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ECONOMICS LEGISLATION COMMITTEE

Customs Amendment (Anti-dumping Measures) Bill 2011, Customs Amendment (Anti-Dumping) Bill 2011

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ORIGINATING CHAMBER
JOB NAME
JobDate

Senators in attendance: Senators Cameron, Eggleston, Hurley, O'Brien, Williams and Xenophon.

Terms of reference for the inquiry:

To inquire into and report on:
Customs Amendment (Anti-dumping Measures) Bill 2011, Customs Amendment (Anti-Dumping) Bill 2011

BAXTER, Mr James, Assistant Secretary, World Trade Organisation Trade Law Branch, Office of Trade Negotiations

GLEESON, Mr Geoffrey Maxwell, Director, Operations, Trade Measures Branch, Australian Customs and Border Protection Service

JOHANNES, Mr Geoffrey Mark, National Manager, Trade and Compliance Division, Australian Customs and Border Protection Service

PITMAN, Ms Suzanne Margaret, National Director, Trade and Compliance Division, Australian Customs and Border Protection Service

TROTMAN, Mr Paul, General Manager, Trade and International Branch, Department of Innovation, Industry, Science and Research

WILD, Mr Russell Bradley, Director, Subsidies and Trade Remedies Section, World Trade Organisation Trade Law Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade

YOUNG, Ms Elizabeth, Director, World Trade Organisation Disputes, Special Adviser's Section, World Trade Organisation Trade Law Branch, Department of Foreign Affairs and Trade

ZIELKE, Ms Judith, Head, Enterprise Connect Division, Department of Innovation, Industry, Science and Research

Committee met at 9.19

CHAIR (Senator Hurley): I declare open the hearing of the Senate Economics Legislation Committee's inquiry into the Customs Amendment (Anti-Dumping) Bill 2011 and the Customs Amendment (Anti-Dumping Measures) Bill 2011, which were referred to the committee on 3 March 2011 and 24 March 2011 respectively. The committee is due to report to the Senate on both bills by 22 June 2011. To date, the committee has received 25 submissions, which are available on its website. These are public proceedings, although the committee may determine or agree to a request to have evidence heard in camera. I would ask everyone to ensure that they have switched off their mobile phones. I would also ask photographers and cameramen to follow the instructions of the committee secretariat and ensure that the laptops and personal papers of senators and witnesses are not filmed.

I remind all witnesses that in giving evidence to the committee that they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground that is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may also be made at any other time.

I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits asking for opinions on matters of policy only and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

A witness called to answer a question for the first time should state their full name and the capacity in which they appear. Witnesses should speak clearly and into the microphones to assist Hansard to record proceedings. I welcome officers from Customs, DIISR and DFAT. Do any of the officers wish to make an opening statement?

Ms Pitman: Yes. I will begin, and then I will hand over to my colleagues from the Department of Innovation, Industry, Science and Research and the Department of Foreign Affairs and Trade. Customs and Border Protection thanks the committee for the opportunity to appear at this inquiry into the bills that are before it. Australia's antidumping legislation allows Australian manufacturers to apply for remedies where they consider that dumped and subsidised imports have caused or threaten to cause material injury to them. Customs and Border Protection is responsible for investigating applications by manufacturers, conducting reviews and inquiries and advising the minister on whether measures should be imposed, varied, continued or revoked. Customs and Border Protection is also responsible for implementing decisions of the minister. Hence, we monitor compliance with measures imposed and we provide information and assistance to parties who may be interested in making a claim or parties who are subject to measures.

Consistent with the WTO agreements that govern this area, where it appears that imported goods have been dumped and have caused or threaten material injury to local manufacturers, provisional measures may be imposed. Final measures, which usually take the form of dumping or countervailing duties on imports, are imposed for five years. Price undertakings by exporters are an alternative measure.

The legislative framework provides all parties with the opportunity to put their case and defend their interest. Key characteristics of the system that my area administers are a streamlined approach to processing applications and investigations, relatively short timeframes, transparency and careful attention to procedural fairness at all stages of the investigation. They are principles that we try very hard to apply at all times. We seek to identify and implement improvements to our administration and have been doing so over a number of recent years. And we continue in that endeavour.

I note that this is a challenging area of administration. I have been involved in it for a little while now. It intersects with Australia's legislative, legal and industry policy frameworks and with our approach to participating as a member of the international trading community. They are all considerations that we have in our minds when we are thinking about how to conduct our administration of the area—hence the participation of my colleague departments at this hearing.

We note that the bills before us address a range of concerns. The first bill, Senator Xenophon's bill, addresses concerns regarding access to the system, the onus on applicants, consideration of impacts on employment and investment in the assessment of injury and the use of industry experts and new information. The second bill, which we have provided, seeks to address the implications of recent Federal Court decisions regarding reviews of measures. We welcome the opportunity to assist the committee in understanding the potential operational impacts of the changes proposed by both bills.

Ms Zielke: I thank the committee for the invitation. The Department of Innovation, Industry, Science and Research has policy responsibility for anti-dumping and countervailing measures in relation to the industrial and manufacturing sectors. This includes industries like pulp and paper, iron and steel, plastics and chemicals, and textiles, clothing and footwear. In its submission the department of innovation has reflected its views on changes proposed by the bill, and we would like to note that our views expressed in our submission are based on our experience and past interactions with industry stakeholders as well as our submissions during and after the recent PC inquiry into Australia's anti-dumping and countervailing system. As part of the consultation phase of responding to the PC inquiry, our officers have met with a large range of industry stakeholders and companies, including companies such as Alcoa, Australian Paper, Australian Vinyls Corporation, BlueScope Steel, Kimberley-Clarke Australia, PolyPacific and Townsend Chemicals.

Through our submission, Innovation is attempting to assist the committee to understand the unintended consequences and/or perverse outcomes that may arise due to the introduction of certain provisions contained in the bill. It is not our intention, though, to provide commentary on the merits of the particular legislative amendments, not is it our intention to rank the appropriateness or applicability of certain measures or provisions contained in the bill. Our submission is intended to be of assistance in that regard and I am more than happy to address any questions as a result.

Mr Baxter: DFAT also thanks the committee for the opportunity to appear at this inquiry. DFAT's interest in the inquiry relates firstly to Australia's international trade obligations, in particular under the WTO agreement. DFAT provided a written submission to the committee in relation to the Customs Amendment (Anti-Dumping) Bill 2011. We requested that the committee keep our submission confidential, and that was to ensure that any views regarding compliance with Australia's international trade obligations could not be used to prejudice Australia's position in the event of a future WTO dispute. This sensitivity extends to any oral evidence that we provide relating to Australia's WTO obligations.

DFAT also has portfolio responsibility for promoting and protecting the interests of Australian exporters. Trade plays an important role in enhancing Australia's economic prosperity and DFAT seeks to ensure that other countries do not apply trade rules in ways that interfere with legitimate trade flows. This includes assisting Australian exporters which may be the subject of other countries' trade remedy investigations. More broadly, the government seeks to ensure that international trade rules promote competition while enabling Australia to take effective action to remedy injury caused by dumped and subsidised imports. The government pursues these objectives in WTO discussions on anti-dumping and subsidies, including the rules negotiations which form part of the Doha development agenda. Those negotiations are aimed at clarifying and improving disciplines relating to anti-dumping and subsidies issues. DFAT leads the government's participation in WTO negotiations and, if the committee would find it useful, we would be happy to outline areas of those negotiations that may relate to the committee's inquiry.

CHAIR: Thank you, Mr Baxter. As you noted, your submission is confidential and you have said in your oral submissions as well that you will have issues of confidence The committee would like to explore that a little. I think Senator Xenophon has a question.

Senator XENOPHON: Chair, I am very unhappy that foreign affairs and trade want to make their submission confidential. This is about considering two bills. Most of your comments relate to the bill I have introduced—in fact, I think almost entirely in terms of your concerns about it. How can this committee, the public and the parliament objectively assess the merits or otherwise of the bill I have introduced if you are not prepared to have your evidence on the record?

Senator CAMERON: On that point, how can you explain they are losing their jobs because they dumped the goods and that we should do all this in secret?

Mr Baxter: Thank you very much for the question. It is an important question and one we have given a lot of thought to in this and other contexts. Our principal concern is to assist the committee by providing advice that is relevant to the committee's inquiry.

Senator XENOPHON: In secret.

Mr Baxter: The reason that we have asked that that submission be treated as confidential is that it canvasses issues about WTO consistency. It is quite possible that this committee will enact of course the legislation that is before it. In the case that the Department of Foreign Affairs and Trade has given advice to a committee that certain aspects of that legislation may be inconsistent with WTO commitments, the legislation were passed and we were challenged in the WTO, I am sure you can imagine that a complainant would seek to use the statements that we had made about the WTO consistency of those then measures with our WTO commitments.

CHAIR: Let us discuss this. You are saying that there are aspects of the WTO inconsistency that you are unable to discuss or that it would not be a good idea to discuss publically. Are there other aspects of the bills that can be discussed in an open hearing?

Mr Baxter: I suppose the complication for us is that, were we to say that certain aspects of the bill were in our view consistent with our WTO obligations and be silent on other aspects, that could by inference lead others to think that we took the view that they were not consistent with our WTO obligations and that could similarly be used against us in the event of a WTO dispute.

Senator XENOPHON: Mr Baxter, are you a lawyer by background?

Mr Baxter: Yes, I am.

Senator XENOPHON: Can we just talk to lawyer to lawyer? You know very well that when you prepare arguments for court and tribunals that, if you are giving an advice, you could easily couch that advice in terms of: this is a potential argument that could be used. If you couch your advice, your opinion, in a particular way, how can that be prejudicial down the track in the context of a WTO dispute? You could say, 'This is a potential argument.' You are saying that, by virtue of providing an opinion in relation to this bill, it ought not be made public because it will inevitably be used against Australia in the event that this bill is passed and in the event that it is a dispute. Is that what you are saying?

Mr Baxter: I do not think that is what I am saying, Senator—

Senator XENOPHON: I am sorry; tell me what you are saying.

Mr Baxter: There is a concern on the department's part and on the minister's part that if we comment on aspects of the proposal that we are of the view are inconsistent with our WTO obligations that may be used against us should those aspects of the then legislation—

Senator XENOPHON: Sorry: can I perhaps take up the chair's invitation to drill into this. You are making an assumption that by expressing an opinion that would inevitably lead to a challenge of any law that may be passed.

Mr Baxter: I do not think we are making that assumption. We are simply trying to guard against the possibility that, should a challenge eventuate, these statements could be used against the government—but I might note parenthetically that WTO dispute settlement cases are very commonly about trade remedy actions. It is one of the most active areas of WTO dispute settlement. It is in my view very reasonable for us to expect, should the parliament proceed with measures that are vulnerable from a WTO consistency viewpoint, that those measures may well be challenged.

Senator XENOPHON: So you are saying that, by expressing an opinion openly, that would give ammunition to the other side for a challenge?

Mr Baxter: That would give ammunition to the other side that it could use should it challenge.

CHAIR: I propose that the committee go in camera and then we can discuss some of the issues more openly.

Senator XENOPHON: I wonder if we could first have a brief private meeting.

CHAIR: Certainly.

Evidence was then taken in-camera but later resumed in public—

Mr Baxter: I should just clarify something that I just said—and I am happy to do it in public—relating to the issue of trade unions. I said there had been no finding in a WTO dispute settlement case about that. That, as I understand, is correct. The issue has been raised in one dispute, which was the EC bed linen dispute.

Senator XENOPHON: What was the name of that dispute?

Mr Baxter: EC bed linen. We can provide further details about that if the committee wishes.

CHAIR: Thanks, Mr Baxter. I think that would be useful.

Senator CAMERON: Chair, given that this is on the public record I think we should contextualise it a little bit, because people will be wondering what that is about. This was about the trade union movement being a party to the legislative process. Would that sum it up? Is that correct?

Mr Baxter: An interested party.

Senator CAMERON: But named in the legislation?

Mr Baxter: Yes, that is right.

CHAIR: I will just formally reopen the meeting on a public basis. We have already had some discussion, but we will include that. Now we will get to the stage of questions. We will probably run a little over our 10.15 time line, by about 10 minutes or so. I will just ask a brief question about the effect of an antidumping application, what effect that has on trade and what effect the length of time of discussion has on trade in that industry in general.

Ms Pitman: I confess that in this area there is anecdotal evidence but I am not personally aware of any substantive, concrete evidence. But, in the course of managing the area, I have had discussions with areas in industry—and I refer to importers and those associated with the importation of goods—concerning the effect of our advancement of investigations on certainty for them as importers about the price at which they are able to obtain their product or the availability of that product and their decision making about whether they should persevere with the existing sources of supply. Equally, because we deal with a wide range of different parties, the concerns of manufacturers about the time taken to arrive at a decision about measures, we acknowledge, are a real issue. In spite of our system being one of the fastest in the world, nonetheless time passes while we are investigating matters, and we acknowledge that that time may be a period during which injury is occurring.

CHAIR: What steps do you take to track what has happened to the industry? This is either for you or the department of industry. What happens to the industry if you reject the application? I presume that you follow through to make sure that your assumptions are right?

Ms Pitman: The rejection of an application is something that can lead to a review. If we decide not to initiate an investigation it can be reviewed. We do not have a formal tracking mechanism in place for those applicants

whose applications have not been initiated. Because we are dealing with a fairly confined group of industries we are involved in ongoing discussions with many of them and in an informal manner there is an avenue through which we can gather information about how they are tracking. It is not a formal surveillance mechanism. We are not equipped to conduct that process. We rely on information from the manufacturing industries to inform us about how they are performing. We can of course monitor imports because we receive full information about imports and exports. The industry itself which initiates a matter is the body that will come to us and continue to talk to us about the performance of their company or industry sector.

Senator CAMERON: An industry may not know that something is being imported for maybe months. It could be imported and be up for sale. Is there any way that Customs could get an early warning of something happening or if there is, say, a peak in importation of a certain product?

Ms Pitman: We do not do as a routine. We have some constraints on us which derive from our own legislation and mean that we have to be very careful with how we handle commercial–in-confidence information. At one point we were engaged with the steel industry in looking at what could be provided by way of data. Ultimately we established a mechanism which takes data that is a few weeks out of date that summarises it at a level that is non-confidential but pulls it into categories of product. That has enabled us and the steel industry to share a view of what is happening at that level. It is not very specific, so it needs to be interpreted by someone who knows what they are looking for, and it certainly preserves the confidentiality of parties who are trading in that sector.

Senator CAMERON: So you have done something in steel. As I understand it, the Productivity Commission said the job is getting less onerous because we make fewer things. So this problem will go away if we do not have a manufacturing industry, wouldn't it—or certainly for manufacturing dumping?

Ms Pitman: If I have not understood your question correctly please correct me. I became involved in this area in 2000—so I have been involved with it as a senior manager for the past 11 years. Whereas I might have thought that over those years the job would become less intensive, it has not. What might have happened is that the range of different industries that I think we dealt with previously might have contracted. So the focus on steel and the activity around steel, plastics and a couple of other industries was quite intensive during that period.

Senator CAMERON: The Productivity Commission identify a range of areas that are now no longer manufactured. You say the intensity has increased in other areas.

Ms Pitman: Yes.

Senator CAMERON: Wouldn't it be expected that if people are losing their capacity to manufacture in Australia because of dumping that they would be saying to you, 'Give us some help on this'?

Ms Pitman: They certainly do ask us for help and we endeavour to provide that, obviously within constraints of legislation and the WTO requirements—

Senator CAMERON: Is it practical for Customs to develop an early-warning system across all of manufacturing?

Ms Pitman: I do not think that it is feasible for us to do that.

Senator CAMERON: Is that a resource issue?

Ms Pitman: It partly goes back to the way that the dumping rules work. I am thinking of dumping principally, but the same probably could be said for subsidies. Dumping addresses very specific products. I have some examples that we could give you of various grades of product within a broad category. I remember that before my time we investigated forklift trucks from Ireland, I think. I am informed that it was one of the most complicated investigations we ever conducted, because of the number of different types of forklift trucks.

The same thing has been replicated over the years in investigations that I am aware of. Knowing which product you would need to monitor so that you have something that is defined in terms that we would then investigate would be an extraordinarily large task. It is hard to describe how big that task would be. This is why the onus on an applicant to tell us what product it is that concerns them is very strong.

Senator CAMERON: How do companies actually keep tabs on this. We signed a so-called free trade agreement with the US—they are not free trade agreements, they are bilateral agreements—and we signed an agreement with Thailand. The rules of origin then kick in. I have had a look at 'rules of origin' in the Customs Act and I cannot understand it to be honest.

Ms Pitman: They are quite complex.

Senator CAMERON: Do you understand it?

Ms Pitman: At a level I understand that—

Senator CAMERON: And therefore you understand it.

Ms Pitman: I have experts.

Senator CAMERON: That is a good answer, because you would have to be an absolute expert to understand the rules of origin, wouldn't you?

Ms Zielke: The rules of origin are quite complex in that regard. I agree that it does take people with expertise to understand them. It is for that reason that companies of various industry sectors have advisers within the industry associations to assist with it, noting of course that advice can always be provided directly from us if required.

Senator CAMERON: But what if they are not a member of an industry association and are just a small manufacturing company—they are not a member of AIG or ACCI—that sees that their product is being dumped? It is costly and it is complex. Do you think a small company without access to expert advice can actually deal with the dumping issue?

Ms Zielke: I agree that there are difficulties for SMEs in relation to putting forward those cases. Some of the feedback we have had is that the cost of putting forward a case is a key issue for them. Hence Customs currently has arrangements to try to group SMEs to put forward cases. I agree that not everybody has full or equal access in relation to the level of advice that they require.

I will note, though, that, in previous reviews of the antidumping system in Australia undertaken by the PC and others, industry did advise that it was their preference to put a high level on the information required to start an investigation, because they saw more value in relation to the time frame in that regard. But I cannot discount your comments in relation to the impact on SMEs.

Senator CAMERON: Mr Baxter, regarding the Thai free trade agreement—you look perplexed.

Mr Baxter: It is a bit out of my remit but—

Senator CAMERON: Is it?

Mr Baxter: I can try and take something on notice, if you like.

Senator CAMERON: You might like to take these on notice: have there been any complaints of dumping since the signing of the Thai free trade agreement; were there any complaints of dumping before signing the Thai free trade agreement; has the Thai free trade agreement resulted in injury to Australian manufacturing; and what are the terms of trade between Australia and Thailand in relation to the Thai free trade agreement? The econometric modelling that was done by your department on the Thai free trade agreement said that there were going to be huge benefits—can you advise us if those benefits have been delivered? I may have some questions I will put on notice in relation to trade agreements. We are now talking about unilateral trade agreements. What are the implications of unilateralism by Australia on trade in relation to dumping?

Mr Baxter: Sorry, on that one: can I clarify what a unilateral trade agreement is?

Senator CAMERON: You had better ask the minister; he just announced it two weeks ago.

Mr Baxter: You are talking about the reference to unilateralism in the statement?

Senator CAMERON: Yes. I would assume if you do an agreement you say, 'We're going to disarm but you can keep up some of your buyers.' That is a unilateral free trade agreement. We have decided we will unilaterally reduce barriers but the trading partner does not have to. Is that what you understand unilateralism to be?

Mr Baxter: I hesitate to comment on that. That is well beyond my remit, so I would have to take that on notice.

Senator CAMERON: I would like you to have a look at that and any implications that those free trade agreements and unilateralism in free trade negotiations we have on dumping.

Mr Baxter: Okay. Can I just comment? A number of your initial questions are relating to complaints about dumping before and since the Thai free trade agreement and are issues on which Customs, I think, would be better placed to advise than we would. A number of your questions are areas within DFAT's portfolio responsibility and I am sure we can—

Senator CAMERON: Can I then ask Customs to take on board any of the issues that are relevant to them because I do not have the—

Mr Baxter: We can consolidate it.

Mr Johannes: We can advise you.

Ms Pitman: I want us to complete one point that I did not quite get to before. It relates to the question about tracking of goods coming into the country, into Australia. The tariff classification system, which defines the goods that are reported to us as they come into the country, does not correspond directly to the descriptions of goods that we would often be investigating in an antidumping or countervailing matter. I did not quite get to explain that not only that the size of the task, which would be quite immense, but the nature of the reporting we receive on imports is not designed to enable us to connect that information directly to the level at which we define goods for investigation.

Senator CAMERON: On that point, Chair, when we sign bilateral preferential trade agreements, the rules of origin kick in and those rules delineate what goods are eligible to come in duty free or tariff free. If you can do it in that case, why can't you do it more generally?

Ms Pitman: The rules of origin that apply vary but one that is more frequently used is one called change of tariff classification, which again means that we are looking at goods at the level of the classification that is used in the international harmonised tariff system, so it is set at the same level as the general classification system I was describing.

Senator CAMERON: Thanks. I have run out of time. I have lots more questions, but no time.

Senator XENOPHON: On that, we might need to put some questions on notice, although that is not the most satisfactory outcome. Ms Pitman, I will direct some questions to you about the practicalities of this. I was quite taken by a statement that a union leader told me about. He went to an international trade forum not so long ago and he said that the joke is that Australia is known as the Taliban of free trade, because we are such free trade fundamentalists that no other country seems to have such a liberal regime in terms of trade. I want to go to the practicalities of this. In 2010, CSR's upstream Viridian Glass division ran an antidumping case in relation to clear float glass. They spent over $300,000 collecting evidence on pricing and in preparing the case against imports from China, Indonesia and Thailand. In November last year, Customs issued their statement of essential facts, which said that dumping had occurred, dumping margins were not negligible—they were from 3.5 per cent to 26 per cent—the volume dumped was not negligible, material injury occurred, there were lost sales and lost market share, prices were suppressed due to company integration, profitability and profit were lost, return on investment was reduced and sales revenue was reduced. Customs stated to CSR that it was their intent to introduce measures at the time the case was presented to the minister and not wait for his decision. The day before the report was sent to the minister, CSR tells me that they were advised that the case was terminated and in the termination report Customs concluded that dumping occurred but that now you could not determine material injury. This is not an isolated case. This seems to me to be emblematic of the problems that occur in this system. How can something like that occur?

Ms Pitman: In that particular case—and I will defer to my experts about the specifics of the case—while I said before that we endeavour to apply procedural fairness as far as humanly possible within the constraints of timing that we must always be bound by in a statutory process, sometimes our weighing of evidence or the timing of evidence that we receive means that we have to make judgments close to the end of the period that is available to us for investigation.

Senator XENOPHON: But it seems completely contrary to the statement of essential facts, though.

Ms Pitman: In terms of the process that we go through, I am happy to go back a step and explain the statement of essential facts. As far as possible, it represents the guidance about the judgments that we are making in formulating our response to the minister. The statement is required at day 110, unless extended, of an investigation. There is a period following the publication of that statement in which parties have an opportunity to respond. We take into account that information. We then prepare a report, which in the normal course of events is due by day 155. It is not always possible to go back to parties to enable them to respond a second time.

Senator XENOPHON: Is that because the current processes do not allow you to look at new facts? You are constrained?

Ms Pitman: This is not something that we do by design. The example of something that changes late in the piece is not the preferred approach and in virtually every case we manage to not have that happen. But the system is that we are obliged to publish a statement of essential facts. As far as possible, we include all of the relevant non-confidential information and an assessment of that information in the statement. We publish that so that the parties have the opportunity procedurally to comment again. Typically, it contains only the information that they are already aware of as we maintain a public file throughout the course of an investigation. But that is not always immutably the case. Sometimes information comes to light or our assessment of the information that we already have changes after we have received those responses to the statement of essential facts.

Senator XENOPHON: So you are saying that the essential facts had changed by the time that you made that final decision?

Ms Pitman: I will ask the experts, because we are talking about a specific matter. I will ask Mr Gleeson to come to the table

Mr Gleeson: If I understood your question correctly, you are asking whether the facts changed after the statement of essential facts.

Senator XENOPHON: Yes, that is right.

Mr Gleeson: I do not think that that was necessarily the case, although we would certainly have regard to submissions made in response to the statement of essential facts, which will provide clarity around the existing facts and allow us to refine our analysis of the facts and our interpretation of them. It is between the time that the statement of essential facts was issued and the final report where we had changed our judgment from a positive finding that dumping existed and had caused material injury to a finding that, while dumping had occurred, it had not in and of itself caused material injury.

Senator XENOPHON: That is the issue, isn't—how you interpret 'in and of itself'? You are constrained by the current rules. Are you guided by the act or are there protocols in place to determine what 'in and of itself' means?

Mr Gleeson: The legislation sets down that dumping in and of itself must cause material injury for us to recommend that action be taken.

Senator XENOPHON: So you do not look at any consequential or associated issues?

Mr Gleeson: We look at whether the dumping has caused material injury to the Australian industry manufacturing those particular goods.

Senator XENOPHON: In the initial statement—and I am referring to this case, but it could apply to the Kimberly-Clark case or to a whole range of others—on this relatively recent case there was a finding of lost sales, lost market share, suppressed prices, lost profitability and profit, reduced return on investment and reduced sales revenue. Which of those was no longer applicable such that you could no longer determine material injury had occurred?

Mr Gleeson: If I recall correctly, all those injury findings were upheld in the final report. But it was more a case of us satisfying ourselves after the statement of essential facts with subsequent analysis and refinement of our initial analysis that there were other factors at play that were also mentioned in the report. These were other factors in the market for that particular product that were causing and contributing to the injury. This meant that we were not satisfied that dumping in and of itself had caused material injury.

Senator XENOPHON: So all of the factors that I have outlined were upheld, but you found another way to say that you could not determine material injury?

Mr Gleeson: Caused by dumping—that is correct. We were not satisfied that dumping had in and of itself caused material injury.

Senator XENOPHON: I find that extraordinary. Ms Pitman, does that raise issues of resourcing? Manufacturers have put to me—and I am sure that this is a view shared by unions—that there is an increased need for improving resourcing for investigations. What resources are set aside for investigations of these matters?

Ms Pitman: We have a branch that is dedicated to this, the trade measures branch. It has existed for many years. It has a number of units of personnel who are dedicated to operational investigation work. Geoff Gleeson is one of the directors in charge of one of those units and he has extensive experience in leading investigations. We have other units within the branch that are there to support and help to develop capability in our investigators.

Senator XENOPHON: We are running out of time. On notice, can you let us know what the resources are, what the budget is and whether it has changed over the years. The other issue is that it has been put to me by industry that the investigating team should be required to engage an industry subject matter expert on the team. Is that the case at the moment?

Ms Pitman: We are working on a couple of things that are relevant to your question. One is staffing up the area, so we are actively recruiting at the moment. And we go through cycles of doing this. The other thing that we are working on is incorporating independent expertise in our guidance to our investigators to a greater extent than we have done in the past.

Senator XENOPHON: The reason that they say that you should be required to do so is that there is a view among many in the industry that you should be required to use interpreters, to have forensic accounting experts

available and conduct more face-to-face interviews rather than carry out desktop inquiries. Is that now being done? Are you using interpreters, forensic accounting experts and the like?

Ms Pitman: We certainly have used forensic accounting experts and continue to do so. I expect we will be doing more of that in the future.

Senator XENOPHON: Finally, a complaint that has been put to me on a number of occasions is that the onus is all on the enterprise and, even if they are a relatively large company, the burden on them is quite great. If you are a small- or medium-sized business, you have no hope of contesting this. An issue has been put to me that, where there is a suspicion of dumping, if the importer or company does not cooperate or if it is not necessarily forthcoming with material, there is not much that can be done about it. If there is a lack of cooperation it just makes the job of Australian manufacturers so much more difficult, and in some cases they just give up because they cannot afford the cost of investigating it.

Ms Pitman: There are a couple of issues in your question. These are all quite complex matters for us to digest as well. The issue of cooperation is separate from the onus on the applicant to establish the initial prima facie case. Once we are in an investigation our role is to gather all of the information we need, and their cooperation can become an issue for us. It is not the expectation that the manufacturing industry will supply us with exporters' or importers' information in the course of the investigation itself, but it does need to establish at a prima facie level that there is a case in order for us to start an investigation.

Senator XENOPHON: But that is sometimes difficult, isn't it? You might have a state owned enterprise somewhere overseas that will not play ball. Isn't that an issue?

Ms Pitman: We have to examine information that is based on the best available to Australian industry. At times, because we have dealt with an industry over a lengthy period, we can look at information that is not particularly accurate and we can apply a lens to it. So we can make an assessment of the order of magnitude within which—and we tend to be talking about normal values—is the overseas information.

Senator XENOPHON: But the capacity to be hoodwinked is quite significant under the current framework, isn't it?

Ms Pitman: Once we are in an investigation there are a variety of stages where we are very conscious of that. We apply ourselves thoroughly to gathering evidence and checking it, and we employ forensic accountants or whomever we need if there is an argument that what we have checked is not correct, and we have done that. Where there is noncooperation, we are very conscious that those who do not cooperate should not benefit from their noncooperation, so we deal with that. There is a range of steps we go through.

Senator XENOPHON: On notice, would you provide more details on how you determine noncooperation and the consequences of that and what you spend on forensic accounting. It seems that those who do not cooperate sometimes seem to be, if not rewarded, escaping the consequences of dumping duties.

CHAIR: As there are no further questions, I thank all the departments for coming in this morning. We look forward to your responses at a later date. We will come back to the Department of Foreign Affairs and Trade.

GREEN, Mr Adrian John, Adviser, JELD-WEN Pty Ltd

PERCIVAL, Mr Andrew, Solicitor representing, JELD-WEN Pty Ltd

SILBERBERG, Dr Ronald, Senior Corporate Adviser, JELD-WEN Pty Ltd

[10:35]

CHAIR: Welcome, JELD-WEN. Do you have an opening statement that you would like to make?

Dr Silberberg: I do, thank you, Chair. We appreciate the opportunity to appear before the Senate Economics Legislation Committee hearing into the Customs Amendment (Anti-Dumping Measures) Bill 2011. By way of background, JELD-WEN is Australia's largest manufacturer of windows and doors and employs 4½ thousand people in Australia who are involved in the manufacture, sales, distribution and installation of windows, doors, shower screens and wardrobes. JELD-WEN has considerable experience in antidumping cases, principally as an objector, for instance, involved in investigations relating to aluminium extrusions and clear float glass. Through that experience we contend that improvements can be made to the operation of Australia's antidumping system. The objectives of the amendments, in our view, should be to achieve an antidumping system that is effective and efficient, fair to all stakeholders, transparent and contestable, and compliant with Australia's international trading agreements and internal laws governing competition and commercial behaviour.

The bill has provisions that have the potential to enhance the effectiveness of Australia's antidumping system. Equally, there are proposed amendments that, in our view, would contravene Australia's international legal obligations as well as impose impractical evidentiary burdens on local businesses that process and fabricate imported goods in the final products.

Our observations about the bill fall into four areas. These are: firstly, the rights of stakeholders to make submissions to investigations; secondly, an impact assessment of dumping and remedial trade measures; thirdly, the timeliness of investigations; and, fourthly, Australia's international trade obligations. While the bill expands the rights of trade unions to make submissions as interested parties, the current system denies local processors and fabricators the right to make submissions unless they are an importer of like goods. Many businesses involved in the processing and fabrication of like goods are small and medium-sized firms that account for much of the employment and value-add. This oversight should be rectified in the bill by conferring upon intermediate users of like goods status as interested parties.

The bill extends appropriately the scope of an investigation to include the flow-on effects of dumped imports to related industries. At the same time, we submit that there should be a consideration of the impact of trade measures on downstream users as recommended by the Productivity Commission inquiry report into Australia's antidumping and countervailing system. An impact assessment could follow the cost-benefit approach adopted under the Council of Australian Governments' best practice regulation. It should consider the effects both of dumping as well as proposed trade measures on market competition including small business as well as potential price impacts on purchases of final products. The impact assessment would form part of an investigation; its findings would not necessarily be binding, however.

Attempts to reduce the period of antidumping investigations should focus on ensuring that Customs and the Trade Measures Review Officer are resourced adequately and have access to economic agencies such as the Productivity Commission. Allowing accredited legal and accounting representatives to access so-called 'confidential information' subject to a binding confidentiality agreement, in our view, would help to sort the wheat out from the chaff and might facilitate an earlier determination of investigations.

Finally, we see merit in streamlining the appeals process as evidenced by the success of the appellate process that operates under the income tax law. In our submission we have identified a number of provisions in the CA(A-D) that would contradict Australia's commitment to the World Trade Organisation Anti-Dumping Agreement. We do not need to go in camera, though, to discuss those. In our submission we have identified a number of provisions in the CA(A-D) that would contradict Australia's commitment to the World Trade Organisation anti-dumping agreement. We do not need to go into camera, though, to discuss those.

Senator XENOPHON: Pleased to hear that.

Dr Silberberg: I am not a lawyer but we do have a lawyer present.

Senator CAMERON: I thought you were going to co-opt yourself.

Dr Silberberg: Thanks, Senator. Again, our thanks to the committee.

CHAIR: Thank you, Dr Silberberg. I have an overall question. You say that JELD-WEN have been involved in a number of anti-dumping inquiries over the years. How do you see the overall situation? Has it improved or is it getting worse in your industry?

Dr Silberberg: We have people who are highly critical of the system on both sides of the investigation process. Some might conclude that, on balance, that means it is about right. I think the lack of transparency with respect to material is a real issue. One of the reasons that firms like JELD-WEN require the subject matter experts of accountants and lawyers is to try and piece together the nature of the material that is submitted to Customs but redacted. It elongates the process. That is why we thought it would be potentially valuable were the applicant and objectors able to avail themselves of accredited legal and accounting representatives who would have to operate under a binding confidentiality agreement. So in JELD-WEN's case we would not become aware of the so-called confidential information that had been submitted by a party but the lawyers and the accountants would be able to provide their interpretation to Customs on the quality of that information. I note that Canada and the United States do have this facility. It was commented upon by the Productivity Commission in its report, but the Productivity Commission did not recommended in favour of such a proposal. I would have to say, with respect to the Productivity Commission inquiry report, I do not think they provided substantive reasons to invalidate the proposal. It has been suggested that, if we had lawyers and accountants involved in reviewing so-called confidential information, that would elongate the process. I disagree. I think it would abbreviate it because we would get to the heart of the information a lot quicker.

I do not envy the role of Customs. I think it is an exceedingly difficult one. This process is complex. It is costly. And while I am not sure that there is a magic wand that we could apply that would rectify some of those things, investigations have to be thorough. We should not have a system that provides for people just to lob in applications that might be deemed somewhat vexatious. There are no sanctions that I am aware of that have been applied to either applicants or objectors that have provided fanciful or erroneous information. If we provided to ASIC some of the information that we have seen submitted to Customs, the directors of that company would be in some trouble with ASIC.

CHAIR: Interesting.

Senator XENOPHON: Thank you, Dr Silberberg, for your submission from JELD-WEN. I note there are some parts of the bill that you think could be useful and others that you do not think would be useful.

Dr Silberberg: We tried to be constructive.

Senator XENOPHON: I know. Can I thank you for the submission because I think it is a fine submission and a very comprehensive one.

Dr Silberberg: Thank you.

Senator XENOPHON: You have said that some amendments are inconsistent with article 3.1 of the antidumping agreement. This amendment proposes an onus of proof on importers to prove that the imported goods have not been dumped into Australia or subsidised for export to Australia. Mr Percival, I do not share the antipathy towards lawyers—

Mr Percival: I am pleased to hear that!

Senator XENOPHON: but if you look at article 3.1, which you have referred to, saying it is potentially inconsistent, it talks about a determination of injury being based on positive evidence. But the rest of article 3 talks about domestic price. It goes into various criteria. Obviously you are very familiar with this. 3.5 says:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement.

It talks about 'the demonstration of a causal relationship'. But isn't it a chicken-and-egg situation at the moment in that there is a real difficulty in gathering the evidence because some of the parties are withholding importer or overseas manufacturer information? At the moment there is a huge disadvantage. I refer to the CSR case—were they one of your competitors?

Dr Silberberg: JELD-WEN arguably is the principal objector. I have to say that the JELD-WEN organisation has incurred expenditure of $1 million to date in opposing the antidumping application by CSR and Viridian in respect to clear float glass. Hopefully, that puts some perspective on the observations about the costs to applicants.

Senator XENOPHON: But that it costs so much for these disputes to be resolved cannot be good all round, can it?

Dr Silberberg: No.

Mr Percival: I agree with your comment that there are significant costs on both sides. Enhancing transparency in appropriate ways in the process may attenuate that if people can address the factual issues and the information a lot quicker and more directly rather than trying to figure out what is before customs. To me, that would be a significant benefit.

Senator XENOPHON: So you are saying that you can reduce the costs significantly for all parties.

Mr Percival: I believe so.

Senator XENOPHON: But isn't it fair to say that article 3.1 refers to a very broad context about the potential impact of dumping—the impact on the market and the like?

Mr Percival: Correct. Article 3.1 is under WTO jurisprudence and is an overarching provision where you find the detail in subsequent provisions, but the aim of those provisions is to provide guidance for the relevant authorities—in this case, Customs and Border Protection—in the conduct of their investigation. This is what you need to be looking at. This is the information you need to be collecting. The application put by Ms Pitman said there is a difference between the prima facie case for the application and the subsequent investigation where Customs needs positive evidence on which to base their findings. That is their task and the task of all relevant authorities.

Senator XENOPHON: Could we explore that? I do not have your expertise. My background in law is as an ambulance chaser—a personal industries lawyer, not this sort of specialised law.

Mr Percival: I am a trade lawyer.

Senator XENOPHON: That is right—and I am not. It says it must be based on positive evidence, but isn't there a threshold issue if you cannot obtain the positive evidence because a party is withholding that evidence—I am just talking about general principles—is being recalcitrant in providing that evidence, is cooking the books or whatever? How do you deal with that? Otherwise, if you cannot even get to the threshold of getting positive evidence, where do you go?

Mr Percival: I appreciate your question. The issue there becomes part of the investigation procedure, and there are provisions in the WTO agreement which do address this. It says that the first thing is to try to get positive evidence from the importers and exporters to provide whether dumping is occurring or not. If they do not cooperate, there are provisions in the WTO agreement which say Customs can rely on the best information available. That can be ABS statistics. It can be information provided to them by the Australian industry. Customs do on occasion do that, as do other countries.

Senator XENOPHON: I value your evidence, but how do you define a lack of cooperation? That in itself is the subject of disputes, isn't it?

Mr Percival: The way I understand Customs to assess lack of cooperation is that after they have initiated an investigation they send to all known importers and exporters questionnaires. There are separate ones for importers and exporters in each of the countries. Those that respond are considered to be cooperating at that point in time. Those that do not respond—

Senator XENOPHON: They could respond. If Senator Heffernan were here I am sure he would use much more colourful language. So they could respond, but it could be absolute rubbish in that response.

Mr Percival: As I said, at that point in time, when they get the response, without looking at the quality of information or what is actually there they will regard them as cooperating. Customs, depending on the numbers that were involved—if there were reasonable numbers—would go out and investigate each one of those. That is when they put in their forensic people and their auditors, and that is when they spend a week or two overseas checking that information and verifying it. That is when, I would expect, the issue that you are concerned with is dealt with: are these accounts sustainable, doctored or what have you? That is the process to identify that. If during that process information is withheld or they decline to participate, they are also considered to be non-cooperating.

Senator XENOPHON: It goes to the question of the quality of the investigation and the resources as well, doesn't it?

Mr Percival: Yes.

Senator XENOPHON: And that is one of the criticisms of industry.

Mr Percival: I think it cuts both ways. An assessment of Australian industry—what is happening in terms of injury and economic performance—and, on the other side, an assessment of dumping are both becoming, in my

view, more and more complex. That would tend to suggest—and JELD-WEN in its submission recommended—adequate resourcing so these increasingly complex issues can be addressed properly.

Senator XENOPHON: There is an amendment proposed to remove the prohibition on the CEO of Customs making a preliminary affirmative determination following the initiation of an investigation, thereby allowing securities to be taken out on imports of light goods at an earlier time. That was in cases where it seems to be bleeding obvious that there is an issue there. You have said that that is inconsistent with article 7.3 of the antidumping agreement, which prohibits any measures sooner than 60 days. There must be circumstances when it is so obvious that there is a blatant case of dumping—where it has to be below cost or the evidence points to that—and even in a relatively short time of 60 days it could cause damage to a particular industry, depending on the nature of the industry. Are you reading article 7.3 quite narrowly? It says:

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months …

Does that imply that you could act earlier than 60 days, or are you saying there is an absolute prohibition of 60 days?

Mr Percival: My reading of that is that there is an absolute prohibition of 60 days. But putting that aside, I would question seriously whether Customs would within that 60-day period have sufficient information that there was dumping occurring, the level of dumping and that it was causing material injury. I have seen it in one case put on relatively early. It certainly was not 60 days. It was probably 70 or 80—I would have to go back and check. It was one of the earliest ones I have seen.

Senator XENOPHON: Could you take on notice how many days it was?

Mr Percival: Yes. But what drives that is more a function of the responses they get from importers and exporters and the information that is available at that time. Often people say, 'It's blatantly obvious they are selling below cost.' Selling below cost is not dumping. Dumping is selling at an export price below what you are selling at in your country of export. It is a price discrimination issue. Certainly low-cost can be dumping, but it does not necessarily follow. My feeling was, and my experience has been, that Customs is rarely in a position to have sufficient information to form a view that there are reasonable grounds to believe dumping is causing material injury, which I think is the test under 269TAD, from memory, which is the provision in the Customs Act enabling Customs tax security.

Senator XENOPHON: So you do not see any scope where there might be exceptional circumstances—where it seems to be a blatant case of price discrimination?

Mr Percival: I have not seen evidence of it.

Senator XENOPHON: I will put some questions on notice.

Senator CAMERON: I am not sure whether this is a question for Dr Silderberg or for Mr Percival. You mentioned the Productivity Commission inquiry. What specific recommendations from the Productivity Commission would be helpful?

Dr Silberberg: One of the recommendations related to a consideration of the effect of dumping and trade measures on downstream users of intermediate goods. We welcome that, because it would help to round out an assessment of what flow-on effects would emanate from dumping and proposed trade measures. There are a number of areas of building activity where there is a sole manufacturer of a product in Australia. That relates to steel and glass. Imports play an important part in meeting shortfalls in domestic supply. That is particularly the case with clear float glass. There are many small and medium sized businesses that rely on the availability of competitively priced imports of glass for their business.

If we look at the glass manufacturing sector, there would be fewer than 300 people involved in the direct manufacture of glass in Australia. JELD-WEN alone employs 4½ thousand people in the manufacture of windows and doors and their installation, but they are not the only player. There are thousands and thousands of people in downstream processing and fabrication. Their voice is rarely heard in this area of anti-dumping. Typically, the most vocal players are the local manufacturers. That is not a criticism; it is just an observation. I think the Productivity Commission recognised that downstream users of intermediate goods should be given some consideration when we are looking at Australia's anti-dumping system. We welcomed that.

Senator CAMERON: What elements of the Productivity Commission report would you say we should not adopt? You will want to take that on notice.

Mr Percival: Yes. I would probably, on behalf of JELD-WEN, take that one on notice, and we can provide you with some. Obviously one—the one Dr Silderberg mentioned—is the issue of having access to confidential information under legally enforceable confidentiality undertakings.

Dr Silberberg: Correct.

Mr Percival: There could well be others, but I would need to take that on board.

Dr Silberberg: By way of a positive observation, my recollection is that the Productivity Commission did recommend that under the new anti-dumping system that they were advocating there would be a requirement to look at the resourcing of the relevant agencies involved in the administration of the anti-dumping and countervailing system. I think it is fair to say that there is a level of unanimity of view about that proposition.

The Productivity Commission undersold its potential role in assisting the work of Australian Customs in investigations. The Productivity Commission has the internal capacity to do sectoral and economy-wide assessments of dumping and of trade measures, and I would have thought it would have been highly desirable for Customs to avail itself of that internal capacity. There are also private agencies—accounting and other economic agencies—that regularly do this sectoral and economy-wide work. Governments of all persuasions have been ready users of that sort of external support.

Senator CAMERON: There are a couple of points I wanted to raise. One of the provisions of the existing act that would be affected by the amendment is 269TAE(3)(m), which is the ability of persons engaged in the industry to raise capital in relation to the production or manufacture of goods of that kind or like goods and investment in industry. So it says you can raise these issues if it has these effects. The Customs and Border Protection submission this morning says that when they conduct an investigation they look at price, volume, profit effects and other economic factors. You have raised on a number of occasions the Australian workers that you employ. Are they simply another economic factor in this legislation?

Dr Silberberg: I would like to know the instances where Australian Customs has taken into account the flow-through effects of alleged dumping. I think, in respect of the cases that JELD-WEN has participated in, the scope of the investigation seems to be somewhat confined and does not take into account, to my knowledge, impacts on employment in other sectors and investments in capacity. This is why I think Senator Xenophon's bill is particularly important. We need to round out the analysis so that we can shed some light on the full implications of dumping and proposed trade measures. It should facilitate sound analysis.

I do not envy Customs having to try to disentangle the effects of changes in the exchange rate, changes in transport costs and the pricing of imports. There are a lot of things that are percolating and cross currents, and to try to identify the separate contributions of some of those influences is technically a very difficult exercise. You do need people with accounting and economic experience, and it would be highly advantageous were Customs to be able to avail itself of people with direct commercial and industry experience. It is not a desktop exercise.

Senator XENOPHON: Would that save money in disputes?

Dr Silberberg: Longer-term. I think it would enhance the quality of decision-making, and it might well. If we had access by professionals to information that is deemed confidential, I think it would cause both applicants and objectors to think very carefully about the quality of the information that they submit to customs in their submissions.

Senator CAMERON: To come back to the issue of employment: 269TAE talks about Customs and Border Protection. They can consider protecting price, volume, profit effects and other economic factors. I assume that an economist would argue that, if you protect those areas, you protect employment. It seems to me to be quite wrong that employment is not a specific factor in 269TAE, and I wonder if that would be WTO compliant if that were included.

Mr Percival: I would probably have to take that on notice. The thought that goes through my mind immediately is that, when you think of antidumping remedy, it is simplest by imposing a tax in the form of a duty on particular imports. The question that immediately runs through my mind is that it has a price effect—the idea is to uplift the price of the imported goods—so can that translate into protection of employment? I suppose the answer at a logical level is that if you are protecting the industry one would suspect that it would. Off the top of my head I would not think that that is necessarily WTO inconsistent, but I would like to take it on notice to give it more thought.

Senator CAMERON: Sure.

Dr Silberberg: One of the issues that we are confronted with is that, if we were to have duties increased on some intermediate goods, where duties do not apply to the final product there is an additional possibility of import leakage of fully fabricated products. That is pertinent to windows. There are price points on clear flow glass where it will be more economic to bring in fully fabricated windows, so we have to be careful. We could bring in fully fabricated double-glaze windows below the cost of what is being produced in Australia today. It is a real risk. We have seen significant import penetration—

Senator XENOPHON: No dumping there?

Dr Silberberg: No. JELD-WEN operates in 22 countries. It knows what the price of glass is. It is essentially a global commodity. It knows what its production costs of windows in the United States are, and they are much lower. One of the reasons the cost to produce is much lower in some other countries is that they have a higher level of standardisation of windows. In Australia the extent of import penetration of commercial building has gone north while expenditure on commercial building in Australia has been down quite considerably. The reason we have more import penetration of fully fabricated windows in commercial buildings has nothing to do with dumping. It has a lot to do with standardisation of window sizes and the costs that apply to the production of those window units in countries that have production capacity that exceeds Australia by an astronomical factor. We are a small country. We have significant disadvantages in terms of local manufacturing when we look at some of the global giants that occupy this space. The issue that we see is that, once standardisation moves beyond commercial building into residential, you are going to have a lot more fully fabricated windows coming into the domestic building in this country. You have organisations such as Bunnings and Lowes which have entered into license agreements with China for windows.

Senator XENOPHON: Coles and Woolies in other words.

Dr Silberberg: We need to be mindful of these developments. While there might well be a temptation to provide additional protection for the local manufacturer of an intermediate product, there are a lot of other factors at play. We note that in the United States dumping duties on aluminium extrusions were increased quite a bit recently and there has now been an upsurge in fully fabricated shower screens from China going to the United States.

Senator XENOPHON: Would you be able to provide further information on notice about that and also about Bunnings and Lowes as well. That might be interesting.

Dr Silberberg: Yes, happy to do so.

CHAIR: Senator Eggleston, do you have any questions?

Senator CAMERON: I was not finished. Do I get any more time?

CHAIR: No.

Senator EGGLESTON: It was interesting what was said that the United States. I am very interested in international comparisons. Do you wish to make any comment for the purposes of the record on differences between Australia and other countries in terms of anti-dumping practices?

Dr Silberberg: Senator, I would like to ask Andrew Percival to respond to your question.

Mr Percival: Senator, if you would not mind elaborating on your question.

Senator EGGLESTON: How different are and what are the differences between Australia's anti-dumping practices and law compared to other countries with which we deal such as the United States, such as countries like New Zealand, the United Kingdom and European Union countries?

The specific reference was shower curtains and things brought in from China. China is exporting to the world. Without wishing to specifically identify China, what are other countries doing to manage the impact of low-cost manufactured products which compromise or undercut their own manufacturing industry? A comparison between the Australian anti-dumping regime and that of other countries to the extent that you could give it would be very interesting.

Dr Silberberg: I do note that the Productivity Commission did, in its inquiry report, draw up a comparison of the features of the anti-dumping systems across countries. I do note that some of the provisions that Senator Xenophon has in his bill are picked up in some other countries, particularly relating to things like national interest type considerations. Canada and the European Union, for example, have built-in some of those considerations into their anti-dumping systems.

Senator EGGLESTON: Thank you. Chair, could we obtain a copy of the Productivity Commission report for the committee.

CHAIR: Yes. I am sorry, Senator Eggleston, you missed out on getting a copy of the recommendations, which the rest of the committee has just received.

Senator EGGLESTON: You could fax or e-mail it to me.

CHAIR: Yes, we will do that. Thank you to Dr Silberberg and the JELD-WEN people.

HUDSON, Mr Andrew, Former Chair, International Law Section, Law Institute of Victoria

PERCIVAL, Mr Andrew, Deputy Chair, International Law Section, Law Council of Australia

[11:23]

CHAIR: We welcome the Law Council of Australia and the Law Institute of Victoria. Do you have an opening statement?

Mr Percival: We do. The Law Council welcomes the opportunity to appear before the committee and to address any questions the committee may have on the two bills and our submissions on them. Insofar as the Law Council and the Law Institute are concerned, we consider that Australia's antidumping and countervailing system should be efficient, effective, impartial, transparent, comply with Australia's domestic and international obligations and provide interested parties with the right to have decisions made under the system—in the first instance, under the current system, reviewed by the Trade Measures Review Officer and subsequently by the Federal Court. I should just note that not all decisions made by the minister under the existing regime are reviewable by the Trade Measures Review Officer. I think that those under division 5, which are review of measures and division 6A, which is a continuation of measures, are not reviewable by the Trade Measures Review Officer, which seems curious. Without going into a great deal of detail the Law Council are aware that there is and has been, certainly in the media, a lot of speculation as to the effectiveness of Australia's anti-dumping system and whether those countries which are exporting to Australia are complying with WTO rules. To the Law Council this perhaps is a reflection of a degree of lack of confidence in the system.

We would submit that while we believe that organisations such as Customs and Border Protection Service have an onerous task in front of them they do do the investigations thoroughly and professionally. The system lacks an element, in our view, of transparency which affects the confidence of whether you are the Australian industry seeking to have measures applied or you are an importer or exporter resisting the application of measures. It is difficult often to understand outcomes or the processes that necessarily were gone through. We believe that increased transparency would assist in improving confidence. It could also improve in reducing costs and the timing as interested parties—that is, the Australian industry importers and exporters through their representatives—would have access to the information before Customs and could make responses in a much quicker fashion and probably more to the point.

Again we would not necessarily just restrict access to the legal profession—obviously, we would like that but we recognise that there are other professionals who, with legally enforceable confidentiality undertaking, should also have access and contribute to that process.

CHAIR: Thank you. You are aware of course of the Productivity Commission report.

Mr Percival: I am aware of the Productivity Commission report. They looked at the issue in, I think, three or four paragraphs. They referred back to the Willett report and, for other reasons, I do not believe they went through it in the depth that I would have hoped they had. Certainly, the Law Council in its submission to the Productivity Commission recommended that this sort of process be adopted in Australia.

CHAIR: So generally speaking with the Productivity Commission reviews—apart from that particular issue—do you generally concur with the direction they head in.

Mr Percival: In substance, I think the Law Council concurred. I would have to go back to the submission that we submitted to Customs in response to the final report of the Productivity Commission to go through the detail of that again but that is certainly publicly available if you needed to seek the Law Council's view on it. I think in substance we concur with many of their recommendations.

Mr Hudson: I am conveniently also called Andrew, we thought it facilitated the process by doing that! I am a partner at Hunt and Hunt law firm. I also sit on international law section of the Law Council with my colleague Mr Percival. We have worked collaboratively in this space for a long time both the Law Council and the Law Institute. We have both written submissions on behalf of the Law Council and also the Law Institute into a variety of anti-dumping and other customs legislation which have come before parliament, including submissions before different Senate and other parliamentary enquiries. We also worked collaboratively on submissions to the Productivity Commission and we have worked collaboratively on this submission as well.

I think it is safe to say that we share very similar views on the legislation and on how the Australian dumping system should work and does work. We certainly endorse the opening comments by Mr Percival on that. We

should also probably add briefly that both Andrew and myself have practices which involve acting for parties involved in anti-dumping investigations on behalf of applicants for dumping duties or for people trying to resist the application of dumping duties. I am sure we have both acted for clients who have not proceeded with applications for anti-dumping duties for economic or legal reasons as well.

If I might briefly address a couple of the issues around what Andrew said. We certainly endorse and we are both very much of the same line in respect of the confidentiality issue. It is extremely difficult for a party involved in proceedings acting for an importer to properly address material if it is all deemed confidential. Yes, you do get a non-confidential version but really a lot of the exciting and important information is just not there and it makes it very hard to be involved. In many other jurisdictions, parties—legal representatives or others—get access to, for example, AAT proceedings. Whilst a party can say, 'This information I'm giving to you is confidential,' as a lawyer I regularly give undertakings to the other party and to the AAT, even to the client on occasion, that in exchange for providing the confidential information I will undertake not to disclose it. So there are mechanisms available and I endorse Mr Percival's comments regarding the Productivity Commission's approach on that.

Mr Percival: And I just said that the Federal Court has a similar sort of approach.

Mr Hudson: In that context, I think that would facilitate things. If you are looking briefly on the issue of speed of the inquiry—and I think that has been a concern that has been expressed on a number of occasions—you could actually take the minister and the political aspect out of the decision. All the final determinations require ministerial approval and ministerial sign-off. I think in our submissions on this we said that if you want—

Mr Percival: We said in our submission to the Productivity Commission that if you find dumping causing material injury and there is no ministerial discretion in a public interest test then why is it going to the minister? It is simply an administrative decision.

Mr Hudson: So if you take the political aspect out of it altogether—

Senator XENOPHON: But the minister could act quickly, though.

Mr Percival: Apart from one case, which I think took 24 hours, it generally takes several months.

Mr Hudson: It does. The ammonium nitrate case was given to the minister on 12 April. We regularly have clients who say: how has the minister made the decision? If you are talking transparency there may be an aspect there that interested parties do get an opportunity to present before the minister. I have done that myself, about canned mushrooms of all things, where we put them on a plate and showed him. But, from that perspective, if you want to expedite it you could take that level of process out of it and leave it entirely to a decision-making body such as the Australian Customs and Border Protection Service.

Another thing we mentioned in our submission was perhaps working with other government bodies and with the ACCC. This is without, in any sense, suggesting that Customs and Border Protection do not do a terrific job; I think Andrew and I are both firmly of the view that they do a terrific job within the parameters of the legislation and the resources they have. They should certainly have more resources. Many of these issues are competition issues and whether they work together with the ACCC, for example, on different aspects or whether the ACCC takes it on independently is one of the other differences we have with the Productivity Commission.

CHAIR: What was the point there about working with the ACCC? You think they do or you are not sure?

Mr Hudson: They are not involved in the investigation process. They are in economics. They look at markets and the like and maybe there is some collaborative work there.

Mr Percival: It seems to me that there are experts both within the ACCC and the Productivity Commission, which, when you are looking at that particular dumping investigation, which may involve competition from imports compared to locally produced products, it would be sensible to get some vehicle with that sort of economic background to at least have a brief look at it. There may be nothing in it, but on other ones there could well be. I certainly know that in one case that I was involved in involving a particular model, a white-good product, I would contend that the Australian industry just missed out on three ships in the market. The market shifted three times and they were behind it each time. I can make that observation, but it would be better if somebody like the ACCC said, 'Yes, this is what is happening in the market.'

Mr Hudson: I will address that, given your question about any differences we may have had or any areas in the Productivity Commission's recommendations where we potentially—perhaps 'disagreed' is not the word—thought there might have been other recommendations. But generally I entirely endorse the underlying theme of additional resources in this area, therefore additional transparency, creating additional confidence and additional happiness.

CHAIR: Thank you, Mr Hudson.

Mr Percival: If I could make just one comment to clarify. In terms of the Law Council's submission, it is not my submission and it is not Andrew's submission.

Mr Hudson: It is our body's submission.

Mr Percival: It is our body's submission and there is a group of people who actually work on it.

Senator XENOPHON: Can I just pick up on the issue of competition. Taking into account that competition issues are a red herring, isn't there a threshold that if the goods are being dumped and it fulfils the definition of being dumped then issues of competition are not really relevant, are they?

Mr Hudson: They do come in in terms of material injury. They look at what else is happening in the marketplace at that time. What appears to be material injury might be caused by other competitive forces within that industry. We have this linkage issue. You have to link the goods that are dumped at price causing the material injury. You have to determine whether there has in fact been material injury caused by these imports or whether it has been caused by other factors. That is where you potentially get other competitive factors coming into it and causing it.

Mr Percival: Shifts in the market could have nothing to do with dumping. The WTO jurisprudence and our own jurisprudence is to look at: what is the injury and then what is the injury that has been caused by other economic factors—shifts in the market—

Mr Hudson: Consumer preference, for example.

Mr Percival: increases in the Australian dollar, the GFC.

Senator XENOPHON: Sure, but there is a causation issue. We discussed this in your previous evidence. I am a tort lawyer and we look at issues of causation, and I think the principles would be the same. If you could show that the dumping of goods made a difference—in other words, if it was one of the factors that made life more difficult for the local manufacturer—surely that should be a factor if it is making it more difficult.

Mr Hudson: And we are not moving away from that at all.

Senator XENOPHON: Are you sure you are not moving away from that?

Mr Hudson: No. The point I am making is the availability of the resources from the ACCC.

Mr Percival: And looking at having a government expert on issues of competition and what effect they may be having on the market. If you have got dumping and you can see that the dumping is having an impact on local prices and/or sales volumes and you can draw the connection between the two, which is the causal connection, then clearly that is relevant. Maybe the shift in the market is completely irrelevant. I am not trying to second-guess because that would depend on each investigation according to its facts.

Senator XENOPHON: But if there is a test that says that the dumping of goods so long as you fulfil the issue of dumping is making life more difficult for the Australian manufacturer to any material degree then surely that should be enough. You are saying it should be?

Mr Hudson: Part of the process of making that decision is determining—

Mr Percival: Certainly the test in the legislation is: is dumping occurring? If the answer to that is yes. Is the local industry incurring injury in either a price related form or a volume related form—and I can go into that in more detail? If the answer to that is yes. Then you ask if the injury is material, and that is a pretty generally subjective assessment. Then you ask: how are the dumped imports causing the injury? Normally there would be two ways in my view that it would be doing that. You look at the dumped imports. Say, they are coming in at a dumping margin of $10, so instead of $100 they are coming in at $90, and they are undercutting the Australian industry prices by $10. That can affect the sales volumes. If they are losing sales volumes then they are obviously losing profits and profitability, so that flows through the chain. The other way it can have an effect is through price depression so the Australian industry drops its price from $100 down to $90. Presuming the market still sells the same volumes it still has a price effect because it is losing profits because it is not making the extra $10 it would otherwise make. That is how you track it through. You can do it. That answers your question. That is the causal relationship. If there is something else happening in the market—

Senator XENOPHON: But shouldn't the predominant issue be: if imported goods are being sold below cost in this market—

Mr Percival: Below cost is not relevant.

Senator XENOPHON: Below the home market price and we have a manufacturing base in Australia that produces similar goods then should that be the overwhelming criteria?

Mr Percival: The WTO criteria are that you need to show that the dumped prices are causing the material injury. Article 3, which we were looking at before, sets out how you work that through.

Mr Hudson: I think when we were talking about material injury before we talked about the ability to look more broadly and looking at the downstream parties as well.

Mr Percival: Again, the material injury historically or traditionally has been: has the local industry lost sales volumes and reduced prices and therefore lost profits and profitability? I think certainly in your bill and in the existing Customs Act they are not the only injury factors that there can be. There can be a reduction in return on investment or the ability to raise capital for investment. There can be other injurious factors. I am not walking away from that. But traditionally it has just mainly looked at profits and profitability.

Senator XENOPHON: But isn't the predominant issue whether you are selling goods in this market below what you are selling them for in your home market?

Mr Percival: No. That is only half of it. You still have to show that there is material injury caused by that low pricing. To import goods at dumped prices is not unlawful, illegal or actionable so long as it does not have an adverse effect in the form of material injury to the local industry.

Senator XENOPHON: It is a question of how you interpret that, because you have acknowledged it is subjective. You have made a number of assertions in your submission that this would be in breach of our international obligations. How do the US, Canada and Europe deal with these issues? In a sense, they seem to be more vigilant in terms of the potential impact on local manufacturers than we seem to be, particularly the US with steel imports.

Mr Hudson: Hopefully I can address this in part. There are increasingly situations where measures in respect of certain goods are being applied internationally. For example, I think we have talked of extruded aluminium. There were Canadian measures which were put into place, there are Australian measures which are now in place and the US has initiated an investigation. I do not quite know how far that has got. The US has got a different system, which is still WTO compliant but—

Mr Percival: Um—

Mr Hudson: Well, okay—

Senator XENOPHON: Mr Percival, you are not sure? It must be WTO compliant.

Mr Hudson: Indeed, it must be—

Mr Percival: It is not.

Senator XENOPHON: It is not?

Mr Hudson: It is possibly not.

Senator CAMERON: Probably the advice from Treasury in the US was never made public.

Mr Hudson: By the same token, the Americans have the International Trade Commission, which is—

Mr Percival: They have a split system, where there is one body which actually does the dumping investigation and there is another body which does the assessment of material injury. We used to have that previously, with Customs doing the investigation and then, predominantly, the Anti-Dumping Authority doing that, but that was scrapped.

Mr Hudson: I think one of our recommendations might have been to look at that.

Mr Percival: On your question about the US and other countries, I could be wrong but I think it might have been DFAT representatives who said that disputes in the WTO are predominantly about antidumping rules. The US gets regularly hauled into there. Their practice of zeroing has been found three times to be non-compliant.

Senator XENOPHON: Practice of what, sorry?

Mr Percival: Zeroing.

Senator XENOPHON: Which is?

Mr Hudson: It's really, really yuk!

Mr Percival: When they do their dumping calculations, they take out of those calculations all exports that are found to be above the dumping margin price and then do the dumping margin calculation on the ones that are dumped. The effect of that is that you end up with a dumping margin which is significantly higher, because it is an averaging process.

Mr Hudson: In the Byrd amendment there was a provision in the US whereby they gave the dumping duties back to the local manufacturers.

Mr Percival: Which local manufacturers could also be multinationals, but putting that aside.

Mr Hudson: So the revenue collected basically went back to the local industry, and again WTO said that was not a good idea; in fact, it was inconsistent with their provisions.

Mr Percival: I think in the Law Council's submission—I cannot remember on which bill—they found that the manner in which they assessed whether the measures should be continued, the test, in the US was wrong; it was inconsistent. It regularly happens. I do note that the US does actively pursue antidumping. They are currently looking at reforming their system. I have got articles on it which I have not read, but they seem to be moving probably closer to our system.

Mr Hudson: But they are known as being more aggressive. They have got a much bigger administrative infrastructure, which reviews US trade relations with a variety of countries and I think it is probably fair to say that they more aggressively pursue what they see to be issues of concern for the local industry.

Senator XENOPHON: So it is a resources issue in part.

Mr Hudson: It is a resources issue and also an attitude issue.

Mr Percival: But also you are finding that China and India are increasingly high users of antidumping in the world today, so everybody is getting into the game.

Senator XENOPHON: When you say that these are in breach under the articles of the WTO agreement, are you referring to case law as such or are you saying that prima facie it could be? It has not been tested, though, has it?

Mr Percival: It depends on which particular ones that you are looking at. As you said, regarding the one dealing with provisional securities, we are just looking at the article in the WTO antidumping agreement and what it says. I am not certain whether there is any WTO jurisprudence on that. In relation to article 3, we have referred to two WTO cases on that. If the Senate wants me to go into further detail about those, I am more than happy to.

Senator XENOPHON: I would find it useful. You have referred to the dynamic random access memory semiconductors case.

Mr Percival: From Korea, I think.

Senator XENOPHON: From Korea. That is one of the authorities that you referred to.

Mr Percival: I am more than happy to paraphrase the reasoning in those cases, at a panel level. The panel then gets appealed to the WTO. Panel body reports go from anywhere to 200 to 400 pages. The appellate body reports are usually shorter; 100 to 200 pages.

Senator XENOPHON: A precis would be terrific. We would thank you for that.

Mr Hudson: They usually issue a summary, don't they? Just the highlights.

Mr Percival: To wade through one of those is not easy. But if you would like some further comment on that, I can provide it.

Senator XENOPHON: Yes.

Mr Hudson: In our submission on the more substantive bill we have drawn on the words in the WTO agreement that we see as being perhaps inconsistent.

Senator XENOPHON: But you acknowledge that in the current system, if you are a small- or medium-sized enterprise in this country and you are worried about goods being dumped affecting your business, you have a hell of a fight on your hands.

Mr Percival: I agree. It is tough. I have acted for SMEs, so I do have some knowledge, although most of my clients tend to be importers and exporters. It is difficult, but the difficulty with SMEs—unlike the major users of Australia's antidumping system, which tend to be major companies usually with a monopoly or a near monopoly in Australia—is that there are usually hundreds of SMEs. This was a part of your issue about the threshold amount of the Australian industry that you need to get your case heard. To get a sufficient number of SMEs that produce like goods together in the same room with consistent accounts and a consistent story is really difficult.

Mr Hudson: I would endorse that totally from my experience as well. More generally, there is the proposition that any party involved in a situation that they think is illegal or unfair and that is affecting them and that has to resort to litigation of any type—antidumping or anything else—finds that it is costly and disadvantages a lot of them. The threshold problem of the cost and the complexities applies to anybody seeking redress in any form, whether it be antidumping, whether it be before a magistrate's court, an administrative tribunal, a Federal Court, a High Court or a Supreme Court. Those important threshold issues of complexity and expenditure apply across the board.

Mr Percival: Earlier on Senator Cameron raised the issue of free trade agreements. Without expressing any views on the utility or otherwise of free trade agreements, from our perspective they do not really impact on antidumping. Between Australia and New Zealand, there is no possibility of introducing antidumping actions. It is basically free trade between us. Imports can come in, whether at dumping prices or not, from New Zealand and there is no opportunity to take an antidumping action. But free trade agreements involving virtually any other country do not address the issue of antidumping at all.

Mr Hudson: Antidumping regimes are explicitly left in place. They are not derogated from; they are not diminished.

Senator CAMERON: The point I was trying to make in that question was that if you do not have a bilateral preferential trade deal in place—that is what they are; they are not free trade agreements—then the visibility of dumping becomes easier because there are no trade deals, you do not have to look at any of the details of the trade agreement to make an assessment as to whether some dumping has been taking place. So what you are really saying is that, regardless of the trade agreement, you still have to come back to the anti-dumping agreement on article VI. So that would still have an overarching implication. Whether you have got a trade agreement or not, the anti-dumping agreement of the GATT would still apply.

Mr Percival: Correct.

Mr Hudson: I could add one example to do with pineapple at the moment. There are a couple of measures in place where the other countries involved—

Senator CAMERON: You shouldn't mention pineapples because we'll end up getting Senator Boswell here!

Mr Hudson: Okay, perhaps I will avoid the pineapple—it's probably more comfortable that way! Generally, a number of the dumping applications do involve countries with which we have free trade agreements. There is currently an investigation about US biodiesel. There are measures in place in respect of goods coming out of Thailand and other ASEAN nations.

Mr Percival: There have been with Korea.

Mr Hudson: Yes. They are countries we trade with the most and therefore there are going to be more actions. But certainly it does not detract from that.

Senator CAMERON: Senator Xenophon's bill has in amendments (1) and (2) the inclusion of trade unions in the definition of interested parties. I am amazed by the submission from the DIISR; I am not sure if you have seen that. What it says is:

> The involvement of unions … might lead to tensions between employees and employers or between parent and subsidiary companies, with adverse implications for investment and manufacturing in Australia.

It goes on to say:

> 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 goes on to talk about the need to minimise unintended consequences. Is there any legal restriction on Australia actually including the trade union movement as an interested party in the legislation?

Mr Hudson: You talked about the US experience. In the US the trade unions are quite active in this field. I was involved in some capacity-building work in Vietnam and one of their issues was catfish going into the US. A number of the parties who were initiating or interested parties were local union membership on behalf of the workers effectively who were being disadvantaged, in their view, by cheap imports or unfairly cheap imports of catfish from Vietnam. I think I might have posed this question previously. There is no reason in principle why a trade union should not be an interested party, but their ability to be the applicant is the question, I think.

Mr Percival: Their ability to be the applicant certainly would be problematic. Currently the legislation provides that trade unions actually form part of the interested parties. I think the test is that a majority of them have to be directly affected, or some words to that effect, and I think Senator Xenophon's bill actually reduces that. So it actually expands the potential number of trade unions that could be interested parties. Without having gone back to look at WTO rules, I cannot see why there would be an international legal reason against it.

Senator CAMERON: I would qualify my comment by saying I had a very quick look at the WTO rules, but I do not see anything in those rules that talks about a government having to take into consideration tensions between employees and employers in trade agreements.

Mr Percival: I would be very surprised if it did.

Senator CAMERON: So would I.

Mr Hudson: And that may not be consistent with the International Labour Organisation, the ILO.

Senator CAMERON: You may not be qualified to answer this, but I would still be interested given that you have had a good look at trade issues. Have you any idea why—and I will put this question on notice to DIISR—there would be adverse implications for investment in Australian manufacturing if the Australian trade union movement was an interested party?

Mr Hudson: No.

Senator CAMERON: You look as bewildered as I am, I have to say.

Mr Hudson: I looked at that briefly on the way up, amongst the other submissions, and I think it is fair to say we have not teased that out. We might need to do some further work on that. Perhaps we will put our heads together again on this one, but I think the trade union movement are included as an interested party. The issue is their ability to initiate as an applicant.

Mr Percival: I would have thought that the trade unions' contribution to an investigation once it had been initiated would be to say, 'If you don't do something, this is what the likely impact is going to be on my members.'

Senator CAMERON: If a company is involved in transfer pricing and the parent company has a subsidiary in Australia and it decides it will dump goods within Australia and the local company is under the instruction, 'Don't you say anything about this—just get it into the market,' why shouldn't the Australian trade union movement be able to protect jobs in Australia against transfer pricing and dumping?

Mr Hudson: If I could just go to the transfer pricing issue, transfer pricing does create an issue for Customs in terms of the valuation code.

Mr Percival: Correct.

Mr Hudson: There are a wide variety of issues for both the ATO and Customs. I am involved with them at the moment. The issue is that, if they are changing prices in Australia and artificially bringing the prices down so they do not make a profit here, they are not declaring the real value of the goods. It is open to Customs to bring an action against them for misleading statements or values not being correct to recover the duty and penalise them.

Mr Percival: Basically recovering duty. But I suppose the issue in transfer pricing is probably, putting aside the Customs valuation and the ATO type issues, that if they are turning around and saying, 'We are going to ship goods to Australia again at a low price because we want to make a profit offshore and not in Australia,' and that leads to dumping then your question as to whether the trade union could or should be able to do anything about it—

Senator CAMERON: It should have standing to bring an action. That is the point I am making.

Mr Percival: The question I have is this—and I would probably want to think about it more. It is the issue that Mr Hudson pointed out: would they have sufficient information to be able to prepare and lodge that application with Customs?

Mr Hudson: On behalf of the industry.

Mr Percival: On behalf of the industry. I do not know the answer to that question. I understand where you are coming from.

Senator CAMERON: They are not underresourced and they do have contacts elsewhere.

CHAIR: Mr Percival, you mentioned that in the United States several processes and decisions were held to be against WTO requirements. Did that result in the overturning of those decisions in the United States?

Mr Percival: The WTO process is that a complaint is lodged by another country saying your systems and processes are not WTO compliant. If the dispute resolution body in the WTO concludes that that is correct and those processes, procedures or legislation are not WTO compliant then typically the panel, the appellate body who has heard the case, will say, 'This is what you need to do to bring the processes and legislation'—whatever it might be—'into compliance,' and there is an obligation to do that. If they do not do that then ultimately there can be sanctions, which can take the form of awards of compensation or trade sanctions. This is part of what you are seeing, not in this area, in the Boeing-Airbus dispute.

Mr Hudson: Australia has been subject to WTO resolution issues that affected the apples from New Zealand—the fire blight issue—where they ruled that our measures were not consistent with WTO rulings. They told us to go away and do it in a way that is consistent.

Mr Percival: Flowing from that, one would expect that having had a WTO ruling saying that our procedures in the DRAMS case were non-WTO compliant, you would think it would be incumbent upon the US to not only legislate to change its rules but also revisit that particular case.

CHAIR: Review the decision?

Mr Percival: Yes, because clearly it does not stand up.

CHAIR: It would be very disruptive for the industry involved. It would be a very long period of uncertainty for them while the case was at the WTO and then to see what the government's response would be.

Mr Hudson: You are correct in mentioning the government response because ultimately a political aspect comes into it as well.

Mr Percival: It can do. The US has been playing around with zeroing for a long time. All they really need to do is to get rid of it and they would save themselves a lot of time and money.

CHAIR: It is probably a bad political time at the moment.

Mr Percival: The commentators in the US are suggesting that they scale back some of their anti-dumping.

Senator XENOPHON: If you have any information on that commentary it might be useful. The Law Council's and the Law Institute of Victoria's members are responsible for preparing this comprehensive submission. What proportion of work would be done for those seeking to have dumping duties imposed and those seeking to oppose it? Is there any way you could—

Mr Hudson: Not really. The reality is, as with every volunteer organisation, there is a reasonably small group of people who put up their hands—

Senator XENOPHON: But in your practice?

Mr Hudson: In my practice I have acted for both.

Senator XENOPHON: Do you act predominantly for one rather than the other?

Mr Hudson: Not really; it has been evenly split down the middle. It has almost exactly been split down the middle.

Senator XENOPHON: Is that similar for you, Mr Percival?

Mr Percival: No, there are a few exceptions where I have acted for the Australian industry. I tend to act predominantly for importers and exporters—not by choice, but by their choice of me.

Senator XENOPHON: But you would contest the imposition of dumping duties, generally?

Mr Percival: Generally. I would say that I do not think that is necessarily the case for all the people who participated in preparing the submissions. I would also mention that some of those people who assisted in preparing the submissions have also sat on WTO panels.

Proceedings suspended from 12:03 to 13:15

CROFTS, Mr Brad, National Economist, Australian Workers Union

FETTER, Mr Joel, Policy and Industrial Director, Australian Council of Trade Unions

PARSONS, Mr Callen Leslie, National Industrial Officer, Australian Manufacturing Workers Union

WACEY, Mr Travis Kent, Policy Research Officer, Construction, Forestry, Mining and Energy Union

CHAIR: Welcome. Gentlemen, would you like to make an opening statement?

Mr Crofts: Yes. We will share the opening if we may. We will be as succinct as we can. Before opening, on behalf of DOW and Paul Howes, our alliance partners in relation to this issue, I would like to publicly acknowledge the participation of Senator Xenophon at a recent antidumping round table that was held in conjunction with industry on 20 April. That attendance and participation was much appreciated in a very busy schedule, and I just wanted to put that on the record.

Thank you very much for having us attend today. Our unions have made separate submissions to the inquiry by the Economics Committee on the Customs Amendment (Anti-Dumping) Bill. We support the amendments contained in the bill, in particular the rights of unions as a party to complaints, interested parties reversing the onus of proof on exporters to importers and improvements to appeal arrangements and procedures. These reforms make important and meaningful strides in the right direction and towards improving the effectiveness of Australia's antidumping and countervailing system. Other reforms included, such as a mandated review of changes, are also strongly supported. However, at a fundamental level, resourcing is critical and needs to be addressed as the ability to secure funding should not be used to qualify government support for any of the proposed amendments.

We would like to see further changes aimed at enhancing the coverage and scope of the Customs Act to respond to a range of subsidies which are allowable by the WTO but not in our own legislation. Compliance is another important issue. Cooperation between authorities should also be mandated. Particular aspects of resourcing, governance, appeals, coverage, compliance, cooperation and review are set out in our respective submissions. Our aims are clear: the AMWU, AWU and CFMEU are not prepared to stand idly by and watch otherwise competitive and profitable local industries sustaining jobs and local communities succumb to rampant trade malpractices employed by others. The consequences of inaction in adequately addressing dumping and countervailing to Australian workers, their families and their communities are all too familiar, following the loss of employment in otherwise good, productive union jobs. Australian exporters are world competitive by definition and need to adapt to the pressures associated with the two-speed economy, including higher exchange rates and interest rates. However, the traded goods sector should not also be expected to simply absorb the added costs of illegal trade practices cutting into remaining margins even further.

The sustainability of Australia's manufacturing sector is under threat. As a vital first step, government can help by adopting a strict rule-of-law approach to illegal trade practices, consistent with our WTO entitlements. This rightly defends local industry in the national interest—and local industry is worth defending. Australian manufacturing employs at least five times the numbers employed in our mines. If agriculture is included, it is closer to seven times that number. Most of our manufacturing sector and agriculture is almost entirely trade exposed. It asks for nothing apart from fair treatment when it comes to our international rights in trade and to be afforded the opportunity to compete on a level playing field. Unilaterally limiting dumping and countervailing actions does not promote stronger competition or economic efficiency, because domestic resources end up being misallocated, corrupted by dumped or subsidised imports. This exacerbates the effects of the two-speed economy and results in higher longer-run costs.

So let us not be blind to the policy related threats which encircle our local manufacturers, workers and regions from those countries prepared to subsidise their own and see their output dumped onto our market below cost, aimed at driving the local competition out of our market. Our aim is simple. China and other countries must play by the international rules governing trade, investment and labour standards. Australia must enforce its rights to apply effective anti-dumping and countervailing measures to prevent injury and loss to Australian industry and workers. Amendments proposed by the bill go a long way in addressing current weaknesses in domestic law. In

particular, reversing the onus of proof and enshrining the rights of unions to be a party to investigations and complaints are warmly welcomed.

The debate on these issues is not over. Our campaign is unfinished. However, the important step this bill takes in defence of Australia's export- and import-competing sectors is wholly embraced. Our unions welcome this opportunity to comment on the amendments and stand ready to assist the committee in its further deliberations on these vital issues in the interests of our collective national prosperity. The bill is commended for bipartisan support. I now turn to my colleague from the AMWU, who will talk about the public interest test.

Mr Parsons: In its review of Australia's anti-dumping system, the Productivity Commission recommended that a new public interest test should be enacted. Our unions opposed the proposed public interest test on the basis of three important points. The first point is that there is no need for a new public interest test, because it already exists in the form of ministerial discretion. For several decades now the Commonwealth government has determined that a separate public interest test is not appropriate and that such a test already exists for the national interest considerations the minister takes into account in making the decision to impose measures or not to impose measures. The minister has the discretion to do these things and the courts have upheld that discretion.

The existence of this national interest provision within the context of ministerial discretion was reaffirmed as recently as 14 August 2009 in the Federal Court of Australia in Siam Polyethylene Co Ltd. v Minister of State for Home Affairs. The public interest test therefore already resides in ministerial discretion. It is within the minister's discretion not to impose measures if, for example, such action was likely to eliminate or significantly reduce competition in the domestic market. The fact that such ministerial discretion has not been utilised reflects the seriousness of dumping actions that cause or threaten to cause material injury to Australian industry and thereby the job and income security of working people, their families and their communities.

In Canada, recommendations by the Canadian International Trade Tribunal to the minister in the public interest to reduce and not eliminate dumping duties have been made only five times in the last 22 years and only four of the five by unanimous decision. The Australian system can already impose a lower duty, and ministerial discretion to go further exists if required. There is no case for change. The second reason that there is no need for a new public interest test is based on the time costs and risks associated with its introduction relative to the magnitude of the alleged problem and expected benefits. To impose the Productivity Commission's six-part public interest test would seriously disadvantage that part of domestic industry that is suffering from dumping. It would significantly increase the cost to government to administer the system and the cost of participants to prosecute cases under the PRT. It would also increase the time of dumping cases by at least 30 days and probably more given that 60 per cent of dumping cases under the current system are granted time extensions. It would also significantly increased the risk of unbalancing the existing system. Importantly, the additional cost, time and risks associated with introducing a public interest test have to be weighed against the benefits.

During the past decade only five anti-dumping cases a year result in new measures being applied compared to an average of 14 in the previous decade. During the global financial crisis in 2008-09, a time when dumping increased globally, Australia only initiated eight new investigations and imposed six new measures. During the most active year in previous recessions more than 70 investigations were initiated and 50 new measures introduced in the early eighties and nineties.

It has been suggested that, with very little detailed analysis, the public interest test in the European Union prevents about 10 per cent of dumping cases from having measures introduced. As noted above, in Canada, only five recommendations in 22 years have been submitted to the relevant minister to partially reduce dumping duties. With the likelihood of measures being imposed in about 50 cases over the next decade, why would it be in Australia's national interest to incur the extra time, costs and risks of a new public interest test to prevent measures being introduced in zero to five new cases. Why would it be in the national interest to do this when national interest considerations already reside in ministerial discretion and the option of lesser rates of duty already exist.

The third reason that our unions are opposed to this measure is that there is a very real possibility that a new public interest test would undermine the checks and balances in the existing system thereby diminishing its legitimacy. The introduction of a new public interest test would, of necessity, require countervailing checks and balances including the introduction of much broader public interest criteria than that proposed by the Productivity Commission. As the CFMEU argued in proceedings before the commission, there would need to be triple bottom-line accounting criteria regarding labour rights and the environment introduced into a public interest test. This is entirely consistent with the ALP platform that reads in part:

Labor recognises that economic growth and prosperity arising from increased international trade brings with it the responsibility to promote higher labour and environmental standards for Australia and internationally. Labor will support greater cooperation between the secretariats of the WTO and the ILO on the issue of trade and labour standards.

Labor supports the incorporation of core labour standards in all international trade agreements. Labor will outlaw the importation into Australia of goods or services produced with forced or prison labour. Labor will work actively through the WTO and other international trade organisations to combat and overcome the scourges of forced, prison or child labour.

Labor is fully committed to the goal of sustainable development. Labor will work towards the removal of environmentally damaging subsidies, and promote mechanisms which can reconcile the interests of environmental protection and open markets.

Labor notes the important role and responsibility we have at the Asian Development Bank and supports the inclusion of core labour standards in ADB decision-making including a role monitoring mechanism at the ADB.

Given the commitment to core labour and environment standards, it is a logical extension to extend them to a public interest test. In that context could one seriously envisage an Australian government telling a group of workers, retrenched because of the injury dumping was having on their industry, that although the overseas importer has an appalling human rights record, breaches ILO core labour standards, engages in devastating and unsustainable environmental practices and has been shown to be dumping and causing Australian workers to lose their jobs, that it is in the public interest for this to occur and dumping measures not be imposed? The potential for that sort of an outcome would seriously risk the de-legitimisation of the existing system. It would take us back into the past to the environment surrounding the highly politicised cases in the 1980s at a time when Australia's future trade engagement with China, Asia and emerging markets more generally is vital to the national interest. I will now refer to Travis to continue.

Mr Wacey: I will make some brief observations from the roundtable which Brad referred to earlier which was attended by Senator Xenophon and another key crossbench member of parliament, hosted by the three trade unions and also attended by a significant manufacturer and industries related to the workers which our unions collectively represent. The roundtable endorsed the following as an agreed set of guiding principles required for reform in the anti-dumping system as it stands today. They are, a properly resourced independent anti-dumping and countervailing system; relevant agencies, in particular Customs and the Trade Measures Review Officer, responding proactively to dumping and subsidy complaints and undertaking appeals openly, transparently, expertly and fairly; improving the culture and technical capabilities of Customs aimed at assisting local industry and compliance with Customs' decisions by all parties; to consider treating Chinese exports via state owned enterprises by a separate agreement like other state owned enterprises in other developed economies consistent with China's market economy status, reflecting WTO rights in Australia's anti-dumping and countervailing systems legal trade defences rather than industry protection; and amending the Customs Act to acknowledge that unions should have the right to petition for investigations in particular on behalf of smaller employees.

Further, it included strong local content requirements encouraging the local supply chains to manufacture and source locally and, as Callen just referred to, opposing any narrow public interest test which undermines anti-dumping measures. These guiding principles for reforming the system were endorsed by the roundtable and it is the position of the unions that we welcome reforms introduced by Senator Xenophon. Our initial advice is that, in order to reform the anti-dumping and countervailing system based on those principles, the Customs Amendment (Anti-Dumping) Bill 2011 is a good basis for exploring that as opposed necessarily to the Customs Amendment (Anti-Dumping Measures) Bill.

CHAIR: I think in your submissions there is an implicit criticism of the Customs message at least of scrutinising applications. Do you believe that is a resourcing issue? I think Mr Wacey talked about an attitude.

Mr Fetter: I am sorry to interrupt. I was interested to know whether you would like to hear a brief opening submission from me first.

CHAIR: I am sorry, I did not realise you were appearing by teleconference. Please go ahead.

Mr Fetter: Thank you, I will not be long. I just wanted to indicate the strong support of the peak council, the Australian Council of Trade Unions, for the submissions made by our three affiliate unions and to indicate our support for the two bills, particularly the bill put forward by Senator Xenophon. Clearly, the practice of dumping and the provision of unfair subsidies overseas have widespread negative effects in Australia not only on our three affiliates and their members but on all Australian workers and the remainder of our membership. It is clear that these practices have significant potential to have flow-on effects, destroy jobs in local communities and severely impact on the Australian economy. In our view it is clear that the WTO rules do allow Australia to adopt a more vigorous and effective response to this unfair practices by overseas companies and governments. Other countries use them and so should we. I also indicate that in the view of the ACTU Australia's response to the practice of

dumping and unfair subsidies also needs to be considered with the bigger picture in mind. Do we want Australia to have a manufacturing capacity, for instance, in 2050, in a world where there will most likely be a carbon tax or carbon price in place in Australia as well? Furthermore, what is going to happen when the practice of dumping and unfair subsidies is extended to trade in services? At the moment, it is principally a manufacturing sector issue, and that is why you have the three unions before you today. But, equally, these practices can be extended to services and Australia is a major exporter of services. They are my brief remarks. We urge the government and the Senate to think about the bigger picture here about the role of Australia in a world that is based on free trade but also one of course where trade must be governed by appropriate rules.

CHAIR: Thank you. I returned to my question about your view of the kind of investigation by Customs.

Mr Wacey: We think it is a combination of a resourcing issue and that is why the roundtable called for the proper resourcing. We do think there is a cultural issue there as well. If I could follow on from what Senator Xenophon referred to this morning about a trade union leader referring to Australia's position on trade as fundamentalist. Whether that flows on to Customs—

CHAIR: Could you explain that? What is this about references to the Taliban?

Senator XENOPHON: The reference was from a senior union official that, at trade forums, Australia's position on trade is described as with the Taliban and free trade because we are free trade fundamentalists—the view of other countries.

Mr Wacey: Whether that attitude flows on to the relevant agencies charged with the conduct of Australia's antidumping and countervailing system, we would argue, yes it does, based on the recent experience of that system companies that employ our members. That is why we reiterate this point in the roundtable that Australia's antidumping and countervailing system should be recognised as a legal trade defence rather than industry protection. I think it is an important point to highlight and Senator Xenophon does that by suggesting the onus of proof be on the importer as opposed to the applicant. But in terms of the resourcing issue, the three unions in submitting to the final report of the Productivity Commission did not oppose an increase in resources for the agency charged with conducting Australia's antidumping and countervailing investigations. But it is our view that that extra resourcing would not be linked to the introduction of the public interest test and other elements of that report which, in our view, weaken the system.

CHAIR: Mr Fetter, you talked about whether Australian manufacturing would still be around in 2050. How significant are allegations of dumping in this? You made it sound as if that was a fairly significant factor.

Mr Fetter: It is clear that they is a range of pressures on Australian manufacturing, including the strength of the dollar at the moment. We are not able to control some of those macroeconomic variables directly but others we are. Clearly, our response to dumping and unfair subsidies is one of the things that is within our control. While I cannot say, as a percentage, the impact that it has on manufacturing compared to all of the other pressures that manufacturing faces, it seems strange that we would have it in our power to do something about it and not actually take up the option.

CHAIR: You would see that we could considerably expand antidumping actions?

Mr Fetter: Yes, and I think the case studies that are being provided to the Senate by the unions give a number of examples where the magnitude of the dumping is in the order of 20 or 30 per cent of the price of the product; so it is clearly a very significant factor going towards their viability. In those cases at the very least, there is a strong role, you would think, for antidumping and countervailing duties there.

Senator CAMERON: I am quite happy for anyone to answer this question. We had evidence from the Department of Innovation, Industry, Science and Research regarding their submission this morning. They said this is about including trade unions in the definition of 'interested party'. They said that the involvement of unions might lead to tensions between employees and employers and 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. They go on to say that we should talk about this because there are unintended consequences. Did this department participate in any of the roundtables that you were involved in?

Mr Crofts: I am very disappointed to hear of that particular intervention by the department. We have been working with the department closely in developing a strategy for Australia's steel sector. We will continue to participate with the steel council as genuine partners with government and industry. We have had nothing but consensus around the table with industry which , as you can see, was also demonstrated among our unions in

dealing with the dumping issue and dealing with it more effectively than hitherto. It should bespeak the fact that we are not doing it adequately currently that we had that degree of cohesion and consensus.

The concern of trade unions being a party to applications and to reviews is something that we feel is fundamental to a more effective application of our dumping and countervailing system. It is something that would be more reflective of what occurs in the US jurisdiction, where this is hard wired into legislation, and also of the more consistent approach by Canada in these issues. I would have thought that having unions at the table at a time when we are attempting to address the competitiveness challenge to Australian manufacturing with the impact of subsidies not available to local manufacturers is nothing but a positive. I regret that there is that view that trade unions would somehow be doing the process down rather than attempting to contribute to its more effective development and application. That is why we are taking such a strong stand on this issue. We feel that hitherto we have not been heard as clearly as we should have been on these issues. The way that Senator Xenophon, in this bill, attempts to address—

Senator CAMERON: I do not have a lot of time. I am happy for all that to come out. I am simply asking the question: did the department consult with any of the unions appearing here today about their submission, which says that giving unions a right to be a nominated party would cause a problem for investment in manufacturing and create disputes between employers and unions?

Mr Crofts: To my knowledge, no.

Senator CAMERON: Any of the other unions?

Mr Wacey: No.

Mr Parsons: Not to my knowledge, no.

Senator CAMERON: I suppose that goes for the ACTU as well?

Mr Fetter: No, we have not had contact.

Senator CAMERON: Can I come to the issue of WTO compliance. We have had some lawyers here today, and in their submission they have raised issues about WTO compliance. Have you had a look at the compliance issue of the WTO obligations against this legislation? Have any of you any comment on that?

Mr Wacey: I have had a look. I do not have a legal or economics background. However, working in trade unions you do have to take those into account. My reading of the WTO's antidumping act would be that it is written in a deliberately vague manner on occasion in order to provide a level of sovereignty for nations to protect their industries from unfair trade. Our interpretation of the amendments tabled were that it was indeed consistent with the WTO antidumping act—or at least as consistent as the system currently operates.

Senator CAMERON: Does that go for the reversal of the onus of proof?

Mr Wacey: We just had a conversation about this.

Mr Crofts: My understanding is that Customs would, prima facie, adopt a certain degree of that onus of proof immediately upon commencing an investigation. So the extent to which the onus of proof is balanced is really what we are raising. We feel as if the balance is too far weighted toward the importer as opposed to our traded goods industries. In terms of consistency with the WTO, our approach has been to observe how our own legislation is not fully reflective of our WTO entitlements when it comes to certain actionable areas in terms of countervailing actions available to other WTO signatories. That is something that was raised in the original submission by DFAT to the Productivity Commission, something that the commission itself raised in its report. It is something that we have reflected is an area where the customs act could be more reflective of our WTO entitlements, which may assist in addressing the dumping and countervailing challenge that we face.

Senator CAMERON: I go to the broader issue here instead of the details of the amendments. I have read that there is a growing debate in the United States not about protectionism as such but about making sure the benefits of globalisation are properly shared. Professor Dani Rodrik from Harvard talks about smart globalisation as distinct from maximum globalisation. He argues that we have to have social, legal and political institutions that are embedding the benefits across society. We have also recently had the IMF say that during the Washington consensus—years of privatisation and a free-trade approach—the countries with the greatest growth were those countries that did not participate, such as Japan, China, South Korea and India. Do you have any comment on that general view that is starting to be debated internationally?

Mr Parsons: A lot of this debate that we are hearing around the world is based in ideology, essentially. We are talking about fair trade, free trade—all of these types of things. A lot of it is based on ideology. I think that what you were referring to previously—

Senator CAMERON: Fair trade what not an ideology; it was a hope—that I have given up on!

Mr Parsons: Agreed. In terms of what you were referring to previously—the gentleman from the United States—that should definitely be the objective of what we are looking at here. I also referred to that earlier when we were talking about the Labor Party platform. In terms of those objectives, that is absolutely something that we should be striving towards. What we are talking about here with this dumping legislation is trying to take away a little bit of the ideology from this debate—especially that free-trade ideology that we have had drummed into us for years—and to look at this from a more practical perspective. I guess you cannot have any more practical perspective than having 250 people retrenched. We are talking about Millicent and Kimberly-Clark before. You cannot get a more practical example than that about how the free-trade ideology is potentially hurting us as a community.

Senator CAMERON: Maybe you could take that on notice if you want to have a look at that and provide another detailed answer to it. I am also interested in the issue that you have raised about core labour standards.

Mr Fetter: I want to make a brief response before you move on. On the issue of what other countries do: part of the unions' complaints here are not necessarily about the content of the WTO rules but about how they are interpreted in a domestic context by Customs, which in our view is very timid. There is no requirement in the GATT or WTO rules that you take a very timid approach, and I think it is true that other countries have been more vigorous in applying the letter of WTO rules. So in our view some of the changes that are needed are changes in regulatory culture here to ensure that we can make decisions that are consistent with WTO rules but where Customs or whichever body is going to administer the test is being more realistic about what is going on and what the appropriate response is.

That then goes to the question of how to assess whether dumping is occurring and the burden of proof, and one of the advantages of appearing before this committee by teleconference is that I can have a copy of the GATT up in front of me on my computer screen while listening to the question. I have been able to have a look and, sure enough, as you would expect, the rule under article 6 of the GATT is that it is up to national authorities to determine whether or not dumping has occurred and arrange a criteria set out. But the main principle is that it is for the authority to determine. It is clear, we say, that the law could inform the authority as to how it is to form its judgment about whether something has in fact occurred. The only restriction, which is contained in clause 2.4 of the article, is that, if there are to be evidentiary requirements including a burden of proof, the burden of proof should not be unreasonable.

On my assessment—I am not a trade lawyer, but I am a lawyer—I would say that it is consistent with that rule to reverse the burden of proof. It does not put an unreasonable burden on the foreign company, because, after all, the foreign company is in possession of all the relevant facts about the price of the product in its home market in a way which the complainant party does not necessarily have access to. In the same way as in domestic law, where we often reverse the burden of proof in, say, discrimination cases, where you might expect that the alleged wrongdoer knows more about the circumstances surrounding the conduct than the victim, I think it is entirely reasonable that we reverse the burden of proof. If indeed that is allowed by the GATT—and I think it is—what we are saying is that we should take advantage of that provision and try to encourage Customs or the authority applying the rules to take a more vigorous approach to interpreting and applying the letter of the GATT.

Senator CAMERON: Could I ask you to take this on notice. My attention has been drawn to a US decision, *Anti-dumping measures on certain hot-rolled steel products from Japan*. The appellate body made a number of determinations that seem to be being used to say, 'That's why you can't reverse the onus of proof.' So could you have a look at that and give us your considered opinion on that decision, and can you also give us your opinion on article 3.2—I think you just spoke about that—and article 3.4. Could you do that for me.

Mr Fetter: Yes.

Senator CAMERON: Thanks.

Senator XENOPHON: Further to Senator Cameron's line of questioning to you, Mr Fetter, how many other lawyers are on the panel? Are you the only one?

Mr Fetter: Yes.

Senator CAMERON: That is it.

Senator XENOPHON: That is probably not a bad thing! Mr Fetter, further to that, I draw to your attention the submission of JELD-WEN and also the Law Council of Australia and the Law Institute of Victoria. They have made a number of assertions about this bill being in breach of Australia's international treaty obligations in relation to the GATT. In particular, I think Senator Cameron referred to article 3.2. Could you take it on notice, perhaps, to look at those particular assertions. It is not just clause 3.2; also, in the JELD-WEN submission, they looked at 3.1; 7.3 in terms of time frames; and, I think, article XI, of the GATT, saying that this is inconsistent.

Could you consider that and, in particular, the issue of onus of proof that Senator Cameron has referred to, because I cannot see how they have come to that conclusion but I think it is a live issue in relation to considering this bill.

Mr Fetter: Yes, I will certainly take that on notice. Thank you.

Senator XENOPHON: The other thing is that, in terms of the ACTU, you make reference to the subsidies that foreign governments give:

… the granting of subsidies by foreign governments does not receive proper examination, as the focus is on dumping …

Could you elaborate on that. That was in the ACTU's submission in relation to this. I invite any other members of the panel to comment on that.

Mr Fetter: Yes. We make the point briefly—but there is further material in the submissions made by our affiliates—that it seems that our system does have a primary focus on dumping, whereas, if you look at the distortionary and unfair trade practices of some of our trade competitors, it would seem that as much if not more of the damage is done through the provision of subsidies that are illegal under WTO rules. Complaints are not often brought in Australia on that basis, and the question is, I suppose, why. One response, I suppose, is that it is much more difficult to establish that the subsidies are improper. Indeed, for instance, Australia subsidises primary, secondary and tertiary education, and we would not want foreign governments saying that is an unfair subsidy improving the quality of our workforce. So, for whatever reason, the law or maybe even the parties in Australia have not been as vigorous in tackling unfair subsidies as have other parties overseas, and we think that those subtle forms of trade distortion are probably as important as dumping is in terms of adverse effects in Australia. I might leave it to the three affiliate unions to give examples in their own industries of how subsidies are affecting them.

Senator XENOPHON: Before you do that, Mr Fetter, you are saying in effect that the issue of subsidies can be used to circumvent trade rules in any event and has been used by other countries anyway?

Mr Fetter: Yes, I think clearly that is the case. China is often put up on a pedestal as the worst offender. What I am saying is that the existence of subsidies, particularly in countries like China, is often hidden and it would be an almost impossible exercise for a complainant company or even a complainant trade union in Australia to prove they did exist, particularly if there is a high evidentiary bar with an onus on the complainant to prove on the balance of probabilities that the subsidies were there and were unfair and illegal and were the cause of the low cost of the product. Again, there is an informational asymmetry here and my suspicion, although as I say I am not a trade lawyer, is that it is the difficulty in gathering evidence of subsidies that means that you do not often see challenges to foreign subsidies under Australia's countervailing duties regime.

Mr Crofts: Just to back up Joel's comments, the subsidies and countervailing measures agreement is clear in terms of subsidies which are prohibited and actionable—export subsidies being prohibited, and a range of actionable subsidies. Mention was made earlier of a number of particular subsidies to which the Customs Act does not extend, but if it did it would actually be available to us to take some action on. Those subsidies relate to research activities, assistance to disadvantaged regions and adaptation to new environmental requirements in addition to a range of measures under the WTO's agriculture agreement. It also goes to the issue, in addition, of coverage of resources. This comes back to the original question in relation to the governance and resourcing of customers. To the extent that we have, if you like, additional protections available to us and yet we may not be taking them up, that might be just as much a part of the resourcing of the customs agency as it is with their posture in terms of proactively taking up these particular cases.

As to the industries that we help to represent, Joel mentioned China and certainly steel is a major beneficiary in China of a range of domestic subsidies. There is a lot of information available in terms of the nature of those kinds of subsidies and we may be able to be more proactive than we have been in terms of addressing those. It does go to the issue of coverage and scope in terms of legislation and resourcing and a proactive approach to addressing subsidies as fiercely as we would dumping.

Mr Wacey: In the forest products industry, in particular, there is anecdotal evidence of importer firms being provided with free forestry concessions under national legislation—access to export finance facilitation at preferential rates through quasi-autonomous non-government financial institutions and so on. This is an issue relating to the point Callen made earlier in terms of Labor's commitment as part of their platform to work towards the removal of environmentally damaging subsidies and promoting mechanisms which can reconcile the interests of environmental protection and open markets. The CFMEU's preference in doing this would be through capacity building as much as possible, and that would address some of those core labour standards we spoke about earlier as well.

Senator XENOPHON: How do they enforce that, though? How do we know that we are not importing timber from rainforests which is being dumped, having been harvested with forced or exploited labour?

Mr Wacey: I would have thought that is something that will be brought up in terms of the illegal logging legislation as well. The CFMEU will be looking at that. There are other options in terms of certification and so on, but it needs to be tested and definitely there needs to be cooperation between agencies in control of Australia's antidumping system. There is also the point of the WTO and the ILO working closely together, as was previously mentioned.

Senator XENOPHON: When your organisations go off to trade forums—and you heard the Taliban remark—how are we regarded? What do fellow trade unions and fellow peak bodies say about the way that we do things here compared to the way that things are done in the US, Canada or Europe?

Mr Wacey: We will take it on notice. But I will say that our members—the workers in the forestry industry in particular—note that other countries, such as the USA, Canada and those in the European Union are able to balance their responsibilities in order to protect their industries and comply with the WTO in a much more effective way than Australia. Leaving aside whether the amendments proposed are compliant or not compliant with the WTO antidumping rules, the government needs to make a commitment to do whatever is possible in order to protect Australian industry from the practices of unfair trade, in our view. That is the view of our members: that other jurisdictions are able to much more effectively balance those responsibilities.

Senator XENOPHON: Can any or all of you give examples of that? If so, that would be useful in terms of learning how they deal with it. Mr Fetter, perhaps on notice given time constraints, what fellow organisations do overseas? How do they deal with this issue?

Mr Fetter: I will do that. I can indicate that in interactions with trade unions from overseas it has been remarked that Australia seems a little bit naive in terms of our trade policy. We are a very open economy by world standards. There is a whiff of fundamentalism about it in Australia that other trade union organisations and indeed other governments find a little curious, I have to say. My own view is that other governments play a much smarter game in terms of applying WTO rules but making sure that they are applied right up to the limit of how strictly one can apply the rules and yet be compliant. The view of the Australian practice that we are not only applying the letter of the law but we are very much capture by that free market ideology that is not necessarily captured in the black letter of the text. In the way that we interpret it, we very much put ourselves at the mercy of more cunning foreign competitors.

Senator XENOPHON: What is the American term? Schmuck?

Mr Crofts: On America, our compatriots in the US United Steelworkers Union are at the table when it comes to bringing forward actions. They have entitlements that they can petition on. They can join in petitions under the US Tariff Act and the US Trade Act 1974. What entitlements that unions in the US are able to bring actions on are clearly prescribed. They look at as askance in terms of our approach, which Joel says appears to be far more timid when it comes to testing the boundaries of what is in and what is out when it comes to the WTO.

Mr Wacey: It is a really good point. This is a not a game. It is business. It is big money. You need to be able to go beyond economics 101 and laws and theories. With game theory, for example, you would not have an antidumping system. But it does not work like that in the real world. Our members have felt the impact of this.

Senator EGGLESTON: I am very interested in the general statements about other countries being a little bit more cautious or artful in the way they administer their antidumping provisions. What seems to be coming through from these witnesses is that Australia is losing out because in some way we are not being cautious enough in the way that we apply these rules. I find that very interesting. Are the witnesses able to provide us with details in specific industries where this is occurring? Could that sort of information be provided to the committee?

Mr Crofts: Yes, by all means.

Mr Wacey: Yes, it certainly can, in regard to the paper.

Mr Fetter: I will just mention one that was in the news recently. The WTO has recently found that both Airbus and Boeing have been heavily subsidised, as everybody has known, by the governments of Europe and America respectively for many years, so there is a decision there, but in a sense nobody has clean hands there. The American government has been subsidising Boeing for years and the Europeans have been subsidising too. So, as my colleague remarked, there is a game of international trade being played here. It has to be played within the rules and it is particularly important for us, as a small open economy, that we have a rules based system. I am not condoning breaches of the rules, but clearly, with any set of rules, we should see how we can make the most of the rules, and the feeling is that we are not doing that at the moment.

Senator EGGLESTON: I gathered that from your evidence. If you can provide more detail, that would be helpful to the committee.

Mr Fetter: Yes, Senator.

Senator O'BRIEN: I am curious about the US steelworkers' complaints about it—or perhaps the union movement; I am not sure if you meant the union movement or the government—being somewhat inadequate in terms of their role in trade law. I think a 1974 act was mentioned. Is that it? The latest piece of US legislation that—

Mr Crofts: As I am aware. There are a couple of specific sections in that act where the entitlements of unions to petition for investigations are made clear, in addition to title VII of the US Tariff Act.

Senator O'BRIEN: And as far as you are aware there is nothing in subsequent iterations of international trade law which would change the position with regard to domestic legislation?

Mr Crofts: Not that I am aware of. It would appear that the US jurisdiction has taken that particular approach and adopted its domestic laws accordingly.

Senator O'BRIEN: Yes. I suppose Senator Xenophon usually talks about contemporaneous matters, but I remember Billy Joel's song *Allentown*, which is about all the steel industries closing down in New Jersey in particular and around New York, so they have not done that well in the United States, by my recollection.

The other question was to you, Mr Crofts. Part of your submission seems to be rerunning the fair trade versus free trade argument when you talk about labour standards. How does that feed into arguments about antidumping legislation?

Mr Crofts: I reiterate that the AWU fully support free trade, but we would not consider unregulated trade as equated to free trade. There are rules of the game. We are looking for the strict application of law which governs free trade—no more, no less.

Senator O'BRIEN: But you talked about labour conditions in your submission—

Mr Crofts: Yes.

Senator O'BRIEN: I think fairly. Senator Cameron, I remember, has been on the public record on this issue many times. It is a cornerstone of the argument that we should have fair trade rather than free trade. I am trying to look into your submission and ask: are you changing your position on free trade, or is that superfluous to the real argument you are putting to us?

Mr Crofts: Labour standards are critical when it comes to the competitiveness of the local traded goods sector—the ability to compete against countries that are not actually applying what would be considered as being international standards. Where that is the case and margins are affected accordingly, they are losing out, particularly in some of our major resource projects. We would contend on that basis that, without complicating our antidumping regime, we are in a position, however, to do other things in perhaps other areas when it comes to minimum local content requirements on some of our major projects, for example. Government procurement to do more to assist with the—

Senator O'BRIEN: So it is not antidumping that you are talking about?

Mr Crofts: Not strictly speaking, but it is another way of addressing the competitive—

Senator O'BRIEN: Okay. We have limited time so I just want to draw you to the question. Mr Wacey, evidence received on another committee I am on talked about the fact that European sawn softwood timber is being landed on the wharfs in Melbourne at less than the production cost of equivalent Australian produced timber. Are you aware of that? If you are, does your organisation consider it is dumping or do you consider it is a consequence of the regime of the value of by-products in the timber industry in Europe?

Mr Wacey: We are aware of allegations of a massive increase of market share of structural softwood timber from, as I think you referred, the docks of Europe affecting the market share of the Australian industry. I think the jury is still out whether it has been imported under normal value, so under the domestic price in Europe; however, there are ways which are proposed which would make it a lot easier for local industry to be able to prove that that were the case if indeed it were the case, for instance, including what is proposed by the Productivity Commission in terms of having non-confidential data which can be viewed in other jurisdictions—that data being provided through the Australian Bureau of Statistics.

Senator O'BRIEN: So you are not sure whether it is dumping; you are waiting for more data?

Mr Wacey: Yes, ultimately. It goes to the point of proving—the difficulties under the current system—that dumping has occurred.

Senator O'BRIEN: It has been suggested that the value of the product is able to be reduced because of the value of by-products in the European market for the production of biofuels has a real impact on their ability to land the product here at a low cost.

Mr Wacey: My initial reaction to that would be that it should not impact. Their normal value should be similar then as well. If the use of by-products in terms of biofuels affected the export price then it would also affect the domestic price—

Senator O'BRIEN: Can you take on notice to give us a more considered view?

Mr Wacey: I would be happy to do that.

Senator O'BRIEN: It is a complicated argument. If the cost of production is being met and a profit is being made through the various products, where should the share of profit be is a real question in an antidumping consideration I imagine.

Mr Wacey: Absolutely. I want to address your question to Brad.

CHAIR: We are running over time. There are another couple of follow-up questions, so I ask you to be quite quick please.

Mr Wacey: I would consider a properly configured antidumping system as an important check and balance for the protection of environmental standards, labour rights and human rights in the developing and exporting world.

Senator CAMERON: I will put these questions on notice because we have run out of time. Could the ACTU and the unions here give the committee their considered view on the key points of the Productivity Commission inquiry report? In the overview on page x they list a number of key points. Could you particularly address the Productivity Commission's statement that measures would not be in the public interest where they would be ineffectual in removing injury or would impose large costs on downstream users relative to the benefits of the applicant industry? What I am thinking about there from my experience in industry is an Australian car component company supplying to one of the major car manufacturers and Toyota or Ford saying: 'We have found a cheap manufacturer in Thailand with no labour rights. They are undercutting but we like the idea of reducing our costs.' I have not heard a real argument on this issue, other than what Mr Parsons said earlier about this. Given that the Productivity Commission is arguing that it is in the wider community interest to get those cheaper goods in at the expense I would think of Australian jobs I would like you to give some more thought to that. The last question is on the fact that Minister Emerson has announced some views on trade policy recently. I describe it as trade unilateralism. I think he describes it himself as that. Can you give us an idea of whether there are any implications from the minister's announcement for that dumping and change in trade policy?

Mr Wacey: That would be our pleasure.

Senator XENOPHON: In terms of the government's bill, you made reference to the Productivity Commission's public interest test. On notice, could you confirm this. Do you think that the government's bill is helpful or unhelpful? Are you neutral to it? Do you think it should be supported or not? I am not quite sure where the ACTU and the three constituent unions come at that and what pitfalls you see in that potential bill, and it will be coming up as a government bill sooner rather than later.

Mr Crofts: Certainly. If I may just quickly refer to that, it was part of our initial presentation but for time we have omitted it. Certainly the bill as far as it goes is supported but it does not actually do which at we are really looking for it to do, which has been the subject of our discussion today.

Senator XENOPHON: If you want to add to that on notice that would be fine.

CHAIR: Thank you very much to the ACTU and the three unions for appearing this afternoon. Thank you for your assistance.

JONES, Dr Garry, Planning and Development Manager, Australian Paper

[14:22]

CHAIR: Welcome. Do you have an opening statement you would like to make?

Dr Jones: I did not prepare an opening statement as such, but I would like to start off by endorsing the opening statement that Brad Crofts gave. He certainly said lot of the things that I would have liked to have said. I also point out that the CFMEU, which was represented here, is the primary union in representing our workers. Our interest in this is as an industry which is under ongoing continuous threat of attack from both dumped and subsidised products from major emerging economies. I say that firmly because there has been a recent case in the United States related to coated paper which has established high levels of dumping and high levels of subsidies. When you read through the subsidies that they have identified—and it took them many years to identify those subsidies—they are equally applicable to all grades of paper and, for that matter, to steel and a whole bunch of other basic commodities produced in those countries.

Senator Kim Carr set up a pulp and paper industry strategy group a couple of years ago. That reported in March last year. One of the things that it has identified is that our industry, the paper industry, is at a crossroads. If you have a look at the recent Kimberly-Clark announcements, the closure of two paper mills in Tasmania and before that the closure of mills in Western Australia and Victoria by Amcor—and they are going to be closing another one next year—it all adds up. That is Kimberly-Clark in South Australia but Amcor in Western Australia with their Spearwood mill before that and their mill in Victoria. It is an ongoing scenario and it is an industry at a crossroads. When you go through the information, we are really under attack from both dumped and subsidised exports from emerging economies. So it is very important that we do not lose sight of the countervailing aspect of the bill and of each of its sections. Each should apply equally to dumping and countervailing.

With the question of the reversal of onus of proof and that sort of thing, one of the major rocks on which many antidumping and countervailing cases founder, both in Australia and in the US and Europe, is the question of proving conclusively injury and causal link. At the moment if we were to launch a case we could probably show reducing prices, reducing market share and things like that. But is it the Australian dollar moving? Is it dumping? What is it? It is very difficult to prove even though it is Economics 101 that the introduction of low-priced imports will cause the local manufacturer to either have to drop its prices or reduce its market share or something else.

Going through the other things, we would endorse the view that the unions should have an ability to be represented or to even start cases in their own right in this field. It is probably not so important for an industry like ours, which has a fairly straightforward product set and suchlike and operates on a large scale, but it is certainly so for the smaller industries that do not really have the critical mass to mount cases in their own right quite often.

CHAIR: Thank you, Dr Jones. So you are saying that your industry is at a crossroads and I think your submission talks about emerging Asian economies, so how do you see this working out? So your company is an Australian company but with connections to a Japanese company, is that right?

Dr Jones: It now has connections to a Japanese company. Australian Paper was previously owned by Paperlinx, which was an Australian company. Clearly the economic outcomes that we were providing for them were not sufficient.

CHAIR: Were not sufficiently profitable or the prospects for the future were not good?

Dr Jones: I am not sufficiently a party to those to be able to answer that.

CHAIR: Given that you are linked to another Asian company and that you are talking about these emerging Asian economies, can you elaborate on that a little bit?

Dr Jones: Yes, most specifically, using the example of the US coated paper case, Indonesia and China. If you look at the example of coated paper, which we no longer make after the closure of the mills in Tasmania, you see the imports from Indonesia rise dramatically through the late 1990s and then in the 2000s the imports from China rise dramatically. When you examine the US case you see they have identified subsidies in tens of per cent and also dumping margins of similar magnitude. The EU are mounting a very similar case at the moment.

CHAIR: Clearly Australia is not the only country affected, and you have mentioned the US. Are many other countries making coated paper?

Dr Jones: Certainly. European countries are making it, the US is manufacturing it and Japan manufactures it or at least, with our company, Nippon Paper did until the tsunami. That part of it is now out of business for a while.

Senator XENOPHON: Did they have Australian manufacturing plants?

Dr Jones: The Australian coated paper manufacturing plants had already closed at that point.

Senator XENOPHON: So we are not picking up any lost production as a result of the tsunami?

Dr Jones: A small amount but not in the coated paper field.

Senator XENOPHON: Because we do not have that capacity anymore?

Dr Jones: That is right.

CHAIR: Is it just your company that does not have the capacity or is there no further capacity in Australia?

Dr Jones: We are the only manufacturers of printing and writing paper in Australia.

Senator XENOPHON: Thank you for your submission. I note that you have endorsed largely what the previous witnesses, the union representatives, have said. In relation to some of your concerns, is there a concern that, if you are involved in a dispute, the costs of it are potentially so onerous? Is that a significant factor? Do you decide not to go ahead with some disputes because you think, 'Here is another half a million dollars, or $1 million or $2 million that we'll have to spend on this?'

Dr Jones: It is maybe not so much the costs in our case, because the last few cases that we have been involved in we have run in house, although there is certainly an ongoing cost in gathering the information from overseas sources and such like. But the disruption it causes to the general running of the business and the time it takes from critical functions can be quite major. Given that, if measures are put in place, after 12 months those measures can be challenged and you might be going through it all again, it can be quite an ongoing burden. If we were to mount a countervailing case in our own right, such as the US one—I believe that cost them several million dollars to put together—that would be totally beyond our resources. Our only option would be to piggyback on theirs.

Senator XENOPHON: In your submission, under section 6, 'Other Issues', you say:

6.1 Concealment of Import Trade Data

One of the largest issues Australian manufacturing industry has in identifying and actioning unfair international competition is access to sufficiently detailed import statistics.

And you make reference to the fact that in the US there is a requirement for full disclosure of individual import shipments. Can you just elaborate on that? Is that one of the issues where it is very hard to prove a case because you just do not have the access to that data?

Dr Jones: It certainly is. Here the Australian Bureau of Statistics, if they are asked by an importer—or an overseas exporter, I believe—to conceal the statistics of imports from a certain country that the company is importing from or exporting from, they are basically bound to do so. A very recent example of that is that a new stationery chain entering the market in one of the Australian states was offering copy paper in box lots for $2 a ream, coming in from Brazil. We have no way of knowing whether or not they were just loss leading or whether it was being dumped at an extraordinarily low price, because the export stats—

Senator XENOPHON: And where did the paper come from?

Dr Jones: Brazil.

Senator XENOPHON: Yes, but what sort of timber was cut for it?

Dr Jones: In that case it was almost certainly plantation, so I do not believe there is an issue there, but the issue was that, three months before that, they had the statistics concealed.

Senator XENOPHON: What explanation has been given to you from Customs to say, 'We won't give you the same level of information that the US provides'?

Dr Jones: Customs refer us to ABS, who send us a form letter basically saying that that is the legislation they operate under. I have not tracked back through to see exactly what legislation that is. I am an engineer, not a lawyer.

Senator XENOPHON: We might want to ask ABS that.

CHAIR: Yes. I think we have explored those issues with ABS a couple of times, but it is something that we might do again, perhaps even in estimates.

Dr Jones: A company like ours can sometimes obtain the statistics by getting the export statistics from the countries exporting to Australia. It takes a few months longer and a few thousand dollars extra, but we can do that. I really feel for the smaller manufacturers on this one.

Senator XENOPHON: In relation to the causal link, that is I think the nub of it, in terms of the causal link and material injury.

Dr Jones: Yes.

Senator XENOPHON: Some of the submissions opposed to the bill—government department submissions and those that are public; the submissions from JELD-WEN, the Law Institute of Victoria and the Law Council of Australia—said that we are in breach of our international obligations. If you are in a position to comment on that—on notice, because I am concerned about time constraints—I would appreciate your views.

Dr Jones: I would like to comment immediately on that. My experience with Customs, and, generally speaking, the antidumping and countervailing operations through the Trade Measures Department, is that I have found them to be very dedicated and very good. But they actually seem to pay more attention to the WTO rules than to our own legislation. That is what they are tiptoeing around all the time. We have this absurd situation in Australia where treaties override domestic legislation, whereas the US does not operate that way.

More specifically the question of reversing the onus of proof came up in discussions with the trade union representatives—

Senator XENOPHON: Because of the provision in the bill?

Dr Jones: Yes. And I have had a couple of quick discussions with Customs, who are also firmly of the belief, as I understand it, that that would breach the WTO provisions. My feeling is that there might be some way around that in that, if you like, Economics 101 says that, if you introduce a cut-price product into a market from somewhere, the domestic product will either have to drop in price to match it or lose market share. Whether there is some way that a general economic expert report could cover that situation and cover off the injury causal link argument, I do not know.

Senator XENOPHON: Could you elaborate. I am interested in what you are saying. How would you do that? Would there be another test rather than reversing the onus of proof, would you have an alternative approach?

Dr Jones: I think it is the same test, but with a qualifier that allows it to be done by an economic expert argument rather than specific exact examples of market share decline or price decline.

Senator XENOPHON: What factors will they take into account? Will it be the long-term impacts on an industry or the short- to medium-term impacts?

Dr Jones: The way that antidumping operates is basically short- to medium-term. In fact, if the regular reviews are annual, as they seem to be at the moment, it is a very short term. So I guess short- to medium-term impacts would be the kind of thing that they would need to look at. Again, I am not an economist. I am looking for a way around the problem.

Senator XENOPHON: If it were not in breach—there is an assumption that it is in breach from some of the parties who have made submissions—or it were not an issue, would the reverse onus of proof seem to be a practical solution to the problem?

Dr Jones: Yes, certainly. One of the union representatives pointed out, I think, that the exporter is far more in possession of the facts than the person taking the action. So it makes sense that you reverse the onus of proof to the person who has the information.

Senator XENOPHON: There is that phrase 'information asymmetry' that Senator Cameron is very fond of.

Dr Jones: Yes.

Senator CAMERON: Joe Stiglitz has a lot to answer for! On the issue of reverse onus of proof, are you saying that Customs are saying to you that they think it is not GATT compliant?

Dr Jones: That is certainly the impression I got with a couple of brief chats I had with them.

Senator CAMERON: As I understand it, what government has to do is take evidence and make a determination. Have you seen anywhere in GATT that you cannot take action prior to taking those actions that are laid out? I am looking at the GATT Act now. It does not say that you cannot stop the injury, but it goes through a process.

Dr Jones: There is certainly nothing there that stops you putting provisional duties in place. The US does that all the time. It is very rare here. But the present legislation allows for that.

Senator CAMERON: We have heard that the US has a rule where unions can take an action.

Dr Jones: Yes.

Senator CAMERON: Has the US got reverse onus of proof?

Dr Jones: I am not sure about that.

Senator CAMERON: But the US can stop what they perceive to be an injury while the process is being undertaken?

Dr Jones: Yes, they can put provisional measures in place, and collect securities.

Senator CAMERON: What are securities?

Dr Jones: They impose a provisional duty and that duty goes into effectively a security deposit, to be released if the measures are not proven in the long run.

Senator CAMERON: But there is no right in the US for a company to then say, 'We're taking legal action against the government because you've done that'?

Dr Jones: I am honestly not sure. I know there is something happening at the moment where the US has imposed both anti-dumping and countervailing duties in relation to this coated paper case. I believe they are being taken to the WTO—

Senator CAMERON: That is a different issue, though.

Dr Jones: Yes—on the basis that you cannot have both.

Senator CAMERON: So US manufacturers have got more support and protection from the government than you do here?

Dr Jones: I believe so, yes. But, again, where cases have fallen down there it has been on the injury causal link issue because it is so hard to prove in a specific sense.

Senator CAMERON: The big issue here is that by the time you get a resolution to a claim that there have been detrimental effects through dumping, the detrimental effects have been in and the damage has been done.

Dr Jones: Yes, and you have started collecting data six to 12 months before you have got your application together, because you have got to collect it from overseas as well as locally.

Senator CAMERON: Customs said this morning that they have some process they use with steel, like an early warning system—those are my words; I am not saying that is exactly what it was. They have got arrangements with steel where they consult about any increase in the amount of steel that could be being dumped. Is there anything like that for paper?

Dr Jones: Not in paper. I have heard tell of this arrangement but I do not know any details.

Senator CAMERON: Would that be a good arrangement for paper—obviously you do not know the details of that, but some arrangement that would give you an early warning? The issue I raised this morning with them was that some companies may not know that this importation is in there, and it may be weeks before your intelligence out there says, 'Hey, look, there's all this cheap paper being dumped.' Is that a fair statement?

Dr Jones: It probably is. I think the steel one might relate to a system where the level of imports ramps up rapidly. There is some provision in the legislation to call a temporary halt to that, but I cannot remember what it is specifically called.

Senator CAMERON: You are aware of the new public interest test that has been proposed by the Productivity Commission—my good friends in the Productivity Commission.

Dr Jones: Yes.

Senator CAMERON: They lay out a number of checks and balances on this. One is that there have to be readily available goods at a comparable price to the dumped or subsidised imported goods. They also say that you have to have a test where there is choice and competition. The example I used with the unions was that if a component supplier from overseas dumps goods here then one of the major car companies can say, 'It's okay because it's a net benefit to us because we can sell a bit cheaper,' but that if one car component company sacks 300 workers that is okay. Is that your reading of that?

Dr Jones: It sounds very like it. Certainly when we have put in anti-dumping applications in the past, associations of paper merchant importers have been our main opponents, other than the exporter, of course. Just looking back on the submission I put into the Productivity Commission itself, my interpretation was that where an industry does not account for more than 20 per cent of the local market it will be denied access to the measures; and, in contrast, where an industry holds a significant proportion of the market it will also be denied measures as it will be argued there will be a lessening of competition. That sounds awfully like catch 22.

Senator CAMERON: So it could be theoretically possible for goods to be produced in Burma with slave labour, such as there is in Burma; for those slave-labour-produced goods then to be pushed through into Thailand; and, because we have a bilateral free trade agreement with Thailand, for those goods then to compose part of an

export of goods to Australia. It would be very difficult to find that out, but it could reduce the costs and be injurious to an Australian company.

Dr Jones: It would certainly be very difficult to find that out. Also, there is no sort of provision in any of this for looking beyond the good being exported to Australia, such as the paper from China—where is the pulp coming from? I am not sure that in our industry that is a major issue. I can certainly see it being an issue in the car industry.

Senator CAMERON: Yes. What about the number of jobs? Can you just explain this to us again: if you had robust dumping legislation in place, effectively operated as in America, would that have saved jobs in your industry?

Dr Jones: I believe it probably would, and it may well give the opportunity for more jobs. Again, it is very much like the injury issue. It is very hard to separate the different causes. Right now we have a dollar that is up around US$1.09. We have the looming prospect of a carbon tax. We have dumping and subsidies to the tune of, probably, 20 or 30 per cent out of the emerging Asian economies. Which one is the straw that breaks the camel's back?

Senator CAMERON: Are you one of the top 1,000 polluters?

Dr Jones: I guess we probably are if you assume that carbon is pollution.

Senator CAMERON: So should you be allowed to pollute with no price?

Dr Jones: Would you prefer that it be done in China or Indonesia?

Senator CAMERON: I am asking you: should you be allowed to pollute without a price on carbon.

Dr Jones: You are asking that. I guess that leads us into an entirely different question. Will it, in fact, improve the environment in any way if we are driven out of business?

Senator CAMERON: It will improve the economy here in the longer term.

Dr Jones: Do you think so?

Senator CAMERON: Yes.

Dr Jones: I take issue with you, but I do not think this is the forum.

CHAIR: I do not think it is either.

Senator CAMERON: We were doing all right up till then!

Dr Jones: And yes, I have put a submission in on the carbon issue in the last few days.

Senator CAMERON: No doubt it was, 'Let's keep polluting.' Was it?

Dr Jones: Different discussion.

CHAIR: If you have no further questions, Senator Cameron, I think Senator Eggleston will take over.

Senator EGGLESTON: Not exactly take over. Senator Cameron and others have been referring to the way the Americans deal with dumping and so on, but it has been put to me that the GATT Anti-Dumping Code and the Agreement on Subsidies and Countervailing Measures are both codes of practice rather than absolute law. As such, there is a lot of wriggle room which is used by many countries to advantage themselves, especially large companies in large countries. Could Australia be a little bit more creative, if you like, in using that sort of wriggle room to deal with dumping here in this country? Would you agree with that statement or not?

Dr Jones: You would expect that that would be the case but, as I said a little earlier, my dealings with Customs have reflected the fact that they certainly regarded the WTO rules, guidelines or whatever you would like to call them as being effectively black-letter law and were very afraid of ending up in a court challenge on them.

Senator EGGLESTON: Yet, according to the person who has passed on this view to me, many countries, including the United States, use the wriggle room within the GATT Anti-Dumping Code—which they say is really a code of practice rather than absolute law—to protect their domestic industries. Would you therefore say that our authorities are being far too conservative in their view of the GATT anti-dumping requirements?

Dr Jones: I have certainly put that to Customs in the past.

Senator EGGLESTON: You have put it to them. I am very pleased to hear that. That gives me the answer. Thank you very much.

CHAIR: If there are no further questions, thank you, Dr Jones, for coming in this afternoon.

WILLOX, Mr Innes Alexander, Director, International and Government Relations, Australian Industry Group

CHAIR: Welcome. Do you have an opening statement you would like to make?

Mr Willox: Yes, I am assuming that members of the committee have copies of our submission in front of them, so I will talk briefly about that but I will not go through it in great detail. For the benefit of members of the committee, I represent the Australian Industry Group, specifically the Australian Industry Group's Trade Remedies Task Force. This is a group of about 50 Australian manufacturing companies and industry associations. We represent their broad interests in the trade and dumping sphere. The issue of dumping into the Australian market has been a long-running concern of ours. In recent times, particularly since the onset of the global financial crisis, dumping has become a much more central and focused issue for Australian companies as they deal with the increasingly competitive global environment. Australian companies are already facing challenges with the dollar at $1.10, well above parity. Our members generally say that they can compete quite well with the dollar at somewhere around 90c but when it gets beyond that it starts to stretch their ability to compete. Due to the onset of the global financial crisis we have seen a marked increase in concerns and allegations of dumping into the Australian market. Our members realise the difference very much between dumping and straightforward competition from imports. It is no issue with competition on a globally competitive environment. It is when the competition becomes skewed and the playing field becomes unlevel.

As we have mentioned in our submission, several areas of the proposed legislation we are in agreement with, others we have some questions about and are willing to explore further. This has become very much a key issue in terms of Australian industry competitiveness and then the flow-through into jobs and investment going forward. That is the basis of our interest and our concern about this issue generally. That is all I have to say as an opening statement. In terms of the specifics, I am happy to take questions from committee members.

CHAIR: Thank you. As you mentioned in your opening statement, it is always a balance in any of this kind of thing between taking too severe measures and disrupting the markets. Customs noted that the initiation of an anti-dumping investigation can have trade chilling effect. Would you agree with that? What would be your response to that view?

Mr Willox: To initiate a claim of dumping will often take 12 months or more to gather the evidence that is required to lodge and prosecute a claim. These are not easy claims to lodge. They are more likely than not costing companies hundreds of thousands of dollars. I am aware of cases in current times where companies have had to spend over $1 million in pursuit of claims. So they are both lengthy and costly to pursue. Looking at an analysis of the statistics, Australia is a moderate to light user of dumping claims. Globally claims are much more prevalent in other markets that are being lodged. It is often put to me that at the Australian Industry Group we have many members who, if you want to put it in its bluntest form, benefit from dumping. Our response to that is yes, in some cases that may be so because it provides cheaper inputs, but with those inputs as well if you get dumping on a regular scale that distorts the markets you therefore lose your competitiveness in the market, you lose suppliers going forward and then the inevitability of market monopoly or duopoly takes over and that is the situation you are always facing. For our membership we look at the ability and right to pursue dumping claims as an important protection within the economy. They are not distorting the market if the market is not a level market to begin with. What they are trying to do is redress some balance into that market.

CHAIR: There has been some criticism of the way Customs operates during anti-dumping investigations. What is your view of the way Customs operate?

Mr Willox: We start from the premise that the system in itself is not fundamentally broken but can be improved dramatically. A key component of improving the system is better staffing, resourcing and skilling of Customs to get proper and adequate skills, particularly in terms of skills in accounting and analysis, forensic accounting, language and the like so that they can address claims in a much more expeditious and timely manner. A lot of concern is around the time that it takes for claims to be investigated, which is often up to 18 months for claims to be worked through, before there is any adjudication and then there is the review process on top of that. It is a timeliness factor and the ability of Customs to get to the heart of what are, quite often, complex cases quickly. Those are the sorts of concerns that are put forward.

There is not a widespread view or any view really that any other agency is better equipped than Customs to handle it. It is how Customs is equipped to handle these cases that is the issue of concern. That goes to one of the points in these proposals for an Administrative Appeals Tribunal type process as an appeals mechanism. We

would say that that may be necessary if there is not an improvement in the skilling and resourcing of Customs, but the skilling and resourcing of Customs should be the first steps to making it a much quicker and transparent process for those involved in it.

CHAIR: One of the bills we are dealing with, which is Senator Xenophon's bill, seeks to insert a requirement that Customs consult with independent experts. Is that your view of the way it could work or do you think it would be better to include those experts within Customs?

Mr Willox: We think that there should be the ability to consult independent experts from outside Customs. Basically, there is a strong concern at the moment that relative industry expertise in either the application of the investigation or the review process is not taken into account. We would very much support the provision or the ability for there to be consultation with outside industry experts as part of the investigation review process. This could be with people who not only are Australian but also are offshore, if they have relevant skills, expertise or knowledge to bring to the table. What we think that does is to bring forward outside views to allow Customs to maybe think much more widely and perhaps globally in how they manage these cases and these claims as they go forward and to seek other input from people who may have information to bear.

The other point on this is that we also believe that, once a claim is lodged, that should not be the be-all and end-all of the process. Additional material that is brought forward or uncovered during the process being initiated should also be brought into the investigation for consideration as part of the investigation or review process. It does not become a static claim, and outside or new sources of information are also able to be taken into account. Customs has a lot of bright people and a lot of expertise and knowledge; there is no doubt about that. But it is not the font of all knowledge and there are often very good indications where the views of outsiders, who are experts in their field, would be of benefit to the investigation.

CHAIR: You have also mentioned that it could take up to 18 months for an investigation. In fact, in other countries like the US and the European Union, the statutory period for investigation is longer than that of Australia, although the Australian period can be extended. How do you see or do you have any knowledge of the average period of investigation in countries like the US and the EU?

Mr Willox: I could not give it to you off the top of my head but, be that as it may, 18 months for an investigation is still a long time. That comes on top of an organisation or a company initiating a process that would, on average, take at least 12 months to see through. Therefore you are looking at 2½ years from go to whoa on average for the whole process and then a review process on top of that. We are looking at a long time before a company is able to begin to gain redress. We think that is too long a period and that, if possible, there should be a shortening of that time frame through better equipped investigators and with more knowledgeable inputs.

Senator XENOPHON: Mr Willox, thank you for your submission. In terms of your colleague organisations overseas, do you have discussions with other industry groups in Europe and the United States on how they deal with the issues of dumping and protection barriers?

Mr Willox: Yes, we do speak regularly with our affiliated organisations overseas both bilaterally and in international fora. Each market treats the issue differently and each has different ways and means of investigating but underneath it all there is a very clear recognition that this is not just an emerging issue but an emerged issue in the global economy, as we have all those developing markets where there has been a reduction in market share seeking new markets. The economies which emerged relatively successfully from the global financial crisis such as Australia are the markets that are attractive to companies in those developing markets, to seek access. Some of our affiliates have very similar views and some have slightly different views about the best way to tackle the issue but there is uniformity about the importance of the issue, the fact that it has emerged and the fact that it is going to be of major ongoing concern. What that demonstrates is that there is some feeling that a strong, effective, anti-dumping regime is in anyway protectionist; it is rather to provide protections for local industries to compete on a level playing field.

Senator XENOPHON: If I can go to—you may want to take this on notice—a number of submissions from government. I cannot talk about DFAT's submission at this stage. There are submissions from JELD-WEN, the Law Institute of Victoria and the Law Council of Australia which have said that this could be in breach of our international obligations under the WTO. Could you comment on that and perhaps make reference to their submissions—I think they made reference to article 3.1 and to article 11 as well. Earlier there was a very interesting question to a previous witness from Senator Eggleston. I am sure Senator Eggleston will correct me if I am wrong but basically the question was: which status do you give these rules, these WTO rules, these GATT rules? Are they a guide? Are they almost like a code of conduct rather than black-letter law and are we taking them too literally compared to other countries?

Mr Willox: Certainly, if I may say so, I think you could take the impression away that Australia has taken a very pure view.

Senator XENOPHON: Fundamentalist, some would say, Mr Willox.

Mr Willox: Yes, some may say that, but if there is a view it has certainly been very much a black-letter law view of the WTO anti-dumping agreement. I would like to see in detail what some of the government departments have said. We have always said that we have to be broadly WTO compliant, because that will then open up the option for Australia or Australian companies or organisations to be taken to the WTO. That may be an argument that we have to have in some cases to establish exactly what is intended, basically to test this agreement. It is often a matter of interpretation. We have been very clear as we framed our response to this legislation to ensure that as broadly as possible we are compliant with what we would take to be the intent of the WTO agreement; but as far as we have made clear there is very little here that we see as being far outside the reaches of any WTO guidelines.

Senator XENOPHON: Perhaps I could just go to the issue of the rebuttable presumption in this bill that if there is a finding of dumping and that dumping is causing material injury to the Australian industry then the position of some of those opposed to the bill—including JELD-WEN and the Law Council of Australia and the Law Institute of Victoria, if I am correct—is that these proposed amendments are contrary to Australia's international legal obligations under article 3.1 of the WTO agreement, because it requires that a determination of injury must be based on positive evidence. What is your view on that? I note that on the final page of your submission, in the second paragraph, you say that you:

> … support the inclusion of WTO consistent amendments which provide Australian manufacturers greater protection from predatory practices such as allowing preliminary affirmative decision to be applied once an investigation has been initiated …

What is your view on whether that is in breach of article 3.1 of the WTO rules?

Mr Willox: There we would say what we said in our submission, which is that we would support amendments that would open up the applications to Australian industry with a market share smaller than 50 per cent but larger than 25 per cent for individual businesses. We believe that that provision, from the evidence that we have seen and garnered, would be broadly WTO consistent. Once dumping has been proven and material injury has been proven there is a presumption that the material injury is determined to be as a result of dumping. We see that sort of implication of the legislation as quite consistent with the WTO agreement.

Senator XENOPHON: In the CSR case of float glass, with JELD-WEN on the other side, there was an initial statement of facts in relation to that, but in the end Customs decided not to proceed with it. In fact, the statement of essential facts found that dumping occurred and material injury occurred, but the decision was changed in the determination report. They could not determine material injury. Where are the flaws in the current system in determining material injury? Where does it fall down in a practical sense?

Mr Willox: That is a very good question, because often the concern is how 'material injury' is defined. What is the definition here? Is it through loss of market share? Is it through loss of employment within an operation? Is it loss of ability to compete in the future, because once a new price—a new, lower 'dumped' price—has been established, does that then become the market norm? And what is the multiplier impact on your business as a result of that? There are always fundamental, undefined answers around questions related to what material injury is. We have seen a couple of instances in which dumping was found to have occurred but material injury was not found to have taken place. It always leaves those affected more than bemused—and often downright angry—that a finding can be made that dumping has occurred but that it has not materially impacted on the business in Australia. At a time when competition is tight, that sort of finding is befuddling. The WTO agreement does not define material injury. It gives some factors that it might involve, but at no point does the definition of material injury under the WTO prohibit the impact of dumping on capital investment and jobs—among other factors—as being material to an impacted party's interests. That is where an issue for us such as the impact on an organisation's ability to employ skilled people should be very much taken into account as a material factor in determining a dumping claim.

Senator XENOPHON: As well as capital investment?

Mr Willox: Yes.

Senator CAMERON: We have received some evidence today that the US have a much more flexible approach to implementing their obligations under article 6. Would you agree with that summary?

Mr Willox: Does the US have a much more flexible approach? You could interpret it that way, Senator.

Senator CAMERON: One of the witnesses said that they look after their industry better and they protect their interests far more rigorously than we do. Would that equate to your experience?

Mr Willox: Experience would say that perhaps the US and Australian examples are perhaps looking at the same problem from different perspectives. Within the Australian circumstance there is a history of being extremely cognisant of what are perceived to be global factors and the need to be a global player. Within other markets you look at the problem not as a protectionist measure but at what can be done here to help sustain our industries to keep them competitive in the global context. So it is a matter of which basket you want to put your eggs into.

We have existing industries in Australia that can compete when the playing field is relatively level. We have other Australian industries that are looking for both local and global suppliers, but they want a mix of suppliers. How do you set up a circumstance where you do not block foreign competition but where you give companies the ability to seek some redress through some sort of appeal mechanism for what they see as unfair competition. If they put together a case that stacks up it should be taken seriously and addressed appropriately with all reasonable penalties that should apply. If they have a case and it does not stack up then it should be the end of it. I think that is what everyone accepts. This is such a complex area and it is so expensive to lodge these claims that nobody goes into it half-heartedly. Once they decide to make an effort to go into these cases they would expect to be taken seriously and for their concerns to be looked at appropriately and quickly. That is, in some ways, a difference in the way that the initial perspective takes place.

Senator CAMERON: It has been put to me that the GATT anti-dumping code's agreement on subsidies and countervailing measures is not a legal document, but is a code. What is AiG's view on that?

Mr Willox: This is a really vexed question—how you interpret these codes. Do you interpret them as law or do you interpret them as guidelines or do you interpret them as guides? Then, where do you go from there? In a perfect world you would want an international system that all can broadly agree on. Without that general agreement the entire system falls over in terms of implementation and methodology. Any law needs to be tested, and I suppose you get to the point in any of these cases where if an aggrieved party feel strongly enough they will take it to the WTO for some sort of agreement or decision. But we see them much more in the guise of guidelines rather than strict, black-letter law.

Senator CAMERON: That should mean we have some flexibility, and legal determinations overseas are exactly that—they are not determinations that bind Australia.

Mr Willox: When companies operating in Australia are seeking investment in Australia and are seeking to provide jobs in Australia and product for Australia, and for the global community as well but they are operating in Australia, they see themselves very much as operating in an Australian context.

Senator CAMERON: Have you seen the DIISR submission to this hearing?

Mr Willox: No I have not, unfortunately.

Senator CAMERON: Can I take you to a couple of points in it and get your comments. Before I do that, union submissions here today say that in the US the unions have standing to bring antidumping cases before the appropriate authorities. What is AiG's view about that applying here?

Mr Willox: We would support unions having that standing.

Senator CAMERON: That is good. DIISR say:

... the involvement of unions might lead to tensions between employees and employers or between parent and subsidiary companies, with adverse implications for investment in manufacturing in Australia.

Given you are one of the key manufacturing organisations in this country, you did not put that to DIISR, did you?

Mr Willox: No, we did not.

Senator CAMERON: I cannot understand this submission, and I did not get a chance to ask them about it when they were here, but can you see any validity in this submission to the Senate inquiry?

Mr Willox: I think that submission, as you describe it, would be an in extremis case. Because these cases are so costly, I think the reality is that more often than not they are brought by the companies, but they are brought by the companies in conjunction and in concert with their workforce because of the implications for their workforce. They cannot do these things in isolation, and I think any sensible viewpoint of this would say it would be unlikely that a case this large and that costs this much and is so time-consuming would be brought by a union alone without the relevant company cooperating in some way. That would be hard to envisage.

Senator CAMERON: Mr Willox, the other proposition that has been put to me is that one of the weaknesses in Customs is that it does so few investigations into dumping that the expertise in the organisation is not of world standard; it is not international best practice. I am not having a go at the officers who are tasked to do this but it is a serious question as to whether Customs does have the experience, the expertise and the resources to actually do

an investigation to the same level as it would be done, say, in the United States. Do you have any comments on that?

Mr Willox: Like you, Senator, I sit here and I cast absolutely no aspersions on the ability of people who operate within Customs and who work on these cases. They do as good a job as they can, given the circumstances and the constraints they face. We would argue that, with greater resourcing and better resourcing in terms of skills, these cases could be handled much more quickly and diligently. There could be greater understanding between Customs and the differing parties—the applicant and the defendant, as it were—in order to work through these cases quickly.

You go to a very clear point, Senator: we do not launch that many cases in Australia compared with elsewhere in the world. In part that is because of the cost and it is also, in part, because of a lack of confidence in the system and those who are charged with overseeing the system, and that is driven a lot by the lack of resources and skills overall within that area of Customs to handle these cases quickly.

Senator CAMERON: This has been going on now for decades, hasn't it?

Mr Willox: Yes, it is a long-running issue. But the global financial crisis has perhaps put it back on the agenda. I do not think we have seen too many stories about dumping in newspapers, certainly in my memory, over the last 10 years, except maybe for the last two years.

Senator CAMERON: I want to take you now to the proposal being put forward by the Productivity Commission. I will not go to the exact thing but I have been describing it from my experience in manufacturing, which is that the commission is talking along the lines that, if one of the car companies finds a supplier overseas that can supply goods at far less cost for the same goods than from an Australian supplier, even if it is dumped, you have to take into account the overall benefits to the community. I would assume that means lower cost cars. That seems bizarre to me, and I wondered whether AIG supports that proposal from the Productivity Commission.

Mr Willox: No, we do not. This goes to the very heart of their suggestion for a public interest test to be taken into account as part of any claim. Our concern in this area has been that 'public interest' is very hard to define, and you would need to define that before you start the process of what you meant by public interest. Do you define public interest in the case of the dumping claim as being the difference between $1,000 off a car or the jobs of tens of thousands of workers in automotive and automotive components manufacturing? That is the fundamental trade-off you are looking at there, and I think it would be a very brave person to put one on top of the other as part of a broader public interest test.

Using the example of car manufacturers, car manufacturers are always looking for strong, stable, reliable suppliers. They are after suppliers who can supply quickly, who can supply quality goods and who are as close to market as possible. Those are the fundamentals they are looking for.

Senator CAMERON: That is the theory anyway. Thank you for that.

Senator EGGLESTON: I would like to pick up on Customs. It is apparent to me that Customs is the best agency to handle dumping complaints, they are disciplined in their processes and they focus on hard evidence as opposed to unsupported assertions. They have a straightforward, robust and tested operational method, but they are under resourced to deal with large complex cases especially those involving imports from the People's Republic of China which involve hundreds of exporters. They need more in-house expert advice instead of outsourcing it from companies like KPMG. Specifically, they need Customs project-specific access to independent agencies and industry specialists, more knowledge of manufacturing globally traded goods, people who are highly experienced forensic accountants and experienced business analysts. Would you like to comment on that?

Mr Willox: On your first point we agree that Customs is the best agency to investigate claims because they do have the broad expertise and the broad insights and inputs into this issue and they look at this sort of issue policy wise from a relatively uncompassionate perspective. They look at a facts based inquiry, so, yes, Customs is the best place. There are two aspects to resourcing. One, is we believe that they should be better resourced in terms of language skills, accounting skills and the like. These cases are often huge and complex with a massive brief of evidence that is produced which is detailed and requires a lot of examination. To examine that properly you need expertise, industry knowledge and background. On the one hand, yes, that should be in-house. They should have more of those skills in-house so that there can be proper examination of the evidence and proper visits overseas to seek and test evidence. That is crucial to an investigation.

Secondly, they should also be able to access where necessary or required outside advice and information from industry specialists to help them better test evidence and also to test hypotheses behind evidence. On those counts

that would make the investigations quicker, much more thorough, much more robust and probably much more, for want of a better word, trusted within industry.

Senator EGGLESTON: Thank you for that. The other point is that there has been some discussion about a new public interest test and there is a view that Customs currently addresses the public interest in applying the so-called 'lesser duty rule' on a case-by-case basis to the evidence gathered during an investigation. Is there really any need for a new public interest test?

Mr Willox: We have argued since the Productivity Commission began its inquiry in 2008 very strongly against the need for the introduction of a public interest test. Specifically, it would just add another layer of complexity and argument around dumping. It would be extremely contentious among industry and would end up playing industries and companies off against each other in a very public way that would not add anything to the basic facts of the case that is being presented.

Senator EGGLESTON: Thank you very much.

Senator XENOPHON: I have one more issue. It has been put to me that Customs should be renamed Customs Border Protection and Dumping so that there is an appropriate emphasis on their role in dealing with dumping cases. Do you think that has any merit?

Mr Willox: Certainly our experience tells us that in recent years, because of the emphasis on the second part of the title Customs and Border Protection, the focus in the department internally has very much switched to border protection given the publicity that surrounds the issue. That is perhaps natural. The other part, the customs part and particularly the dumping part, has lost resources, funding and focus within the department given the other activities within the department. To give it a title of something like 'Border Protection, Customs and Dumping Investigations' would not hurt.

Senator XENOPHON: I cannot imagine reality TV shows involving dumping cases, can you?

Mr Willox: No, it would not make great reality television.

Senator XENOPHON: It would not make compelling television..

Senator CAMERON: I am sure one of those channels would find a way.

CHAIR: I thank Mr Willox from the Australian Industry Group for joining us this afternoon.

Mr Willox: Thank you, Senators. I very much appreciate your time.

BIRRELL, Mr David Alan, Chief Executive Officer, Australian Steel Association

HOWARD, Mr 'Jack', Secretary-General, Australian Steel Association

[15:46]

Mr Howard: We appreciate the opportunity to present our view. We are not the rich importers; we are very much the poor relation. By way of background, there might be a general understanding of what our organisation is about. We represent people who import steel. They import steel not because of choice but because of a need for one reason or another. I know that dumping legislation and policy administration need to be more or less universal and cannot be sector related or specific to a sector. Our opening stance is that we do support an effective, robust antidumping system. We are not opposed to an antidumping system. We support Australian industry. We do support all jobs in Australian manufacturing. I would like my colleague, David Birrell, to make an opening statement. I will make a few brief comments after David has made his opening statement.

Mr Birrell: The Australian Steel Association, as Jack mentioned, is supportive of Australian industry but is supportive also of the recommendations resulting from the recent Productivity Commission inquiry. In particular, the ASA supports the bounded public interest test as a means of achieving a balanced representation of raw material producers downstream value adding to manufacturing. The current antidumping system in Australia is anticompetitive and that is why the government referred it initially to the Productivity Commission.

The proposals in the antidumping bill would make it even more anticompetitive and I would like to explain why. It will result in a number of consequences including: a lessening of competition for the supply of industry inputs to Australian manufacturing; a breach of Australia's treaty obligations with the WTO, as we have heard discussed in some of the previous discussions; and, in steel's case, patronage of two monopoly raw steel producers at the expense of the competitiveness of downstream small-to-medium owner-operated steel users, distribution businesses and their employees. In effect, whilst it is well intentioned, the likely outcome would be a lessening in the competitiveness of the overall steel sector. We would like to explain and elaborate that there are three avenues available to market for manufactured steel goods in Australia. The first is where steel materials are produced and then subsequently value-added in Australia. The second is where steel material inputs are at least in part imported for value-adding in Australia. The third is the full importation of predesigned, pre-galvanised, prefabricated and preassembled steel structures, which we are increasingly seeing. Our focus, as Jack just mentioned, is that we support Australian industry but we would like to draw particular attention to the competitive impacts of the second group—that is, those manufacturing businesses that import some of their raw materials so that they can subsequently value-add to them in Australia.

Steel material imports are driven by Australia's downstream manufacturers seeking to remain competitive, increasingly against fully imported manufactured goods, not by foreign steel mills. You may be aware that Australia's steel industry produces approximately eight million tonnes of steel in the context of 1.4 billion tonnes worldwide, so it is not as if there are overseas mills targeting Australia as some nirvana; it is actually downstream manufacturers who go and seek out overseas steel suppliers. So, whilst upstream raw material producers are well organised and able to garner broad political support, downstream manufacturing—and by that we mean fabricators, galvanisers, roll formers, miscellaneous manufacturers and erectors, fixers, refixers and the like—tends to be more disparate and less structured. Nevertheless, this is where the majority of Australia's steel jobs and the value-add to steel occur.

For small- to medium-sized downstream manufacturers to have a fair go and compete with fully imported steel structures, or fully manufactured goods, they need to have access to truly competitive available inputs. Presently the balance is tipped in favour of a select two vertically integrated steel producers that command the antidumping system and effectively compete with downstream manufacturing. In some cases that is their customer base as well. Ironically, by stymieing the availability of inputs to other Australian steel manufacturers, this removes the opportunity for downstream manufacturing to offset in part the impacts of a strong Australian dollar. We have heard in some of the earlier commentary that that is one of the key challenges for Australian industry, be it steel producers or downstream manufacturers.

The effect is that we are seeing an all-or-nothing outcome. By that we mean that either it is fully produced in Australia from raw steel and value-added or it comes in fully fabricated, designed overseas, and all those value-adding services are lost to Australia. That is reflected in a sixfold increase in imported fabricated steel tonnages over the last decade alone. We consider that this is the real challenge confronting Australian manufacturing.

The antidumping system should be available as a transparent balance mechanism, not as a marketing tool available for the powerful at the expense of the weak, for these disparate downstream manufacturers. The ASA experience on defending competing imports to BlueScope and OneSteel antidumping actions over a period of more than 30 years has been—and we heard it mentioned before as well—that the very chilling effect of an initiated antidumping action, let alone the imposition of interim and periodic measures, is the lessening of competition in the Australia market for the goods concerned. A presumption of guilt would exacerbate that further.

We will just give a fairly recent example of one of our members down in Canberra a few weeks ago. Just with some of the rhetoric that has been understandably in play in recent times, their overseas supplier chose not to offer to supply them for that quarter. They said, 'We're not exactly sure what's happening and we don't want to pick a fight, so we'll just withdraw until we get a better understanding.' What does that mean for that business? He needs to deal with that. He either does not have material to value-add to—he has paint lines; it is a 50-year-old Australian business—or otherwise he counters that by holding increased working capital. That is a cost to his business which ultimately lessens his competitiveness. That is a real example over the last few months.

The interests of downstream users of the goods concerned and the competitive issues are taken into consideration with the public interest test, and we believe that redresses some of those concerns.

We would like to comment briefly on what factually constitutes dumping. 'Dumping' is a pejorative term, and it is a practice that is universally condemned. That is why the World Trade Organisation exists, with some 150 member countries including Australia. It espouses an open market and a free-trade approach. Most commentators, however, do not understand what constitutes dumping in the context of Australia's legislation and the WTO agreement on antidumping and countervailing. The basis for much of the current push for trade protectionism is apparently the need to protect Australian industry from injury from imports and, by definition, to protect job security in a period of real and increasing skill shortages. The issue that we have with most commentators is that they label any import perceived to be cheaper than the locally produced equivalent as being dumped. Lower price of itself is not dumping. Productivity and efficiency drive material imports sold by Australian manufacturers to be competitively priced. We would also add there is a drive by the domestic steel producers to maintain a premium in their home market. That is honourable and we respect that, and that is based on the value proposition. But, by definition, that means that to be able to source a competitive material you need to be probably at a comparable if not slightly lower price. That is to do with lead times and a whole host of other elements of a value proposition.

The anti-dumping bill proposes, inter alia, to legislate that there be a presumption of dumping unless the importer can prove that there is no dumping. We consider that this proposal demonstrates a lack of understanding of the commercial realities involving international trade. The reasons for that are that, unless the two parties are associated and the transaction is effectively a transfer price, the unrelated importer has no knowledge of the exporter's cost to make and sell data or the exporter's relevant domestic sales transactions.

The reality is that a small to medium manufacturer in Australia will go to a trading house or the like and try to seek out someone who can supply to their customer requirement. These are not off-the-shelf products, because of the nuances of the Australian standards and requirements, so they actively have to go out and seek someone to supply them. What they then typically try to do over an extended period of time is build a relationship to develop that supply source. It is not the other way around. Therefore, the requisite connection of causality is really a competition issue, which is outside the scope of any importer's resource and is more a matter for the ACCC. For example, the basic factor of price differential needs to take into consideration that domestic producers universally accept a price premium, as I mentioned. And on the issue of loss of sales and market share, the real consideration is the local producer's marketing practice: do they sell to each and every purchaser on the same terms and conditions as those to their own downstream entities? So you have got downstream manufacturing seeking to remain competitive who may not be on the same favourable terms as a downstream subsidiary of the local steel producer. That is one of the key drivers that needs to be taken into account.

In summary, the Australian Steel Association supports the need for a viable, efficient but customer responsive Australian steel producer sector. Again, we support the recommendations of the Productivity Commission as providing a positive, balanced way forward. The anti-dumping debate in our country and our industry sector in particular is more about competition than imports; it is really about big business trying to minimise competition from smaller competitors. We acknowledge the macroeconomic effects and other challenges facing our steel producers. There was commentary earlier about the exchange rate, for example. We understand that, but we do not think the anti-dumping mechanism is the way to counter what are real issues both for steel producers and for downstream industry.

Rather than having a presumption of anti-dumping measures with the consequent impact on downstream manufacturing, value-adding services and Australia's overall competitiveness, repeat applicants should be redirected to more appropriate or suitable assistance mechanisms on the basis of a national or public interest test. We believe those concerns should be handled separately, as opposed to through the anti-dumping mechanism. As I mentioned, Jack would like to give some specific examples of real issues of Australia's competitiveness.

Mr Howard: Would that be appropriate, Senators?

CHAIR: Yes, please go ahead, Mr Howard.

Mr Howard: I do not profess to be an expert on anti-dumping at all. I have been a reluctant participant for about 30 years, since I first represented a Korean steel mill called POSCO back in the 1980s when the then BHP threatened that, because they were the new kid on the block, if they started exporting to Australia then dumping action would be taken against them, which they did. I would like to make a few comments.

The biggest single project on the Australian scene at the moment is the Gorgon gas project; I believe I am correct in saying that. That project has, I understand, contracted some 220,000 tonnes of steel from Hyundai in Korea. It requires in all about 260,000 tonnes. My point is this. Firstly, 220,000 tonnes or 260,000 tonnes of steel would represent the entire one-year production of the Whyalla facility of OneSteel. Secondly, if my sources are correct, the reason Gorgon would have gone to Korea and not Australia is the cost differential per tonne. The imported product is $1,500 per tonne and the Australian cost, as I understand from my sources, is $5,000 per tonne. My point is that if the AMWU were allowed standing or were legislated to have standing, for instance—I am not just seeking to highlight the AMWU—

Senator XENOPHON: Senator Cameron won't mind!

Mr Howard: Yes, but it is if they have standing and say dumping is proven. And I do not know how dumping could be proven on these fabricated imports that come in. As David mentioned, there are three as to markets. We prefer 1 and 2. They value-add local steel or, in the second case, they value-add imported semifinished steel. The third as to the market is fabricated steel imports. Even if there were a 100 per cent dumping duty applied from the Gorgon gas project, if my figures are anywhere near correct, it is not going to make any difference. Gorgon will still import that 220,000 to 260,000 tonnes. At the other end of the scale, and this is a comment by way of observation, I do have some knowledge of the aluminium industry whereby a leading manufacturer of Australian window furnishings had a specific design requirement for an aluminium profile. They went to the local producer and the local producer advised them that they could not make what they wanted but they could give them something else. They wanted specifically what they had by way of a design specification and they found a profiler in China that could supply what they wanted. Now they are paying 27 per cent dumping duty on that. Should they go back to the local producer, the people who initiated the dumping action on that? No, because they do not make what they want.

Another case of ours is this. We have a member who could not get a supply of steel pipes from the only steel producer in Australia of that product so they built their own mill in China. During the investigation period when a dumping action on those pipes was taken by OneSteel, they had not exported and they were still building their mill in China but they got caught up in the dumping thing. I have heard today how it has taken 18 months for a dumping action to be concluded. That member of mine is among one of those companies. You can imagine the frustration that we also experience from actions and investigations taking 18 months. It is partly because of the political cycle: in this case ministers change and governments change so that adds to the delay in the process and the outcome.

As another comment, and I am probably being presumptuous here, Senator Cameron talks about the public interest test and about a local producer only having 20 per cent of the market. We have a specific case—and it might be at the bottom of the food chain compared to the car company and the manufacturing and component sector—with galvanised pipe. Dumping duty on galvanised pipe has been in place for more than 10 years. It was for a first five years and then extended for another five years. With that particular product the local producer, and there was only one, produced, say, 20,000 tonnes—and I could quote the figures—and the market happened to be for 110,000 tonnes and yet they had dumping on imported galvanised pipe from Thailand. To me that did not make sense. So they are the comments that I would like to make in regard to my experience. As I said, I do not pretend to be an expert on dumping but I have been a reluctant practitioner in defending it for some 30-odd years.

CHAIR: Thank you for those opening comments. I do think they illustrate the complexities of this kind of legislation. We have heard previously that small companies face difficulty, and that is in bringing about antidumping actions, but in some industries in particular—and you refer to yours—the other side of it is that small companies cannot contest an antidumping application very easily either. In your submission you have gone

through it as to where you support or do not support the proposed bill and indeed some of the Productivity Commission recommendations. As for the public interest test, I think you are the first one to have supported the public interest test. Do I have this right? Is that because it has the potential to recognise the differences between industries, particularly in the case of the steel sector?

Mr Howard: Yes. I was responsible for our submission to the Productivity Commission, and we were very strong in advocating what we started off calling a national interest test but which the commission concluded should be a bounded public interest test. The premise I have is that when a minister needs to make a decision, the minister should make that decision in the national interest anyway, and that discretion already rests with the current legislation. So a public interest test rather than delaying the process or adding another layer to the process, I believe, is necessary when you need to bring into consideration the downstream effect. I think that what Senator Xenophon is proposing in his amendment bill is tantamount to what we want by having a public interest test. He is more specific, if I can say that, by wanting standing for unions and other interested and affected parties. We believe that that should happen and that the downstream people, who by themselves could never get a dumping action up or do not currently have standing, should have their interests taken into consideration. My scenario in terms of factual experience would demonstrate that. As I said, it could be the bottom of the food chain, but where a local producer only produces, say, less than 20 per cent of the market requirement it is ludicrous that there should be dumping duty on the supply of 80 per cent.

Mr Birrell: I think that it is also worth adding that to give a voice to the downstream manufacturing in a lot of cases could pre-empt the need for a dumping action, so you shorten the total process if you avoid it in the first place. I have spoken with people such as fabricators and galvanises—and I have previously worked in the zinc industry as well—and when you ask them what their response is to some of these things you get an emotive response. One comment to me recently from a galvaniser with regard to the Worsley Alumina project in southern Western Australia was, 'Yes, we are livid about that.' I asked what they were doing but found that they do not have that linkage point to say, 'What do we actually do about this to challenge it?' They read about it in the paper and just bear the consequence of it. For them to have a voice, as Jack mentioned, prior to considering anything such as the their availability to goods so that they can compete and secure those jobs in the first instance, would be a proactive approach, we believe.

CHAIR: Another issue that you touched on that I have been asking questions about is that chilling effect on trade of putting in an application. I think that has been noted over the years, but can you elaborate a bit more on that?

Mr Birrell: I gave the example in my opening about that member of ours whose supplier literally stepped away from supplying for a number of months. Regardless of the substance of a particular dumping action et cetera, most of these overseas mills are not looking for confrontation; they are looking to be responsible suppliers. That might be in contrast to what many people's perceptions are, but by just having an accusation made, if you like, by virtue of an antidumping action, that can damage the supply channels for downstream manufacturing and that obviously lessens their competitiveness.

CHAIR: Yes, I suppose that illustrates the difference between industries and maybe even within the industries in some cases.

Mr Howard: Senator, in terms of our imports, there is a three- to four-month lead time from the time the order is placed and a contractual arrangement concerning when the goods are to arrive. When dumping actions are mooted or implemented during that period of time, that is the first thing that the overseas mill has to deal with. In our system it is the exporter, the overseas supplier, that has to satisfy to customs' satisfaction their requirements. It is a very exhaustive process and they need to evaluate whether it is worth it and in their interests to devote the resources and the cost of doing that. They either say, 'Suddenly, we do not have production capacity available to produce your order,' or the importer, on the other hand says, 'I am the one that is going to cop any dumping duty–what do I do?' You cannot go anywhere else because imports are the only alternative for the local producers.

Mr Birrell: We are not the great Nirvana, as I said earlier, the products are custom-made and we talked about the economies of scale of overseas steel mills. Australian orders imported by our downstream manufacturers are relatively small, custom-made products so once you start adding all these other overlays of complying with Australian standards, which may not be aligned with international standards, and you overlay a potential dumping action and a few other things, in a cost-benefit analysis for that overseas steel mill it just becomes difficult to do. We might say, 'Hurrah, Australia!' and we then get the opportunity to get full production of steel and so regain that production in Australia. That is terrific, except for the downstream manufacturer who was relying on that supply source.

Senator XENOPHON: Thank you for your submission. So your members are largely steel importers and fabricators but they rely on getting steel from overseas.

Mr Birrell: Fabricators and downstream manufacturers.

Senator XENOPHON: Sure. How much steel do you use nationally each year? How much steel is used in Australia? How many tonnes of steel are used each year?

Mr Howard: We do not account for every import, but it is in the order—

Senator XENOPHON: What is the ballpark figure?

Mr Howard: In the distribution market, which is where most small to medium sized steel users source their product because they do not have the volume to go ex mill like a car manufacturer, we would represent around 20 per cent of that market.

Senator XENOPHON: How much of our total steel usage is manufactured here and how much is imported?

Mr Howard: It depends on project requirements. There is a lot of steel pipe imported for oil and gas projects that the Australian producer cannot make. But it is normally in the order of 20 per cent imports and 80 per cent local.

Senator XENOPHON: Eight million roughly.

Mr Birrell: That is the rule of thumb. Our members import some of the steel coming in. You also have the local steel producers who can import some product to meet their own needs for their own shortfalls.

Senator XENOPHON: But you acknowledge though that even 20 per cent can make a big difference to the profitability for the remaining 80 per cent because it can shift the market. Even a 20 per cent share can shift the market considerably in terms of pricing and the like.

Mr Howard: True, and that is not only in terms of those imports that come in. The car companies, for instance, import a lot of material which is not produced by the local manufacturer. But, yes, it can. But the thing is that imports are the only alternative source of supply. If people have the legitimate right to be in business either as a distributor or making roofing, guttering or walling out of steel and they have to compete with, say, the only local producer downstream manufacturer of those products then the only way they can be competitive is to source from overseas. So they have a right to import.

Senator XENOPHON: But the issue is not one of whether we should have imports. That is not the issue. It is whether there should be a regime to have appropriate safeguards in place where goods are being sold here below what they are being sold in their own domestic markets.

Mr Howard: I could not agree more. We support that. There is no argument here.

Senator XENOPHON: But do you? I appreciate your submission but in it you said in the process of evaluating where dumping has occurred—I think Mr Birrell referred to this—there is no definition of injury. You referred to a 1992 Federal Court. The quote from that decision is that 'the material injury against which the act provides relief is a material injury attributable to the dumping and to no other cause'. There are always going to be some other causes. There are a whole range of causes, but it is a question as to what extent it is material. Do you believe that is the appropriate test—the no-other-cause test?

Mr Howard: I believe that all those causes should be looked at as to what is causing the detriment to the local industry. Maybe I am too bogged down with some practical experience but we have said that a lot of the steel products that are imported by our members are made to order and that the overseas producer of that product does not necessarily make that for their own domestic market or for other export markets. Therefore, we come under the umbrella of what they call 'like goods'. My point is that they are not identical to what has been produced and sold in the domestic market in terms of establishing a normal value, which is the test of whether or not there is any dumping in comparison to the export price.

Senator XENOPHON: But the goods are substantially identical, aren't they?

Mr Birrell: Not necessarily to what is produced in the home market from where the steel is exported.

Senator XENOPHON: Can you give me an example?

Mr Howard: One member, as I said, built their steel mill in China because they could not get supply from the local producer here at a competitive price. They do not sell domestically on the market in China. They only produce for the Australian market. So they have no domestic sales for a start. So when Customs go there they have to construct a normal value. It is a notional price.

Senator CAMERON: What company is that?

Mr Howard: Steelforce.

Mr Birrell: Another example may be if you look at roof sheeting, which can be galvanised zinc, or have a zinc-aluminium coating or a whole range of different coatings. One aspect is the physical coating, which is the same as those used in the home market, and the other thing is the amount of zinc or its composite coating, the same as in the home market. If Australia is requiring 350 grams per square metre for purlins, that is not what you will typically find in an overseas market. To try and find a comparative price for what is called a Z350 purlin from overseas, you will not find, because it is a custom-made product to meet Australian specifications.

Senator XENOPHON: You can still try and work out whether it is being sold. You are saying there is no way of determining whether it is being sold below cost in its domestic market.

Mr Birrell: They do not sell that. It is their product in their domestic market.

Senator XENOPHON: Would you be concerned if that product was being subsidised compared to similar products that are being manufactured for the domestic market and that there was some price disparity for it? In other words, it was another steel product but a similar type of product. Would you use that as some sort of benchmark to try and establish whether it is at low cost?

Mr Birrell: There are possibly two questions there. One is, if it were being subsidised, yes, we would be concerned. To try and iterate back to what is the comparable price in that local market is not a simple exercise because you have to look at what are the costs of zinc. Zinc, as you possibly know, trades on a floating price in the London Metal Exchange. It changes by the minute. Again, with a three-month lead time you start to get into what is not a readily simple comparison.

Mr Howard: If there is blatant dumping—this is my experience—then there is a case to answer. One of the issues I have with the current system is the lack of transparency. If I can just try and simplify it by saying, if I do an exercise, say, to an overseas mill—and I have been to plenty—and if the dumping margin on my calculation is, say, $20 a tonne, that has that caused a material injury or detriment to the local producer. I do not know what dollar figure the local producer is claiming by way of material injury. He can claim price depression or price suppression but then we have to understand that the local producer has what we call a 'domestic price premium' anyway. They should have confidence in their own brand compared to an imported product. They should be able to sell at a price premium to any imported product. That is my experience in steel. If the $20 is the dumping margin and the material injury that Customs have in a black box is $100 a tonne, then I suggest to you that the $20 is not the cause of the $100. That is the point. If it is a $100 dumping margin and a $20 material injury, QED.

Senator XENOPHON: It will still have an impact on the domestic market. It depends what the cost factors are in the place of manufacture. I do not want to get into an argument.

Mr Howard: What I am saying, if there is blatant dumping—in my experience, it may seem somewhat semantic, but there has never been an intentional case of dumping—our people who place the orders in the overseas mill for a product coming in in three or four months time look and say, 'What do I need to buy it at?' and then the overseas mill needs to say, 'What can I make it for?' and 'What do I sell it for?'

Mr Birrell: There is no doubt that by having an alternative supply source that it does have an impact on the local market. I mean it is competition.

Senator XENOPHON: The issue is not competition. It is about the below cost issue.

Senator CAMERON: We have heard a lot about how you are defending the little guys. We have not heard much about your big-guy members. Do you want to tell us about them?

Mr Howard: We do not have any.

Senator CAMERON: You do not have any?

Mr Howard: The big guys, the heavy hitters, in our industry are the two local producers who also dominate the distribution market, which is the competitive market supply for most small users.

Senator CAMERON: What about JFE Shoji Trade Corporation?

Mr Howard: JFE is a Japanese mill and they would have a representative office in Australia. They do not have any—

Senator CAMERON: They are a member of yours, aren't they?

Mr Howard: Yes, they are.

Senator CAMERON: Tell me about them.

Mr Howard: They are an overseas mill in Japan and they are one of the biggest mills in Japan. Their representation in Australia—I cannot be precise—is, say, two or three people in an office. We need to understand

that they are the link between the distributor and the user in the overseas mill. Most users and distributors of steel do not have sufficient requirements or volume requirements to go to an overseas mill. So we need what we call a 'trading company' and JFE Shoji is a trading company.

Senator CAMERON: What steel corporations do they have links to?

Mr Howard: JFE in Japan.

Senator CAMERON: What steel mills do they represent?

Mr Howard: I presume JFE.

Mr Birrell: They can typically source from wherever they like—

Senator CAMERON: You have presented yourselves as being here representing the battlers. You have members who represent some of the biggest, most profitable steel corporations in the world. You should at least be honest and put that on the table.

Mr Howard: They are members, Senator, but—

Senator CAMERON: Let me put this on the record: JFE Shoji Trade Corporation, just the trading corporation, is worth about $14.5 billion. Kawasaki Steel is worth about $100 billion on their own, going back 10 years, and NKK Trading were worth about $400 billion in 2003—and that is just JFE Shoji. You have not been able to tell me much about them. Tell me about Tata Steel.

Mr Birrell: Can I just go back there—

Senator CAMERON: I am asking—

CHAIR: You have asked a question, Senator Cameron.

Senator CAMERON: I asked about Tata Steel.

CHAIR: I think they have a right to answer.

Mr Birrell: JFE, as you may know, is in Japan, so if we separate JFE trading, JFE in Japan—and you mentioned some of those companies—has come about by the conscious rationalisation in Japan of some of their steel producers, as has happened across the world. Steelmaking has historically been nationalistically based—we have had it with people like Corus, and you get onto Tata Steel, for example, who own Corus. That is just a rationalisation of steelmaking to get economies of scale across the world.

Senator CAMERON: And you represent them in Australia.

Mr Birrell: We have trading houses such as JFE Shoji as members. You ask the question as to where they can source from—they can source from wherever they like but typically—

Senator CAMERON: I did not ask you where they sourced from; Mr Howard referred to that. I am interested in knowing clearly who you represent and who your members are. Tata Steel is a $22.8 billion Indian steel corporation. Are they a member of yours?

Mr Howard: Yes.

Senator CAMERON: Steelforce went over to China. As I understand it, having a quick look on the net, they do 1.5 million tonnes of steel around the world. There are Steelforce subsidiaries all over the world, with offices in Europe, Africa, the Middle East, Asia and South America.

Mr Howard: With respect, Senator, you are talking about a different company.

Senator CAMERON: I googled the company that is the company on your website. That took me to Steelforce in China, and it took me to Steelforce all around the world. These are some of the biggest steel players in the world that you have as members.

Mr Howard: I have a fairly intimate knowledge of Steelforce's operation. They have a mill that produces steel pipe in China for the Australian market. They do not export to any other country. They do not sell on the domestic market in China. In terms of output, they would be 40,000, 50,000 or 60,000 tonnes at the very most.

Senator CAMERON: Are they part of the Steelforce international group?

Mr Howard: No. I do not know of a Steelforce international group.

Senator CAMERON: Can you give the committee some more details on that. I just want to clarify it because that is what is popping up when I search for it. It did not surprise me, given that you have as members Tata Steel and JFE Shoji, these monstrous steel companies. It just surprised me that you came here almost as though you were looking after the poor, bedraggled, downtrodden bottom end of the market. I think you describe them as the bottom of the food chain. They are anything but the bottom of the food chain.

Mr Howard: I think you are taking it out of context, Senator.

Senator CAMERON: You are not bottom of the food chain when you have members like that**.**

Mr Howard: In terms of JFE, who are a trading company member, they primarily import from Japan because of the connection. If you look at the numbers, most imports do not come from Japan anymore. The biggest quantity of imports from Japan are for the car companies: Ford, Toyota and General Motors. JFE shows that they would represent hardly anything in terms of our members' import volumes. Tata Steel have just become a member this year. My understanding is that in Australia it is virtually a one-man operation. But they joined our association; we do not exclude them from being a member from our association. But to portray our association as being the giants of the steel world is ridiculous, I am sorry.

Senator CAMERON: What I am saying to you is that your members are the giants of the steel world. Which other way would you describe Tata? They describe themselves in glowing terms.

Mr Howard: In terms my knowledge of our members' activities and their import volumes, I do not know that Tata import anything.

Senator CAMERON: Kawasaki Steel are certainly not bit players.

Mr Howard: No, certainly not. But what I am saying is that their import volumes, compared to the imports of—

Senator CAMERON: I want to move on from there. I just wanted to make it clear who your membership are.

Mr Birrell: Can I just clarify on the membership comment?

Senator CAMERON: Yes, go on.

Mr Birrell: It was actually referring to a product, not a customer, as in galvanised pipe, which is a relatively unsophisticated product, in relation to the example given earlier on, the automotive industry. It was not anything to do with customers; it was actually about a product and its degree of sophistication.

Senator CAMERON: So Tata Steel and JFE Shoji want to join you because they want to be part of the bottom of the food chain?

Mr Birrell: We have not suggested that.

Mr Howard: I did not say that, no. What I said was that, compared to car components, which you obviously have an interest in, galvanised pipe is probably the bottom of the food chain. Nevertheless, it is an important import product in terms of its application.

Senator CAMERON: How much of your membership income comes from Shoji and Tata?

Mr Howard: They pay a nominal yearly membership, as our other members do. We have a structure. We have trading companies, who perform the role of linkage between the distributors and the users with the overseas mills, and they bundle the orders, they do the shipping, they do the currency factor and they do the delivery.

Senator CAMERON: So they are purely a funnel to these big, multinational steel giants. Is that a reasonable assessment?

Mr Birrell: A small manufacturer does not have the size of themselves to go to an overseas steel mill and get an order. They literally will not get in the door. So what the trading houses do is provide a conduit to combine orders and consolidate shipping, because it is a matter of getting the lowest cost of supply to make the whole thing work. As Jack mentioned, the trading houses a la JFE Shoji are that conduit to take it to an overseas mill. Again, if we go back our earlier point, the overseas mills are not chasing down small manufacturers in Australia. The only way it works is by having that conduit of combining small orders from disparate companies and presenting them to, as you say, a large, medium-sized—or whatever it may be—overseas steel mill.

Mr Howard: Do you mind if we get back to you, the committee, in terms of what the import volumes JFE Shoji would have had over the past 12 months and what Tata would have imported?

Senator CAMERON: You can provide whatever information you like. I want to come to Steelforce; you mentioned Steelforce. This is the company that had to go over to China. Could you provide details to the committee of whether core labour standards apply in their manufacturing plant, what the wages are on comparable classifications to Australian companies of Steelforce in China and an Australian steel mill, and whether Steelforce or any of your members have been involved in any dumping allegations anywhere in the world. That will do me.

Mr Howard: I will ask Steelforce. I am not privy to that but I can ask them. In terms of the dumping around the world, the only dumping problems we have had have been in this country. As I said, technically they could never have dumped because they had not even started producing.

CHAIR: Thank you. Senator Eggleston, do you have any questions?

Senator EGGLESTON: No, not at this point.

CHAIR: Thank you, Mr Birrell and Mr Howard. If you could provide whatever information you can to the committee secretariat when you can, that would be useful. Thank you for coming in this afternoon and assisting us.

Committee adjourned at 16:30