The Australian Manufacturing Workers Union (AMWU)

The Australian Workers Union (AWU)

&

The Construction, Forestry Mining and Energy Union (CFMEU)

Joint Submission

Inquiry into the *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015* and *Customs Tariff (Anti-Dumping) Amendment Bill 2015*

Senate Economics Legislation Committee

April 2015

Executive Summary

- Australian industry faces challenges from dumped and unfairly subsidised imported produce, products, goods and materials.

- If this unfair trade remains un-remedied by the absence of the levying of antidumping and/or countervailing duties it causes material injury to Australian businesses, which in turn costs jobs via reduced economic activity and decreased industrial viability.

- Acting at the behest of our members, their families and communities, for a number of years our unions have been at the forefront of reforms to strengthen the antidumping system.

- In spite of some useful elements and workable clauses, the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015* in its current form is unsupportable overall.

- The main problem with the Bill is that it abolishes the International Trade Remedies Forum (Forum), the only body where unions, employers and industry groups enjoy a formal dialogue with the Government on the antidumping system.

- Since it first met in 2011, this Forum has been instrumental in assisting the Government implement a number of positive reforms to the antidumping system.

- Since the change of government in 2013 the Government has not reconvened the Forum and, necessary further reform to the antidumping system has stagnated as a result.

- A consequence of this is stakeholder uncertainty in the antidumping system on a number of key matters which were in the process of being addressed by the Forum in its work plan.

- The Government has no mandate to abolish the Forum and it should have been ensuring it remained operational in accordance with the *Customs Act*.

- The Government needs to remove the proposal to abolish the Forum from the Bill and ensure the Forum meets as soon as possible both in accordance with the Act and in the broader national interest of supporting Australian industry and Australian jobs in the face of unfair, often predatory and unscrupulous trade behaviour.

- In line with the Government's proclaimed and worthy desire for more effective and efficient consultation between industry and the Government on antidumping matters, our unions would be only too pleased to discuss specific proposals.

- We have outlined in this submission some suggestions on how more effective and efficient consultation might occur whilst importantly maintaining the important structures and elements of the Forum.

- We are happy to provide further advice to the Committee regarding any questions it may have arising from this submission.

Introduction

Thank you for the opportunity to comment on the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015* and the *Customs Tariff (Anti-Dumping) Amendment Bill 2015.* The Australian Manufacturing Workers Union (AMWU), the Australian Workers Union (AWU) and the Construction, Forestry, Mining and Energy Union (CFMEU) represent more than 350,000 workers across Australia in a range of industries. We welcome the opportunity to make this submission.

A distinguishing feature of our unions' combined membership is the number of workers we represent who are employed by firms in industries where their jobs and income security depend on successfully exporting or competing against imports. This is why productivity, international competitiveness and fair trade have always been core business for our unions. Maintaining and improving the integrity of Australia's antidumping system is very much a part of that core business.

Our unions would like to take the opportunity to applaud the Senate for its continued interest in improving Australia's antidumping system. The Bills in question represent the eighth 'tranche' of antidumping legislation introduced into the Parliament since 2011. Although the previous seven tranches have all received unanimous support of the Senate, there are particular elements of the current tranche, and particularly the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015* (Bill) which determine that the Senate should not support passage of the Bill as currently written.

It would be a shame if the entirety of the tranche is rejected, as particular elements of each Bill are clearly consistent with the aim of improving the integrity of the antidumping system. This was a feature prevalent in all previous rounds of reform since 2011. This submission will highlight amendments that need to be made before the tranche's passage could be supported by the Senate.

First and foremost the submission will outline why the section of the Bill abolishing the International Trade Remedies Forum (the Forum) should be removed. The submission will also comment on other selected elements of the Bills for the consideration of the Committee in its deliberations.

Background

Any sensible economist (and for that matter any national Government or any of those aspiring to Government) serious about acting in the economic interest of the nation considers antidumping a legitimate and legal trade defence, rather than unfair industry protection. Even classical economists who have stayed loyal to their roots would follow the teachings of Chicago School scholar Jacob Viner and concede that antidumping action is a desirable legal trade mechanism. Viner outlined the artificial trade distorting effects and resulting consequential negative impacts of regional, national and global economic inefficiencies created by dumping.[1] Furthermore, the necessity of antidumping action is recognised by the World Trade Organisation (WTO) which allows antidumping remedies as part of its trade governance framework.[2]

As outlined by the current Government (when in Opposition) in their 2013 Manufacturing election policy:

> *"Dumping is a tactic that provides the illusion of a short term benefit to consumers. In the longer term international dumping hollows out Australian industry, decreases competition, costs jobs and increases prices."*[3]

[1] Jacob Viner, *Dumping: A Problem in International Trade,* New York: Kelley, reprinted 1966.
[2] The WTO, 'Anti-Dumping Agreement', 1994, (available online @ https://www.wto.org/english/tratop_e/adp_e/adp_e.htm)
[3] 'The Coalition's Policy to Improve the Competiveness of Australian Manufacturing', August 2013, p 12, (available online@ http://lpaweb-static.s3.amazonaws.com/13-08-21%20The%20Coalitions%20Policy%20to%20Boost%20the%20Competitiveness%20of%20Australian%20Manufacturing.pdf)

There has been strong bi-partisan support for improvement to Australia's antidumping system in recent times rather than support for the system's decimation as was effectively proposed by the Productivity Commission (PC) in 2009. Given the Government's policy, there should be little surprise that there has been little or no evidence of Government support to re-engage with the PC's system destroying recommendations despite the 2014 *Commission of Audit* recommending the Government do so.[4]

By way of background, in 2009 our unions were forced to act in response to the recommendations in the PC's Inquiry Report into Australia's Anti-Dumping and Countervailing system.[5] These recommendations would have seriously diminished in terms of both its efficiency and effectiveness the antidumping system had the Government of the time agreed with the PC and implemented them. At the time, our unions also noted the Department of Foreign Affairs and Trade's (DFAT's) submission to that inquiry which stated that partly due to limitations in the Custom's Act, Australian industry could be enjoying more generous antidumping and countervailing rights under the WTO Anti-Dumping Agreement (ADA) and Subsidies and Countervailing Agreement (ASC) than was available in Australia. This view was compatible with our observations of what was occurring in the economy which included job losses caused by lack of appropriate remedy to support local industry suffering material injury from dumping and unfair subsidies. Emblematic of this was a number of high profile investigations that failed to result in appropriate (or in some cases, any) duties. This outcome inevitably resulted in ongoing material injury caused by the imports and subsequently job losses.

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[4] Commission of Audit, 'Towards Responsible Government', *Appendix to the Report of the National Commission of Audit*, Volume 2, February 2014, p 13, (available online@ http://www.ncoa.gov.au/report/docs/appendix_volume%202.pdf)

[5] Productivity Commission, 'Australia's Anti-dumping and Countervailing System', *Report no. 48*, December 2009, Canberra, (available online@ http://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf)

Our unions also identified barriers to the antidumping and countervailing rights of Australian industry being enjoyed due to procedural issues including systemic operational flaws and resource constraints within the bodies responsible for administering and enforcing the system. When our unions undertook closer inspection, it was obvious Australia had one of the weaker antidumping and countervailing systems in the world. This was even the case without implementing the certain recommendations of the PC's Inquiry report which to reiterate, if implemented, would have only further diminished our system.

In addition to rejecting the Report's recommended system destroying elements, our unions highlighted a number of systemic reforms to strengthen it with the aim of boosting it to equal to those that are available to industry internationally. Our unions have subsequently been working with industry and the Parliament to improve Australia's antidumping system in a way consistent with the former and current Government's objectives of remaining compliant with our World Trade Organisation (WTO) obligations.

Collaboration between our unions has included but not been limited to:

- A joint submission in response to the PC's Inquiry Report, (August 2010);[6]
- The calling and hosting of an Antidumping Roundtable attended by industry (April 2011), at which the footnoted issues paper was endorsed by industry stakeholders;[7]

[6]AMWU, AWU & CFMEU, 'Maintaining and Improving the Integrity of Australia's Anti-Dumping System', August 2010, (available online through https://www.amwu.org.au/news/37/research%20reports%20submissions/)
[7]AMWU, AWU & CFMEU, 'Don't Dump on Australia', *Issues Paper,* Anti-Dumping Roundtable, 20 April 2011, Sydney available (online@ http://www.awu.net.au/sites/awu.net.au/files/awu-file/anti_dumping_rt_issues_paper.pdf)

- Jointly, with the Australian Council of Trade Unions (ACTU), appearing before the inquiry into Senator Xenophon's Private Members Bill, *the Customs Amendment (Anti-Dumping) Bill 2011,* (May 2011);[8]
- A joint Submission to the Brumby Anti-Dumping Review; [9]
- Working together on policy positions in:
    - the Forum;
    - the 'Prime Minister's Manufacturing Taskforce';
    - the 'Manufacturing Leaders Group (MLG)'; and
    - Other tri-partite groups which had an interest in strengthening the Anti-Dumping system, that were operational under the previous Government (for example the Pulp and Paper Advisory Group {PPAG}); and
- Submissions into the Government's Inquiry into the Circumvention of Anti-Dumping laws.[10]

It should be noted that two of the tranches of legislation successfully introduced to Parliament formalised the role of trade unions in Australia's antidumping system. These particular Acts were the *Customs Amendment (Anti-Dumping Improvements) Act 2011* which clarified unions as affected and interested parties to investigations in certain circumstances and the *Customs Amendment (Anti-Dumping Improvements) Act (No. 1) 2012* which established the Forum to:

[8]ACTU, AMWU, AWU & CFMEU, 'Public Hearing Economics Legislation Committee, 04/05/2011, *Customs Amendment (Anti-Dumping) Bill 2011,* (transcript available online@ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:committees%2Fcommsen%2F2965fbf1-0a41-4a53-a3d9-d4e44a511a3a%2F0004)

[9]AMWU, AWU & CFMEU, 'Submission: The Brumby Anti-Dumping Review', September 2012, (available online @ http://www.cfmeu.net.au/sites/cfmeu.net.au/files/Brumby-Anti-Dumping-Review-Written-Submission-AMWU-AWU-CFMEU.pdf)

[10]AWU, AMWU/CFMEU 'Submissions to the Inquiry, House of Representatives', *Standing Committee on Agriculture and Industry*, 'Circumvention of antidumping laws', November 2014, (available online through: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping/Submissions

"(a) Advise the Minister on the operation of Part XVB of the Customs Tariff (Anti-Dumping) Act 1975; and

(b) Advise the Minister on improvements that could be made to that Part of the Act."

The Act legislates that industry members of the Forum consist of:

- *11 members, each of whom represents one or more of the 11 following groups:*

(i) Australian producers;

(ii) Australian manufacturers;

(iii) Australian industry bodies;

(iv) Australian importers;

(There must be at least one representative of each of the above categories) and

- *4 members who represent Australian trade unions;*

It might interest members of the Committee to know that the legislation facilitating the opportunity for unions to play formal roles within the Australian antidumping system brought the Australian Government closer to the practices of antidumping systems across international jurisdictions. By way of example, in the United States unions are permitted to petition the Government for antidumping and countervailing duties on behalf of their members. This petitioning happens frequently.

Our Unions' Opposition to the Bills

The Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 was introduced with the *Customs Tariff (Anti-Dumping) Amendment Bill 2015*, the Bill amendments the *Customs Act 1901* to:

- Reduce deadlines for submissions to the Anti-Dumping Commission (ADC) in response to dumping and subsidisation investigations;

- Require antidumping notices to be published electronically;
- Consolidate lodgement provisions for antidumping applications and submissions;
- Clarify: The length of the investigation period in antidumping matters, cumulative assessment of injury, normal value provisions, the calculation of the dumping margin, material injury determinations, effective notice periods, and the definition of a subsidy;
- Provide that the minister is not required to have regard to the lesser duty rule where a country has not submitted a notification of its subsidies;
- Introduce a fee and raise procedural and legal thresholds for applications to review antidumping decisions;
- Streamline merits review processes of the Antidumping Review Panel; and
- Abolish the International Trade Remedies Forum.[11]

These Bills should be opposed by the Senate as long as the following are featured within them:

- **The abolition of the Forum;**
- **Any weakening of the Forum in terms of its union representation; and/or**
- **Changes to the specifically crafted balance of industry interests in the Forum.**

The International Trade Remedies Forum

The Forum represents a tri-partisan approach to the operation and continual improvement of the antidumping system and has been of use to Australian producers, workers and their representatives since it first met in 2011. As this submission will highlight, the evidence of achievement of the Forum does not support its proposed abolition. Indeed, it is clear that due to the Government not utilising

[11]Minister Macfarlane, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, 'Explanatory Memorandum' (Circulated by authority of the Minister for Industry and Science, the Honourable Ian Macfarlane MP, (available online@ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5413_ems_5e1811bc-d441-4257-b451-99f6e5b5a9f5%22)

the Forum and ignoring its legal requirement to hold a mandated minimum of two Forum meetings per year there has been detrimental impacts on the ability of stakeholders to engage with the Government and continue with the Forum's important work plan.

Legislating the Forum was a key policy of the former Government's *Streamlining reforms*[12]. The reforms were announced and delivered partly in response to the inquiry into the above mentioned private member Bill moved by Senator Xenophon. The Forum met six times on the following dates:

- The 29th of August, 2011;
- The 12th of December, 2011;
- The 12th of May, 2012;
- The 31st of August, 2012;
- The 4th of December, 2012; and
- The 25th of March, 2013.

Our unions encourage Senators participating in this Committee to seek out and read the Forum meeting's minutes, papers and documents for an understanding of its achievements, work and ongoing work plan if there remains any doubt about its usefulness to government, industry and workers. Our unions urge the Forum Secretariat to provide this information to all Committee members upon their request.

Additionally, for the benefit of the Committee, and to demonstrate the worth of the Forum, we believe it is worth highlighting some key achievements of it, as well as its ongoing work plan.

[12] The Australian Government, Australian Customs and Border Protection Service, 'Streamlining Australia's anti-dumping system: An effective anti-dumping and countervailing system for Australia', June 2011, Canberra, p 21, (available online@ http://pk.awu.net.au/sites/pk.awu.net.au/files/streamlining_australia_s_anti_dumping_system.pdf)

Key Achievements of the Forum

The Forum has performed the role of central consultative and advisory body for all proposed and implemented reforms to the antidumping system between its establishment and the current Bills. In addition, not only has the Forum advised government on reform proposals and their likely impact in the real world, it has advised Government in their implementation, ensuring application of reforms encountered as few unnecessary hurdles as possible and when hurdles were encountered, they were overcome in a cooperative, consultative and effective manner.

It appears that this is the first round of reforms that the Forum has not played a role as a source of advice to government since its establishment, which is disappointing. Our unions have no doubt that these Bills, as well as future reform efforts, would be improved through close consultation with the Forum.

In addition to direct issues around tranches of reforms to the antidumping system, the Forum has provided the Government with reports on specific issues, providing it and individual investigators with a broader base of knowledge than would otherwise have been available. Issues covered have included; particular market situation, closed processed agricultural goods provisions and a Protocol for the use of experts in Anti-Dumping investigations.

Finally, the Forum has had a relatively short life and its past achievements cannot and do not attest to its full usefulness in the future. Specific achievements of the Forum are expounded upon in more detail below:

A Stronger Approach to Non-Cooperation

A headline, significant and supportable reform of the Government reflected in the Bills is the reduction (from 40 to 37 days) of the period in which submissions should be lodged in response to the:

- Initiation of an investigation;
- Review of measures;
- Continuation inquiry; or
- Anti-circumvention inquiry.

As the Government's antidumping policy outlines, this amendment should complement a more rigorous approach to enforcing the deadline, for now the Anti-Dumping Commissioner will only allow extensions to submissions when it's considered "necessary and reasonable". [13] It might be noted this legislative amendment was first proposed by union representatives during the third Forum (the 12th of May, 2012) and received support in the Forum's subsequent discussion on approaches to non-cooperation.

A Better Electronic Public Record (EPR)

On the advice of the Forum and through the formation of the EPR Working Group, the EPR on which investigations can be followed by applicants, interested and affected parties and the public was overhauled, and made more accessible. The results speak for themselves, but of note is the formal congratulations to the EPR Working Group from an antidumping specialist with over 30 years of case experience. This testament stated that in their opinion the Australian EPR now surpasses those of

[13] The Australian Government, Department of Industry and Science, 'Fulfilling the Government's election commitments: Place a greater onus on overseas businesses', *Levelling the playing field – changes to Australia's Anti-Dumping laws,* December 2014, (available online@ http://www.industry.gov.au/industry/IndustryInitiatives/TradePolicies/Pages/Levelling-the-playing-field-changes-to-Australia%E2%80%99s-Anti-dumping-laws.aspx)

the United States of America's (USA's) and Canada's in terms of ease, use and accessibility.[14] This represents a vast improvement from the previous EPR.

The Work and Outcomes of the Particular Market Situation Working Group (MSWG)

The MSWG's recommendations were fully accepted by the Government. The *Customs Amendment (Anti-Dumping Improvements) Bill (No.2) 2012* implemented the MSWG's recommendations to remove the limitation to the inclusion of profit when calculating the normal value of a good in its country of origin (in certain circumstances). The implementation of the recommendations of the MSWG is an ongoing issue which will be discussed in further detail.

Facilitation of the Greater Use of Experts in Investigations

As the *Streamlining* reforms recognised:

> *"Parties who had been involved in investigations had expressed concern that the Branch did not have specific in-house expertise in relation to the wide range of products, industries and countries in which Anti-Dumping investigations take place."*[15]

The Forum quickly developed a protocol for the engagement of experts. This in turn facilitated the possibility of the greater use of experts in investigations. The Forum also established the circumstances where the refusal to provide access to a nominated expert may or may not constitute 'non-cooperation'.

[14] Copy of correspondence available to the committee on request.
[15] Customs, 'Streamlining Australia's Anti-Dumping System', p 14.

Expansion of Customs' Compliance Assurance Program

Leaving aside comment about the implementation of the anti-circumvention framework until later, it is important to note that Forum members analysed the findings of *Operation Bluenet* which was initially established to examine circumvention activity. *Operation Bluenet* recognized that in addition to avoidance of antidumping duties through sophisticated circumvention, also widespread was significant avoidance of duties and taxes at the border through misrepresentation of volumes, values and tariff codes.

In light of these findings, union members of the Forum made recommendations to the previous Government, resulting in budgetary outlays to improve and expand Customs' compliance assurance program. The Government provided $13.5 million over the forward estimates. The expected revenue results were estimated in the 2012-13 Budget. The revenue projection from this expenditure item was estimated to increase revenue by $57.0 million, and facilitate an increase in GST payments to the States and Territories of $22.8 million over the forward estimates period.[16]

The measure provided an additional two point five (2.5) Full Time Equivalent (FTE) staff in 2012-13, growing to thirty three FTE from 2013-14. Of this additional FTE, twenty five FTE are dedicated to increased compliance activity targeted at recovering revenue shortfalls, five FTE are dedicated to the review of Tariff Concession Orders and three FTE are dedicated to the investigation and prosecution of serious fraud, as a complement to the increased compliance activity. At the time of the announcement the additional twenty five FTE for compliance activity represented about a 40%

[16]Australian Government, Treasury, 'Appendix A: Policy Decisions taken since the 2012-13 Budget (Continued)', *Revenue Measures (Continued) Attorney-General's Customs' compliance assurance system — expansion,* May 2013, (available online@ http://www.budget.gov.au/2012-13/content/myefo/html/08_appendix_a_revenue-02.htm)

increase on the number of FTE focussing on economic risk in Customs' compliance program.[17] It would appear that the estimated revenue as outlined in the 2012-13 Budget was actually understated. In the Financial Year 2013-14, the first year for increased revenue, the ACBPS compliance program delivered approximately $133 million in revenue understatement detections; this far exceeded the target of $66 million required by the measure.[18]

In addition to this, the 2014-15 Budget indicated an extra $208 million ($346.6 million over six years) over the forward estimates from 'revenue uplift'. This projected increase of $208.2 million relates entirely to duty-related revenue. Flow on increases to GST revenue are expected as a result of this work, however these increases were not specifically modelled. Essentially, revenue uplift is a program which intends to acquire additional revenue out of Customs' current operating model. [19]

It is likely revenue uplift is assisted by skills developed and human resources acquired through the additional 2012-13 budget measures in addition to the more recent $12.4 million for the Revenue and Trade Crime Task Force. This taskforce includes up to fourteen FTE.[20] Again the Revenue and Trade Crime Task Force may have been formed because of union Forum members' representations to the current Government about the issue of duty and tax avoidance at the border.

Significantly increased revenue through increased compliance activity is directly related to the aforementioned representations from the union representatives of the Forum. It also contributed to

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[17] Customs, 'Answer to Question on Notice from Senator Carr', *Supplementary Budget Estimates*, 20 October 2014, *Immigration and Border Protection Portfolio*, (available online@ http://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/sup_1415/DIBP/SE14314.pdf)

[18] Ibid

[19] Customs, Answers in response to Senator Bilyk, *Official Committee Hansard*, 20 October 2014, *Senate Legal and Constitutional Affairs Legislation Committee, Supplementary Budget estimates* 114-115 (available online@ http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/e0ac4873-6e45-47ec-b82f-7eb06a2dd45f/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2014_10_20_2981_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/e0ac4873-6e45-47ec-b82f-7eb06a2dd45f/0000%22)

[20] Customs, Answer to QoN (Senator Carr, 20 October 2014).

inclusion of elements within the bipartisan supported *Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Act 2013 (Organised Crime Act*). Amongst other things, this Act improves the utility of the Infringement Notice Scheme (INS) by increasing penalties for false and misleading Customs' import declarations, and encourages greater compliance.

The Forum's Stronger Compliance Working Group (SCWG) was formed so that Industry and unions could assist both Customs and the ADC to address duty avoidance and more sophisticated circumvention of antidumping and countervailing duties through provision of industry intelligence to inform and compliment an intelligence led and risk based approach. It is disappointing that the SWGC has not met since the new Government was formed following the September 2013 election.

The Wind Down and Proposed Abolition of the Forum

As previously mentioned, the Forum's last meeting took place on the 25th of March, 2013. The Forum was due to meet again in August, 2013, however this meeting was postponed because the government had entered caretaker mode. Four days prior to the August, 2013 meeting, members were provided formal written advice that the meeting would not take place, but would be rescheduled to late September or October, after the election. This promised meeting was never rescheduled, and the incoming Government ignored even its minimum obligations (as per the *Customs Act*) to hold an obligatory additional meeting in 2013. The Forum was not reconvened in 2014, despite the Government being reminded of their obligations under the Act to convene a minimum of two meetings of the Forum via the processes of the 2014-15 Budget and Supplementary

Budget Estimates.[21] On the 15th of December, 2014, the Government announced its antidumping policy and, with it, the intention to abolish the Forum.[22] On the 17th of December, 2014, the Government informed members of the Forum's discontinuance.

Subsequently, the Department of Industry was asked about the Forum in Additional Budget Estimates and answered that:

> *"As part of the announcement on 15 December, the government made clear that the International Trade Remedies Forum would no longer continue, but it would use alternative consultative arrangements to consult with industry. Prior to the announcement, former*

[21] Anti-Dumping Commission, Answers in response to questions from Senator Carr, *Official Committee Hansard,* Monday, 2 June 2014, *Senate Economics Legislation Committee, Estimates*, p 59-60 (available@http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/923f407c-2b4d-422d-a63a04252dcd2f74/toc_pdf/Economics%20Legislation%20Committee_2014_06_02_2540_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/923f407c-2b4d-422d-a63a-04252dcd2f74/0000%22)& Anti-Dumping Commission, Answers in response to Senator Ketter, *Official Committee Hansard,* Thursday, 23 October 2014, *Senate Economics Legislation Committee, Supplementary Budget Estimates*, p185- 188, (available online@ http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/c972af79-90ce-4b97-8022-a80b42e59bc8/toc_pdf/Economics%20Legislation%20Committee_2014_10_23_2971_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/c972af79-90ce-4b97-8022-a80b42e59bc8/0000%22)
See also the following answers to QoN:
BI-20, Anti-Dumping Commission, 'Operations of the International Trade Remedies Forum during Caretaker', 25/07/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/bud_1415/Industry/answers/BI-20_Carr.pdf)
BI-21, Anti-Dumping Commission, 'International Trade Remedies Forum Meetings', 25/07/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/bud_1415/Industry/answers/BI-21_Carr.pdf)
B165, Anti-Dumping Commission, 'Stronger Compliance Working Group', 25/07/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/bud_1415/Industry/answers/BI-165_Carr.pdf)
BI-172, Anti-Dumping Commission, 'Subsidies Working Group', 25/07/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/bud_1415/Industry/answers/BI-172_Carr.pdf)
SI-69, Portfolio Strategic Policy, 'International Trade Remedies Forum', 12/12/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/sup_1415/Industry/answers/SI-69_Ketter.pdf)
SI-70, Portfolio Strategic Policy, Stronger Compliance Working Group, 12/12/2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/sup_1415/Industry/answers/SI-70_Ketter.pdf)

[22] Department of Industry and Science, *Levelling the playing field,* December 15, 2014.

> *parliamentary secretary Baldwin met with all members of the International Trade Remedies Forum, or he at least invited all members of the former International Trade Remedies Forum, for a briefing on the pending reforms."*[23]

This submission informs the Committee that the AWU and CFMEU were not invited to a briefing and this information was only shared with the AWU and CFMEU due to close collaboration with the AMWU. Needless to say, none of the unions responsible for this submission finds this acceptable.

Industry Reaction

It is important to note that in the estimates hearing, two of the three industry players cited as supporting the reforms by Senator Ronaldson were the Australian Steel Institute (ASI) and the Australian Forest Products Association (AFPA).[24] On closer inspection, these industry peak bodies do not appear to have had the same enthusiasm for the Forum's abolition as they had for the reforms in general. For example, the ASI stated in a public hearing of the Government's current inquiry in to Australia's anti-circumvention system:

> *"I think a more collegiate or cooperative structure between ADC and industry would be productive. The ADC have the best data. They have all of the most recent data available, whereas industry have got the market intelligence. We are in the market every day. A combination of both would be very helpful. Previously there was a body called the International Trade Remedies Forum. It consisted of government, the old ADC, Customs, as*

[23] The Department of Industry & Science, *Proof Committee Hansard*, Senate Economics Legislation Committee, *Additional Estimates*, Thursday,26 February, 2015, p 142, (available online@ http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/bfbc24dc-05de-4445-bfa3-96aebc0c45a5/toc_pdf/Economics%20Legislation%20Committee_2015_02_26_3238.pdf;fileType=application%2Fpdf#search=%22committees/estimate/bfbc24dc-05de-4445-bfa3-96aebc0c45a5/0000%22)

[24] Senator Ronaldson, Ibid, p 136.

well as industry. That met quarterly. An initiative such as that would be helpful going forward."[25]

The AFPA, when they appeared weeks later, was even more explicit:

"…it is a retrograde step not to have the ITRF. We put that on the record."[26]

In the same hearing, Mr Steve Porter, General Manager, Steel, Concrete and Trade, OneSteel Manufacturing, Arrium stated:

"The forum was of great value to industry. It was an opportunity to engage directly with the government around issues as a user of the system and to be able to identify areas for improvement both around legislation and administration. I think it provided that. There has been a tranche of legislation that has followed through from there. I think it is disappointing that there isn't a formal opportunity, similar to the trade remedies forum, for all industry participants to directly engage with the government."[27]

[25] Mr Cairns, National Manager, Industry Development and Government Relations of Australian Steel Institute, *Proof Committee Hansard,* House of Representatives' Standing Committee on Agriculture and Industry, 'Circumvention of antidumping laws', Thursday, 5 March 2015, p 4 (available online@ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommrep%2F1491168a-5441-4618-9e7b-1bcf4f6c39db%2F0000%22)

[26] Mr Hampton, Chief Executive Officer of the Australian Forest Products Association, *Proof Committee Hansard,* House of Representatives' Standing Committee on Agriculture and Industry, 'Circumvention of antidumping laws', Thursday, 19 March 2015, p 4 (available online @ http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommrep%2F1aa0842a-c2d5-45ad-8c53-e2380552ca73%2F0000%22)

[27] Mr Porter, General Manager, Steel in Concrete and Trade of OneSteel Manufacturing, Arrium p 12, ibid.

Our Unions' View

The announcement of the Forum's abolition had been pre-empted by our unions in submissions to the anti-circumvention inquiry. Prior to the Government's announcement that it intended to abolish the Forum, our unions strongly advised against the move:

> *"The AWU supports the on-going participation of the ITRF in Australia's Anti-Dumping and Countervailing System. Through its formal advisory role, the ITRF reports to Government on options for further improvement, with contributions from industry stakeholders that are key users of the Anti-Dumping system contributing to the transparency and effectiveness of the Anti-Dumping system. However, there is a concern that the Government may abolish the body in up-coming reforms, yet to be announced. Such an outcome would be a retrograde step given the coalition of interests around the ITRF table and expertise available to the Government."*[28]

Whereas the AMWU and CFMEU noted:

> *"Given that the ITRF has not been convened (despite its legal requirement to meet two times a year) and may by all indications be abolished by the Government, there is no formal mechanism for industry as a whole to pass on advice about circumvention activity to the Minister, especially activity which needs to be captured by amending regulation. Regardless of the ability of the Industry Department to informally consult industry and unions on Anti-Dumping issues, this cannot possibly be as effective as the ITRF. Its formal structures and official role in advising the Minister should not be discarded by the Government."*[29]

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[28] AWU, 'Submission to the Inquiry, House of Representatives', *Standing Committee on Agriculture and Industry*, 'Circumvention of antidumping laws', November 2014, p 25 available online through http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping/Submissions

[29] Ibid, AMWU & CFMEU submission, p 2-3.

A snap shot of the Forum's ongoing work plan: Opportunities foregone?

In the Department of Industry's Budget Estimate's hearing on the 2nd of June 2014, the Anti-Dumping Commissioner, Mr Seymour, made the following promise with regard to the Forum:

"I will make sure that the outstanding matters for the ITRF are properly managed and concluded"[30]

Given this commitment, it is worth analysing a number of matters from the Forum's last meeting which resulted in action items, and whether they have indeed been properly concluded or whether in the absence of Forum meetings, the action items remain outstanding and steeped in uncertainty around how they will be progressed, or even if they will be progressed at all.

The submission will explore in some detail the matters which were under the consideration by the Forum at its meeting on the 25th of March, 2013 including:

- How the determination of normal value is calculated when a particular market situation is found but actual costs are distorted through non-market activity or other factors;
- Subsidies;
- Access to confidentialised import data so industry can apply for Anti-Dumping investigations; and
- The determination of non-injurious price when the "lesser duty rule" is applied.

The way matters have progressed (or stagnated) since that Forum meeting requires the Committee's scrutiny to test the claim by Mr Seymour and, at the same time, highlight the Forum's ongoing operational worth.

[30] ADC, 'Estimates', Monday, 2 June 2014, p 59.

Determining normal value when costs are unreliable

The recommendations of the MSWG were accepted by the Government in full. These recommendations included having an international trade legal expert (independent of the Government) provide advice on methodologies that Australia may employ in the event that, having found a particular market situation, the records of the exporter are not kept in accordance with the generally accepted accounting principles of the exporting country, or do not reasonably reflect the costs associated with the production and sale of the product under consideration.[31]

After analysing a variety of legal advice, the Forum, when it last met in March 2013, discussed proposed legislative amendments outlined in the advice commissioned and the merits of pursuing those amendments. Although the majority of Forum members who commented on the proposals at that meeting were in favour of legislative amendment, there was a variety of views about the necessity of it. For example, in correspondence received by the PPAG from the Australian Industry Group (AIG), the AIG posited that the legislative amendment may be unnecessary on the grounds that:

> *Currently in accordance with s.269TAC (2) (a) (ii) of the act, subsection 269TAC (5A) specifically applies the operation of regulation 180 to the normal value calculation method which states 'exporter's records' must, amongst other requirements 'reasonably reflect competitive market costs associated with production, or manufacture and sale of like goods", and if they do not, the Minister may have regard to "all relevant information". Under the 269TAC (7) of the Act, the Minister has absolute discretion to "disregard any information that he or she considers to be unreliable" and we cannot think of any circumstances where a*

[31] MSWG, *Report to Government*, p 25.

Minister would consider costs that do not reflect competitive market costs to "be reliable". In this circumstance, it should be open for the Minister under subsection 269TAC (6) to determine the constructed normal value "having regard to all relevant information. [32]

Even so, there remains a clear element of doubt about whether the AIG's interpretation of the Act is exactly shared by the Anti-Dumping Commissioner Mr Seymour. On the 23rd of October in Supplementary Budget Estimates Mr Seymour outlined a technically different interpretation (or at least one which appears to fall short of the AIG's understanding of the Act), particularly with reference to the potential of "having regard to all available information", as follows:

"The starting point for establishing dumping is to compare the normal value of the goods based on the domestic selling price for the goods in the exporter's home market with the export price of those goods to Australia. Australia's antidumping legislation recognises that, even in countries that we have recognised as market economies, there can be certain situations in the domestic market of the exporter which can render those domestic selling prices unsuitable for establishing a dumping margin. These circumstances are commonly known as 'a particular market situation'. Whilst the WTO antidumping agreement define the term 'a particular market situation', Australia is legislation is consistent with this (sic). This situation involves a broad range of circumstances. However, it often involves examining whether the domestic selling prices are artificially low, possibly because of government influence on the market for the goods that are the subject of the investigation, or government influence on the market for key inputs for those goods or for some of the reason.

Now on getting to the answer to your question. I had to explain that to you. My apologies for that. Where a particular market situation is then found, the normal value of the goods can be

[32] Correspondence received by the PPAG from the AIG, 28 August 2013.

based on a cost plus profit construction which seeks to address the existence of the market situation by establishing a normal value that represents competitive market conditions. For example, where certain input costs are found to be distorted, these costs in the cost construction can be replaced using benchmarked costs that represent the costs that would apply in a competitive market. That is how we approach the issue at hand."[33]

The ongoing confusion around the ADC's interpretation of the act is not a simple theoretical distinction; it also could well be costing jobs. By example, there was an investigation into the alleged dumping of photocopy paper from China. At the conclusion of this investigation (which was terminated), there remains ongoing uncertainty about jobs at the Maryvale paper mill (which is the largest private sector employer in Victoria's Latrobe Valley, supporting one thousand direct jobs, four thousand flow on jobs and thousands more in the forest and forest products industry)

In its submission to that investigation, the CFMEU outlined that the ADC should not have determined a normal value of goods under s. 269 TAC (1) (that is, domestic selling prices of the most comparable models)[34] Earlier, clearer and stronger clarification about how a good's normal value might be calculated in the event of a particular market situation being found may have resulted in the applicant taking a different approach. This approach could have in turn resulted in a more just outcome via a remedy from unfair trade and removed the ongoing threat to jobs, industry and regional viability.[35]

[33] ADC, Estimates, 23 October 2014, p 186.
[34] CFMEU, 'Submission to the Investigation', 15 November 2013, (available online@ http://www.adcommission.gov.au/cases/Documents/008-Submission-Other-CFMEU.pdf) & CFMEU, 'Submission to the Investigation', 04 April 2014, p 2 (available online@ http://www.adcommission.gov.au/cases/Documents/037-Submission-TradeUnion-CFMEU.pdf)
[35] For more information see ibid.

Frustration with the lack of clarity and the confusion around this part of the Act is not confined to one industry. For example, Forum member Capral point out in their submission to the anti-circumvention inquiry:

> *"In particular, the methodology applied when a 'particular market situation' is found in the exporting country needs to be addressed. Capral has previously submitted that a simple amendment to the Customs Act can be made as proposed by Stephen Lloyd QC"*[36]

In any event, an outcome of the last Forum meeting was for non-Government member submissions to be provided to the Forum Secretariat by the 9th of April 2013. These submissions canvassed the issue of 'market situation', and whether it should be included in the Bill to be introduced in the winter 2013 parliamentary sittings. A submission was provided by our unions and other members. However, as the Forum had not been reconvened, the issues identified and Government response to the submission's recommendations has not been forthcoming. When questioned directly if submissions would be responded to, Mr Seymour stated (as above), that matters of the Forum would be properly concluded.

For the record, in the absence of acceptable clarity being provided through ministerial direction, our unions support legislative change along the lines of the amendment Senator Whish-Wilson presented to *the Customs Amendment (Anti-Dumping Measures) Bill 2013,* which is as follows:

> *"Subsection 269TAC (2A) After subsection (2), add: (2A) Where the Minister is satisfied that because the situation in the market of the country of export is such that sales in that market*

[36]Capral Limited, 'Submission to House of Representatives' Standing Committee on Agriculture and Industry', 'Circumvention of antidumping laws', November 2014, p 1, (available online through: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping/Submissions)

are not suitable for use in determining a price under subsection (1), regardless of subsection (5D), the normal value of goods is the amount determined by the Minister having regard to all relevant information, including by costs of production calculated on the basis of records kept by the exporter or producer, provided that: (a) such records are in accordance with generally accepted accounting principles of the exporting country; (b) such records reasonably reflect the costs associated with the production and sale of the like goods under consideration; and (c) the costs incurred are not affected by the particular market situation."[37]

It is a shame this issue has not progressed, essentially because of the jobs that non-progression is currently costing the Australian economy. It should also be noted there is an opportunity for enhancement of Australia's international reputation. This opportunity presents itself because according to China's WTO accession protocol, the right to consider China as a non-market economy for antidumping purposes expires in 2016. An outcome of Australia entering 'Free Trade Agreement' negotiations in 2005 was the controversial granting to China of 'market economy' status for antidumping purposes, which put Australia in a relatively unique situation.

Consistently observed by both Government and non-Government Forum members on numerous occasions (including the in the 25th of March, 2013 Forum) is the opportunity to demonstrate a pragmatic and effective approach for China's major trade partners– namely, the EU, the USA, Japan and India to follow in dealing with non-market situations in China post 2016. By such an amendment to the *Customs Act*, and by determining normal values appropriately and fairly in antidumping

[37]Amendments to the *Customs Amendment (Anti-Dumping Measures) Bill 2013,* moved by Senator Whish-Wilson in the Senate, 25 June 2013, (available online@ http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5063_amend_6c7fe803-cfbc-4645-8aa5-dcd9b191c7b8/upload_pdf/7411_REV_Customs%20Amdt%20Anti%20Dumping%20Measures%20Bill%202013_Ag.pdf;fileType=application%2Fpdf#search=%22legislation/amend/r5063_amend_6c7fe803-cfbc-4645-8aa5-dcd9b191c7b8%22)

investigations, Australia can lead the way and potentially provide for China's major trading partners' a post 2016 transitional pathway that is mutually acceptable for all parties, potentially avoiding trade tensions and even conflicts. Such initiative would be consistent with Australia's role as an important diplomatic middle power, and would demonstrate a traditional continuation of Australia as a good international citizen when it comes to the promotion of fair and open trade. An opportunity still exists to address this issue and the resultant international benefits remain achievable if the issue is acted upon prior to the protocol accession agreement expires in 2016.

Subsidies

Another MSWG recommendation accepted by Government was for the Forum to convene a separate working group to examine possible improvements to Australia's countervailing provisions.[38] The MSWG recommended this course because a common basis for a claim of a particular market situation relates to Government policies operating in a foreign market.

When asked about the status of the group through the Budget's estimates process, the answer confirmed that the working group had not formed because the Forum had not met:

> *"Members of the ITRF were notified of the intention to establish a Subsidies Working Group with a preparatory presentation explaining key concepts and investigative processes to be held in conjunction with the meeting of the ITRF scheduled for 5 August 2013. That meeting of the ITRF was postponed, as was the subsidies presentation. They are yet to be rescheduled."*[39]

[38] MSWG, *Report to Government*, p 4.
[39] BI-172, Anti-Dumping Commission, 'Subsidies Working Group', 25 July, 2014.

Again, the result of this is confusion amongst stakeholders. As the Anti-Dumping ADC stated in a question on notice:

> *"The Anti-Dumping Commission is not aware of any concerns that the delay in establishing the Subsidies Working Group has affected the ability to recognise alleged subsidies or a "particular market situation" in anti-dumping investigations*."[40]

This was the ADC's contention despite the fact that in the photocopy paper investigation, the CFMEU stated in a submission in response to the ADC's Statement of Essential Facts:

"The CFMEU points out two instances of grievance which if avoided might have determined a different approach by the ADC in determining normal values in this investigation…Despite the requirement that the International Trade Remedies Forum (ITRF) must meet at least twice each calendar year as per the legislation establishing the ITRF, the Forum only met once last year and has still not met since the 25th of March, 2013. The Minutes of the March 25 meeting included:

'Action item 9: Customs and Border Protection to establish the Subsidies Working Group with the same membership as the Market Situation Working Group.'

The Subsidies Working Group (SWG) has not been established nor did, as a result of the Forum not meeting, a scheduled Subsidies briefing which was due to accompany the next Forum occur where, amongst other matters, scheduled for discussion was how subsidies could impact market situations, determining domestic selling prices distorted and thus unsuitable for determining normal values" [41]

[40] Ibid.
[41] CFMEU, Submission to the Investigation, 04 April 2014.

Another part within the answer to the SWG question tabled through the Senate Budget estimates processes raises further concerns about the ADC's interpretation of the MSWG's recommendations. In response to a question about the whether the Forum and SWG not meeting had impacted investigations, the ADC stated:

> *"The Commission notes that, in conducting anti-dumping and countervailing investigations, it is bound by domestic legislation and World Trade Organization obligations. Accordingly, the Anti-Dumping Commission is required to establish whether goods exported to Australia receive the benefit of a countervailable subsidy, or whether the effect of such programs renders domestic selling prices unsuitable for normal value purposes based on the evidence and facts available in relation to the specific goods the subject of each investigation."*[42]

Also of relevance to these concerns is the approach taken by the ADC as outlined in their termination report in the photo copy paper investigation:

> *"The Commission considers that claims that an Australian industry has been injured by exports to Australia that are benefiting from countervailable subsidies should be dealt with through an application for countervailing measures. While the receipt of countervailable subsidies may be a factor contributing to a particular market situation finding, in the Commission's view, such a claim should be considered* ***only*** *in the context of a combined anti-dumping and countervailing investigation where the existence of countervailable subsidies is being properly investigated according to the provisions of Australian anti-subsidy legislation and the World Trade Organization Agreement on Subsidies and Countervailing Measures."*[43]

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[42]BI-172, Anti-Dumping Commission, 'Subsidies Working Group' 25/07/2014.
[43]The ADC, Termination of an Investigation, *TER 225, Alleged Dumping of White Uncoated A4 and A3 Cut Sheet paper Exported from the People's Republic of China*, 7 August 2014, p 26, (available online@ http://www.adcommission.gov.au/cases/documents/TER225.pdf)

Read in conjunction, these two pieces of advice from the ADC seem to represent a significantly diluted understanding of the MSWG's findings. The MSWG's report outlined all manner of evidence and processes in addition to successfully launching a combined antidumping/ countervailing investigation which could conceivably result in a finding of a particular market situation in a dumping investigation, and subsequently render domestic sales unsuitable. The MSWG report states**:**

"Ultimately for the test to be satisfied…(the ADC)…needs to be in a position to:

- *identify a "market situation" (e.g. existence of subsidy, government activity in setting and maintaining prices etc.), and*
- *be satisfied that the market situation renders domestic sales unsuitable for comparison with export price (i.e. that the market situation distorts domestic pricing to an extent that renders prices unsuitable)"*[44]

Evidence suggests that due to pressure from hierarchical management, some Australian firms with international ownership structures are at times reluctant to launch and or/pursue countervailing investigations alongside dumping investigations. This presents another issue with the ADC's interpretation providing little comfort to local workers.[45]

In addition to this the ADC's interpretation virtually abdicates its agreed role as outlined in the MSWG report. The report states clearly for example:

[44]MSWG, *Report to Government*, p 8.
[45]Our unions are willing to elaborate on this evidence for the Committee on a confidential basis on request. See: CFMEU submission, Productivity Commission's Inquiry Report, 26th June 2009 for an introduction to the issue of how conflicts of interest might emerge, (available online @ http://www.pc.gov.au/inquiries/completed/antidumping/submissions/sub027.pdf)

"Where an Australian industry makes a claim of a particular market situation existing in the country of export, Customs and Border Protection will examine this claim and the supporting evidence to determine whether there appears to be reasonable grounds to initiate an anti-dumping investigation on the basis that a particular market situation exists in the country of export that renders domestic sales unsuitable for determining the normal value.

Following initiation Customs and Border Protection will investigate the claim further. This will include issuing questionnaires to exporters and the government of the exporting country seeking relevant information. Customs and Border Protection will not issue such questionnaires where a claim of particular market situation has not been made. <u>However this does not preclude a finding of particular market situation being made where Customs and Border Protection becomes aware of such a situation during the course of an investigation and is ultimately satisfied that a particular market situation exists.</u>"[46](Our emphasis)

And:

"The MSWG also discussed the possibility of an interested party other than the applicant presenting information relevant to determining the existence of a market situation, which may require further refinement to the questionnaire. Customs and Border Protection considers that if information is presented in a timely manner, supplementary questionnaires can be issued where warranted."[47]

In any event, the reality is that the Forum has not met meaning the promised subsidies briefing has not occurred. That the SWG has not been established to progress these important issues including

[46] MSWG, Report to Government, p 6.
[47] Ibid, p 18.

how subsidies can impact on the particular situation of a market in addition to them being formally identified in a countervailing investigation is of frustration to our unions.

A supportable element of the Coalition's 2013 election commitments on antidumping included a commitment to:

> *"Strengthen the enforcement of the provisions of the WTO Agreement on Subsidies and countervailing measures."*[48]

The Government, when announcing the policy in Opposition, provided no indication it would not be holding either the Forum or working groups like the SWG. Given that they must have been aware of the recommendations made by the MSWG to form the SWG (as the MSWG report and its recommendations to Government was a public document), it was reasonable to expect the Coalition, in Government, would utilise the Forum and Group to assist implementation of their policy commitment. It is extremely disappointing and baffling that this is not the case.

The Government seems to also have moderated its election commitment about strengthening enforcement in its most recent policy too, simply stating that:

> *"The Government will take a stronger stance in World Trade Organization forums on the transparency of foreign subsidies, which will assist in ensuring that Australian producers and exporters are able to compete fairly."*[49]

[48] 'The Coalition's Policy to Improve the Competiveness of Australian Manufacturing', August 2013, p 13.
[49] Department of Industry, *Levelling the playing field,* December 15, 2014.

It is hoped this policy commitment, in addition to the amendment in this Bill to clarify the circumstances in which the Minister does not have to consider the lesser duty rule (which will be elaborated on further below), is not the sum total of the Coalition's election policy with regard to strengthening enforcement to prevent unfair subsidies injuring Australian industry. A formal dialogue between Government and stakeholders within industry, including our unions on these issue would be extremely valuable. The Forum and SWG should be providing this vehicle for dialogue on an ongoing basis - but as we have shown, currently the Forum and SWG cannot because of the Government's decision to not reconvene.

Our unions take the opportunity to reiterate that we only conditionally support the element of the Bills which amends the definition of a subsidy (For the purposes of Australia's anti-dumping system to better align the definition with the WTO Agreement on Subsidies and Countervailing Measures {The amendment provides that the receipt of a financial contribution by a government does not in and of itself confer a benefit, but that it must be determined whether that contribution provides a benefit})[50]

Our support is subject to;

- The Forum remaining in place in legislation;
- The Forum once again becoming operational,
- The promised subsidies briefing occurring at the next Forum meeting; and
- The formation of the SWG with the first items on its agenda at least covering the Government's election commitment on subsidies, the 15th of December 2014 antidumping policy as it relates to subsidies and the recommendations of the MSWG.

[50] Minister Macfarlane, *Explanatory Memorandum,* p 3.

Import Data

By way of background, the PC acknowledged in its Inquiry Report that applicants and potential applicants for antidumping measures were having difficulty developing applications. This was owing to the obligations of the Australian Bureau of Statistics (ABS) to maintain confidentiality of individual businesses or persons upon their respective requests. It is worth the committee considering the PC's position in full; it provides the context of the importance of the discussions on the issue that were taking place in the Forum, and explains the seriousness of the matter not progressing, caused by the fact that the Forum has not met.

From the PC's Inquiry Report:

"For those seeking the imposition of Anti-Dumping or countervailing measures, lack of access to Australian Bureau of Statistics (ABS) import data suppressed on confidentiality grounds has been a perennial issue in past administrative reviews and one that has again been raised in this inquiry. In essence, the concern is that without access to such data, whether directly or through a third party, it can be difficult to mount a sufficiently robust case for Customs to initiate an investigation.

For example, the Plastics and Chemicals Industries Association stated that: It has become all too easy for the ABS to suppress vital market information on confidentiality grounds. The suppression of this data restricts the capacity of participants to … pursue action where there is suspicion that injurious behaviour is occurring. (sub. 31, p. 11)

OneSteel contended that making such import data more widely available could have other benefits: Perhaps if this information was readily available, claims of 'frivolous and vexatious

applications' may fall as potential applicants can better assess their material injury claims prior to making a decision to lodge an application. (sub. 16, p. 14)

And Australian Paper went as far as to advocate full disclosure of details of individual import shipments.

Suppression of country of origin information in Customs/ABS import statistics is common in tariff codes affecting the pulp and paper industry. The problem is deeper than just country of origin volumes and prices. Even when import data for an individual tariff code and country of origin is available, there may be several suppliers of a good, or one tariff code may contain several distinct goods at quite distinct prices, some dumped or subsidised … The only way this can be resolved is by full disclosure of individual import shipments as takes place in the US system. (sub. DR41, p. 3)

The Commission understands these frustrations. Indeed, it is somewhat incongruous that export data published or available on request from government agencies in other countries — which may closely approximate data that has been suppressed by the ABS — is sometimes used by an applicant for anti-dumping measures. In these circumstances, from the applicant's perspective, the effect of the confidentiality provisions is simply to increase the time and expense involved in seeking antidumping protection without having any ultimate material impact on the availability of the information concerned.

The confidentiality provisions concerned are, of course, generally applicable and set out in the ABS's enabling legislation. As such, they encompass considerations that extend beyond the anti-dumping system. In particular, the ABS stated that it: … enjoys a high level of community trust and cooperation because the community is confident that the information it provides to the ABS will be protected … [If the ABS lost] that confidence, the community may not provide information to

the ABS, or may not provide accurate information, both of which would reduce the quality of ABS statistics. (sub. DR53, p. 2)

The ABS further indicated that it had made two submissions along these lines to the very recently finalised review by the Australian Law Reform Commission (ALRC) of the relevant laws and practices relating to the protection of Commonwealth information, including the scope and appropriateness of legislative provisions regarding secrecy and confidentiality. In that review, the ALRC considered options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government through providing appropriate access to information. The
ALRC reported to the Attorney-General on 11 December 2009. In the Draft Report, the Commission proposed that the ALRC consider recommending a change to the legislation governing the operation of the ABS to preclude the suppression of import data when the same or similar information can be publicly accessed from the export statistics of other countries.
The proposal received strong support from participants, though several suggested that it did not go far enough. For example, BlueScope Steel contended that: … the ABS takes an overly conservative approach and suppresses information beyond that which is required to protect the legitimate commercial interests of international suppliers and the local importing industry. (sub. DR55, p. 21)

And, as noted above, some participants suggested that the confidentiality restrictions be relaxed completely, such as along the lines of the arrangements in the USA. However, reflecting its general concern to preserve confidence in the use of information supplied to it, the ABS (sub. DR53, pp. 1–2) was strongly opposed to the Draft Report proposal, suggesting that such a change would require it to play a direct role in administering the anti-dumping system. It further posited

that there will always be differences between the records of goods imported into Australia and the counter-party export records (observing, for example, that differences between the date of export and the date of import could lead to differences in monthly data).

As it transpires, the Commission now understands that this particular matter was outside the scope of the ALRC review. Nonetheless, the Commission still sees a strong case for some change to the current arrangements. And it does not share the concerns of the ABS that the Bureau's reputation for integrity, and the public's confidence in the security of material provided to the Bureau, would be undermined by a common sense approach to publishing data that is available elsewhere. In this regard, it is notable that for import data, the ABS does not rely on any voluntary participation by stakeholders — rather, it acquires that data directly from Customs. Also, while there may be small differences in import and export data ensuing from timing differences and variations in statistical codes, this does not negate the general argument in favour of publication.

The Commission accepts there may be some internal administrative costs associated with changing the relevant practices — and that these costs would need to be balanced against the associated reduction in costs for applicants for anti-dumping measures. Accordingly, and given that the matter appears to have been outside the scope of the ALRC review, the Commission is now recommending that the Government should consult with the ABS on the best way to ensure that the publication of such import data is not in future unreasonably precluded in circumstances where broadly equivalent data are publicly available from other sources.

The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.[51]

The former Government accepted that recommendation of the PC's in its *Streamlining* policy where is stated:

> *"Improving access to import data will increase the capacity for local manufacturers to monitor the volumes and prices of the import competition. This increased visibility of export prices and volumes may lead to a greater number of applications for anti-dumping and countervailing actions. Where applications are made, the applicants' estimates of export price, and consequently the estimates of dumping margins, are likely to be more accurate and reliable than would be the case with some of the existing restrictions on accessing import data. Importers and other interested parties will also gain visibility of import data, further informing them as to their competitors' or suppliers' import activities and data. As a result, these other interested parties will also be better informed for the purposes of defending their interests in dumping and subsidy investigations…"*[52]

The progression of this issue in the Forum provides an interesting history. At the first Forum meeting held on the 29th of August, 2011 the Forum decided on the formation of the ABS Data Working Group (IDWG) to analyze the issue. The issue featured in the subsequent next three Forum meetings.

[51] Productivity Commission, Inquiry Report, p 157- 160.
[52] Customs, 'Streamlining Australia's Anti-Dumping system', p 10.

At the second Forum meeting held on the 12th of December, 2011, the draft paper of the Closed Processed Agricultural Goods (CPAG) Working Group was tabled. When the CPAG Working Group members made the point about access to import data, our unions highlighted we were talking about legislative reform, as opposed to simple assistance in accessing the ABS website and other ABS data not subject to confidentiality provisions.[53] This proposition was accepted and subsequently reflected in the Forum meeting's minutes.

Despite this when the IDWG report was presented at the third Forum meeting held on the 12th of May, 2012 the result was disappointing. On the core issue, despite the wish of many of the IDWG's members (and those of the Forum), the report failed to recommend legislative amendments compelling the ABS or Customs to make available import data available when it was available from other sources. The report proposed effectively a 'no change proposition'; including in regards to the availability of the maintenance of confidentiality restrictions, the need to pay to for reviews of confidentiality restrictions, but not paying to have them applied (amongst other things). Elements of the report were extremely specious for example where it stated:

> *"The International Trade Remedies Branch is not aware of any examples where an application has not proceeded because of a lack of ABS data on export prices."*[54]

At the Forum, a number of members suggested the IDWG had not delivered its mandate because it had not adequately considered the issue of the ABS releasing data where that data is otherwise publicly available. The Forum was reminded by our unions that the rationale previously provided by

[53]The draft report stated: "Some CPAG Working Group members advocate legislative changes to make trade data that is currently subject to confidentiality provisions more widely accessible, and this issue is being looked at in the Data Working Group."
[54] IDG, 'Report to Forum', May 12, 2012, p 6.

the ABS about maintaining public confidence in ABS data had been rejected by the PC because the data of concern comes only from Customs.

As a compromise, the Forum put the topic to the newly formed SCWG on which our unions were represented. At the inaugural meeting of the SCWG held on the 27th of July, 2012 the industry and union representatives raised the issue again and it was subsequently agreed that Customs and Border Protection would analyse other jurisdictional approaches to sharing import data. It was agreed any comparison of different approaches should include the treatment of data and requests for confidentiality by the Customs services of New Zealand, China and the USA.

At the Fourth Forum meeting held on the 31st of August, 2012, Forum members were informed the agreed study had been placed on Custom's the longer term work plan and, given other work priorities, would not be undertaken until 2013. Despite this setback, it appeared the issue was progressing when the sixth and last Forum meeting held on the 25th of March 2013 agreed to an action item which was for:

> *"Customs and Border Protection and the Australian Bureau of Statistics report to the Forum on restrictions to accessing import data and the approach taken by other border agencies."*

As the Forum has not met since March 2013, we know there has been no opportunity for progression of this action item. This was confirmed by written responses from the Senate's Budget estimates process where it was admitted by the ADC that:

> *"Information has not been circulated to International Trade Remedies Forum (ITRF) members in relation to this issue. The analysis and international comparisons were agreed to be*

completed in 2013. An ITRF meeting has not been held since March 2013. The analysis and information will be shared and discussed with the ITRF at an appropriate opportunity.

Information was prepared in anticipation of the proposed meeting of the ITRF in August 2013. However, this meeting was postponed due to the operation of caretaker conventions prior to the Federal election in September 2013."[55]

And subsequently through Supplementary Budget Estimates' processes:

"The information has not yet been shared and discussed with any International Trade Remedies Forum (ITRF) members. The ITRF is under consideration by the Australian Government and there will be announcements made in due course. Until then, no meetings of the ITRF or its working groups have been convened."[56]

The reality is that this issue has not progressed for two years as the Forum has not reconvened. Given the lack of acknowledgement in any antidumping policies announced including the policy on December 15, 2014, there does not appear to be an obvious plan for any compiled information and analysis to be disseminated to Forum members, or for the issue to be advanced by the Government.

This is despite the fact that the issue is neither insignificant, nor has it diminished in importance since the significant industry concern was initially outlined in the submissions to the PC's Inquiry back in 2009 (as cited above). For example, many manufacturer's and producer's (and their association's) submissions to the Brumby Review (September 2012) reiterated this concern.

[55] B1-65, Anti-Dumping Commission, 'Stronger Compliance Working Group'
[56] SI-70, Portfolio Strategic Policy, Stronger Compliance Working Group'

It is also worth noting that Australian Paper, through their own submissions and through their industry association (AFPA) to a number of inquiries, has been one of the most active proponents to increase transparency and accessibility to import data. They describe Australia's antidumping system, by comparison to other countries, as cumbersome and time consuming.[57] The data confidentiality issue was described by Australian Paper's industry association the AFPA in its submission to the anti-circumvention inquiry outlined as follows:

> "*Australian industry has repeatedly identified the access (or lack thereof) to sufficiently detailed import statistics and the transparency or granularity of this data, as major constraints in evaluating antidumping applications. One such example is the suppression of country of origin information in the Antidumping Commission/ABS import statistics, common in many tariff codes. As a point of comparison, the U.S. system, allows industry full access to import data on a transaction by transaction basis with full detail of what is being imported by who, from where, and at what price. A similar framework should be implemented for Australian trade data."*[58]

In October 2014, Australian Paper stated that it was restarting dumping investigations, with claims against photo copy paper imported from China in the 'next few weeks'.[59] There has been a lack of movement since 2009 over the issue of easier access to confidentialialised import data for the purposes of antidumping applications. The non-convening of the Forum since March 2013 can be considered largely responsible for the lack of progress of the issue since March 2013. When the absence of necessary reform achieved is combined with the heavy use of confidentiality provisions

[57] Mr Kashima, *Pulp and Paper Edge*, 'Dumping Double Down – Australian Paper Restarts Investigation', *Edition 113: October 2014*, 14 October, p 4.
[58] The Australian Forest Products Association, Submission to House of Representatives' Standing Committee on Agriculture and Industry, 'Circumvention of antidumping laws', November 2014, p 4, (available online through: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping/Submissions)
[59] Mr Kashima, 'Dumping Double Down – Australian Paper Restarts Investigation', p 4.

by paper importers as is the case, it is perhaps no surprise that as of April, 2015 there has been no information about the re-commencement of this investigation.

For the record, particularly given the absence of the promised consultation on the issue (precipitated by the Forum not meeting) and the resultant negative impact on jobs, our unions support a legislative approach to this issue. We support a repeal to the section of the *Census and Statistics Act, 1905* which allows parties associated with the imports of a particular product to request that the name of the country of origin (and the associated values and volumes) be suppressed in the reporting by the ABS (a curious provision in an era of free trade), and/or the changes to the *Customs Act* along the lines advocated for by Australian Greens members in their below amendments to the *Customs Amendment (Anti-dumping Measures) Bill 2013…*:

> *"At the end of Division 1 of Part XVB Add: 269TBAA Access to import data (1) For the purposes of subsection 16(2) of the Customs Administration Act 1985, a person is authorised to make a record of, and to disclose to any person, protected information (within the meaning of that section) that is import data. (2) Despite section 12 of the Census and Statistics Act 1905 and any determination made under section 13 of that Act, the Statistician (within the meaning of that Act) must publish all import data. (3) For the purposes of this section, import data means the following information about individual shipments of goods exported to Australia: (a) country of origin; (b) the type of goods; (c) the volume of the*

shipment; (d) the value of the shipment; (e) any other details about the shipment of the goods specified by the Minister by legislative instrument"[60]

…and/or the approach proposed by Senators Xenophon and Madigan in their amendment tabled during debate on the same Bill in 2013:

"Add: 269TBAB Reporting information about imports into Australia (1) The Commissioner must: (a) establish a publicly available free website; and (b) publish on the website, and keep updated, such information as prescribed by the regulation made for the purpose of this subsection. (2) The regulation made for the purpose of paragraph (1)(a) must: (a) include details of the kind of information that the Commissioner must publish, and keep updated, on the website; and (b) include a requirement that the following information about individual shipments of goods exported to Australia be published on the website: (i) the country of origin of the shipment; (ii) the type of goods in the shipment; (iii) the volume of the shipment; (iv) the value of the shipment. (3) Before recommending that the Governor-General make a regulation for the purpose of this section, the Minister must consult with the Commissioner about the kind of information that should be published on the website."[61]

[60] See amendments moved in the House of Representatives by Mr Bandt (available online@ http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5063_amend_14d1dff6-a643-414a-9bb9-dd176d12d088/upload_pdf/13126Bandt.pdf;fileType=application%2Fpdf#search=%22legislation/amend/r5063_amend_14d1dff6-a643-414a-9bb9-dd176d12d088%22) and Senate by Senator Whish-Wilson in the Senate (available online@ http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5063_amend_6c7fe803-cfbc-4645-8aa5-dcd9b191c7b8/upload_pdf/7411_REV_Customs%20Amdt%20Anti%20Dumping%20Measures%20Bill%202013_Ag.pdf;fileType=application%2Fpdf#search=%22legislation/amend/r5063_amend_6c7fe803-cfbc-4645-8aa5-dcd9b191c7b8%22)

[61] See amendments moved in the Senate by Senator Xenophon and Senator Madigan, (available online @ http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r5063_amend_d10e1445-17e3-4e51-b918-21b4c51ffc9c/upload_pdf/7428_Customs%20Amdt%20(Anti-dumping%20Measures)%20Bill%202013_X.pdf;fileType=application%2Fpdf#search=%22legislation/amend/r5063_amend_d10e1445-17e3-4e51-b918-21b4c51ffc9c%22)

Lesser Duty Rule

There is one other specific action item from the last meeting of the Forum (the 25th of March 2013) which deserves attention. It provides an example of the stagnation of the work plan because the Forum has not been reconvened and how that has ultimately been to the detriment of Australian industry, the economy and jobs. This action item followed feedback from the Non-Injurious Price workshops conducted on 20th and 21st of March, 2013.

By way of background, there was a significant history of the Forum considering the issue of non-injurious price stemming from the original *Streamlining* policy. The Forum was asked by the former Government to analyse methods of the practice for setting the non-injurious price in Australia. This followed an acknowledgement of concerns raised by both industry and workers that the Australian approach to determining the non-injurious price, upon which the lesser duty is based was inadequate, and the contention than an improved methodology needed to be adopted ensuring injury to Australian industry is sufficiently addressed.[62] A discussion paper was tabled at the third Forum meeting (the 12th of May, 2012) and further consultations were proposed and agreed to in the fourth Forum (31st of August 2012), resulting in the non-injurious price workshops.

Our unions participated in these workshops. The resultant report and views of the majority of participants of the workshops reported at the sixth Forum (25th of March, 2013) was that if the lesser duty rule was to be used in the future under any circumstances, a much more precautionary approach to the prevention of material injury needed to be taken in setting the non-injurious price than what was practiced. Indeed an 'error margin' could be implemented in favour of preventing material injury. This would mean that the objective of remaining as least 'trade restrictive as practical' was never achieved at the expense of achieving the primary objective of the antidumping system which is, rightly, prevention of material injury to local industry from dumping.

[62] Customs, 'Streamlining Australia's anti-dumping system', June 2011, p 21.

The action item of the 25th of March, 2013 Forum indicated the tabling of a revised paper on non-injurious price at the next Forum meeting, (which was to take into account feedback from the workshops). Because that Forum never convened paper was never presented for further consultation with Forum members and subsequently, there remains confusion about the ways "non-injurious price" is being considered and implemented as well as, any changes to both the methodology and approach. This undermines stakeholder confidence in the antidumping system.

Brief Commentary on Other Elements of the Bills

Our unions make the following comments about the other elements of the Bill(s) for the Committees considerations.

"To clarify that the length of the investigation period of an anti-dumping and countervailing investigation cannot be varied, provisions related to the consideration of an application will be amended. This clarification provides guidance on the long-standing practice of the investigating authority, reduces risks to the timeliness of investigations and improves stakeholder certainty."[63]

Our Unions' Comments

Our unions note that this element of the Bills is unlikely to provide comfort to stakeholders such as the Cement Industry Federation (CIF) who, in their submission to the anti-circumvention inquiry, propose reforms to the antidumping system to increase flexibility with the investigation period. This submission was made in the context of CIF member's experience which saw the Commission 'demonstrate inflexibility with the nominated investigation period'. The CIF's submissions states:

[63] Minister Macfarlane, 'Explanatory Memorandum', p 2-3.

"As a consequence, the investigation period accepted by the Commission for the purposes of an inquiry failed to take account of a critical quarter of material injury to the Australian industry."[64]

The issue of investigation periods received attention in the Forum. This was initially the case because the *Streamlining* policy stated that:

> *"Some stakeholders have indicated concerns that the evidence required to demonstrate dumping is, in fact, occurring and that the dumping causes material injury over the time periods described are unduly onerous."*[65]

At the third (the 12th of May, 2012) Forum meeting, a paper on investigation and injury periods was tabled. Actions outlined (i.e. retaining a 12 month investigation period for dumping) were agreed by Forum members, subject to receiving clarification on a number of further issues. In a discussion about these further issues in the fourth (the 31st of August, 2012) Forum meeting, our unions highlighted that there was actually no WTO ADA requirement to set a dumping period at the initiation of an investigation. In response, Customs and Border Protection noted the decision of the Trade Measures Review Officer (TMRO) in the 'Quicklime' case and outlined how the TMRO recommended that Customs' CEO resume the investigation with a different/longer investigation period. Our unions suspect the same investigation is likely to be what the CIF is referring to. An outcome of the meetings and our unions' contribution was that *"The Forum will be provided with an update on the outcomes of that case..."*

Our unions note that in a termination report tabled on the 7th of November, 2014, the ADC states:

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[64] Cement Industry Federation, Submission to House of Representatives' Standing Committee on Agriculture and Industry, 'Circumvention of antidumping laws', November 2014, p 10, (available online through: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping/Submissions)

[65] Customs, 'Streamlining Australia's Anti-Dumping System', p 9.

"*The Commissioner has found that it is not open to him to amend the investigation period of 1 July 2010 to 30 June 2011."*[66]

Because there has been no Forum meeting since the 25th of March, 2013, and no case update has been provided to us, our unions do not feel that we are in a position to comment either on the veracity of the amendment to the Act as proposed in the Bill, or the suitability of it given the outcome of the investigation. We do however consider that retention and enhancement of flexibility in the system is both desirable and possible via an amendment to the *Customs Act* as suggested by us at the 31st of August, 2012, Forum meetings. The logic and details of this proposed amendment and the issue is explored below:

Although non-binding, the WTO committee on antidumping practices formulated a recommendation as its meeting of 4-5 May 2000 that, as a general rule, the period of data collection for *dumping investigations* (i.e. the investigation period) normally should be twelve months and in any case no less than six months, ending as close to the date of initiation as possible. Australia's legislation requires the Anti-Dumping Commissioner to define the investigation period in the notice advising initiation of an investigation (stated in the initiation notice is that evaluation occurs only within the period of the investigation)This practice (although required by the Act) is unnecessarily cumbersome, and removes flexibility in determining whether dumping and dumping causing injury has occurred. The practice has no basis for requirement according to the WTO ADA (Article 12.1), which states simply that the following is required to be provided in a notice of initiation:

(i) The name of the exporting country or countries and the product involved;

[66] ADC, 'Termination of an Investigation', NO. TER 179B, Alleged Dumping of Quicklime from Thailand, 7 November 2014, p 5, (available online @ http://www.adcommission.gov.au/cases/Documents/079-TerminationReport.pdf)

(ii) The date of initiation of the investigation;

(iii) The basis on which dumping is alleged in the application;

(iv) A summary of the factors on which the allegation of injury is based;

(v) The address to which representations by interested parties should be directed;

(vi) The time-limits allowed to interested parties for making their views known.

Our Unions' Proposal

Repeal s269Tc94 (bf) -*"On the basis of the examination of exportations to Australia of goods the subject of the application during a period specified in the notice of the investigation period in relation to the application"*

This amendment to the Act would mean the period of investigation (for determining dumping and injury) may not necessary be subject to an arbitrarily period, and not be required to be specified at the initiation of the investigation. This would not detract from the ability of the ADC to request a certain period of injury data from applicants or a period of alleged dumping data from exporters in the form of a questionnaire. The same flexibility should be provided for injury periods.

"Amending the provisions regarding the calculation of the normal value in anti-dumping matters clarifies that, in Australia's anti-dumping system, there is no specific hierarchy between the various methodologies for determining normal value. The amendment removes doubt that the Commission can calculate normal value on the basis of construction without first having regarded the use of third country prices. This clarification takes advantage of flexibility permitted under the WTO agreements and thereby improves the alignment of Australia's provisions with those of the WTO agreements."[67]

[67] Minister Macfarlane, 'Explanatory Memorandum', p 3.

Our Unions' Comments

This is a change that is supportable. It should be noted that it is the existing practice of the ADC to do a cost construction rather than analysing export prices to third countries in this situation. The reason for this is certainly justified because there is no obvious way to determine if those exports to third countries may indeed or otherwise be dumped. This amendment is consistent with solidifying current practice which received the support of Australian industry as outlined in the MSWG report:

> *"Given the practical difficulties and impact on timeframes, together with the fact that Customs and Border Protection often has some verified costs (or alternative benchmarks to rely on), Customs and Border Protection considers a cost construction to be the most appropriate approach. Australian industry recognises the limitations of using third country export sales and supports the approach taken.*
>
> *Discussions with the EU, US and Canada confirmed that they undertake a similar approach…"*[68]

"To clarify the circumstances in which the Minister is not required to have regard to the lesser duty rule, provisions of the Customs Act would be amended to require that the Minister is not required to have regard to the lesser duty rule where a country has not submitted a notification of its subsidies, as mentioned in paragraph 1 of Article 25 of the WTO Agreement on Subsidies and Countervailing Measures, at least once in the compliance period. This amendment clarifies the circumstances in which the Minister is not required to have regard to the desirability of a lesser duty in light of the practices regarding submission of subsidy notifications under the WTO Committee on Subsidies and Countervailing Measures."[69]

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[68] MSWG, Report to Government, p 24.
[69] Minister Macfarlane, Explanatory Memorandum, p 4.

Our Unions' Comments

Set out in the *Customs Tariff (Anti-Dumping) Act 1975*, currently the specific circumstances in which the Minister is not required to consider application of the lesser duty rule include the circumstances where:

> *"The country in relation to which the countervailable subsidy has been provided has not complied with Article 25 of the World Trade Organization Agreement on Subsidies and Countervailing Measures (relating to notification of subsidy programs) for the compliance period."*[70]

This amendment would appear in this case to actually weaken the current approach where compliance to the entire chapter 25 is required including 25.9 which states:

> *"Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member."*[71]

Considering the above, how this amendment is consistent with the Government's supposed approach outlined in the 2013 election *"to strengthen enforcement of the WTO agreements in Subsidies and Countervailing Measures"* is a mystery.

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[70] ADC, Answer to Question on Notice from Senator Carr (B169) 'Anti-Dumping Duty', Economics Legislation Committee, Industry Portfolio, Budget Estimates Hearing, 2014-15, 2-3 June 2014, (available online@ http://www.aph.gov.au/~/media/Committees/economics_ctte/estimates/bud_1415/Industry/answers/BI-169_Carr.pdf)

[71] WTO, 'Part VII: Notification and Surveillance Article 25: Notifications' *Agreement on Subsidies and Countervailing Measures*, 1994 (available online@ https://www.wto.org/english/docs_e/legal_e/24-scm_03_e.htm#articleXXV)

In addition to this issue, our unions point out that, as the Forum has not met since the Act creating this legislation passed parliament, urgent concerns remain about how Australia's subsequent signing of Free Trade Agreements may impact the use of the legislation remain. The uncertainty has impacted the ability of unions to appraise any benefits of the agreements.

DFAT attempted to address the concern, as did the ADC too:

> *Question: "Section 6.8.2 (b) of the KAFTA states: the Party making such a decision to impose an Anti-Dumping duty in accordance with Article 9.1 of the Anti-Dumping Agreement, shall normally apply the 'lesser duty' rule, by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry."*
>
> *-Does this limit the Minister's power to apply the full margin of duty?*
>
> *DFAT:*
>
> *"Article 6.8 of Section C of the KAFTA trade remedies text is intended to enhance transparency in the application of anti-dumping and countervailing duty measures. It describes anti-dumping practices in relation to the determination of the dumping margin for exporters and the level of duties imposed. This provision does not impact on Australia's ability to take anti-dumping action."*[72]
>
> *ADC:*

[72] DFAT, Answer to Question on Notice from Senator Wong, 'Question No 317: KAFTA', Senate Foreign Affairs, Defence and Trade Legislation Committee, Additional Estimates 2014, 27 February 2014, p 534, available online@ http://www.aph.gov.au/~/media/Estimates/Live/fadt_ctte/estimates/add_1314/dfat/dfatqonsanswers.pdf

> *"Section 6.8.2(b) of the KAFTA does not limit the Minister's power to apply the full margin of duty in imposing anti-dumping measures. The text in that section reflects what has been the routine practice in the administration of Australia's anti-dumping system where, following the Minister's mandatory consideration of application of the lesser duty rule, a lesser duty has generally been applied. In the view of the ADC, reference to a practice that is "normally" applied does not preclude circumstances where the Minister may be satisfied that the full margin of dumping should be applied in a particular case."*[73]

In need of urgent clarification is, if it became a regular occurrence that investigations into goods from a given country did not require consideration of the lesser duty rule (because of the part of the act dictating the Minister does not need to consider it), whether the Minister would be influenced to consider the lesser duty in any event because of the Free Trade Agreements clearly stating that the rule (in KAFTA's case) shall normally be applied. The alternative and preferred clarification would be that the conditions allowing circumstances that the Minister does not need to consider the "lesser duty rule" under the act determines that on a prima facie basis application of the rule would be inadequate to remove injury to domestic industry.

In the absence of any adequate clarification (which might have been received had the Forum been operational and the issue potentially pursued), our unions believe the provisions in the KAFTA do impact the Minister's ability to avoid applying the lesser duty rule, and so reject the notion that if similar provisions are in agreements, those agreements do not modify Australia's rights in relation to antidumping and/or countervailing duties.

[73] ADC, 'Anti-Dumping Duty', 2 June 2014.

Conclusion

The Government has no mandate to abolish the International Trade Remedies Forum, and the evidence and experience clearly demonstrates that this Forum plays a central and important role in the continuous reform and effective functioning of our antidumping system. Rather than neglecting the Forum and planning for its abolition since coming to power, the Government should have facilitated the Forum's ongoing operation in accordance with the Act. Indeed, the evidence also suggests that if those obligations had been complied with, there would have been a real benefit to Australian industry, businesses and workers including through jobs preservation.

When the Forum was established, it was not opposed by the Opposition (now Government) with the Bill legislating for its creation receiving unanimous Parliamentary support. In the House of Representatives debate about the Bills subject to this inquiry, and particularly, the proposal to abolish the Forum, it was pointed out by Shadow Parliamentary Secretary for Industry Mr Zappia that when the legislation (establishing the Forum) was debated, the Coalition did not oppose the Forum, and in fact they supported it:

> *"At the time their spokesperson said: … "We support the establishment of the International Trade Remedies Forum. Indeed, the Coalition has said for a long time that industry must be given a much greater voice in articulating improvements to the system and, more to the point, that its voice should be far more clearly heard … If we take the government at face value on this and accept that its genuine intention is to bring together representatives from local industries, importers and unions and give them a better say in identifying problems and*

suggesting future improvements to our national antidumping system, then it is certainly a step in the right direction."[74]

The approach by the Government when in Opposition of supporting a tri-partisan mechanism for improving the antidumping system seems to have been nearly completely reversed, as evidenced by the proposal to abolish the Forum and the additional behaviours outlined in this submission. The apparent change in attitude is perhaps best betrayed by the contribution to the debate by the Member for Hughes, Mr Kelly, where he stated:

"In the final minutes left I would like to quickly say that I do not support the amendment proposed by the opposition. The amendment involves the International Trade Remedies Forum, which was set up by the previous Labor government. For all intents and purposes that forum is redundant. We know that it is stacked. By its regulations, it is compulsory that it has a discriminatory provision where four members must be union members. I know that the opposition likes to have these things to give jobs to their union mates. This is an unnecessary, redundant provision, and I oppose the amendment."[75]

The statement by Mr Kelly has absolutely no foundation. As Senator Carr pointed out in his contribution to the debate when the Bill reached the Senate:

[74] Mr Tony Zappia, *House of Representatives Hansard,* Monday 16 March 2015, 'Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015 Customs Tariff (Anti-Dumping) Amendment Bill 2015, Second Reading', p 87, (available online@ http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/f64ad34c-669f-49218ec47e5a6fee2dc9/toc_pdf/House%20of%20Representatives_2015_03_16_3292.pdf;fileType=application%2Fpdf)

[75] Mr Craig Kelly, ibid, p 98.

> *"The Forum's membership is drawn from manufacturers, from producers, from importers, from unions and from industry associations, as well as including representatives from government agencies…"*[76]

As Senator Carr asks:

> *"So, what is all this about? It is not about budget savings, because most of these people do not even get paid."*[77]

Even so, our unions take the opportunity of making this submission to reiterate that our only interest in participating in the Forum and the antidumping and countervailing system is to defend from the consequences of unfair trade practices, the jobs, wages and conditions of our members. Assumedly also Mr Kelly, knew the proposed legislated Forum composition when he voted in favour of its formation in 2012. There was no mention about the Forum's composition been 'stacked' at the time and with four union members out of fifteen industry representatives it is hard to fathom what the real problem is. If the real motivation behind the statement and move to abolish the Forum is an implication that unions do not have a legitimate role to play and contribution to make in public policy than this is nothing short of a denial of the rightful expression of workers in their future as determined by the fate of their businesses and industries, and is unacceptable.

Although it might suit the Government's political agenda to provide distraction from its significant shortcomings by demonising unions and attempting to delegitimise our important role in public policy formation, it needs to be called out. This is particularly the case when it attempts to justify the

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[76] Senator Carr, *Senate Hansard*, Wednesday, 18 March 2015, 'Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015 Customs Tariff (Anti-Dumping) Amendment Bill 2015 Second Reading', p 24, available online@ http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/f7429714-3e7b-44b5-ab71-9285fd74431d/toc_pdf/Senate_2015_03_18_3296_Official.pdf;fileType=application%2Fpdf

[77] Ibid.

disestablishment of bodies for the mere fact that unions are represented on them, especially when abolishment is at the clear expense of the national interest which the abolition of the Forum would certainly represent.

The Government's support for the legislative establishment of the Forum is on record; neither did the Government say it would be seeking its abolition before the election, including as part of their antidumping election policy.[78] If the Government wants to abolish the Forum, it bears the onus to prove the Forum's failure. As stated by the then Opposition when voting in its favour, the Forum's benchmark is to bring together representatives from local industries, importers and unions, and give them a better say in identifying problems and suggesting future improvements to our national antidumping system. There can be no doubt that any objective analysis must conclude the Forum has met this benchmark.

We fear that this attempt to abolish the Forum represents a departure from the tripartisanship that successfully characterised the strengthening of the Anti-Dumping system and that if abolition is achieved, ultimately it will cost Australian jobs. As a result, the current Bills before the Committee should be opposed whilst ever they continue to include the abolishment of the Forum.

Our unions note Senator Carr's further contribution to the debate on these Bills:

> *"The abolition of this group is in line with a pattern of behaviour from this government which, one would have to suggest, is about limiting opportunities for industry and the community to provide independent advice to the public service and to the government itself. What we have seen is that the government has been abolishing, one after another,*

[78] 'The Coalition's Policy to Improve the Competiveness of Australian Manufacturing', August 2013, p 12-13.

committees such as this throughout the industry portfolio and those agencies related to the industry portfolio. This is a shockingly retrograde step.

Just a few months ago, in the December MYEFO, the Liberal government announced that they were reducing the number of government bodies as part of what they call the 'Smaller Government initiative'. A number of groups in the industry portfolio were abolished under this so-called initiative, including expert advisory groups on research and development, on venture capital, on commercialisation programs, on workplace productivity and on intellectual property. And that is just the tip of the iceberg. This is a government that is absolutely terrified of independent advice! It is absolutely terrified of talking to people who actually know something about the regulations that affect them. So the dismantling of these advisory groups—often, as I said, comprising external experts from business and industry, and often at incredibly low expense to the government—is an extraordinarily stupid and short-sighted approach. In taking these acts, the minister is effectively shooting himself in the foot.

It is the Labor Party's view that getting rid of independent advice is actually counterproductive. I know it is very popular in the public service, because what you want to do in the public service is to confine advice—to make sure that the channels of communication to the minister are limited. The real risk is in losing people who are actually directly affected, who can provide you with expert opinion and direct experience, and who can save you huge sums of money—not to mention the grief that comes as a result of regulations being implemented which have all sorts of adverse consequences, often quite unintended. It is actually a smart thing to do to engage people in the processes of government…

… The December MYEFO flagged some of the amendments to the antidumping system which we are debating today, including the abolition of the International Trade Remedies Forum. MYEFO documents state: The existing International Trade Remedies Forum will be replaced with a streamlined Anti-Dumping Industry Board. Right. However, there is no reference at all to the antidumping industry board in this bill that we are debating today. There was no reference to the replacement body when the Parliamentary Secretary for Industry, Mr Bob Baldwin, wrote to members of the International Trade Remedies Forum in December last year. Mr Baldwin wrote to senior industry leaders, informing them that the forum would be discontinued. He said, 'The government will consult with stakeholders by convening smaller committees to provide industry feedback on the operation and the reform of the Australian antidumping system.

Well, I may be a little cynical after a few years in this place, but I am not inclined to take this government's word when it purports to commit to an engagement with industry, or manufacturers or, particularly, with trade union representatives. We have not seen any evidence that there is genuine dialogue in the 18 months that this government has been in office…"[79]

Groups the Government has been able to abolish from the industry portfolio (some of which Senator Carr mentioned in his contribution) include the MLG and the PPAG, as they had not been legislated for. However, the Forum has been.

The creation of forums, bodies and groups where unions, industry and Government can sit down to discuss jobs, creating them and how best to defend them is not unnecessary 'red tape'. The achievements and work plan of the Forum as outlined in this submission defends that contention.

[79] Senator Carr, *Senate Hansard*, 18 March 2015, p 23-24.

Indeed, we would and do argue that a cooperative approach to the nation's challenges between industry, government and unions like which has occurred within the Forum is needed more generally, if ever we are to address the real challenges we face. The current Government is much more comfortable in creating enemies out of the key community and economic constituencies which need to be part of the solution and are not part of the problem as portrayed by the Government. Its attitude to unions in the context of economic policy is just one of many striking examples.

We also put on the record that our unions believe the Government's supposed justification for seeking to abolish the Forum which is efficient consultative arrangements is laudable. However, our unions suggest that this is achievable whilst maintaining the existing legislation and the important role of the Forum. We would be willing to consider the desirability of a range of options for reform arrangements agreed in genuine consultation between the Government and other Forum members, which may include initiatives such as:

- More meetings (the legislation dictates a *minimum* frequency of two meetings per year)
- More targeted working groups (and greater frequency of them meeting)
- Greater use of experts to advise the Forum.
- A more responsive Secretariat, for example including by providing minutes and papers before all meetings and to agreed timeframes.
- Greater use of the GovDex system (an online forum for members)
- Forum meetings held elsewhere than Parliament House when appropriate.

In addition to the above procedural suggestions, an option worthy of consideration is better utilising the flexibility of the Act which enables Ministerial discretionary appointments for optional Government members of the Forum.

The presence of a mishmash of Government Departments and Agencies with respective sectional bureaucratic self-interests was not always conducive to employer, employer representatives and union Forum members having unfettered formal lines of communication to the executive of Government and Customs (now the ADC) on the operation of the Act and system. An example of this was the unfortunate role played by ABS in the aforementioned debate about import data transparency, but this bureaucracy was certainly not alone in playing a less than constructive role on occasions throughout the Forum and its Working Groups.

As non-Government members' attendances were unpaid and their costs were uncompensated, fewer bureaucrats would probably see the most significant cost of the Forum wiped out. This cost saving would be in addition to the other advantages outlined. In any event, there is nothing precluding the Government from putting industry proposals and advice to the relevant bureaucratic interests outside the Forum when considering the Forum's submissions; indeed, this would be expected and appropriate.

The view outlined in the Bill's Regulation Impact Statement, *"That Discontinuing the Forum as a legislated body reduces the compliance burden for member businesses"*[80] is not an accurate reflection of the esteem in which industry holds the Forum and it is valued by it. The fact industry is willing to pay the negligible costs to participate proves it sees value in the dialogue with Government under the terms of the Forum's legislated make up and functions. Indeed the operation of the Forum need and should not preclude informal consultations with a range of stakeholders by the Government outside of the Forum's structures. In fact, the operation of the Forum should encourage and promote this outcome as it already did with non-Forum members participating in at least one working group of the Forum.

[80] Minister Macfarlane, *Explanatory Memorandum*, p 3.

In conclusion, the Forum's formal role has proven to be important as demonstrated by its history of achievement. In addition to this, when the Government changed in 2013, the Forum was in the process of implementing an ongoing and ambitious work plan. The plan aimed at further levelling the playing field for Australian manufacturers and producers by, in addition to continuing to implement *Streamlining* reforms and address further issues outlined by participants in the Brumby Review (and previous reviews). Not complying with the legislation to hold meetings of the Forum has had detrimental impacts on Australian manufacturers, producers and workers. The proposal to abolish the Forum needs to be dropped completely in order for the Bills to be supportable. Rather than seek to abolish the Forum in legislation the Government needs to be utilising it as it is obligated to by the Act, and for the benefit of Australian industry and Australian workers.