

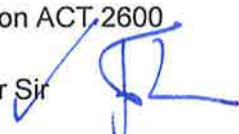
12 September 2012

By email:

The Hon. John Brumby
The Brumby Anti-Dumping Review
Secretariat
C/- The Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Contact
Andrew Percival (02) 9210 6228
Email: andrew.percival@corr.com.au

Partner
John W.H. Denton (03) 9672 3158
Email: john.denton@corr.com.au

Dear Sir 

Review of Current Arrangements for Investigating Anti-Dumping Matters and the Feasibility of a Commonwealth Anti-Dumping Agency

I refer to the Minister of Home Affairs and Justice's reference to you of 4 July 2012 to review the current arrangements for investigating anti-dumping matters and to consider the feasibility of a Commonwealth Anti-Dumping Agency.

Thank you for the opportunity to make this submission.

It is unclear why this review is being undertaken, particularly given the Productivity Commission's recent review of Australia's anti-dumping system and the Government's response to the recommendations of the Productivity Commission.

Presumably there is some perceived deficiency, or possible deficiency, in the current arrangements and hence the review. I am aware that there has been some criticism of the current arrangements by industry, particularly in relation to exports from the People's Republic of China, because the level of measures imposed in Australia are significantly less than those imposed in the U.S.A. and in the EU. This difference is due primarily to the U.S.A. and the EU not treating the People's Republic of China as a 'market economy'. This enables them to use surrogate pricing from another country in the dumping margin calculations, which invariably artificially inflates dumping margins.

Australia, of course, treats the People's Republic of China as having a 'market economy' and uses domestic selling prices in China in dumping margin calculations resulting in lower dumping margins, if any.

To counteract this, I note that there is an increasing trend to find that domestic sales in China are unsuitable for use in dumping margin calculations. This is based on the claim that the People's Republic of China purportedly artificially reduces the price of certain inputs to manufacture such as, for example, aluminium that is used in the manufacture of aluminium extrusions and aluminium wheels. It is claimed that this artificially reduces the price of the end product and, consequently, the selling price of those products in China. Because, it is claimed, that prices for end products also are artificially reduced, they are unsuitable for use in dumping margin calculations.

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Instead, Australian Customs and Border Protection Service uses a 'constructed' domestic selling price where it substitutes the low priced input to manufacture with a surrogate price obtained in another jurisdiction (e.g. aluminium prices on the London Metal Exchange), notwithstanding there is no provision Part XVB of the *Customs Act 1901* entitling it to do that.

No objective evidence is advanced to support these claims and, indeed, it is conceded that the so-called 'program' through which the Government of the People's Republic of China purportedly artificially lowers prices has no legislative or other legal basis. No doubt this is because it does not exist. Further, no attempt is made to ascertain whether the purportedly low price for inputs to manufacture actually flow through into the price of the end product and, if so, to what extent. Such an inquiry would be typical of a subsidy investigation.

Another worrying trend, also involving the People's Republic of China, is in subsidy investigations. Such investigations involve identifying a large number of countervailable subsidies from a list provided by the Australian industry. Of those exporters whose exporters are actually investigated, typically it is found that they receive very few of the subsidies and the amount of the subsidy is not significant. However, for those exporters whose exports were not examined, Australian Customs and Border Protection Service finds that such exporters receive every countervailable subsidy.

Australian Customs and Border Protection Service claims it is reasonable to make such a finding based on the 'available evidence'. However, there is no evidence that such exporters received any of those countervailable subsidies. Rather, the 'available evidence, that is, those exporters who were investigated, is that exporters receive very few of the countervailable subsidies and, where they do, the amount often is negligible.

In light of these worrying protectionist trends, the issue would seem not to be whether dumping and subsidy investigations should be conducted by Australian Customs and Border Protection Service or by a stand-alone Commonwealth Anti-Dumping Agency.

As you would be aware, the anti-dumping system is a rules based process set out:-

- domestically, in Part XVB of the *Customs Act 1901*; and
- internationally, in Article VI of the *General Agreement on Tariffs and Trade* ("GATT"), the *Agreement on Implementation of Article VI of GATT* and in the *Agreement on Subsidies and Countervailing Duties*.

As dumping and subsidy investigations are rules based and as findings in such investigations must be based on objective evidence collected during the investigation and verified, outcomes should be the same regardless of who conducts the investigation.

This is not say that improvements cannot be made. It seems to me that what is required is some oversight of investigations, preferably judicial oversight, to ensure that the rules are being followed. This could be achieved with the following organisational structure:-

- (a) each investigation would involve two investigation teams, one to investigate whether exports to Australia are at dumped and/or subsidised prices and the other to investigate the injury incurred by the Australian industry, whether it is material, what caused that injury and public interest considerations. Each investigation team would consist of personnel appropriate for their respective tasks (e.g. forensic accountants, economists, etc.) supported by a legal team to address legal issues; and

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- (b) each investigation team would report to an independent panel chaired by a Judge or ex-Judge or by a Senior Counsel, with co-panel members being an economist and a senior lawyer with experience and expertise in dumping and subsidy investigations. The role of the panel would be to assess the findings of the two investigation teams and the evidence on which those findings were based to determine whether or not measures should be imposed. If they, the panel would report to the Minister and make the appropriate recommendations. If measures were not warranted, then the panel would terminate the investigation.

Such an organisational structure has a number of benefits:-

- (a) by having two investigation teams with separate roles, completion of their respective tasks could occur earlier in the process, as compared with a single team that investigates everything;
- (b) each investigation team would have personnel with the necessary skills to undertake their respective tasks;
- (c) the oversight of investigations by the panel, which could have the power to issue directions, either generally or in specific investigations, would impose rigour in investigations and give greater confidence in the system; and
- (d) given the oversight of the panel, appeals to the Trade Measures Review Officer would be unnecessary and could be abolished, so that the sole right of appeal is to the Federal Court of Australia.

Again, whether this organisational structure is situated within Australian Customs and Border Protection Service or in a stand-alone Commonwealth Anti-Dumping Agency should not matter. Rather, the adoption of the proposed organisational structure should result in more efficient, transparent and rigorous dumping and subsidy investigations that comply with domestic and international rules regulating such investigations.

If you would like to discuss this submission further, please let me know.

Yours faithfully

Corrs Chambers Westgarth

A handwritten signature in blue ink, appearing to read 'John W.H. Denton', written over the printed name and title.

John W.H. Denton

Partner & Chief Executive Officer