would always be a very modest percentage of the potential gains from a successful anti-dumping action. The Commission has found that average dumping margins far exceed Australia's current tariff levels. Hence it would be natural to assume that suppliers facing dumping duties would be uncompetitive in the domestic market, leaving their historical market share available for local producers.

The intuitive logic of this scenario is supported by foreign literature I have examined including Stiglitz (1997) which speaks of a typical asymmetry in legal costs being borne by domestic applicants and foreign defendants; Prusa (1999); Staiger and Wolak (1994a) and (1997); UNCTAD (2000); Mankiw and Swagel (2005); US Congressional Budget Office (2001); Konings and Vandenbussche (2004); Messerlin and Tharakan (1999); USITC (1995); Bown (2004) all of whom discuss the likely negative impacts of various stages of the process regardless of the final outcomes.

While the Commission did not seek to evaluate the size of the negative impact, I have been advised that the Commission took note of USITC (1995), a study seeking

to analyse the negative costs in the US economy. The Commission has noted that if the methodology was applicable to Australia, then the net welfare loss in this country on an annual basis would be in the order of $250 million That of itself is a significant figure and should undermine a conclusion that the aggregate net losses to the community are small. Furthermore, it is a figure of sufficient significance to make it hard to assert without analysis that the benefits of retention of the system on political economy grounds would naturally outweigh the welfare losses.

More importantly, there are a number of studies that point out why it is likely that the costs of anti-dumping protection will tend to be underestimated. I note Gallaway et al (1999) who assess the welfare losses in the US at a much higher figure than USITC (1995) and Blonigen and Prusa (2003) who argue that the costs of anti-dumping protection are substantially higher than standard tariff analysis would suggest. I believe these studies to be valid in their own right and appropriately applicable to Australia.

Taken together, the insights of USITC (1995), Gallaway et al (1999) and Blonigen and Prusa (2003) have sufficient intellectual merit and have sufficient potential applicability to Australia to have demanded that a proper welfare analysis was conducted, although I agree with the Commission's assertion that full modelling would be difficult and perhaps not warranted.

Anti-competitive effects of the anti-dumping system

There are a number of key anti-competitive effects of any anti-dumping system that should either be the basis for removing such systems in their entirety or at least demanding significant internal reforms to remove their protectionist biases.

The general welfare losses as noted above are one of the key anti-competitive elements.

Secondly as noted by the Commission, if most anti-dumping applications are taken in relation to key input goods, then the anti-dumping regime could potentially be a very significant barrier to the development of a viable Australian manufacturing sector. I note that in considering this aspect, the Commission noted that "user industries will face higher prices with negative impacts on their activity and investment – though where measures prevent the exit of upstream local producers, they may be partially compensated by more secure long term supply." (Productivity Commission Draft Inquiry Report page XVI) While that statement is analytically correct, the degree of higher prices, the general impact on those user industries and their employees, and the ultimate incentive for those industries to move offshore are important issues that might have been assessed. Furthermore, the likelihood that local producers' viability is dependent on the continuation of the anti-dumping system (hence preventing their exit) is analytically unlikely. Even if it was possible, the user industries might obtain secure long term supply through imports.

I believe that a finding that anti-dumping is concentrated in key input industries would make it highly desirable to try and make some broad assessments of these impacts and consider appropriate internal responses if the system is to be maintained.

Another aspect of anti-competitive effects is strategic use of anti-dumping provisions. At p 30 the Commission notes that it is common in many of the industries using anti-dumping for producers to also import products to complement their locally manufactured ranges. The Commission notes concerns that this increases the scope

for strategic use of the system but concludes “it may more generally have discouraged recourse to anti-dumping measures.”

The Commission does note at p 57 that any system providing for the restriction of competition in certain circumstances will inevitably create incentives for strategic use.

The Commission notes what it sees as several factors militating against such strategic behaviour.

(a) It notes that the costs of firms taking anti-dumping action are significant.

In my view, as noted above, they are not significant in the context of the protectionist benefits that the literature alludes to. Furthermore, companies that have full time members of staff whose work is to do nothing other than monitor and bring anti-dumping actions provides for little in the way of marginal costs when an application is made. The proposition also ignores the likely cost imbalance between those bringing applications and those defending them as noted by Stiglitz (1997).

(b) The Commission notes that only around one-quarter of applications ultimately result in the imposition of measures. It concludes that to be credible threats must be underpinned by a reasonable likelihood of success if such action is in fact pursued.

This is not compelling for a range of reasons. First, the literature points out that there is a significant market impact immediately an application is made and even for unsuccessful applications. This is because it is easier for people to try and alter sources of supply so they do not run the risk of paying for the duty. An important question overlooked by the Commission is who effectively bears the duty. Foreign suppliers generally will not bear the duty and in many cases it cannot be passed on to the ultimate consumer although it is part of the risk for importers and/or their distributor clients.

In addition, a 25% strike rate is significant and would be expected if anticipated to make any application seem strategically desirable on cost/benefit grounds. Even if there were no chilling effects in Australia from applications themselves as found in foreign jurisdictions, a successful application would only have to return four times the cost outlay to be profitable. Import values in the industries commonly resorting to anti-dumping activity would be expected to easily support this view, although I have not personally analysed the data.

After alluding to these factors the Commission goes on to say that notwithstanding these constraints “it would be foolish to dismiss the potential out of hand.” At a later stage the Commission notes that in terms of initiation, the lower the bar, “the lower will be the application cost for firms, leading to a possibly greater likelihood of strategic filing behaviour designed to ‘chill’ imports” (p 99).

For the above reasons I agree with the analytical hypotheses of the Commission as to why strategic behaviour may be a problem but do not agree that the level of the problem can be discounted for the reasons the Commission articulates. Quite the contrary. I believe both analytical logic and foreign studies make it almost inevitable that as local producers obtain market power, they will have incentives to abuse it in a range of ways including the strategic use of anti-dumping actions which for reasons noted above, are relatively cheap as compared to the costs imposed on their targets

and most importantly, because it is a legally permitted form of market power abuse, absent any interference by competition law authorities with the functioning of the anti-dumping system.

These analytical predictions are supported by a range of foreign studies whose methodologies appear sound and transferable to the Australian scenario. Studies I have examined in this context comprise Schuler (1996) and Liu and Vandenbussche (2002) that respectively found a correlation between higher market share and greater political activity seeking protection and a higher number of anti-dumping filings the higher the concentration of the industry; Staiger and Wolak (1989); Hindley and Messerlin (1996); and Kelly and Morkre (2002) finding that anti-dumping laws can lead to cartelisation; Stiglitz (1997) noting that statutes offering even a possibility of protection inevitably engender rent seeking activities that are both direct such as lobbying and indirect such as manipulating output in order to make a positive finding more likely; and Staiger and Wolak (1994b) finding that anti-dumping laws are abused with cases filed as harassment, seeking to impose temporary restraints and increased legal costs.

As noted at the outset, it is important to realise that many of the publications deal with theoretical models and are hence not bound by possible differences in data sets between various jurisdictions. I agree with the logic in the theoretical models seeking to show that anti-dumping protection facilitates the abuse of market dominance in the work of Theuringer and Weiß (2001) and Pauwels, Vandenbussche and Weverbergh (1997).

I agree with the logic in Zanardi (2004) which showed that the more an industry exports, the less it is likely to bring anti-dumping actions against competitor imports in its home country. Yet a firm's export behaviour cannot have any correlation to whether dumping actually occurs or not. In the steel sector, I am instructed that OneSteel does little in the way of exports and brings many dumping actions. BlueScope exports significant amounts and has not brought an anti-dumping action for many years.

Both analytical logic and foreign literature would therefore suggest that there is a very significant incentive for abuse of market power through the anti-dumping system. A well-designed system should therefore have built in disincentives to this occurring. I am aware that there are a range of policy options in this regard, ranging from the ability to exclude manufacturers who also import as permitted but not mandated by the WTO Anti-Dumping Agreement; penalties for inappropriate applications; moratoria after unsuccessful applications; and the application of abuse of market power provisions in the Trade Practices Act to anti-dumping applicants. I have not sought to analyse the relative costs and benefits of each of these from an economic perspective. The point is simply that if there are a range of policy options to a demonstrable problem, these should be analysed and the optimal one selected.

I have also been advised that some local producers also import, particularly when they do not have sufficient capacity to meet demand and/or do not wish to devote production capacity to certain kinds of products. Without any systemic disincentives, the anti-dumping system obviously affords them an excellent opportunity to abuse market power both domestically and in the import sector. A local manufacturer with market power who brings anti-dumping actions against all countries other than those where it exclusively imports from, can gain monopoly rights over domestic production and over importation. I have been advised that the ASA members have faced three anti-dumping actions from OneSteel in relation to HSS steel where I am told that OneSteel imports from countries that it does not target with anti-dumping actions.

This is clearly a serious problem worthy of a policy response and also draws attention to the importance of trade diversion as well as trade depression.

Studies identifying such diversion include Brenton (2001), Vandenbussche, Konings and Springael (1999) and Bown and Crowley (2006) This will have inevitable welfare costs but is of particular concern in the Australian industry given the above scenario where customs authorities allow strategic filings by local producers who also import.

Is there an optimal economic approach to causation and lesser duty provisions that is workable in practice?

In my opinion, ASA's submission (paras 33-4) points to clear and compelling reasons why domestic producers are able to command a significant price premium in certain industries. That ought to have raised the most significant policy concern for the Commission. It is perfectly natural, because of such advantages as the absence of the need for foreign shipping, closer geographical proximity to customers and the like, that competitive imports will have to be priced significantly lower just to be in parity with those price premium advantages. Yet I am instructed that Customs generally looks at mere price undercutting as proof of causation of injury. The Commission should not allow the system to be maintained on a flawed misuse of correlation as causation when there is a perfectly natural commercial explanation for price undercutting.

In addition, I am instructed that a proper and comprehensive analysis of even one key industry as a test case would show that pricing decisions are often not truly conscious undercutting by imports, but instead, local manufacturers keeping abreast of import prices and simply adding a premium that would still meet their market share targets. This is particularly important as the Commission has found that the key industries affected are those dealing with important input goods for further manufacture where those industries are typically monopolistic or oligopolistic industries.

These issues make an optimal causation analysis a vital part of any anti-dumping regime concerned to minimize negative welfare effects and accurately comply with the legal requirement that action can only be taken against dumped imports that cause injury.

There are a range of causation tests that may be used in economics. While there may be debate about the merits of each and the potential applicability in a bureaucratic regime that needs to meet dual obligations of fairness and efficiency, I am strongly of the view that without an attempt to apply some economically justifiable causation analysis to the anti-dumping process it will remain fundamentally flawed.

I note a range of studies dealing with causation questions including Grossman (1986); Steinberg and Josling (2003) p 391ff; Prusa and Sharp (2001); Benetar (1999) and Fetzer (2009). I am also aware that US practice is to consider more compelling causation logic although I understand there is no consensus as yet on the best approach. I have also been shown a WTO study indicating the significant growing use of economics and econometric modelling in this and similar areas of WTO analysis. (WTO)

I am strongly of the view that this is a meritorious trend and that Australian reform in this area should follow similar lines, both because of the inherent merit of economic rigour and to be more consistent with best practice as evidenced in WTO developments. In the time available for this report, however, I have not been able to

assess the merits of different causation methodologies and in any event I accept that there may be desirable policy trade-offs between tests that would be theoretically best and those which would be administratively workable within tight timeframes. Importantly, however, the absence of the use of any justifiable test and the application of illogical measures is not good policy and presumably does not meet the statutory mandate to truly look for causation.

Comprehensive economic reform

I have been advised that the key thrust of the Commission's current recommendation is to include a public interest test. Even if there is a finding of injurious dumping, a duty need not be imposed if it would not be in the public interest. The Commission has recommended a number of express criteria where such a conclusion would be appropriate. Some of the more important ones include a situation where there is advice from the ACCC that the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned; where dumping may be a contributing factor but is not the major cause of injury and where like goods could be readily obtained from an undumped source at a comparable price.

While I am wholly supportive of these reforms, in my view it would be problematic if insufficient changes were made to the balance of the system. Where the above public interest criteria are concerned it is important to understand that most of these should already have been taken into account if there was a sensible causation analysis being conducted. For example, the criterion that looks to whether the dumped imports are the major cause of injury ought to have already flowed from the requirement that injury from sources other than the dumped goods should not be attributed to the dumped goods. Where the third criterion is concerned, if non-dumped imports are the market price leader, again there should have been no finding of injury caused by the dumped goods. Thus in my view it is vital that the bureaucracy be given appropriate economic expertise by recruitment of people who can perform each analysis concurrently. Anything else would lead to an unfortunate mismatch between positive decisions on injurious dumping and negative decisions under a public interest test.

Pasquale Sgro

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(see ASA submissions for full citations)

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APPENDIX 'B'

ADJUSTMENT CASE STUDY

This supplementary submission has suggested that reforming the particular rules and procedures is likely to be as important as the laudable introduction of a public interest test. Such changes would not increase uncertainty and complexity but would remove uncertainty and complexity that currently exists in key areas.

An example of an adjustment concern in the steel sector is illustrative. In a particular case, one supplier country evidence had been provided to the effect that for exported product, hot-rolled coil is bought on the world market at proper competitive prices. For domestically sold product, the hot-rolled coil was bought from a domestic supplier who is one part of a duopoly within the marketplace. Customs has already verified figures which demonstrated that the hot-rolled coil for domestic use will typically cost something in the order of 18.90 B/kg compared to 14.96 B/kg on inputs for exported goods. Because hot-rolled coil is the most significant aspect of the cost of the final product, accounting for some 70 per cent of value (as found in TMR 7.1.2, p 19), this is a major difference which alone would guarantee that the normal value if unadjusted, would be higher than the export price in all cases.

The price differences are significantly more than the 10 per cent duty rate applicable on imported coil. The verified differences in price do not support a more limited conclusion made by Customs in TMR No 84 at p 28 where the following statement is made:

> "An import duty is placed on imported HRC to protect the local industry, and therefore the prices of the local industry, although controlled by the government to prevent exploitation, are significantly higher than the global commodity price that Saha pays for imported HRC. As a consequence, the prices of HDG CHS that Saha sells in the domestic market are much higher than export prices of the same goods to reflect the cost of inputs used to produce the goods sold in the respective markets."

This conclusion makes it appear that the difference in price is simply caused by the duty differential. Such a conclusion cannot be supported by the verified evidence before Customs. A world market price inflated by the 10 per cent duty rates operating in Thailand would lead to landed prices in the order of 16.50 B/kg. Because the verified domestic prices are significantly higher, Customs must look for additional explanations.

This difference in circumstances should either lead to normal values being rejected in favour of a constructed price, or alternatively to the normal values being adjusted for comparative purposes. As to adjustment, that should be based on the verified cost differences. As to rejection as an alternative, it must have been obvious to Customs on the face of the information before it that the domestic price is non-commercial for some reason. This alone could allow Customs to conclude that it is outside the ordinary course of trade.

Where adjustments are concerned, Article 2.4 of the WTO Anti-Dumping Agreement indicates that:

> "A fair comparison shall be made between the export price and the normal value. … Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including difference in conditions

> and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

It is clear from the language of the Agreement that the required adjustments are mandatory and are not intended to be limited to specific categories.

Australia's Customs legislation seeks to express this obligation in more specific language. Customs' report on normal value suggests that an adjustment of this nature is not within Customs' policy. TMR No 84 at p 28 states:

> "Customs policy, however, is to make an adjustment only where it can be demonstrated that the prices of domestic sales have been impacted by duty paid on inputs used to produce the domestically sold goods."

Such a conclusion is flawed for a variety of reasons.

The Australian Government is presumed to have incorporated legislation with an intention to be WTO compliant. If Australia's Customs legislation is not in compliance with the WTO Agreement, then Australia is in violation of its international obligations. Hence Australia's legislation should be interpreted in a purposive fashion consistent with Article 2.4 of the Anti-Dumping Agreement (ADA). Such an approach, when examining section 269TAC(8) of the Customs Act 1901 (as amended), would give a broad interpretation to the three enumerated factors to ensure that there was not a more restrictive approach under the Australian legislation than under the WTO Agreement.

Similar issues relate to the question whether section 269TAC(1) applies or whether particular market conditions mean that the analysis should proceed under sections 269TAC(2)(c), (4)(e) and (9).

Federal Court decisions support this analysis. A purposive approach to interpretation of section 269TAC was called for in *Darling Downs Bacon Co-operative Association Ltd and Pork Council of Australia Ltd v The Comptroller-General of Customs; Peter Ludwig Kittler and the Anti-Dumping Authority* (1994) 33 ALD 531 at para 38. That judgment also cited with approval the views of Hill J in *Powerlift (Nissan) Pty Ltd v Minister of State for Small Business, Construction and Customs* (1993) 40 SCR 332 at 348 (?) where his Honour looked at the effects of comparing sales at different trade levels at a time when the legislation did not specifically address this issue. He concluded that "to do so would be to increase the normal value at the expense of the export price, and make it more likely that dumping would be found to exist, when on a comparison of like with like it did not."

If account is not taken of the obviously non-commercial reasons for inflating the normal value, dumping would be found to exist even though the export price is calculated on a fair and reasonable world competitive basis.

Federal Court comments also imply that the more specific language in the Australian legislation was not intended to detract from ADA and should not be interpreted narrowly. The *Darling Downs* case indicated that:

> "The expression 'circumstances of the sales' is plainly intended to have wide operation …." (para 19).

Other relevant principles have been shown in WTO jurisprudence. While the WTO Panel in *United States-Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* took a restrictive view of the facts as to the relevant conditions and terms of sale. The Panel noted:

> "In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4." (para 6.77)

The Panel took the view that differences in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made (para 6.78). By analogy, the difference in pricing between the imported and the local hot-rolled coil was obvious to the exporter and is demonstrably included in its calculations.

A broad purposive approach would be consistent with most parts of the ACS own manual, Volume 22, Dumping and Subsidy. To the extent that that manual precludes an adjustment in this case, the policy is incorrect and an improper violation of Australia's WTO obligations.

Para 218 of that Volume indicates that the proper policy concern is with price discrimination. Where adjustment is concerned, it is clear from the WTO Agreement that the aim is to identify any factors that affect price comparability. Those that do, should be adjusted for. If factors do not affect price comparability, then differences between export prices and normal values point to unfair discrimination in one market at least. If factors do affect price comparability, it is only sensible to make an adjustment to remove their effects to see if this fully explains the price differences or to see if there is any residual unfair discrimination.

The Volume draws attention to some broad policy approaches that would readily apply in these circumstances. Para 224 distinguishes between circumstances that are likely to have a direct or causal relationship to the price of the sales and those circumstances that do not. Where input costs of a component giving rise to 70 per cent of value are about 27 per cent higher in one market than another, it will obviously have a causal relationship on price. Buyers would be likely to be aware of that factor as referred to at para 225 and their own prices would have been affected. But for the sale taking place, the expense would not have been incurred. The relevant expenses are variable expenses as referred to in para 226. They have the closest connection to the sale under consideration as referred to in para 227. They would naturally give rise to "significant differences in costs and/or prices" as referred to in para 229.

Neither domestic express legislative articulations of characteristics requiring adjustment nor such policy manuals should be interpreted in an exhaustive way. This was made clear in the GATT Panel Report on *Audio Tapes in Cassettes from Japan* which held that an earlier version of the EC's basic regulation was in violation of the Tokyo Round Anti-Dumping Code because it precluded the making of due allowances on their merit for certain differences not articulated in that version of the regulation. Council Regulation (EC) No 2331/96 of 2 December 1996 amending Regulation (EC) No 384/96 on Protection Against Dumped Imports from Countries

Not Members of the European Community *Official Journal L 317 , 06/12/1996 P. 0001 - 0002 CONSLEG - 96R0384 - 30/04/1998 - 52 P* has expressly ensured that any enumerated items are not exhaustive. Australia cannot have contrary laws or policies and remain WTO compliant.

The most significant aspect of the European regulation is subparagraph (k) of paragraph 10 of Article 2 of Regulation (EC) No 384/96:

> "(k) Other Factors
>
> An adjustment may also be made for differences in other factors not provided for under subparagraphs (a) to (j) if it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers consistently pay different prices on the domestic market because of the difference in such factors."

Where US legislation is concerned, section 1677b, normal value, provides for broad "(6) Adjustments (for) (iii) other differences in the circumstances of sale. This has been interpreted broadly."

US secondary sources point to a range of practices and decisions that would require careful consideration of the need to either adjust or reject normal values in these circumstances.

APPENDIX 'C'

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