31 March 2011

Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

Customs Amendment (Anti-Dumping) Bill 2011

We refer to the Senate Economics Committee's invitation for submissions on the *Customs Amendment (Anti-Dumping) Bill 2011* to the Law Council of Australia (**LCA**) and the Law Institute of Victoria (**LIV**).

The LCA and the LIV welcome the opportunity to make the following submissions.

1. PRIORITY TO BE GIVEN TO PRODUCTIVITY COMMISSION REPORT ON AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM

At the outset, the LCA and LIV consider it premature to amend Australia's anti-dumping and countervailing system ahead of the Government's response to the Productivity Commission's Report on Australia's Anti-dumping and Countervailing System. Both this Bill and the Government's response should be considered together. The LCA and LIV understand that the Government's response to the Productivity Commission's Report will be made available during the 2011 Budget. The review by the Productivity Commission has been a lengthy and thorough process and is seen as a priority of the Council of Australian Governments (**COAG**). Accordingly, consideration of this Bill should be delayed until the Government's response to the Report has been completed.

2. SUBMISSIONS ON THE BILL

2.1 Items 1, 2 & 32 of Schedule 1 to the Bill

The LCA and the LIV support the proposed amendments. However, The LCA and the LIV believe that the definitions of "affected party" and "interested party" should be further extended to "downstream" industries that use the like good as inputs to manufacture. This is because they, like trade unions' members, may be directly

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affected by the imposition of anti-dumping and countervailing duties and their interests should be taken into account.

Recommendation: Further extend the definitions of "interested party" and "affected party" to include Australian industries that use like goods as inputs to manufacture.

2.2 Items 3, 4 & 7 of Schedule 1 to the Bill

The LCA and LIV believe that the proposed amendments contravene Australia's international legal obligations under the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (**Anti-Dumping Agreement**).

Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury must be "*based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such goods*". The introduction of a rebuttable presumption into Australia's anti-dumping and countervailing regime contravenes the requirements of Article 3 of the Anti-Dumping Agreement because it can result in a finding of injury not based on positive evidence.

Recommendation: That these proposed amendments not be proceeded with.

2.3 Item 5 of Schedule 1 to the Bill

The LCA and LIV support the proposed amendment but note that CEO of Customs and the Minister already could have regard to this under the existing legislation.

The LCA and LIV believes that the economic effect that anti-dumping and/or countervailing measures may have on Australian industries that use like goods as inputs to manufacture also should be taken into account, which is not currently the case.

Recommendation: Extend the proposed amendment to include Australian industries that use like goods as inputs to manufacture.

2.4 Item 8 of Schedule 1 to the Bill

Proposed Amendment: this amendment proposes to restrict supporting data to a dumping and/or countervailing duty application to data relating to no more than the 90 day period prior to the application.

The proposed limitation on supporting data to an application to data relating to no more than the 90 day period prior to the application, in the opinion of the LCA and LIV, would be of little utility in establishing whether dumping had been occurring and, if so, whether it was causing material injury. The timeframe is too short to establish cause and effect.

In any event, the Australian industry should have readily available to it information concerning its own economic performance that it could readily provide to Customs in support of an application.

Finally, by requiring data over a longer period of time does not mean that the Australian industry must incur material injury over an extended period before it can lodge an

application. That is not correct. Consistent with Australia's anti-dumping legislation and the Anti-Dumping Agreement, an Australian industry may lodge a dumping application if it has evidence of dumped imports and those dumped imports, if they are allowed to continue, pose an imminent and foreseeable threat of material injury to the Australian industry.

Recommendation: Insert a provision requiring applicants to include not less than 12 months of data demonstrating material injury unless the applicant is claiming threat of material injury.

2.5 Items 9 & 10 of Schedule 1 to the Bill

The LCA and LIV do not understand how these amendments would operate in practice.

The CEO of Customs is only entitled to accept an application if it was sufficiently supported by the Australian industry and he or she would need to be so satisfied well before the proposed s.269TC(4) would come into operation.

Recommendation: This proposed amendment not be proceeded with.

2.6 Items 11, 16, 17 & 18 of Schedule 1 to the Bill

The LCA and LIV support these amendments as CEO of Customs should base his or her findings on current information as well as historical information.

In relation to requiring the CEO of Customs to consult with persons with expertise in the relevant Australian industry, the LCA and LIV are concerned that such consultants be required to be independent of the parties to the investigation in question and that they not only have the requisite expertise but also appropriate qualifications. Serving officers of Customs and Border Protection should be excluded. This would generally be consistent to those who are to form an "independent review" as defined in Item 4 to the Bill.

Recommendation: Change the amendments to ensure that consultants are independent of the parties to the investigation and have appropriate expertise and qualifications. Exclude serving officers of Customs and Border Protection.

2.7 Item 12 of Schedule 1 to the Bill

The LCA and LIV believe that these proposed amendments are unworkable. An importer will rarely have information available to it to prove that the goods that it imports from third parties are not dumped. Dumping occurs when an exporter exports goods at export prices that are less than its domestic selling price of like goods in the country of export. An importer would not have such available to it, especially in arms length transactions involving unrelated parties, information concerning the domestic selling price of like goods in the country of export.

Not only it is unreasonable to impose a statutory obligation upon a party that that party cannot discharge but then to provide the resulting lack of co-operation gives rise to a rebuttable presumption that that importer's imports are dumped when, again, the importer is not in a position to rebut that presumption is unreasonable.

Recommendation: This amendment not be proceeded with.

2.8 Item 13 of Schedule 1 to the Bill

This proposed amendment contravenes Australia's international legal obligations under the Anti-Dumping Agreement.

The imposition of provisional measures within 60 days of initiation of an investigation is prohibited by Article 7 of the Anti-Dumping Agreement. This proposed amendment seeks to remove that prohibition.

It is unlikely that the CEO of Customs would have sufficient information before him or her to make a preliminary affirmative determination within the first 60 days of an investigation. Responses from importers and exporters to Customs importer and exporter questionnaires would not have been received and evaluated to enable a positive preliminary determination to be made and such a determination could not be made on the basis of information provided by the Australian industry.

Recommendation: This amendment not be proceeded with.

2.9 Items 14, 15, 25, 26, 29, 30, 31 and 33 of Schedule 1 to the Bill

The LCA and LIV generally support the proposed amendments. However, consideration should be given to defining "related Australian industries" to include those Australian industries that use like goods as inputs to manufacture.

Further, the LCA and LIV have reservations regarding the reference to the "multipler effect". This is a general economic term but its precise effect and impact depends on a number of factors that may vary according to the circumstances. It is unclear how this would operate in practice. The LCA and LIV believe this proposed amendment should be deleted or its operation be clarified.

Recommendation: Extend the proposed amendment to include Australian industries that use like goods as inputs to manufacture but delete reference to consideration of the "multiplier effect".

2.10 Items 19, 20, 21 & 22 of Schedule 1 of the Bill

The LCA and LIV do not support these proposed amendments. The effect of the proposed amendments is not only to preclude the Minister from disclosing confidential normal values, export prices or non-injurious prices but also to preclude the CEO of Customs from disclosing, upon request, such information to, for example, an importer of like goods. This would have the effect that importers of like goods would not be in a position to know or calculate the amount of interim dumping duty payable on like goods. In short, this would preclude importers from ascertaining the rate of tax being imposed on their imports. Such lack of transparency is not acceptable and is of questionable constitutional validity.

If a tax in the form of interim dumping duties and/or interim countervailing duties is to be imposed, then importers of goods on which such taxes are imposed must be able to ascertain the rate tax that will be imposed on their imports.

Recommendation: This amendment not be proceeded with or, alternatively, there be an exception to the prohibition against disclosure to expressly permit the CEO of

Customs to disclose the rate on interim dumping duty and/or interim countervailing duty to importers of like goods.

2.11 Item 23 of Schedule 1 to the Bill

The LCA and LIV support the proposed amendment in the interests of greater transparency.

2.12 Items 24, 28, 35 & 41 of Schedule 1 to the Bill

The LCA and LIV support the proposed amendment. However, consideration should be given to defining "related Australian industries" to include those Australian industries that use like goods as inputs to manufacture.

The LCA and LIV reiterate their concern that such consultants be required to be independent of the parties to the investigation in question and that they not only have the requisite expertise but also appropriate qualifications.

Further, consideration should be given to requiring Customs to not only consult with experts but also with the Productivity Commission as an "expert" in Australian industry in all investigations.

Recommendation: Extend the proposed amendment to include Australian industries that use like goods as inputs to manufacture, together with an express obligation that the CEO of Customs consult with the Productivity Commission.

2.13 Item 36 & 46 of Schedule 1 to the Bill

The LCA and LIV do not support the proposed amendments. The proposed amendments contravene Australia's international legal obligations under Article 7.1(ii) of the Anti-Dumping Agreement that requires a preliminary affirmative determination of dumping and consequent injury to the local industry. No such determination would have been made in the circumstances here contemplated. While the Trade Measures Review Officer may determine that a re-investigation is warranted, it does not follow that he has concluded that there is dumping and the consequent injury to the local industry. That there are or may be "reasonable grounds to warrant the reinvestigation" of a finding or findings in an application is not a determination that there is dumping causing material injury to the local industry.

Recommendation: This proposed amendment not be proceeded with.

2.14 Item 47 of Schedule 1 to the Bill

The LCA and LIV do not oppose the proposed amendment. However it is unclear what benefit there is in adding another layer of review decisions in a dumping and/or countervailing duty investigation and how the additional lawyer of review would work with existing review mechanisms.

For example, would the Administrative Appeals Tribunal review decisions currently reviewable by the Trade Measures Review Officer and, if so, what role would the Trade Measures Review Officer have?

Further, reviews by the Trade Measures Review Officer are required to be undertaken in a very short space of time, namely, 60 days. Reviews of decisions by the Administrative Appeals Tribunal can take well over 12 months and involve considerable expense for all parties. The LCA and LIV are concerned that this proposed amendment does not lend itself to an efficient review of decisions in anti-dumping and countervailing duty investigations.

Review of decisions in anti-dumping and countervailing duty investigations was addressed by the Productivity Commission in its Report on Australia's Anti-Dumping and Countervailing System: see section 7.2 of the Report. The LCA and LIV are concerned that the recommendations of the Productivity Commission appear to have not been taken into account.

The LCA and LIV are concerned that careful consideration needs to be given to making the review process efficient for all parties to an anti-dumping and countervailing duty investigation.

Recommendation: Further consideration be given to ensuring that the review of decisions in anti-dumping and countervailing duty investigations is efficient and effective.

3. SUMMARY

While the LCA and the LIV endorse some of the amendments proposed by the Bill, the LCA and LIV believe those amendments should await the Government's response to the Productivity Commission's Report on Australia's Anti-Dumping and Countervailing System.

Further, the LCA and LIV do not support those amendments that contravene Australia's international legal obligations under the Anti-Dumping Agreement. Australia has for many years strived to ensure that both the legislation for its ant-dumping and countervailing system and its administration are consistent with its international legal obligations under the Anti-Dumping Agreement.

Consistency with international rules gives Australian customs law legitimacy and provides the basis of common understanding and interaction with our trading partners. These arrangements underpin Australia's Trade Policy initiatives should not lightly be interfered with. In particular, contingent protection is a sensitive area and changes that are inconsistent with WTO commitments have the potential to create unnecessary friction with our trading partners.

The LCA and LIV see no reason to diverge from that approach.

Yours faithfully,

Bill Grant
Secretary-General
Law Council of Australia