Questions and Requests Taken on Notice

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

ACTING CHAIR: *Thank you very much again, Mr Wacey and Mr Zelinsky. As there are no further questions from senators, we thank you for your evidence. I have in my notes here for the committee members that we are requesting answers to questions on notice by the close of business today. Is that possible, Mr Wacey?*

Senator XENOPHON: *What did you say, Chair? I lost you there.*

ACTING CHAIR: *I have here that we are requesting answers to questions on notice to be provided by close of business today. Is that possible, Mr Wacey?*

Senator XENOPHON: *Maybe close of business tomorrow? Chair, I wonder if we could do that.*

ACTING CHAIR: *Okay, I agree. I have that here in my notes; it was not my decision.*

Senator KIM CARR: *As part of that, are you able to provide us with your assessment of what amendments need to be made to this bill in terms of the current situation?*

Mr Wacey: *Absolutely.*

Part 3: The Anti-Dumping Commissioner will not be able to vary the length of an investigation period.

Recommendation:

The Part of the Bill Should not be proceeded with.

Explanation:

This recommendation would be changed if the inclusion in the Bill of the 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"

(See page 47-52 of our submission for a full exploration of this issue)

Alternatively the amendment might be reintroduced in a future tranche after necessary (as outlined in our submission consultations) with members of the Forum on this issue.

Part 7: The wording of how a subsidy is defined will be simplified.

Recommendation:

The part should be amended in order to remove any ambiguity that the amendment is about strengthening the system and not weakening it- or alternatively not be proceeded with pending consultations with the Forum. Proceeding without the suggested amendment would enhance suspicion of a secret side deal.

Explanation:

By way of context Mr Seymour answer to a question about the changed definition of a subsidy (amongst other matters of the Bill) say that he believes that it strengthens the system in his view. Regarding one element, we agree with Mr Seymour's view. We support the element of the proposed amendment which states that:

"The test in subsection 269TACC (2) is to prevail over the test in subsection 269TACC (3) to the extent of any inconsistency" (we would assume this would clarify existing practice)

We consider this an improvement. In addition we are wondering if the Guidelines for determining a financial contribution under 269TACC (3) could not be further simplified.

However, we do not support the replacement to 269 (TACC) (2)

From:

A direct financial payment received from any of the following is taken to confer a benefit:

(a) a government of a country;

(b) a public body of a country;

(c) a public body of which a government of a country is a member;

(d) a private body entrusted or directed by a government of a country or by such a public body to carry out a governmental function.

To:

(2) A financial contribution is taken to confer a benefit if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.

This additional language, "If it is provided on terms that are more advantageous than those that would have been available to the recipient on the market", have no origin which can be derived from the ASCM.

In addition the Manufacturer's Alliance of Australia's who collectively employ tens of thousands of our unions' members concerns should not be ignored.

Mr Condon stated at the public hearing that to impose an *"additional burden on both the commission and Australian industry to validate a government payment, so where a government is giving a grant to an organisation, how that confers a benefit"* was not justified without providing evidence where making the change would make the Act better align with the ASCM as the *explanatory memorandum* claims.

We don't believe the Government can explain how the insertion of the words – *'it is provided on terms that are more advantageous than those would have been available to the recipient on the market'* - either strengthens or makes the Act for Australian producers and manufacturers more WTO consistent because we do not think it does.

In addition to this, we are concerned about the changes in relation to the responses received from the Anti-Dumping Commission following a CFMEU submission in an investigation (into the dumping of photo copy from the people's republic of China). The union stated the union said the Commission should have found a 'particular market situation' (the response from the Commission of concern are outlined on page 30 of our submission- the discussion about solar panels below is also relevant)

Government's reasoning for the change, claiming that it strengthens it *"To the extent that this change captures a wider range of potential subsidies (broader than the four categories in the current subsection 269TACC(2)), it offers greater protection for Australian industry"* could be dealt with while leaving out the offending words as follows:

Suggested new subsection 269TACC

CUSTOMS ACT 1901 - SECT 269TACC

Working out whether a financial contribution or income or price support confers a benefit

(1) Subject to subsections (2) and (3), the question whether a financial contribution or income or price support confers a benefit is to be determined by the Minister having regard to all relevant information.

(2) A direct financial payment or financial contribution received from any of the following is taken to confer a benefit:

(a) a government of a country;

(b) a public body of a country;

(c) a public body of which a government of a country is a member;

(d) a private body entrusted or directed by a government of a country or by such a public body to carry out a governmental function.

(e) a relevant body subsequent to Government interference in it, resulting in a direct financial payment

Guidelines for financial contributions

(3) In determining whether a financial contribution confers a benefit, the Minister must have regard to the following guidelines:

(a) the provision of equity capital from a government or body referred to in subsection (2) does not confer a benefit unless the decision to provide the capital is inconsistent with normal investment practice of private investors in the country concerned;

(b) the making of a loan by a government or body referred to in subsection (2) does not confer a benefit unless the loan requires the enterprise receiving the loan to repay a lesser amount than would be required for a comparable commercial loan which the enterprise could actually obtain;

(c) the guarantee of a loan by a government or body referred to in subsection (2) does not confer a benefit unless the enterprise receiving the guarantee is required to repay on the loan a lesser amount than would be required for a comparable commercial loan without that guarantee;

(d) the provision of goods or services by a government or body referred to in subsection (2) does not confer a benefit unless the goods or services are provided for less than adequate remuneration;

(e) the purchase of goods or services by a government or body referred to in subsection (2) does not confer a benefit unless the purchase is made for more than adequate remuneration.

(4) For the purposes of paragraphs (3)(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

The test in subsection 269TACC (2) is to prevail over the test in subsection 269TACC (3) to the extent of any inconsistency

Or

CUSTOMS ACT 1901 - SECT 269TACC

Working out whether a financial contribution or income or price support confers a benefit

(1) Subject to subsections (2) and (3), the question whether a financial contribution or income or price support confers a benefit is to be determined by the Minister having regard to all relevant information.

(2) A direct financial payment or financial contribution received from any of the following is taken to confer a benefit:

(a) a government of a country;

(b) a public body of a country;

(c) a public body of which a government of a country is a member;

(d) a private body entrusted or directed by a government of a country or by such a public body to

carry out a governmental function.

(e) A relevant body subsequent to Government interference in it resulting in a direct financial payment

Repeal Sub Section SECT 269TACC (3) and 269TACC (4)

Part 11:

Clarify that the Minister is able to disregard the lesser duty rule, when a country has not complied with its WTO subsidies notification requirements at least once in the compliance period.

Recommendation:

The Part should not be proceeded with.

Explanation:

This would form part of Exhibit A if this bill was being used as evidence following an accusation that Australia had done a secret side deal with China on Anti-Dumping in order to secure a free trade agreement. (It would not be the first time that this government was accused of agreeing to a secret side deal in order to secure a trade agreement with a trading partner) This is due in part, due to its incompatible nature with the Coalition's Anti-Dumping and manufacturing election policy.

As we explain in our submission:

"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""

We expanded on this theme in our tabled statement to the Committee in the public hearing as follows:

"As we read the current legislation "mandatory consideration of the lesser duty rule is not required when the government of the country of export has not complied with Article 25 of the Agreement on Subsidies and countervailing measures for the compliance period."

The compliance period is defined by Legislative Instrument, and on the 18th of December Minister Macfarlane outlined that it is:

"The two most recent biennial periods, ending prior to the date of initiation of a countervailing investigation, in which a World Trade Organization (WTO) Member is obliged to make new and full notifications of subsidies to the WTO in accordance with the procedures adopted by the WTO Committee on Subsidies and Countervailing Measures."

"There are two issues with the proposed amendment which would replace the current provision by saying "mandatory consideration of the lesser duty rule is not required when the government of the

country of export has not submitted notification of its subsidies, as mentioned in paragraph 1 or Article 25 of the Agreement on Subsidies and countervailing measures, at least once in the compliance period"

1. Why should compliance with one of the two most recent biennial periods be considered sufficient compliance?
2. As stated by AUSVEG in their submission Article 25 covers more ground than simply the notification of subsidies, indeed we point out in our submission:

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."

There was nothing said yesterday by either Mr Trotman or Mr Stockwell from the Department of Industry or Mr Seymour from the Anti-Dumping Commission about the issue which alleviates the concerns:

Indeed how Mr Seymour believes the changes in regards to the variety of "incentives at the national government level to comply with the terms of the WTO agreements on subsidies and countervailing measures… "Strengthen Australia's ability domestically in that circumstance to be able to move forward expeditiously" remains a mystery to us.

It is clear that provision weakens rather than strengthens that ability.

It should not be proceeded with.

Indeed a stronger incentive for national government to comply with the terms would be for the Australian minister to be forbidden to apply the lesser duty rule in this circumstance.

Part 15: The International Trade Remedies Forum will be abolished.

Recommendation:

The Part should not be proceeded with.

Explanation:

The case for retaining the Forum is outlined extensively in our submission and was further clarified by us in our public hearing.

In addition to the strong case we have made, the evidence provided by other submitters and by all witnesses at the Public Hearing supports our contention that the Forum and the strong and valued role that our unions play on it needs to be retained in legislation.

What is also clear is that the Government has not complied with the Legislation by not convening meetings of the Forum.

Although it is hoped that this behaviour would not continue, an amendment to the part of the Act to provide for a penalty that the Government would be liable of paying in the event that did not convene meetings of the Forum may be appropriate, especially in the absence of written guarantees.

Not convening the meetings has meant that the Forum's work has not continued and there has been no progress of the Forum's recommendations that the Government consider drafting a Legislative amendment bill based on legal advice from an independent lawyer.

The advice outlined the merits behind a change in the Custom's Act in terms of the way that 'normal value' could be determined when a 'particular market situation' was found in some instances. This change would not be exclusively aimed at China however given the prevalence of 'particular market situation' findings there due to certain economic conditions at play it would have been relevant to analysing goods exported from it particularly. As stated in our submission, countries were watching very closely our treatment of this issue as China's WTO Accession Protocol, a transitional period ends on 11 December 2016.

Not considering this Forum proposal by not holding meetings, not introducing the relevant bill in this legislation as a result and formally abolishing the Forum (which was advocating for this change to normal value determination after a particular market situation finding) will enhance suspicion of a secret side deal.

In order to disprove this suspicion, the Government should in addition to not proceeding with the part of the bill which abolishes the Forum introduce this additional amendment to the Act:

"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 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."

Keeping the amendment as proposed despite the concerns outlined that the bill is in clear contradiction with the Government's election policy will enhance suspicion of a secret side deal. .

In addition the below Amendments on Import Data should be included

Context:

Mr Seymour and the Department of Industry has committed to provide on notice the analysis of other jurisdictions import data arrangements and how they respectively deal with Confidentiality requests.

To clarify, this is not the report that Mr Stockwell refers to in his evidence but the subsequent analysis that was agreed to be undertaken at Request of Forum members through the Greater Compliance Working Group.

Following receiving this report the Government should be in a position to reveal and implement its preferred approach to greater provision of import data and have this reflected in its bill. We have previously outlined these options:

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

And

"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"

Or

"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

In addition, given the concerns that were outlined by Mr Lee from the Manufacturing Trade Alliance at the Public Hearing:

"On the issue about the lesser duty rule, I will just go to a very basic concept: that the system has a lack of symmetry. That is how I would explain it. What we do with the lesser duty rule is that we basically allow a government body to determine what price an individual company or a series of companies of complainants should be allowed to sell their goods for in the Australian market, and as a result there is, I suppose, price control, in a sense. The problem with that is this. Even with antidumping measures imposed, parties that import goods and pay antidumping measures go through final duty assessments, and they are entitled to get a refund of any excess dumping duty that they have paid. The problem is that, if the right dumping duty has not been paid up-front, Australian industry has no ability to go back and get any greater duty. So, if the wrong duty is collected at the start, the damage is done and Australian industry cannot get an increased measure, but importers can get a refund of any excess measure."

We recommend as a first step, and a sign of good faith the issue will be addressed at the Forum as it was in the process of being when it last met (see page 46 of our submissions) an amendment to sub section 269 X (5) of the Customs Act to make it clear that duty can only be refunded if duty paid is in excess of the full dumping margin/and or full subsidy margin, irrespective of the lesser duty rule.

As follows:

Australia should, adopt a position where duty is only refunded, (after duty assessments or in the context of, for instance, duties paid under a Preliminary Affirmative Determination), in excess of the full dumping margin/subsidy margin, irrespective of the lesser duty rule. It is apparent that this approach is consistent with article 9.3.2 of the ADA, Australia's other international obligations and it is the approach taken by the European Union. Legislative amendment at subsection 269X (5) is required.

Other information we committed to provide:

Mr Wacey: Can I just clarify a bit of the information I gave about the solar panels, about the $124 billion?

ACTING CHAIR: Go ahead.

Mr Wacey: I have a quote here. It says:

In 2010, the top five solar companies in China had received over $31.3 billion in loans from the state-owned China Development Bank alone (Mercom).

I am happy to provide that reference on notice as well.

Senator XENOPHON: Yes, please.

The reference is on page 1 of the book *Subsidies to Chinese Industry, State capitalism, Business Strategy and Trade Policy by International Trade experts* USHA C.V Haley and George T Haley. The books reference is also provided to Senator Xenophon in written answers to questions on notice following our appearance into the Senate's inquiry into Commonwealth Procurement Procedures (2014)

It references the course of information being from Mercom Capital Group and further references that according to Mercom, the top five loan subsidies from the China development bank included those to LDK Solar (credit $8.9 billion), Suntech (loan 7.3 $Billion) Yingli Green Energy Holdings (loan 8.3 billion), JA Solar Holdings (loan $4.4 billion) and Trina Solar (loan 4.4 billion)

By way of example, Trina Solar was one of the companies investigated in the recent ADC investigation into the dumping of panels into Australia. The Statement of Essential Facts suggests that dumping margin by Trina into Australia was (the world's largest producer) was 4%.

Whereas on 17 December 2014 Trina Solar dumping margin to the US was revised to 27%.

It is unlikely they have a different pricing strategy in the Australian market compared to the US and they face the same competitors although admittedly not as much domestic competition perhaps.

The more likely difference in margins is a decision by the Anti-Dumping Commissions to determine normal value on domestic sales rather than a benchmarked third party costs (where costs are distorted) or surrogacy

In its application, Tindo submitted that domestic prices of PV modules or panels in China are not suitable for the determination of normal values under subsection 269TAC(1) of the Act, as a particular market situation in relation to those goods renders those domestic selling prices unsuitable. Tindo submitted that the Government of China's (GOC) involvement in the Chinese domestic PV modules or panels industry has materially distorted competitive conditions in China in terms of the GOC providing 'policy loans' and credit facilities by the state owned Chinese banks at preferential rates that do not take into account commercial risk and prudential lending practices that otherwise applied in the Chinese capital credit market. Tindo claimed that this has resulted in a particular market situation making PV modules or panels prices in the Chinese domestic market unsuitable for normal value purposes.

The Commission did not follow Tindo's guidance and instead made the normal value determination based on domestic sales contended:

"The only evidence provided by Tindo in support of its market situation claims was in relation to the provision by the GOC of 'policy loans' to manufacturers of PV modules or panels. In its investigations of the selected exporters, the Commission did not find any evidence that suggests that the alleged 'policy loans' were provided by the GOC to the manufacturers of PV modules or panels that created a market situation such that the domestic selling prices of the PV modules or panels in China would not be suitable for normal value.

We would have thought, anecdotally, that (up to 2010) and with more coming the provision of $31.3 of loans would have the effect of artificially reducing the price of solar panels on the domestic market, not to mention the:

This is not to even mention that the ADC seems to be contradicting itself on the impact on the effect of a key input. By way of context in its consideration report for this investigation (CON 239) the Commission considered that one of the main raw materials used in the production of solar PV cells is silicon metal. The applicant in that investigation alleges that the selling price of silicon metal in China is not suitable for the purpose of assessing the normal value of silicon metal sold in China. In CON 239 the Commission suggested that the findings in CON 239 may be relevant to the assessment of market situation in relation to PV modules of panels."

Tindo's complaints that domestic sales in China is not appropriate is outlined in detail in their submission in response to the Statement of Essential facts, this debate is relevant to many issues facing the anti-dumping system including elements in this brief on the proposed legislation.

http://www.adcommission.gov.au/cases/Documents/118-Submission-Australian%20industry-Tindo%20Manufacturing%20Pty%20Ltd-Response%20to%20SEF.pdf

The book also outlines, with a very conservative methodology:

- $27 billion from 2000 to 2007 in subsidies for the steel industry.
- $33 billion from 2002 to 2009 in subsidies for the Chinese paper industry.
- $27.5 billion from 2001 to 2011 in subsidies for the auto parts industry.
- $30 billion from 2004 to 2008 in subsidies for the glass industry.

This book was referenced by the CFMEU in the 3rd of April 2014 submission to the ADC in support of our market situation claims about the Chinese paper industry. The Commission was subsequently asked about the book in Senate estimates- but defended their approach to determining market situation (see our submission on page 30).