

30 April 2011-05-02

Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary

## **Inquiry: Customs Amendment (Anti-Dumping Measures) Bill 2011**

JELD-WEN Australia is pleased to provide a submission to the Senate Economics Legislation Committee on the Customs Amendment (Anti-Dumping Measures) Bill 2011 (**the Bill**).

## **Submission**

Under the current rules, interested parties may apply for a review of anti-dumping measures 12 months after imposition, and then every 12 months from the date of the notified outcome of the most recent review.

Reviews may result in the measures being altered, left unchanged, or revoked.

There is no express legislative guidance on how to assess whether measures should be revoked or not under existing rules. The matter was recently considered in the *Siam Polyethylene* case<sup>2</sup>, where the Full Federal Court held that the factors to be taken into account should be the same as those which apply before measures are imposed in an initial investigation, i.e. whether there is **currently** dumping causing material injury to the Australian industry.

From Customs' perspective, the impact of the decision is that if measures are in place and are effective, then it is unlikely that dumping would be occurring at the time of a review. Using such a test seemingly would lead to a high likelihood that measures would be revoked. This apparently leaves local industry exposed to the risk that removal of measures could result in a 'recurrence' of dumping causing material injury. The Bill purportedly seeks to address this issue.

Under the new rules, where there appear to be reasonable grounds for recommending that the anti-dumping measures are no longer warranted and a revocation review has been notified, Customs must recommend that the Minister revoke measures, unless satisfied that the removal of the measures would lead to a recurrence of the dumping and material injury that the measures were intended to prevent.

The proposed amendments go significantly further than addressing the specific issue raised by the *Siam Polyethylene* decision. They propose to introduce a specific regime for a review of anti-dumping measures to consider whether they remain warranted and, if so to what extent.

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<sup>2</sup> *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 (*Siam Polyethylene*)

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While JELD-WEN Australia does not directly oppose the proposed regime, we have some concerns as to whether the Bill is in fact in line with our international trade obligations, and these are discussed below. To overcome these issues, we submit a number of clarifications of the Bill for consideration.

## **Inconsistencies with International Trade Obligations**

As mentioned above, the proposed amendments make the revocation of anti-dumping and countervailing measures conditional upon Customs having published a “revocation review notice”: see proposed new paragraph (a) of subsection 269ZDA(1A) and proposed new subsection 269ZDB(1A) of the *Customs Act 1901*: Items 13 and 15 of the Bill.

JELD-WEN Australia considers that this requirement is inconsistent with Australia’s international legal obligations under Article 11 of the Anti-Dumping Agreement.

Article 11.1 of the WTO Anti-Dumping Agreement provides that:-

*“An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing material injury”.*

The Panel in ‘United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or above from Korea’ (WT/DS99/R)(29 January 1999) considered that Article 11.1 of the Anti-dumping Agreement was a general rule that dumping measures are to remain in force for only as long and to the extent “necessary” to counteract dumping that is causing injury. The Panel also found that Article 11.1 was implemented by Articles 11.2 and 11.3.

Under the existing rules, measures may be revoked, in the absence of dumping and it is always open to for applicants to arrange for their reinstatement in the event that dumping does recur. However, under the proposed rules, it is entirely feasible that measures may continue for longer than necessary, because of the threat of impending dumping, which almost by definition is unable to be demonstrated.

Unless it is abundantly clear that dumping “is likely to recur”, Australia would be in breach of Article 11.1 of the WTO Anti-Dumping Agreement.

Further, Article 11.2 provides:

*“The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.”*

There is no requirement in Article 11.2 that the revocation of anti-dumping measures be conditional upon the relevant authorities having published a particular notice. Rather, having undertaken a review under that Article, the relevant authorities must form a view as to “*whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both*” and, if the authorities determine that the anti-dumping measures are no longer warranted, then they must be revoked.

This also applies to a review of countervailing measures: see Article 21 of the WTO *Agreement on Subsidies and Countervailing Measures*.

Accordingly, JELD-WEN Australia submits that the proposed amendments are not consistent with Australia's international legal obligations.

## Proposed amendments to the Bill

To render the proposed amendments consistent with Australia's international obligations, Division 5 of the Part XVB of the *Customs Act 1901* should be amended to expressly provide that any review conducted under that Division must consider whether the anti-dumping measures are "*necessary to offset dumping or subsidisation, whether the injury would be likely to continue or recur if the measures were removed or varied or both*" and, if it is determined that the anti-dumping and/or countervailing measures are no longer warranted, then they must be revoked.

Further, if a review holds that measures should continue, the Bill should require Customs to either:

- state that there were insufficient grounds provided to justify discontinuation of measures, and provide detail as to how they arrived at such a conclusion; or
- state that Customs believe that sufficient grounds were provided to justify discontinuation of measures but that their removal would lead, or be likely to lead, to a recurrence of the dumping and material injury. That is, the recurrence of dumping causing injury must be more probably likely to occur than not.

In the event of the latter case, Customs must clearly make the case as to what factors led them to believe that dumping would recur, or be likely to do so and provide evidence to support their position.

If measures are discontinued, similar requirements might be made to ensure fairness and transparency.

JELD-WEN Australia also submits that introducing a bifurcated review process, that is, one for a review of variable factors and another for whether measures should be revoked is inconsistent with Australia's international legal obligations under Article 11 of the Anti-Dumping Agreement and introduces unnecessary complexity to the review process. As indicated earlier above, once a review has been initiated, consideration must then be given to whether the anti-dumping measures are "*necessary to offset dumping or subsidisation, whether the injury would be likely to continue or recur if the measures were removed or varied or both*". If the measures are not 'necessary', then they must be revoked.

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JELD-WEN Australia welcomes the opportunity to appear before public hearings of the Senate Economics Legislation Committee to discuss the above and our earlier submission in more detail.

Yours sincerely

for: Ron Silberberg, AO