Safeguards Inquiry into the Import of Pigmeat

Further Submission to the Productivity Commission

On behalf of the United States Industry, represented by the National Pork Producers Council (NPPC), the American Pork Export Trading Company (APEX), the American Meat Institute (AMI) and the US Meat Exporters Federation (USMEF)

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Requests

For the reasons set out in this and our earlier submissions, we request that the Commission to:

I. confirm the determinations in Finding 2.6 of the Accelerated Report that there is no evidence that increased imports have caused or are threatening to cause serious injury to the domestic industry and that the principal cause of serious injury is higher domestic feed costs;

II. reverse its determination in Finding 2.1 of the Accelerated Report that, for the purposes of this safeguards investigation, the products that are 'like or directly competitive with' pigmeat imported under tariff subheading 0203.29 include products other than primal and sub-primal cuts, and instead determine that such cuts are the relevant 'like or directly competitive product';

III. reverse its determination in Finding 2.2 of the Accelerated Report that pig producers and primary processors produce products which are either like or directly competitive with imported pigmeat cuts, and instead determine that the domestic industry that produces products that are like or directly competitive with pigmeat imported under tariff subheading 0203.29 is limited to the boning room industry;

IV. reverse its determinations in Findings 2.3 and 2.4 of the Accelerated Report as to the existence of 'increased imports' and 'unforeseen developments';

V. reverse its determination in Finding 2.5 of the Accelerated Report that the domestic industry producing products like or directly competitive with imported pigmeat is suffering serious injury or is under threat of serious injury; and

VI. determine in accordance with Article 9.5 of the AUSFTA that imports from the United States, standing alone, are not a substantial cause of injury to the relevant domestic industry, and consequently that such imports must be excluded from any final safeguard measures that are imposed.

If the Commission does not make the above determinations, we request that the Commission recommend to the Government, in accordance with the policy guidelines set out in section 8 of the *Productivity Commission Act 1998* (Cth), that safeguard measures would not be in Australia's best interests.

Introduction

1. The Commission's Accelerated Report of 14 December 2007 represented the culmination of a challenging preliminary process. In our view the Commission correctly concluded that increased imports of frozen boneless pigmeat cuts are not causing serious injury to the industry producing like or directly competitive products.

2. Despite concluding that interim safeguard measures were not warranted, we submit that the Commission's report contains a number of flaws in its analysis, leading the Commission to several erroneous conclusions, most notably with respect to the identification of the relevant domestic industry and the determination of serious injury and threat of serious injury.

3. Thus, while urging the Commission to affirm in its final report that safeguard measures are not justified, we submit that it is essential to revisit these key aspects of the safeguards analysis and refine and correct them, so that the Commission's final report is consistent with WTO safeguard rules and the Australian law that gives them effect.

4. The Commission should also determine that imports from the United States, standing alone, are not a substantial cause of injury to the relevant domestic industry, within the meaning of Article 9.5 of the AUSFTA.

Domestic Industry

The product that is 'like or directly competitive' with imported frozen boneless cuts is primal and sub-primal cuts; the domestic industry that produces the 'like or directly competitive' product is boning rooms.

5. WTO safeguards rules, as reflected in Australia's safeguards procedures, draw a clear line around the domestic industry that is relevant for a safeguards inquiry. The relevant domestic industry is limited to producers producing products that are 'like or directly competitive' with the imports that are subject to investigation.[1]

6. In interpreting these requirements, the Appellate Body has made clear that this definition calls for the industry to be defined by reference to a product and the competitive relationships it encounters in the marketplace.[2] It is not consistent with the *Agreement on Safeguards* to define the scope of an investigation by reference to an industry that produces goods other than like or directly competitive products. This means that producers of products that are upstream to final products that compete with imports will only form part of the relevant domestic industry in limited circumstances: 'input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products'.[3]

7. What defines the 'domestic industry' for purposes of a safeguard investigation is not, therefore, the full range of things that an enterprise (or group of enterprises) may produce. Rather, the domestic industry is limited to the producers of like or directly competitive products. Such producers may produce other things as well. For example, some vertically integrated enterprises may produce both like or directly competitive products, as well as distinct input or downstream products. But the production of goods that are not like or directly competitive with the subject imports does not form part of the 'domestic industry' for purposes of a valid safeguards investigation and can not be considered in analysing the impact of subject imports on the properly defined ‘domestic industry.’

8. In defining the scope of the relevant domestic industry for its Accelerated Report, the Commission incorrectly identified carcasses and half carcasses as 'directly competitive' with imports when this is not in fact the case. The Commission then went on to group products that are like or directly competitive with imports together with input products that are not.

9. It is not correct to maintain that carcasses and half carcasses are 'directly competitive' with imported boneless cuts falling under item 0203.29 of the Australian tariff. Contrary to the

[1] *Agreement on Safeguards*, Articles 2.1 and 4.1(c).

[2] See Appellate Body Report, *US – Lamb*, paras. 87 ff.

[3] Ibid. para 90.

Commission's preliminary finding, the requirement to bone out a carcass before it can be substituted for an imported boneless cut is not 'largely immaterial'. It is of the essence. The following statement from Houston Pork Wholesalers bears out this point:

> "Our business does not bone the carcasses to a point whether they are identical to those products that fall under [item 0203.29 of the Australian Customs Tarff], but a number of our customers do process the carcass further to be an identical good and say they cannot produce the products for the same as the imported product".[4]

10. If smallgoods manufacturers *cannot produce products that are identical to imported frozen boneless cuts for the same as the imported product*, then the difference between a carcass and a boneless cut is highly material to the nature of the competitive relationship between them. Smallgoods manufacturers cannot simply substitute a domestic carcass for an imported boneless cut. Instead, they must expend considerable resources to transform a carcass into a product with fundamentally different properties. This means the competition between carcasses and imported boneless cuts is at best indirect. Direct competition occurs only at the level of the supply chain where the needs of a purchaser can be met by either buying the imported or a domestically produced product.

11. The Commission was also incorrect to base its analysis of the relevant domestic industry around the existence of vertical integration between pig farmers and primary processors as well as other contractual arrangements that provide for change of ownership only once a pig has been processed to be a carcass. On this basis, the Commission identified the 'producer' of a carcass as the "owner/grower", i.e., pig farmers.

12. Even accepting, for the sake of argument, that carcasses are directly competitive with frozen boneless cuts, the fact that pig farmers happen to own carcasses until a certain point in processing does not justify the inclusion of everything that a pig farmer produces within the scope of the domestic industry producing goods that are like or directly competitive with imported boneless cuts. This is because farmers also produce distinct products that are clearly not like or directly competitive with imported boneless pigmeat cuts, namely, live pigs. To include production of such distinct and non-competitive products within the scope of the relevant domestic industry simply because they are part of a production chain runs counter to the clear wording of the *Agreement on Safeguards*.[5]

[4] To the extent that this submission by Houston Pork Wholesalers is the only evidence apparently relied upon by the Commission to reach its conclusion that carcasses and half carcasses are directly competitive with imported boneless cuts, we question whether this evidence reasonably supports such a proposition.

[5] It is notable that in its Accelerated Report, despite finding that many domestic pig farmers operate mixed farming operations (see, e.g., Accelerated Report, page 25), the Commission – correctly – did not take account of the non-pig related activities of such enterprises in determining the scope of the relevant domestic industry. This, presumably, was on the basis that other products, such as grains or feed grains, or other categories of meat production, are distinct and non-competitive products, not relevant to the safeguards inquiry. The commission failed, however, to apply this same logic when including the production of the distinct and non-competitive product *live pigs* within the

13. Indeed, this is just the error that the Appellate Body warned of in analysing the USITC's Lamb investigation in the *US – Lamb* case. In *US – Lamb*, the AB made clear that "under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products."[6] On that basis:

14. If an input product and an end-product are not "like" or "directly competitive", then it is irrelevant … that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products.[7]

15. The context in which the Appellate Body offered this insight was to rebut comments by the panel regarding the possible relevance of an examination of vertical integration within an industry for purposes of a safeguard investigation. Indeed, the Appellate Body expressly said:

> … we have reservations about the role of an examination of the degree of integration of production processes for the products at issue. [...] As we have indicated, under the *Agreement on Safeguards*, the determination of the "domestic industry" is based on the "producers … of the like or directly competitive products". The focus must, therefore, be on the identification of the *products*, and their "like or directly competitive" relationship, and not on the *processes* by which those products are produced.' [8]

16. None of these observations and rulings from the *Lamb* case is expressed as being limited to the specific facts of that matter or the legal question of whether certain products are 'like', as opposed to 'like or directly competitive'. They are all expressed as statements of general principle in order to clarify the provisions of the *Agreement on Safeguards*, consistent with Article 3.2 of the WTO *Understanding on Rules and Procedures for the Settlement of Disputes*. By virtue of having been adopted by the WTO membership in the Dispute Settlement Body, these are the most authoritative and contemporaneous expressions of the state of WTO law that is available. In these circumstances the opinions advanced by Professor Jackson in 1969 and 1997, the Productivity Commission in 1998 or the Canadian International Trade Tribunal in 1993 are no longer of any relevance now that the Appellate Body has spoken on the issue. In 2008 the jurisprudence relevant to the identification by a competent authority of a domestic industry for safeguards purposes is set out in the *US - Lamb* case and must be applied by the Commission in this matter to

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scope of the domestic industry that produces products like or directly competitive with boneless imported pigmeat cuts.

[6] Appellate Body Report, *US – Lamb*, para. 90.

[7] Ibid.

[8] Appellate Body Report, *US – Lamb*, para. 95 (emphasis original). In footnote 55 to this paragraph, the Appellate Body indicated that it could, "however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products." This footnote has no relevance in the current matter because it is obvious that pigs and meat products are separate products.

ensure that Australia's commitment to the security and predictability of the multilateral trading system is maintained.[9]

17. The integrity of the Commission's conclusions on the scope of a directly competitive industry is further undermined by the failure to recognise that the literal or plain meaning of a word or phrase must take precedence over an interpretation based on an extraneous consideration such as the objectives of the *Agreement on Safeguards*. This failure is compounded by the Commission's incorrect characterisation of the objective as permitting '…action against imports which cause serious injury to a domestic industry'. This assertion would enable, for example, grain producers (or indeed the suppliers of seed to such producers) to claim an entitlement to safeguard measures against imported pork cuts. The phrase 'directly competitive' is a significant limitation on the identity of the industry that can properly seek redress from imports causing injury and it is a phrase that has a plain and ordinary meaning in the context of safeguard measures. Giving due weight to these words, the meaning of 'domestic industry' can be readily identified as those producers whose product constitutes an alternative source of supply for the manufacturers of small goods. In the present case it is only the boning rooms that produce the directly competitive goods.

18. Similarly, it is not appropriate to conclude that, even if the relevant domestic industry were defined as comprising only boning rooms, 'the impact of pigmeat imports would remain relevant … because the output, sales and profitability of boning rooms will be directly affected by any reduction in the competitiveness and throughput of domestic pigmeat.' Again, this overlooks the requirement to consider the competitive relationship between the domestic and imported products. It instead focuses on the effect of changes in the supply of input products brought about by downstream import competition. That is not the correct mode of analysis: as the Appellate Body has clearly stated: 'input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products'.[10]

[9] Moreover, it is well to recall that the *US – Lamb* case arose out of a complaint by Australia and that Australia argued strongly that a determination that live animal inputs and meat outputs could not be treated as like or directly competitive products for purposes of a safeguard inquiry: "feeder lambs do not compete in the market with carcasses or primal or sub-primal cuts … Similarly slaughter lambs do not compete with the output of packers and breakers, since they are the major input for packers." (Australia's first written Submission to the Panel, 19 April 2000, reproduced in the Panel Report, *US – Lamb*, page A-25, paragraphs 114-115) The same logic applies in the case of pigmeat production in Australia.

[10] Ibid. para 90.

Objective evidence does not support a determination as to the existence of serious injury or a threat of serious injury

19. The standard of 'serious injury' and 'significant overall impairment' that is considered in the context of safeguards inquiries has been interpreted as being 'very high', 'exacting', and 'a much higher standard of injury' than the 'material injury' standard used in dumping and countervailing duty cases. A 'threat of serious injury' must be 'clearly imminent' such that it is 'manifest that the domestic industry is on the brink of suffering serious injury'.[11]

20. Under Article 4 of the *Agreement on Safeguards*, a determination of injury must be based on 'objective' evidence. This bears a close relationship to the standard of 'positive' evidence prescribed for the injury determination in dumping cases.[12] That standard has been held to require that 'evidence must be of an affirmative, objective and verifiable character, and … it must be credible'.[13] The requirements that evidence be credible and verifiable are all the more important in safeguards cases where the standard of serious injury is higher than the mere material injury considered in dumping cases.

21. With respect to each of these important thresholds pertaining to evidence, injury and threat, the Commission's preliminary analysis falls well short of the mark.

22. First, it is questionable whether the evidence cited and relied upon by the Commission in its injury analysis is sufficiently objective, credible or verifiable to support the conclusions reached. Much of the evidence of the economic state of the industry has come from APL or from producers themselves. In a case where these groups are the proponents of safeguard measures, such evidence needs to be approached in a dispassionate and sceptical manner. Where the Commission considers evidence such as producers' financial statements to be relevant, steps should be taken to verify it. Where evidence is unsubstantiated and untestable, it should be treated with care. It is essential that performance data submitted by the proponents of safeguard measures be tested for its completeness and accuracy.

23. The same need for credible and verifiable evidence applies to the consideration of the state of primary processors and, in particular, the boning rooms that produce products that are like or directly competitive with imported boneless pigmeat cuts. In the case of these industries, as noted in our letter of 9 November 2006, processors should be requested to submit:

- materials, such as audited accounts, that might corroborate any responses;
- performance data specific to the business activities of the boning rooms; and

[11] Appellate Body Report, paras. 124, 125.

[12] See *Agreement on the Implementation of Article VI of the GATT 1994*, Article 3.

[13] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

- details of how cost and revenue allocations have been made in relation to any disaggregated information that may have been provided by vertically integrated respondents.

Such material should cover not just a snap shot, but instead should give a reasonable sense of the position over a period of several years. Such data should be verified by the competent authority. Respondents should also be requested to provide non-confidential summaries, as contemplated by Article 3.1 of the *Agreement on Safeguards*, in order to allow other interested parties to test the information that is being submitted.

24. Objective evidence of this nature and quality was not before the Commission during the accelerated phase of this inquiry. Such evidence should be collected and assessed before the Commission reaches its final views as to the economic state of the industries that comprise the primary processing sector. In the absence of this factual material, it will be impossible for the Commission to reach a properly supported view in relation to the economic performance of those industries.

25. Secondly, even assuming that the evidence relied upon in the Accelerated Report was sufficient to support valid conclusions as to the existence of injury or threat, that evidence does not support the actual conclusions that were reached. In particular, we submit that the evidence reflected in the Accelerated Report does not support a conclusion that pig farmers are suffering the high level of 'serious injury' contemplated by the *Agreement on Safeguards.* Likewise, the evidence does not support a conclusion that primary processors are 'threatened' with serious injury.

26. The Commission observed the following factors in the injury analysis of the Accelerated Report:

(a) the market share of imports has increased when considered either as part of the processing pigmeat sector or as part of the entire pigmeat sector;

(b) pig farmers are generally making losses; primary processors are generally profitable (with some reporting profit increases and others profit decreases);

(c) both pig farmers and primary processors are reducing employment;

(d) sales of pigmeat have increased significantly, particularly in the protected fresh market, but also in the processing meat sector; and

(e) domestic production levels have remained steady.

27. As to the existence of a threat of serious injury in the processing sector, the Commission observed that:

(a) pig production was expected to be cut over the next 12 months by 10 to 20 percent over the next 12 months;

(b) this expectation of lower production led to an expectation of lower capacity utilization by both pig farmers and processors; and

(c) processors anticipated reduced profits in 2007-2008, with an average expected reduction of profits in the order of 50 percent.

28. These findings do not substantiate the existence of present serious injury in the pig farming sector. The findings indicate production has remained steady. Effectively, this is because the positive development of an increasing size of the overall market has completely offset the proportionate loss of market share to imports in the one segment of the market where there is direct import competition.[14] Taken together, these factors are not indicative of injury, let alone injury that is *serious.*

29. For pig farmers, losses were found, and employment was reported to be declining. Although these factors might indicate injury, we question whether they in themselves support a finding that the 'exacting' and 'very high' threshold of 'serious injury' is met. This is particularly so in a context where the evidence substantiating the existence of such performance factors is thin.

30. Nor do the findings reflected in the Accelerated Report substantiate the existence of a threat of serious injury in the primary processing sector. Although, for this sector, the anticipated cuts in production and capacity utilisation may point to the existence of some level of injury in the future, such a finding needs to be balanced with expectations going forward of *profitability.* Despite an expected downturn in profits, the Commission found that there is an expectation of profitability for the 2007/2008 year. Industries that are currently profitable are not industries that are suffering present injury. In the same way, industries that expect to be profitable going forward are not industries that are on the brink of suffering injury, let alone injury of a 'serious' nature.

[14] In the context of these dynamics, while there may have been an increase in imports reflected in the ABS data, the increase does not meet the threshold of being 'significant enough' to cause serious injury. This is because any significance attributable to increased imports has been offset by overall pork-market growth. This is why Professor Hayes, in the paper submitted to the commission on 31 January 2008, outlined that the unusual level of latent demand in the fresh meat sector needs to be included in any modelling of the impact of imports on the Australian market.

US imports are not a substantial cause of serious injury

31. The Commission did not address in the Accelerated Report the question of whether US imports, standing alone, are a substantial cause of injury to Australian producers. As detailed in the US industry's written submission, the Productivity Commission should consider this issue before assessing the cumulative effect of subject imports.

32. The Australian-United States Free Trade Agreement (AUSFTA) expressly permits Australia to exclude US imports from global safeguards if they are not 'a substantial cause of serious injury or threat thereof.'[15] 'Substantial cause' is defined to mean a 'cause which is important and *not less than another cause*.'[16] Consequently, US imports can only be a substantial cause of serious injury if they are an 'important' cause of that injury ***and*** the US imports must *also* be equal to or greater than any another cause. Therefore, even if US imports are an important cause of serious injury, they will not be a 'substantial cause' if any other cause results in the same or greater injury.

33. As detailed in the US industry's prior submissions, the Commission should address the FTA exclusion at the outset of its analysis in order to avoid the 'parallelism' issued identified by the WTO Appellate Body.[17]

34. The record demonstrates that US imports are not a substantial cause of serious injury, because to the extent there is any injury to Australian producers, other causes are equal to or greater than the impact of US imports.

35. First, there is only minimal direct competition between US imports and Australian products. As demonstrated at the Commission's hearing, fresh pork accounts for approximately 54% of pork consumption in Australia. US imports do not compete in this market at all, because fresh pork may not be imported. This highly profitable segment of the market is reserved for Australian producers. US imports account for only 9% of consumption, and are limited to the small goods market, where they compete directly with imports from Canada.

36. Second, US import volumes are lower than the import volumes from any other country in both absolute and relative terms. Consequently, US imports must be less of a cause of the alleged injury because US volumes are lower than those from other countries.

[15] AUSFTA Art. 9.5.

[16] AUSFTA Art. 9.6 (emphasis supplied).

[17] See, for example, Appellate Body Report, *US – Steel Safeguard*, paragraph 441 (noting that where an investigating authority has conducted a safeguard investigation considering imports from all sources, including any countries that might have an FTA with the country conducting the investigation, that investigating authority may not, without any further analysis, exclude imports from FTA partners from the application of the resulting safeguard measure).

37. Third, since peaking in May 2007, US import volumes have decreased significantly, and at a far greater rate than imports from Canada, and imports from Canada and Denmark.

38. Fourth, U.S. pork producers consistently have received much lower levels of subsidies than producers in either the European Union ("EU") or Canada every year since 1995. Recent announcements confirm that these benefits will only increase in the future for producers in both the EU and Canada. The large and increasing subsidies provided to pork producers in Canada and Denmark (as EU producers) confer a benefit on these producers that provides them an advantage over U.S. pork producers in exporting to other markets.

39. Fifth, the loss of attractive export markets since 2001 has adversely affected Australian producers because 'Australian pig producers/marketers can sometimes obtain a higher net return [for exports] than by selling products domestically because of differences in consumer preferences from one country to another and other market factors.'[18]

40. Finally, higher feed costs and droughts have also had a greater impact on Australian producers than US imports. The Commission found in the Accelerated Report that the "principal cause" of the economic state of the domestic industry "would appear to be higher domestic feed prices".[19] The Commission has long recognized that Australian producers are at a cost disadvantage vis-a-vis foreign competitors because the former rely on feed wheat. The global run-up in feed wheat prices have increased the cost of production for Australian producers and eroded their operating margins. The Commission should exclude US imports because they cannot reasonably be regarded as a 'substantial cause' of any of the alleged serious injury or threat thereof to Australian producers.

[18] PC Inquiry Report, *Australian Pigmeat Industry* (18 March 2005) page 23.

[19] Accelerated Report, Finding 2.6.