29 April 2011

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

Dear Sir or Madam

Customs Amendment (Anti-Dumping Measures) Bill 2011

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

The Law Council and LIV welcome the opportunity to make the following submission.

Item 13 of schedule 1 to the Anti-Dumping Measures Bill, which amends s.269ZD(2)(a) of the *Customs Act 1901* prohibits the CEO of Customs from recommending to the Minister the revocation of measures unless a revocation review notice has been published in relation to the review.

Similarly, Item 15 of schedule 1 to the Anti-Dumping Measures Bill, which amends s.269ZDB(1) of the *Customs Act 1901* prohibits the Minister from making a revocation declaration unless a revocation review notice has been published in relation to the review.

These provisions effectively render the revocation of measures in a review conditional upon the publication of a revocation review notice.

It is the Law Council and LIV's view that these provisions are inconsistent with Australia's international legal obligations under the WTO *Agreement on Implementation of Article VI of the general Agreement on Tariffs and Trade 1994* (**Anti-Dumping Agreement**).

Article 11.1 of the Anti-Dumping Agreement, which is an overarching provision, provides that:-

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

Law Institute of Victoria Ltd
ABN 32 075 475 731
Ph (03) 9607 9311 Fax (03) 9602 5270
Email lawinst@liv.asn.au
470 Bourke Street Melbourne 3000 Australia
DX 350 Melbourne GPO Box 263C Melbourne 3001
Website www.liv.asn.au

Law Council of Australia Limited - ABN 85 005 260 622

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
Telephone **+61 2 6246 3788** Facsimile +61 2 6248 0639
19 Torrens St Braddon ACT 2612 www.lawcouncil.asn.au

If during the course of a review of measures, it is determined that the goods in question are not being exported at dumped prices or, if they are, are not causing material injury to the relevant Australian industry, then those measures are not 'necessary to counteract dumping which is causing material injury'. Consequently, they must be revoked.

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

The Panel also found that Article 11.1 was implemented by Article 11.2, which provides for reviews of anti-dumping measures, and Article 11.3, which addresses whether anti-dumping measures should be allowed to expire or be continued for a further five years.

Article 11.2 of the Anti-Dumping Agreement relevantly provides that:-

> *"...If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately*".

In its consideration of Article 11.2, the Panel specifically held that:-

> "6.43 *The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: viz to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be 'necessary' in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation*".

Further, the WTO Appellate Body in Mexico – Definitive Anti-Dumping Measures on Beef and Rice (WT/DS295/AB/R, 29 November 2005) stated in relation to Article 11.2 that:-

> "314. Article 11.2 *requires* an agency to conduct a review, *inter alia*, at the request of an interested party, and to terminate the anti-dumping duty where the agency determines that the duty 'is no longer warranted'. The interested party has the right to request the authority to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Article 11.2 conditions this obligation on (i) the passage of a reasonable period of time since imposition of the definitive duty; and (ii) the submission by the interested party of "positive information" substantiating the need for a review. As the Panel correctly observed, this latter condition may be satisfied in a particular case with information not related to export volumes. Where the conditions in Article 11.2 have been met, the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review, including consideration of whether the duty should be terminated in the light of the results of the review. We see no reason why the same understanding does not apply in the context of countervailing duty investigations, in particular given the identical language in Article 21.2 of the *SCM Agreement*." (footnotes omitted, underlining added)

It is evident from the judgement of the Appellate Body that in a review of measures, the relevant authorities have no discretion in whether or not to consider whether the measures should be revoked. Rather the authorities are obliged to consider whether the measures remain necessary to offset dumping and, if so, to what extent.

It, therefore, is the Law Council and LIV's view that consistent with Article 11.2 of the Anti-Dumping Agreement, and for that matter Article 11.1 of the Anti-Dumping Agreement, every review of measures should involve a review of whether the measures remain warranted. Reviews should not be confined to a review of the variable factors (i.e. export prices, normal value and non-injurious prices) only.

Rather, every review under Division 5 of Part XVB of the *Customs Act 1901* should be an examination of '*whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both*' consistently with Australia's international obligations under Article 11.1 and 11.2 of the Anti-Dumping Agreement.

The Law Council and LIV consider that Division 5 of Part XVB of the *Customs Act 1901* should be amended to explicitly so provide.

The Law Council and LIV note that, according to the Explanatory Memorandum that accompanied the Anti-Dumping Measures Bill, the reasons for the amendments were to overcome a decision of the Full Federal Court in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 (**Siam Case**).

The Full Federal Court held, at paragraph 60, that:

> "In circumstances where revocation is an option under consideration it is considered imperative that the question of revocation can only be addressed by reference to (in this case) s.269TG(2). No provision within Division 5 expressly gives content to how the option of revocation is to be resolved. In the absence of any contrary indication, it is considered inevitable that a recommendation can only be made that an existing dumping measure be revoked "*if the anti-dumping measures to which the application relates had not been taken, the Minister would not be entitled to take such measures*". And the Minister "*would not be entitled to take such measures*" if he were not (in this case) "*satisfied*" as to those matters set forth in s.269TG(2)"

The Explanatory Memorandum states that this decision is problematic:-

> "*The finding is problematic because in practice, if measures are already in place and are effective, there may not be current dumping or subsidisation causing material injury*".

While that may be the case, it is simply overcome by Customs enquiring into whether, if the measures were revoked, this would lead, or be likely to lead, to a recurrence of dumping causing material injury. The Panel in US-DRAMS held, at paragraph 6.43, that:

> "*... it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the 'necessity' standard, even where the need for continued imposition of an anti-dumping duty is tied to the 'recurrence' of dumping*".

In other words, the 'problematic' nature of the Full Federal Court's decision is not addressed by making the revocation of measures conditional upon the publication of a 'revocation review notice'. Rather it is simply addressed by making explicit the test to be satisfied for the CEO of Customs to recommend the revocation of measures and for the Minister to revoke the measures. This is contained in the proposed subparagraph 269ZDA(1)(1A)(b) set out in Item 13 of schedule 1 to the Anti-Dumping Bill:-

> "(1A) *After conducting a review of anti-dumping measures under this Division, the CEO:*
>
> *(a) ...; and*
>
> (b) *otherwise make a revocation recommendation in relation to the measures, unless the CEO is satisfied as a result of the review that revoking the measures would lead, or be likely to lead, to a continuation of, or recurrence of, the dumping or subsidisation and the material injury that the measures are intended to prevent*".

There is, thus, no reason to render the revocation of measures conditional on the publication of a 'revocation review notice' to address the Full Federal Court's decision in the Siam Case.

Further, such a requirement would be redundant if the Law Council and LIV's recommendation that every review under Division 5 of Part XVB of the *Customs Act 1901* not only be review of the variable factors but also whether the measures are in fact warranted.

Finally, the Law Council and LIV note that there are currently two Bills being considered by the Committee regarding proposed amendments to Australia's anti-dumping and subsidies legislation and that the Government will shortly announce its response to the Productivity Commission's Report into Australia's Anti-dumping and Countervailing System (Report no.48, 18 December 2009).

It would seem appropriate that the two Bills and the Government's response to the Productivity Commission's report be considered together and further, that other existing deficiencies in the legislation be addressed. For example, while decisions of the Minister to impose anti-dumping and countervailing measures are subject to review by the Trade Measures Review Officer, decisions to vary those measures or to revoke them or to continue them for a further five years are not. This would seem to be a clear deficiency in the legislation.

Yours sincerely

Bill Grant
Secretary-General
Law Council of Australia

Caroline Counsel
President
Law Institute of Victoria