



14 April 2014

Senate Economics Legislation Committee
Parliament House
CANBERRA

By email: economics.sen@aph.gov.au

Attention: Ms Toni Matulick, Inquiry Secretary

Dear Secretary,

Submission to the Inquiry by the Senate Economics Legislation Committee into the Anti-Dumping Bills 2015

The Food and Beverage Importers Association ("**FBIA**") thanks the Senate Economics Legislation Committee ("**Committee**") for the invitation to make a submission to the Committee's Inquiry into the *Customs Amendment (Anti-Dumping Measures) Bill (No1) 2015* and the *Customs Tariff (Anti-Dumping) Amendment Bill 2015 ("the AD Bills")*. As invited by the Committee, the FBIA wishes to make the following submission regarding the AD Bills.

This submission was largely prepared by Andrew Hudson of Gadens, lawyers on behalf of the FBIA. Andrew is a member of the Committee of Management of the FBIA. The FBIA would be grateful if all communications regarding the submission be directed to Andrew

1. About the FBIA.

The Food & Beverage Importers Association ("FBIA") is an industry association that represents importers into Australia of food and beverages, both retail ready and ingredients for further processing. Members range from large, multi-national companies to small, specialist importers. Their imports include a wide range of commodities (eg vegetables, fruit, nuts, dairy, seafood, confectionery, oils) and in a range of formats (frozen, fresh, roasted, prepared, and canned).

As the Committee will appreciate, members of the FBIA include a large number of importers of products which are either currently or potentially subject to the anti-dumping and countervailing ("**Regime**") affected by the AD Bills.



2. General Position of the FBIA.

- (a) In general terms, the FBIA believes that the Regime must be consistent with the WTO Agreements on Dumping, Subsidies and Trade Facilitation as well as Australia's obligations under its various Free Trade Agreements ("**FTA**"). Further, the Regime must be conducted in a way which does not have an adverse impact on Australia's overseas reputation or attract any retaliatory action against Australian exports in overseas markets.
- (b) The FBIA is aware of the changes to the Regime as and from June 2013 and the rationale for the changes, which are broadly consistent with the rationale for the AD Bills. The FBIA endorses the principle that overseas exporters and local importers should be able to trade in a way which does not offend our Regime and that any changes to the Regime should not be able to be adopted in a retrospective manner to adversely affect the position of those who are trading in a valid manner.
- (c) The FBIA is of the view that the Regime is one of the most complex regulatory areas which operates at the intersection of international and domestic law, politics, economics and competition theory. It was also the subject of extensive reform approximately two years ago. Accordingly it is very important to ensure that transparency and clarity in the Regime is maintained otherwise the Regime can, of itself, represent an impediment to trade and unnecessary level of regulation. The FBIA understands that the Federal Government is currently endeavouring to reduce the level of regulation in business and trade and the FBIA remains concerned that the Regime is, by comparison, becoming more regulated and more complex. Further, the FBIA is also concerned that the Regime does not become too complex or uncertain as to form a non-tariff barrier to trade
- (d) Based on the comments above, the FBIA recommends that if there are to be any changes to the Regime, those changes:
 - (i) must be supported by actual evidence of failings in the Regime;
 - (ii) must take into account that many provisions of the current versions Regime have only been in place for two years;
 - (iii) must be consistent to Australia's obligations under the WTO Anti-Dumping and Subsidy Agreements, Australia's FTA obligations and the obligations to arise under the WTO Trade Facilitation Agreement;
 - (iv) must be undertaken in a transparent manner which does not unduly add to the regulatory burden of those affected or create a barrier to trade; and
 - (v) should also not allow measures be adopted which allow for the retrospective imposition of measures on goods, whose trading had not, until then, attracted such measures.
- (e) The FBIA also recommends that before making any decision on any such additional changes to the Regime, the Committee should commission further research and consultation with stakeholders and affected parties (such as the FBIA) over and above this Inquiry. That should include Australian industry, overseas exporters, importers of goods and relevant industry associations.



The FBIA does not believe that any changes to the Regime should be endorsed and implemented merely or as a result of limited consultation with those affected by the Regime.

3. Specific concerns of the FBIA on the current Regime.

The FBIA has the following specific concerns regarding the conduct of the Regime:

- (a) It believes that current investigations far exceed the time prescribed for the completion of investigations (ostensibly 155 days). The FBIA is aware that in the majority of occasions, any investigation being conducted by the Anti-Dumping Commission ("ADC") takes a period of time far in excess of that prescribed by the relevant legislation. The FBIA believes that this contributes to significant uncertainty for all affected parties and may give rise to a lack of confidence in the Regime. The FBIA suggests that the Committee enquire of the ADC whether it believes it has the appropriate resources to enable investigations to be conducted within the time prescribed by legislation or whether a more realistic time frame should be included.
- (b) The FBIA is concerned that the significant number of legislative amendments which are being made to the Regime, whether by way of practice change, legislation change or change to regulation (as in the case of changes to the definition of "circumvention activity") creates a significant degree of uncertainty for overseas exporters, Australian importers and their relevant service providers. The FBIA wishes to bring to the attention of the Committee that there are significant provisions in the *Customs Act 1901* ("Act") and other "border" legislation which would allow prosecution of parties who may act inadvertently, recklessly or deliberately in a manner which would avoid the collection of anti-dumping or countervailing duties. Such action could include the adoption of incorrect description of tariff classification of goods or their origin. That could lead to prosecution of parties to the transactions (including their licenced customs brokers) for penalties on a strict liability basis, even by way of the issue of infringement notices by the Australian Customs and Border Protection Service ("**Customs**"). Not only is this supported by the investigation resources available to Government but by the fact that licenced customs brokers are obliged by the conditions of their licences to report misleading, false or incorrect statements to Customs and can be penalised or be subjected to action against their licences should they fail to do so.
- (c) In addition, Customs has recently made a series of media statements regarding the issue of search warrants and the issue of prosecutions against importers, freight forwarders and their offices regarding deliberate attempts to avoid the imposition of anti-dumping or countervailing duties.
- (d) While the FBIA recognises the need for government to prosecute those who attempt to evade or circumvent the measures with intent, the FBIA is concerned that overseas exporters, their Australian importers and their service providers may be subject to prosecution, fine, penalty or infringement notice and action against their professional licence though inadvertent breach of legislation or regulation when the details of such Regulation or legislation have not been widely communicated. For example, the government recently passed a new Regulation creating a new example of "circumvention" activity which provides that "slight modifications" to goods in an attempt to circumvent



the application of anti-dumping or countervailing duties will be deemed to be circumvention activity. There was only limited, specific and deliberate consultation with certain parties regarding the Regulation. Details of the new Regulation were only recently added to the website of the ADC and the FBIA is concerned that a wider circulation of the new Regulation and its affect would be of benefit to those affected by the new Regulation.

- (e) Arising from the comments above, the FBIA is concerned that the rapid and substantive changes to the Regime detract from the transparency of the Regime and may also lead to suggestions that the Regime is becoming a non-tariff barrier itself. That is especially so in the context of changes effected by Regulation rather than the legislation there is little consultation. While the Regime and its amendments may comply with the WTO provisions, the manner of changes may itself create issues as may not be consistent to the Framework.
- (f) The FBIA is eager to understand the steps to be taken by the ADC and Customs to ensure that their administration of the Regime complies with the requirements set out in the "Regulator Performance Framework" ("**Framework**") issued by the Federal Government late in 2014. The FBIA would be pleased to be engaged with such a review and to implement appropriate steps to ensure that the Framework is observed.
- (g) The FBIA would also be keen to hear from the ADC and Customs as to steps they propose to take in terms of outreach on the terms of the provisions of the AD Bills and their effect.

4. Specific concerns in the terms of the AD Bills.

The FBIA wishes to raise the following specific concerns regarding the provisions of the AD Bills:

- (a) The AD Bills seek to introduce new provisions in which they limit the use of the Anti-Dumping Review Panel ("**ADRP**"). These include the following:
 - (i) a threshold test of sorts in which an applicant to the ADRP is to submit evidence as to how the application would lead to a decision which is different to the decision subject to review;
 - (ii) the possibility of the holding of conferences as to the applications being sought before the ADRP to decide whether the application should proceed; and
 - (iii) the payment of fees to seek review before the ADRP.

The FBIA is concerned that these "threshold" provisions are vague and may operate as a legal and financial bar and disincentive to people to seek review of decisions by the ADC under the terms of the Act. This is especially the case when majority of parties seeking review pursuant to the ADRP are overseas exporters or their correspondent Australian importers who would be seeking review of decisions of the ADC taken at the instigation of Australian industry (who are not required to pay any fees associated with any application for an investigation). Indeed, the Federal Government actively supports the Australian industry seeking the imposition of measures by provision of advisory services at the expense of the Federal Government.



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The FBIA believes that it is inequitable to provide resources to Australian industry seeking the imposition of measures then, at the same time, seek to impose charges for those seeking review of decisions before the ADRP. Not only will this operate as a practical and financial disincentive to those seeking review before the ADRP, it may also be perceived by exporters, importers and our trading partners as a deliberate attempt to discriminate them.

- (b) The FBIA is also concerned that there is a lack of detail as to the quantum of the fees being proposed for application to the ADRP as well as an absence of information as to the way in which the ADRP is to conduct the conferences pursuant to paragraph 269ZZRA of the *Customs Amendment (Anti-Dumping Measures) Bill (No 1) 2015*. The FBIA believes that the Committee should require the ADC to produce details of the relevant fees to be sought, the criteria to be applied by the ADRP in determining whether those fees should be reduced in favour of small and medium sized enterprises seeking review, and the rules which apply to the conduct of conferences (for example whether parties will be able to be legally represented, the way in evidence is retained and the rules relating to confidentiality of such conferences).
- (c) The FBIA requests that the Committee seek assurances from the ADC and from Customs that there are adequate resources and measures in place to ensure that parties are advised that details will only be published on the ADC website and that the ADC website will be available at all times to all parties in equal manner.
- (d) The FBIA is also seriously concerned regarding the proposed abolition of the International Trade Remedies Forum ("**ITRF**").

This is a specific concern for the FBIA for the following reasons:

- (i) The FBIA had been invited to join the ITRF and had accepted that invitation. However, the ITRF had not met since the FBIA had joined the ITRF and the views of the FBIA were not sought as to any anti-dumping or countervailing matters even after it had joined the ITRF. For example, the terms of the AD Bills were not forwarded to the FBIA by way of exposure drafts before being introduced into Parliament and the FBIA was not consulted about the development of other legislation and regulations even though the inclusion of the FBIA on the ITRF would suggest that Government had formed the view that the involvement of the FBIA and its members was an important part of the consultative process relating to anti-dumping and countervailing practices.
- (ii) In the Explanatory Memorandum relating to the AD Bills, the Government has suggested that the abolition of the ITRF would provide for more "flexible" arrangements for consultations with industry. However, this suggests that consultation by Government in respect of anti-dumping and countervailing matters would be less transparent as to who was consulted and for what purpose and at what stage. This creates the appearance and practicality of inequality in the way of which the Government develops legislation, regulation or practice relating to anti-dumping or countervailing measures. For example, when the new Regulation described above was introduced relating to a new "circumvention" activity, there was only limited consultation on the introduction of the new activity. The FBIA believes that the retention of the ITRF is of paramount importance and that,



furthermore, the ITRF be subject to a new, comprehensive and transparent regime relating to the conduct of consultation, the holding of meetings and dissemination of information to be considered by those before the ITRF. The FBIA further believes that such a practice would also be consistent to the obligations of the ADC and Customs pursuant to the Framework.

5 Recommendations

Based on the commentary above, the FBIA recommends that the Committee consider the following as part of its Inquiry:

- (a) Seeking commentary from the ADC as to the reasons for the repeated and significant extension of time to conduct Investigations and whether the ADC would benefit from additional funding and resources to conduct its task in the time prescribed by the legislation.
- (b) That the ADC and the ADRP provide details of the costs of the administration of the ADC and the ADRP in general and then allocated to each investigation or review.
- (c) That the ADC provide a "moratorium period" during which it will not insist on strict compliance with the terms of the AD Bills so that during that period, an affected party should not be unduly disadvantaged by failure to strictly comply with the terms of the AD Bills.
- (d) That the ADC and the ADRP to provide additional information of the way in which the ADC and the ADRP propose to conduct their examinations on applications for review to the ADRP including the way in which conferences will be conducted that should also include the ADC and the ADRP providing guidance on the level of difference which must be demonstrated in an application for review.
- (e) The Committee should seek the views of the ADC as to the availability of review from the decision by the ADRP to reject an application for review to the ADRP. If the only available remedy is to seek review before the Federal Court that would appear to be a significant disadvantage to those seeking review before the ADRP. If the only review is to be to the Federal Court, then the FBIA believes that some other, non-judicial option be provided, especially given the uncertainty to the threshold test.
- (f) Whether the imposition of fees on parties seeking review to the ADRP is appropriate given that there are no fees payable by those seeking the imposition of measures in the first instance. For these purposes it is noteworthy that there are no consequences for parties who make an unsuccessful application for measures and that the Federal Government provides financial and other resources assist Australian small and medium sized enterprises seeking the imposition of measures.

If the rationale for the imposition of 'fees' is cost for service then that should apply to all aspects of the Regime?



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- (g) If fees are to be introduced, then the ADC and the ADRP be required to:
 - (i) provide detail of the fees;
 - (ii) provide details of the process to calculate fees; and
 - (iii) provide details as to how proposed fees and changes are to be communicated for comment; and
 - (iv) provide details of the regime to be adopted to reconcile fees paid and costs actually expended

- (h) That the ITRF be retained and that, in addition, the ADC be obliged to hold regular meetings of the ITRF, adopt transparency in publication of the minutes and determinations of the ITRF and to clarify circumstances in which other consultation will take place with members of the ITRF outside of its specific meetings. This should include a requirement that the ADC consult members of the ITRF before any legislation or regulation is introduced to parliament for preliminary consideration.

- (i) That the Committee seek confirmation from the ADC and Customs as to the steps they are preparing to undertake to comply with the terms of the Framework.

Members of the FBIA would be pleased to provide further information if necessary or to appear before hearings of the Committee.

Yours sincerely,

A. J. Beaver
Secretary