Australian Government
Australian Customs and
Border Protection Service

Reference: File No. 2009/009335-01

5 Constitution Avenue
Canberra ACT 2600

Mr Ian Gibbs
Assistant Commissioner
Productivity Commission
15 Moore Street
Canberra City ACT 2600

Dear Mr Gibbs

Productivity Commission Inquiry into Australia's anti-dumping and countervailing regime—Draft Report

I refer to the Productivity Commission's (Commission) draft report[1], our subsequent meeting and correspondence. The Australian Customs and Border Protection Service (Customs and Border Protection) has had the opportunity of reviewing the transcript of the public hearing held by the Commission in Melbourne on 15 October 2009.

Customs and Border Protection have provided further information and comments to the Commission in relation to the proposed recommendations on the public interest test (6.1), annual reviews (7.5), duty collection (7.6), and transparency (8.8). The following additional comments are provided for the Commission's consideration in formulating its final recommendations.

Public interest

Draft recommendation 6.1 outlines key elements of the proposed public interest test, namely

- "a starting presumption that measures will be imposed if there is dumping or subsidisation of exports, which has caused, or threatened to cause, material injury, unless it would be against the public interest to do so;
- general guidance on the matters ...that could be considered...
- a further directive that the imposition of measures will prima facie not be in the public interest...if any of" six specified circumstances were met.

[1] *Australia's Anti-dumping and Countervailing System*, Productivity Commission Draft Inquiry Report, September 2009.

Cause of material injury

Three of the six specified circumstances appear to be relevant to determining the cause of material injury. These are:

- the resulting price for the imported goods concerned would still be significantly below competing local suppliers' cost to make and sell (if the "resulting price" is intended to be a price adjusted for the dumping margin or subsidies)
- un-dumped or non-subsidised 'like' imported goods are readily available at a comparable price to the dumped or subsidised imported goods
- the dumped or subsidised imports are not the primary cause of the injury being experienced by the local industry.

Customs and Border Protection has previously indicated to the Commission its concern that there was uncertainty regarding the application of the primary cause criterion. If that test is intended to be that measures will be imposed unless the decision-maker is satisfied that dumped or subsidised imports are not the primary cause of the injury being experienced by the local industry, then it is more likely that, as a result of the practical difficulty in quantifying cause in practice, it could operate in the exception—as apparently intended by the Commission.

However, the uncertainty regarding the potential application of the primary cause criterion raises a more general concern regarding all the specified circumstances that would normally be taken into consideration in determining whether dumping or subsidisation caused material injury. While the Commission has confirmed that their intention is that measures would not be applied where dumping was a "minor" cause of material injury, Customs and Border Protection questions whether inclusion in a public interest test of specific circumstances relevant to causation is appropriate or whether there is an alternative to ensure these (and similar) circumstances are taken into consideration in determining the issue of causation before any consideration of a broader public interest (e.g. general or more specific guidance in administrative guidelines, Ministerial direction or regulation).

Other public interest criteria

Customs and Border Protection notes that in relation to the other specified criteria the Commission has proposed, the effect is that, where these circumstances are established (e.g. where local industry's share of the domestic market for the goods concerned is less than 20 per cent), it would *prima facie* not be in the public interest for measures to be imposed. In such circumstances, applicants would effectively have an additional onus to satisfy the decision-maker that it would be in the public interest for measures to be imposed.

Trade Measures Review Officer

Draft recommendation 8.2 provides that where the Trade Measures Review Officer finds in favour of an appeal, the Minister should make a decision without returning the case to Customs and Border Protection for reinvestigation. Customs and Border Protection has suggested that further clarification of the Review Officer's role would appear merited, irrespective of whether the recommendation is accepted. The attached paper sets outs some considerations that may assist the Commission.

Any queries in relation to the attached should be directed to Wendy Hunt, Director Operations Support (6275 5740).

Yours sincerely,

Geoff Johannes
National Manager
Trade Measures Branch

9 November 2009

Attachment to The Australian Customs and Border Protection Service (Customs and Border Protection) letter response to the Productivity Commission Inquiry into Australia's anti-dumping and countervailing regime—Draft Report

Topic: Trade Measures Review Officer (TMRO)

(1) Request:

Productivity Commission (PC) sought information from Customs and Border Protection that may assist in clarifying the role of the TMRO.

(2) Response:

The nature of the TMRO's function as limited merits review

As a limited form of merits review 'on the papers', the function exists somewhere between:

a) De novo merits review, which includes fact-finding powers and the responsibility to make new findings and to substitute the 'correct or preferable' decision; and

b) Judicial review, which is concerned with errors of law (including procedural errors), rather than errors of fact, and which has a very limited fact-finding role.1 The Federal Court will only address the quality of a decision, to the extent that it must not be manifestly unreasonable, and must be based on some evidence. The Federal Court does not make a fresh assessment of a dumping application, it rather focuses on the way Customs and Border Protection conducted the investigation, and whether any legal errors were made.

The TMRO presently has attributes common to both ends of this spectrum. Like bodies conducting de novo reviews such as the AAT, it is part of the administrative arm of government, and conducts an (albeit limited) form of merits review. Like the Federal Court, the TMRO does not have any new fact-finding ability, and does not make new findings. This hybrid nature will remain the case even if the TMRO is given the power to make final recommendations to the Minister. Therefore, it is appropriate that the standard of review to be applied by the TMRO be clearly articulated and adapted to its relatively unique position. Two comparable examples of limited merits review that more clearly define the relevant standard of review are examined below.

Other examples of limited merits review in Australia

Discussed below are two illustrative examples of limited merits review conducted by the Superannuation Complaints Tribunal and the Administrative Appeals Tribunal. These bodies apply a standard of review somewhere between the 'correct and preferable' test in the case of de novo review, and the 'manifestly unreasonable' or 'no evidence' tests applied on judicial review.

Superannuation Complaints Tribunal (SCT)

A person can make a complaint to the SCT on the basis that the decision of a trustee was 'unfair or unreasonable'. Section 37 of the Superannuation (Resolution of Complaints) Act 1993 (attached) defines the SCT's powers of review. That section relevantly states that the Tribunal 'must affirm' a decision under review if it is satisfied that the decision 'was fair and reasonable in the circumstances'. Further, the SCT may only exercise its powers under s 37

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1 For example the court may make its own enquiries in relation to jurisdictional facts.

to the extent necessary to eliminate any unreasonableness or unfairness in the original decision. The nature of this review function has been unpacked by a line of Federal Court cases, summarised as follows:

> The tribunal's role is not to decide whether a complainant is entitled to a benefit. It has the more limited task of determining whether the decision complained about was fair and reasonable in the circumstances. It is not open to it to receive new evidence as its review is confined to the circumstances existing when the decision was made.2

In that case, it was noted that the SCT 'is not to act as an objective, impartial observer, but rather... stands in the "shoes" of the trustee or insurer. In so doing, Allsop J has observed:

> The tribunal's task is not to engage in ascertaining generally the rights of the parties, nor is it to engage in some form of judicial review of the decision of the trustee or insurer. Rather it is to form a view, from the perspective of the trustee or insurer, as to whether the decision of either was (recognising the overriding framework given by the governing rules and policy terms, respectively) unfair or unreasonable.3

Administrative Appeals Tribunal (AAT)

The AAT conducts a limited form of merits review in relation to conclusive certificates4 issued under the Freedom of Information Act 1982.5 Generally speaking the AAT has wide powers of merits review where no certificate is in force with respect to a document6, but where conclusive certificates are in force 'the powers of the tribunal did not extend to reviewing the decision to give it', but instead determined 'whether there exist reasonable grounds for the claim for exemption.'7

The High Court case McKinnon v Secretary, Department of Treasury8 discussed in detail the nature of the limited merits review function bestowed upon the AAT. The majority explained that the purpose of this review function is not to decide whether the Minister was correct. The AAT is rather 'limited to determining whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.'9 The majority went on to note that:

> [S]uch a limited form of review of primary decision-making is not unfamiliar. For example (although the analogy is far from exact), when, in an ordinary tort case, an appellate court reviews a finding of negligence by a court of first instance (a finding that may turn upon questions of fact and a normative judgment as to reasonableness), the kind of review that is undertaken will depend upon whether the decision at first instance was that of a judge alone, or of a jury. In the former case, depending on the statute creating the right of appeal, the appeal may be by way of rehearing, and the duty of the appellate court may be to decide whether it regards the decision at first instance as wrong. In the latter case, the appellate court does not decide whether it agrees with the jury's conclusion; it decides whether it was

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2 *Constantinides v Du Pont Superannuation Funt Pty Ltd and Another* - (2002) 67 ALD 664

3 *Retail Employees Superannuation Pty Ltd v Crocker* (2001) 48 ATR 359 at 367

4 A Bill was introduced into Parliament in 2008 that would abolish these certificates: *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008.*

5 Conclusive certificates could be issued in relation to claimed exemptions under ss 33, 33A, 34 or 35 or 36.

6 Set out in s 58 of the *Freedom of Information Act 1982*

7 *Shergold v Tanner* (2000) 62 ALD 584

8 [2006] HCA 45

9 At para [8]

reasonably open to the jury to reach that conclusion[4]. That is a familiar form of review which falls short of full merits review.10

This High Court approved of the following explanation of the test: '[w]hen a statute prescribes that there must be 'reasonable grounds' for a state of mind - including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.'11 The High Court cautioned that this did not mean that such a test will be made out 'so long as there is anything relevant to be said in support of the view'. The question in that case concerned a judgment that disclosure of certain documents would be contrary to the public interest. The High Court said that this issue is multi-faceted and must be looked at from multiple angles, such that there is evidence that the 'weighing' exercise has been done. This test falls somewhere between the undemanding standard applied on judicial review (that of 'Wednesdbury unreasonableness'12 or 'serious irrationality'13) and the 'correct and preferable' test applied in a de novo merits review.

The judicial doctrine of due deference in Canada and the US

The doctrine of due deference as applied in Canada and the US concerns the relationship between the judicial and executive arms of government. Given that the TMRO forms part of the executive in Australia, the 'separation of powers' issue is not relevant here. Further, the doctrine concerns judicial deference to administrative decision makers' interpretation of the law, whereas the TMRO, as a merits review body, is more squarely concerned with matters of fact, that is, whether the facts as found are capable of supporting the conclusions as they **relate to the statutory criteria14.**

The US doctrine

The doctrine of due deference (the so called Chevron doctrine) applies at the federal level in the US, where legislation an agency implements admits more than one interpretation. In such cases, Congress is taken to have delegated the job of 'filling in the blanks' in such legislation to the agency. Not only will courts defer to the interpretation taken by administrators in a given case, but where such agencies have issued directions on the interpretation of certain provisions, these will be binding on the courts. The Chevron doctrine has, however, been explicitly rejected in Australia.15

The Canadian doctrine

In Canada where administrative body specialises in an area, and a particular issue to be determined admits more than one interpretation, a specialist administrator's determination of that issue will be treated as persuasive but not binding. This is termed 'deference as respect', though this respect must be earned by the provision of rational reasons. As such, Canadian courts will pay deference to an adjudicative tribunal's findings of fact, application of law to the

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10 At para [9]

11 *George v Rockett* (1990) 170 CLR 104 at 112.

12 In order to satisfy this test, the impugned decision must be 'so unreasonable that no reasonable authority could ever have come to it': *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] KB 223 at 229 – 230.

13 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003]198 ALR 59

14 An error of law will not necessarily be fatal to a decision, provided the facts support the test correctly stated). The Olive Oil case was an instance where this in fact occurred: the TMRO applied the correct test but still arrived at the same conclusion.

15 *Enfield City Corp v Development Assessment Commission* [2---] 199 CLR 135

facts found, and exercises of discretion, in a like manner to the way an appellate court will pay deference to a first instance court.16

16 Aronson, Dyer and Groves *Judicial Review of Administrative Action* Fourth Edition, Lawbook.co 2009, p.132