Customs Amendment (Anti-Dumping) Bill 2011
Submission by the
Department of Innovation, Industry, Science and Research

This submission presents views of the Department of Innovation, Industry, Science and Research (DIISR) in relation to the changes proposed by the Customs Amendment (Anti-Dumping) Bill 2011 (the Bill), and their possible effects.

DIISR considers there is merit in considering whether changes to Australia's anti-dumping system are necessary to achieve a better balance between the threshold for initiating an investigation and investigation timeframes. However, it is DIISR's view that the Bill in its current form does not achieve such a balance, and is likely to significantly increase costs for industry and Government.

Background to submission

The focus of the submission is on industry policy aspects of the proposed amendments to Australia's current anti-dumping and countervailing regime. The submission addresses DIISR's perceptions of likely effects on Australian industries and associated stakeholders, the effectiveness of anti-dumping and countervailing actions, and the wider trading and industrial context in which such actions are taken.

The views expressed in this submission are based on DIISR's experience and past interactions with industry stakeholders, as well as on submissions during and after the recent Productivity Commission (PC) inquiry into Australia's Anti-dumping and Countervailing System.

Issues relating primarily to administrative impacts or compliance with the World Trade Organization Agreement would be matters for the Australian Customs and Border Protections Service (Customs) and the Department of Foreign Affairs and Trade, respectively.

Productivity Commission Review 2010

DIISR notes that many of the issues the Bill seeks to address overlap with matters raised in the recent PC inquiry. The Government has stated publicly that it will consider and develop its response to that inquiry in the context of the 2011-12 Budget. Passage of any part of the Bill could pre-empt or complicate legislative amendments that may be required to implement the Government's response to the PC inquiry.

Previous Reviews and their outcomes

Australia's anti-dumping and countervailing arrangements have been reviewed on several occasions and adjusted in response to such reviews. Significant reviews and inquiries since 1986 are listed below:

Year	Inquiry / review title	Investigating body	Comments
1986	Review of the Customs Tariff (Anti-dumping) Act 1975 (Gruen Report)	Prof F H Gruen Dept of Economics Aust National University	Aimed at identifying possible improvements and means of implementation.

1989	Inquiry into Material Injury, Profit in Normal Values and Extended Period of Time	Anti-Dumping Authority	Addressed possible formal Direction by Minister in relation to determinations of injury and dumping.
1991	Inquiry into Australia's Anti-Dumping and Countervailing Legislation	Senate Standing Committee on Industry, Science and Technology	Focus on threats to viability of certain industries and adequacy of anti-dumping procedures.
1996	Review of Australia's Anti-Dumping and Countervailing Administration	Lawrie Willett AO	Aim was "fast-tracking Australia's anti-dumping and countervailing procedures"
2006	Joint Study of the Administration of Australia's Anti-dumping System	Government agencies (including DITR and Customs) assisted by a steering committee representing government and private interests.	Administrative 'enhancements' implemented in 2007.

Some adjustments have been made to administrative procedures in response to the completed reviews. Because of the conflicting interests of stakeholders, any change under such a review often leads to some dissatisfaction. Reduction of the timeframe for completing anti-dumping investigations is arguably the most substantial outcome (from the Willett Review in 1996). Australia's procedures have been amongst the quickest in the world since implementation of the Willett Review recommendations. Most other adjustments as a result of these reviews have been relatively minor, as would be expected given the need to maintain Australian law in compliance with WTO agreements, and to balance competing interests.

Current policy settings

The 1996 Willett review led to the establishment of the current parameters for:

- the period for investigating an allegation of dumping;
- determination of the extent to which the Australian industry has suffered material injury as a consequence of dumping; and
- the amount of information required in an application.

These parameters are interrelated. The period required to complete an investigation is dependent on the availability of satisfactory information, only some of which is likely to be available to the applicant at the time of submitting an application. Some countries have a lower threshold for initiation of an anti-dumping investigation than Australia, based on a longer time frame for investigation of both alleged dumping and the claimed injury to a domestic industry.

DIISR notes that the period for investigating an allegation of dumping specified in 1996 has frequently been exceeded in recent years (by DIISR calculations, of the seven investigations commenced since 1 January 2007 in which measures were imposed, six exceeded the standard investigation period of 155 days by between 28 and 140 days, at an average of around 75 days).

It may be the case that there have been changes in the international trading environment or the complexity of the assessments required to establish dumping and/or material injury, such that a longer investigation period is routinely required. This may be a function of characteristics inherent in the investigations conducted over recent years, including difficulties associated with information access, flowing from factors such as market structures, numbers of exporters and cultural and language differences. While long investigation periods may be necessary to verify facts, they can lead to continued injury in some cases, especially if no or ineffective provisional measures are imposed during the investigation period.

DIISR is of the view that recent trends require closer examination so that action may be taken to ensure Australia's anti-dumping and countervailing system maintains an appropriate balance between the threshold for initiating an investigation and investigation timeframes. The need for such a balance was not recognised by the PC in its recent inquiry. While it did consider industry views on the threshold for investigation and the length of investigations, it made no recommendations in relation to either the threshold or the standard timeframes for investigations[1].

While legislative changes may be necessary to ensure an appropriate balance between the threshold for initiating an investigation and investigation timeframes, DIISR's assessment of the Bill is that it does not achieve such a balance, and is likely to significantly increase costs for industry and Government. For these and other reasons, as set out below, DIISR is of the view that the Bill in its current form will not satisfactorily achieve the intended policy objectives.

Comments on proposed changes

The Bill primarily seeks to vary the basis on which material injury is assessed and the information required to assess dumping and injury. The remainder of this submission provides comment on the likely effects of certain of the proposed changes, and some contextual information relating to the trading and commercial relationships that might be impacted by the provisions of the Bill, were they to be implemented.

Amendments 1 and 2: This proposal reflects submissions by unions during and after the PC inquiry, and seeks to include "trade unions" in the definition of interested parties.

Involvement of unions whose members are directly concerned with the production or manufacture of like goods could assist SME dominated industries to access the system by providing a central body for collating and presenting relevant information. However, the involvement of unions might lead to tensions between employees and

[1] PC Report Recommendation 7.3 proposes unlimited extensions to investigation timeframes, but does not propose any adjustment to the standard timeframe for investigation.

employers or between parent and subsidiary companies, with adverse implications for investment in manufacturing in Australia.

Situations could also arise where a union representing employees of downstream users of the like goods might regard itself as an interested party, since its members could also be affected by anti-dumping measures.

DIISR is of the view that this issue warrants further discussion to maximise the efficiency and effectiveness of the system and to minimise unintended consequences.

Amendment 3, 4 and 7: DIISR notes apparent inconsistency between the Explanatory Memorandum (which suggests that dumping and material injury must first be proven before resort can be had to the rebuttable presumption that the dumping has caused material injury) and the texts in the Bill (which suggest that only dumping must be proven first). Implementation of this proposal would clearly reduce the burden for applicants in demonstrating or providing evidence of material injury, but would probably impose a much higher burden on Australia's investigating authority (Customs) due to increased numbers of marginal, frivolous or vexatious applications, and might lead to an increased level of complaint from downstream businesses adversely affected by unwarranted anti-dumping investigations and/or measures (including through an overall increased cost to such businesses in responding to marginal applications).

Amendment 5: The difference between 'impact on jobs' and effects on employment (one of the factors already included in the non-exhaustive list of factors that may be considered in assessing injury, in the WTO anti-dumping agreement) is not immediately obvious. DIISR questions whether this provision would have any practical effect, and what the effect might be.

Amendment 6: Investment and the ability to raise capital are already included in Australia's legislation as relevant economic factors when considering injury. It is unclear what adding impact on capital investment would achieve.

Amendment 8: Limiting supporting data to the last 90 days might disadvantage applicants. In many instances injury would be difficult to demonstrate over such a period. Depending on the nature of the goods, there may be no imports in the 90 days preceding a given date, and it might be easy for exporters to manipulate the system by adjusting the size and frequency of shipments. Also, as dumping investigations must generally examine importations over a 12 month period, in some instances, 90 days of supporting data might give false indications of dumping, leading to unnecessary applications. DIISR is of the view that this proposal needs further work.

Amendments 9 and 10: This proposal appears to be an attempt to address the difficulties experienced by industries in which small and medium enterprises (SMEs) are dominant. The difficulty such industries have in accessing Australia's anti dumping and countervailing system has long been recognised. DIISR doubts that the concept of a 'supporting application' would be effective in addressing perceived problems of SME access. Also, notifying parties of the receipt of an application when sufficient support for that application has not been established could lead to unwarranted distortion in the relevant market should such support not materialise.

DIISR suggests that further discussion of this issue is required to ensure that changes directed at resolving the identified problem of SME access are effective and do not have unintended consequences.

Amendment 11: This provision provides no guidance to the CEO on the expertise to be tapped or the manner in which advice is to be considered. An expert acting on behalf of a user of like goods (a 'related industry') might well provide completely different advice from an expert in the production of the like goods. The Bill provides no parameters for assessment of conflicting advice and does not clearly delimit 'related Australian industries' (in this and subsequent sections).

Amendment 12: This proposal invites unjustified 'gaming' of the trade measures system and could result in a large number of allegations of dumping. As drafted, the proposal would encourage frivolous or unsubstantiated applications (particularly during periods when the Australian currency is strong and local industries face greater competition from imports). It would also require a finding of dumping if an Australian importer (including a downstream Australian producer) was unable to prove the goods were not dumped because it could not reasonably access any relevant information. The proposal raises very serious questions of natural justice.

Amendment 13: At the beginning of an investigation, Customs may not have a reliable basis for making a preliminary affirmative determination that would effectively set the level of provisional duty payable. The making of such a determination and the imposition of provisional measures too early in an investigation has the potential to impose a significant cost on importers, including downstream Australian producers, without proper consideration of evidence.

Amendment 14 and 15: It is not clear that taking into account impacts on "related Australian industries" in (iii) would be appropriate when assessing whether to publish a preliminary affirmative determination in relation to dumping and material injury to an Australian industry producing like goods. Also, in (iv), the effect of a requirement to take account of external expertise is unclear, and there is no guidance as to the weight to be given to opposing views of different experts.

Amendment 16, 17, 18: This provision might invite 'gaming' via withholding of information in order to prolong an investigation, or unreasonably limit the time for consideration of a response to new claims.

Amendment 19, 20, 21, 22: An apparent effect of these proposed changes would be to prevent the Minister from informing exporters of the normal value established for those goods and the price determined to be non-injurious. In such circumstances, the importer would not be in a position to know the price level for purposes of giving an undertaking, and the Minister would not be able to provide such information. Such an arrangement would tend to prevent a competitive market, even at non-injurious price levels. It could render the imposition of trade measures completely opaque, leading to lack of trust in the integrity of the system and processes which allow anti-dumping and countervailing duties to be imposed.

Amendment 23: The intention underpinning this proposal is unclear, but would appear to lead to inconsistent treatment of information disclosure between applicants and other parties, including other Australian producers.

Amendments 24 to 46: These amendments provide for changes to review procedures including consideration by the CEO of information provided by "persons with expertise in the relevant Australian industry and related Australian industries" and consideration by the Review Officer of new or updated information.

As noted above, proposals to permit admissibility of information not previously available, during an investigation or review, are problematic. The "reasonably could not have been provided earlier" provisions could give rise to argument about what could have been reasonably provided and when. This could obfuscate the outcomes of investigations, and lead to protracted legal arguments.

All of the proposed requirements to consult with "persons with expertise in the relevant Australian industry and related Australian industries" lack any framework for exercise of judgement subsequent to receipt of advice, and do not constrain the scope of 'related Australian industries'. In the absence of a definition of 'related Australian industries', downstream users of goods might legitimately argue that evidence from their experts should be accorded significant weight in deliberations of the CEO (and the Review Officer, where applicable).

Questions of natural justice may also flow from the proposals. All parties with an interest in anti-dumping investigation currently have the opportunity to review evidence recorded in a Statement of Essential Facts, and to comment on the veracity and completeness of that evidence prior to a decision on the imposition of measures. It is not clear that the amendments proposed in the Bill would preserve this feature of the current system under all circumstances. Should all parties be allowed to view and comment on new evidence, review timeframes would need significant extension.

These proposals would need further work to ensure decisions could be made using the best information available, but without compromising the efficiency, effectiveness and integrity of Australia's anti-dumping and countervailing system.

Amendment 47: This amendment would allow applications to the Administrative Appeals Tribunal (AAT) in relation to a decision of the CEO, the Minister or the Review Officer for the purposes of Part XVB. The practical operation of such a provision is unclear, since it would make a discretionary decision of the Minister (to impose or not impose an anti-dumping duty) subject to a further review of its merit by the AAT. It would also significantly increase timeframes. DIISR is of the view AAT review in addition to TMRO and judicial review would be costly and unnecessary.