Law Institute Victoria

Law Council OF AUSTRALIA

17 March, 2003

NH: JS
N. Hogg
(03) 9607 9374
E-mail: nhogg@liv.asn.au

Senator Marise Payne
C/- The Secretariat
Senate Legal & Constitutional Affairs Committee
Room S1, 61 Parliament House
CANBERRA ACT 2600

Dear Senator,

Re: Customs Legislation Amendment Bill (No. 2) 2002
Submission to the Inquiry by the Senate Legal and Constitutional Committee

On behalf of the Law Institute of Victoria and the Law Council of Australia, we are pleased to forward the attached submission on the Customs Legislation Amendment Bill (No. 2) 2002.

We look forward to the opportunity for further consultation with your Committee on the matters raised in this submission.

Yours sincerely,

Bill O'Shea
President
Law Institute of Victoria

Yours sincerely,

Michael Lavarch
Secretary-General
Law Council of Australia

Encl.

Law Institute Victoria

Law Council
OF AUSTRALIA

LAW INSTITUTE OF VICTORIA

AND

LAW COUNCIL OF AUSTRALIA
(CUSTOMS & INTERNATIONAL TRANSACTIONS COMMITTEE)

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

ON THE CUSTOMS LEGISLATION AMENDMENT BILL (NO.2) 2002

17 March, 2003

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EXECUTIVE SUMMARY

1. The Terms of Reference are extremely limited in that they concentrate purely on whether the terms of the Bill comply with Australia's obligations to China pursuant to various "WTO International Agreements". This effectively limits the Inquiry as to whether the provisions in the Bill relating to "economies in transition" are consistent (or otherwise) with Australian obligations to China pursuant to those Agreements. This is a very technical issue and involves a detailed examination of:

   - the Marrakesh Agreement establishing the WTO,
   - the protocol by which the PRC acceded to the WTO ("Protocol"), and
   - related agreements such as:
     - the General Agreement on Tariffs and Trade 1994,
     - the General Agreement on Tariffs and Trade 1947, and
     - the WTO Agreement on the Implementation of Article VI (ie the dumping provisions) of the General Agreement on Tariffs and Trade 1994 ("Implementation Agreement").

2. While the provisions of the Bill adopt some of the terms used in Article 15 of the Protocol, the way in which they have been included does not take into account other provisions of the WTO International Agreements, in particular, the Implementation Agreement. Examples of inconsistencies are as follows.

   (a) The provisions regarding "economies in transition" do not provide the same sunset clauses as those contained in the Protocol.

   (b) The requirements for exporters to answer questionnaires do not match provisions in the Implementation Agreement, which permit those exporters to have additional time to complete questionnaires or to seek assistance on the terms of the questionnaires from the Australian Customs Service. This is of particular concern, given that a failure to complete or properly complete the questionnaire will entitle the Australian Customs Service to determine that a market control economy does not exist in an economy in transition (ie PRC). In such circumstances, the Normal Value (one of the crucial criteria for determining whether dumping exists) is determined by the Australian Minister for Justice and Customs, taking into account "all relevant considerations", rather than being calculated in accordance with domestic prices in the country of export.

   (c) It seems inconsistent with Australia's WTO international obligations that the amendments in the Bill are aimed predominantly at affecting the PRC (as demonstrated by the legislative history of the Bill in relation to "economies in transition").

3. Although the amendments may provide administrative expediency for the Australian Customs Service, they are unduly harsh on economies in transition such as the PRC, where domestic producers who export to Australia may have little understanding or interest in questionnaires from Australian Customs Service. As such, the amendments will also potentially disadvantage Australian importers.

4. The recommendations proposed in the Submission are aimed at ensuring consistency with the Implementation Agreement.

INTRODUCTION

The Law Institute of Victoria ("LIV") and the Customs and International Transactions Committee, Business Law Section of the Law Council of Australia ("the CIT Committee") wish to make the following submission ("Submission") to the inquiry ("Inquiry") by the Senate Legal and Constitutional Committee ("Committee") into the provisions of the Customs Legaliation Amendment Bill (No 2) (2002) ("Bill). Please note that the submission has been endorsed by the Business Law Section but has not been considered by the Council of the Law Council.

1 LIV - ILBC

The Submission has been prepared for the LIV with the assistance of the LIV's International Law Briefing Committee ("**ILBC**"). The ILBC is a committee of the LIV that reports directly to the LIV Council. The aim of the ILBC is to provide a practically focused forum to identify, discuss and analyse international law issues that arise in private practice. It is a medium for the free flow of International Law information where its members collectively disseminate relevant information and practical solutions to other groups, committees and organisations in and out of the LIV. The ILBC focuses of four main subject areas:

(a) International Trade and Finance Law

This includes international maritime and aviation laws, international mergers and acquisitions, enforcing the rules governing membership of the World Trade Organisation ("**WTO**") and resolving disputes between WTO member countries.

(b) International Arbitration and Enforcement Law

This constitutes a focus on promoting Australia as a centre for resolution of international and commercial disputes

(c) International Corporate Responsibility

This focus examines multinational corporations' growing legal duties and responsibilities.

(d) International Environmental Law

The membership of the ILBC comprises a combination of practicing lawyers (both in law firms and corporations) and legal academics with a particular interest in international law issues. All are members of the LIV.

2. LCA - Customs and International Transactions Committee

This Submission has been prepared with the assistance of the CIT Committee, which is a Committee within the Business Law Section of the Law Council of Australia. As the Committee may anticipate, the members of the CIT Committee have particular expertise in relation to the *Customs Act* 1901 and related legislation and also practice in relation to those agreements relating to the WTO. The Committee may be aware that the CIT Committee has made a number of submissions to the Committee in relation to proposed Commonwealth legislation in past years.

BACKGROUND - LEGISLATIVE HERITAGE OF THE BILL AS APPLYING TO THE PRC

To properly understand the context of the Bill, there is some need to go into the legislative heritage of the Bill.

1 In 1999, Australia introduced the *Customs (Anti-Dumping) Amendments Act* 1999 (No.26 of 1999) ("**1999 Act**"). These provided amendments to the Anti-Dumping provisions of the *Customs Act* 1901 ("**Customs Act**")

2. The 1999 Act introduced special "economies in transition" laws to modify the application of "non-market economy" rules for establishing the normal value of goods exported to Australia from the People's Republic of China ("**PRC**") (among other countries).

3. The Explanatory Memorandum indicated that the 1999 Act was implemented based on advice that the preceding provisions were deficient to deal with "economies in transition". According to contemporary reports, however, the 1999 Act was also implemented to respond to pressure from Australian industry to reinstate some degree of differential treatment for Chinese exporters. One contemporary report which reflects this view can be found on page 5 of Bills Digest No.22 of 1998-1999 regarding the 1999 Act (see page 5), a copy of which is annexed marked "**A**".

4. Among other things, the 1999 Act introduced new Sections 269TAC(5D) and 269TAC(5E). The combined effect of these sections is that if a Government in the country of export of goods once had a monopoly or substantial monopoly in trade in relation to particular goods of that country and substantially influenced the price of those goods which were supplied, and a "price control situation" applied, then the "Normal Value" would be determined by the Minister for Justice and Customs ("**Minister**") rather than by reference to domestic sales in the country of export.

5. The impact of a finding that Sections 269TAC(5D) and 269TAC(5E) apply is significant as that leads to Normal Value being determined by the Minister "taking into account all relevant considerations". This is a very wide discretion and means that sales in the country of export are disregarded, which is contrary to normal "Anti-Dumping" practice.

6. In late 2000, the Minister again moved to alter the application of the "economies in transition" laws. Again, it was maintained that the changes were made in response to an Australian industry lobby group which argued that the laws did not assist with actions against China exporters to the extent which had been anticipated.

7. The steps taken in late 2000 were in the form of Guidelines ("**Guidelines**") issued by the Minister to the CEO of Customs ("**CEO**") to dictate whether a "price control situation" should be found to exist for the purposes of Section 269TAC(5E). The Guidelines are found in Australian Customs Dumping Notice No.2000/60, a copy of which is annexed marked "**B**".

8. Put simply, the Guidelines indicated that the onus fell upon an exporter to establish that a price control situation did not exist and that a failure to respond adequately to a request for information meant that a price control situation was deemed to exist, meaning that Normal Value was to be determined by the Minister. Further, the Guidelines indicated that the Minister was to be satisfied that a price control situation existed if one of four criteria were not met, which are summarised as follows:

(a) The pricing took place according to market signals and without significant state interference.

(b) The producer/exporter has one set of accounting records kept according to GAAP and independently audited.

(c) The producer/exporters financial situation is not subject to any distortions carried over from the previous non-market economy system.

(d) The producer/exporter is subject to bankruptcy and property laws.

Questions were raised as to the legal basis of the Guidelines as they appeared to go beyond the types of "directions" which the Minister is entitled to issue pursuant to the relevant provisions of the Customs Act. Questions were also raised as to the relevancy of some of the tests.

9. Concerns regarding imports from the PRC which are reflected in the Guidelines appear to also underpin the Bill. This can be found in a number of places, such as the following:

(a) In the Second Reading Speech in relation to the introduction of the Bill in the House of Representatives on 12 December 2002, express reference was made to the fact that the PRC was an "economy in transition" which would be affected by the Bill. That Second Reading Speech indicated that:

"Since the introduction of the "price control" concept in 1999, it has become apparent that there is uncertainty as to whether this includes both direct and indirect forms of government control over prices.

To overcome this uncertainty it is proposed to replace the term "price control" with "price influence" as this more accurately reflects the Australian Government's intention as set out in the ministerial guidelines issued in December 2000."

(b) The emphasis on the PRC in the Bill has created a degree of concern for the PRC. This is reflected in the fact that a representative of the Embassy of the PRC was attending in the public gallery to listen to the debate on the Bill on 12 February 2003 (see page 770 of the Hansard regarding the debate).

10. Accordingly, given the Legislative heritage of the Bill, it is clear that insofar as the 1999 Act and the Guidelines were in response to concerns as to imports from the PRC, the Bill continues the same concerns in relation to the PRC. These concerns are addressed in amendments to the provisions relating to "economies in transition". However, we now understand that for the PRC, the "economies in transition" provisions of Bill are also being portrayed as being consistent to Article 15(a) of the Protocol (**"Protocol"**) by which the PRC acceded to the Marrakesh Agreement establishing the WTO (**"Marrakesh Agreement"**). An Internet link to the Marrakesh Agreement (411 pages) is provided in annexure **"C"** and a copy of the Protocol is annexed marked **"D"**. It seems clear that the economies in transition provisions of the Bill (requiring an exporter to answer a questionnaire to prove that there is a market economy) are taken **generally** from Article 15(a) of the Protocol. **The real issue is whether those "economies in transition" provisions and the obligations placed on exporters to establish that a "market economy" exists exceeds the terms of Article 15(a) or are contrary to other WTO Agreements in a manner detrimental to the PRC.**

Notwithstanding the limited extent of the Terms of Reference, it is also relevant to identify that the amendments in the Bill will have an impact not merely on the PRC but also on other "economies in transition" such as the countries formerly constituting the Soviet Union, Korea and Vietnam. A question may be raised as to whether the impact on these other nations has been considered.

We will now turn to consideration of the terms of the Bill and its impact on the PRC.

PURPOSE OF THE BILL

According to a relevant part of the Second Reading Speech associated with the Bill:

> "The purpose of the Bill is to make amendments to the anti-dumping and countervailing provisions of the Customs Act, an amendment to exempt Air Security Officers from the Passenger Movement Charge and minor and technical amendments to International Trade Modernisation elements in Customs legislation.
>
> The proposed anti-dumping and countervailing amendments have three major purposes.
>
> The first is to provide greater clarity and certainty in respect of the treatment of "economies in transition".
>
> The second will amend the provisions governing the processing of final duty assessment applications and calculation of refunds of dumping duties.
>
> The third purpose will be to make amendments to more accurately reflect the provisions of the World Trade Organisation Anti-Dumping Agreement."

Notwithstanding the comments in the Second Reading Speech, given the Legislative heritage of the Bill described above, it is clear that, for the PRC, the "economies in transition" provisions of the Bill also have a direct link to the provisions of Article 15(a) of the Protocol.

MAIN CHANGES TO ANTI-DUMPING PROVISIONS

Notwithstanding that the main emphasis of the Terms of Reference has been placed on the effect on China of the provisions amending the "economies in transition" provisions, the Bill contains more substantial amendments to the anti-dumping provisions of the Act, all of which may have an impact on the PRC. For current purposes, these can be summarised as follows:

1. A new definition of "Economies in Transition" will be included to cover countries where Government once had a complete or substantial monopoly over trade and determined or substantially influenced domestic prices of goods but at the relevant time, there is no longer such control. This situation appears to operate indefinitely so that any country whose economy evolves from Government control will, presumably, always be an Economy in Transition.

2. If there is an "Economy in Transition" and one of four statutory situations applies, then the Minister must determine Normal Value in his investigations as to whether there has been dumping or countervailing subsidies. Two of the four situations relate to the traditional test of Government affecting the sale of all like goods. Interestingly, the other two situations cover the failure by an exporter in the country from which the goods are exported to provide answers to a questionnaire provided by Customs or providing an inadequate answer to that questionnaire. This imposes a significant onus on exporters and leaves importers at risk should their exporters be

unsophisticated, or not treat the questionnaires seriously (or wish to make life difficult for the importer).

3. The Minister is only entitled to consider accumulated exports from several countries and not accumulated exports from one country in determining the effect of exports.

4. New provisions have been created for the review of interim duties (dumping or countervailing). These are largely in response to the findings of the Federal Court in the *Amcor* case and include the following:

   (a) Applications are to be "lodged", not "made", in a prescribed time.

   (b) New obligations to provide information imposed on the importer or the exporter before an application can proceed.

   (c) Certain information provided directly by an exporter to Customs is to be withheld from the applicant seeking a final review of interim duty unless the exporter expressly consents.

   (d) The CEO may reject an application or terminate consideration of an application for review of interim duty if the CEO believes all relevant information has not been provided by an applicant or by the exporter. The CEO need not even make a recommendation to the Minister.

   (e) Upon request, the Trade Measures Review Officer ("Review Officer") is to review decisions by the CEO to reject or terminate an application for the review of the interim duty. The Review Officer makes a recommendation to the Minister whether the decision of the CEO should be approved or revoked.

5. The only persons who can apply to continue dumping duties are the original applicant or persons representing the whole or a portion of Australian industry producing like goods.

6. Any reinvestigation by the CEO of Customs at the direction of the Minister (following a recommendation by the Review Officer) only needs to re-consider information available at the time of the original decision and is not to include consideration of new information.

COMMENTARY AS TO ANTI-DUMPING CHANGES IN THE BILL

The general effect of the anti-dumping amendments contemplated by the Bill will continue to disadvantage importers of goods where there is alleged improper dumping or subsidies associated with those goods.

A number of observations can be made from the amendments:

1. Once an economy is deemed to be an "Economy in Transition", it seems to indefinitely be an Economy in Transition with the potential adverse consequences of Normal Value being left to be determined by the Minister rather than based on information readily available in the country of export. Article 15 of the Protocol suggests that, at the maximum, this will apply to the PRC for 15 years and that there are means to apply for earlier "release". The Customs Act (Section 269TAC(5J) and Regulation 182) does entitle the Minister to direct that the "economy in transition" provisions will not apply to some countries. However, there is no clear mechanism for this to be instigated.

2. There is some doubt that merely adopting a new definition of "Economy in Transition" is, alone, sufficient to cover one of the intentions of the Bill. Again, according to the Explanatory Memorandum and the Second Reading Speech associated with the Bill, one purpose of the new definition is to remove uncertainty as to whether Government control covers both direct and indirect forms of Government control over prices. While the definition of Economy in Transition is different to the previous "price control situation", the Minister is only entitled to determine Normal Value if there are **other** types of control by Government (i.e. Government has a significant effect on prices). If the intention was to ensure that direct and indirect forms of Government control are covered, then perhaps other definitions or provisions would be included.

3. There are concerns as to the onus being placed on overseas exporters to complete questionnaires as to the control of domestic price in their home economy, especially given that a failure to provide answers to a questionnaire or to answer the questionnaire incompletely will result in the economy being deemed to be "controlled" with the further result that Normal Value is to be determined by the Minister. This may be inconsistent with the spirit of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (**"Implementation Agreement"**), a copy of which is annexed marked **"E"**. Some examples of the inconsistencies are as follows:

   (a) The relevant provision governing the provision of questionnaires to exporter for completion (Section 269TC(8)) complies with Article 6.1.1 of the Implementation Agreement insofar as it grants 30 days to the exporter to answer the questionnaire. However, the proposed Section 269TC(8) does not reflect the other provisions of Article 6.1.1 of the Implementation Agreement, which provides for "authorities" (i.e. the CEO) to give proper consideration to a request for an extension of the 30 day period and grant an extension of time where practicable. Such "extension" provision exist where the ACS seeks expressions from interested parties following a prima facie determination of dumping elsewhere in Section 269TC. If the Government really wishes to comply with the Implementation Agreement, Section 269TC(8) should be amended to oblige the CEO to advise exporters that they can request an extension of time (and how to do so) and to grant the extension where practicable.

   (b) Article 6.13 of the Implementation Agreement obliges authorities to take into account difficulties experienced by interested parties (especially small companies) in providing information requested and provide assistance where practicable. There is nothing in Section 269TC(8) (or elsewhere) which reflects that where information is requested by questionnaires, such assistance should be made available to exporters.

4. There is also the difficulty that an exporter (i.e., in the PRC) may not have the expertise or desire to assist in answering the questionnaire. This is especially the case for the PRC. Indeed, the exporter may wish to actively disadvantage the Australian importer.

5. Information provided by exporters direct to the ACS in any application to review interim duties must now be withheld unless disclosure is expressly directed by that exporter. This new provision is contrary to previous practice and appears to be at odds with Article 6.2 of the Implementation Agreement which states:

   > "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests".

This sentiment was endorsed in the Second Reading Speech to the *Customs Legislation (Anti-Dumping) Amendments Act* 1998, where the relevant Minister quoted from Article 6.2 and gave as an example of Article 6.2 that a party must have:

> "the opportunity to see all relevant information, to acquaint themselves with the opposing views and to offer a rebuttal argument".

It may well be that information from the exporter is such information and, again, potentially adverse to the applicant. The withholding of the information and the right to respond may also be contrary to Article 6.4 of the Implementation Agreement which requires parties to be given access to information and a right to respond.

6. Additional powers are to be conferred upon the CEO to reject or terminate an application to review interim duties. These are new and, again, may be inconsistent with the spirit of the Implementation Agreement, which expressly indicates that parties should have an entitlement to due review. In particular, the right to reject an application pursuant to the new Sections 269YA(2) and (3) for the failure to provide **all** required information pursuant to Section 269W(1) and (1A) may be at odds with Article 6.8 of the Implementation Agreement, which entitles decisions to be made even in the absence of information from an "interested party". Further, Article 5 of the associated Annexure II regarding "Best Information Available" states that:

> "Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, providing that the interested party has acted to the best of its ability".

As a result, even if the CEO is to be granted a right to reject or terminate an application, it should not be based on such a high standard as set out in Section 269YA and should require the CEO to take into account these other considerations and other available material before being able to reject or terminate an application.

7. The type of information to be provided pursuant to the new Section 269W(1A) probably exceeds the type of information which is required to make the determination contemplated by the Section.

8. The Review Officer is being provided with new additional obligations and tasks. This includes the vital review of a decision by the CEO to reject or terminate an application to review interim duties. We would hope that the Review Officer has sufficient resources and acts expeditiously. We would also question, given the significance of the decisions, whether the recourse to the Review Officer satisfies the need for a "judicial, arbitral or administrative tribunal or process" to review administrative actions in this context as contemplated by Article 13 of the Implementation Agreement.

9. If an application is made for the review of interim duty and then rejected or the process terminated by the CEO, the amendments would provide that the application is treated as never having been made. If the 6 month period for review of interim duty has then expired, the applicant has lost the right for review and the interim duty becomes final. Accordingly, the review provisions associated with the Review Officer have the practical effect that although the Customs Act provides for a 6 month period within which to lodge an application to review interim duties, any such application would need to be made within 3 months as a party needs to allow time to lodge a subsequent application within that 6 month period given the possible rejection or termination of the application and the review of the rejection or termination. The 3 month period would then provide some opportunity for the CEO

to review all relevant information, either approve, reject or terminate the investigation and then provide for adequate time for the Review Officer to make a decision on the action of the CEO to either reject or terminate an application to review interim duty and still leave time to re-apply within the 6 month period.

10. The provisions that give authorities such as the CEO and the Review Officer prescribed periods to undertake actions or review decisions do not include deeming provisions that in the absence of a rejection or termination, the CEO or the Review Officer would be deemed to have approved the relevant applications. In the absence of such deeming provisions, delays by the CEO or by the Review Officer act to disadvantage an applicant.

ARE PROPOSALS IN THE BILL INCOMPATIBLE WITH OBLIGATIONS TO THE PRC UNDER WTO INTERNATIONAL AGREEMENTS?

It can be seen from the provisions set out above that unless specific provisions apply to the contrary, it is incompatible with "WTO International Agreements" for Australia to treat the PRC differently to other member countries. For present purposes, the WTO International Agreements are treated as the Marrakesh Agreement, the Protocol, the Implementation Agreement and the General Agreement on Tariffs and Trade 1994 (incorporating the General Agreement on Tariffs and Trade 1947).

We have a number of concerns that the "economies in transition" amendments contained in the Bill adversely affect the PRC and may be incompatible with the WTO International Agreements. These predominately arise from the fact that while the combined effect of Sections 269TAC(5D), 269TAC(5E) and 269TC(8) generally track the provisions of Article 15(a) of the Protocol, the real question is whether those Sections exceed the requirements of the Protocol and are otherwise contrary to the WTO International Agreements.

1 The Legislative Heritage is indicative that the provisions set out in the Bill are aimed at the PRC. In itself, this concentration may be seen contrary to the provisions of the various WTO International Agreements requiring all members to be treated equally.

2. The general proposition pursuant to relevant WTO International Agreements is that it is for the "relevant authority" to determine whether Government affects price in economies in transition. Specific reference can be made to Article 2.4 of the Implementation Agreement. This states as follows (with our emphasis):

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factor level and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes incurred between importation and resale and for profits accruing should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowances as warranted under this paragraph. **The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.**"

However, one of the effects to the amendments in the Bill is that if there is an "economy in transition" and a failure by an exporter of goods under investigation to answer a questionnaire or to answer a questionnaire in acceptable detail, then the normal value for goods will automatically be determined by the Minister having regard to all relevant information. The Minister need make no assessment of the economy of the exporter. In other words, as set out in page 7 of the Explanatory Memorandum to the Bill:

> "If the exporter of goods (from an economy in transition) does not provide the information requested by the questionnaire, then the normal value of the goods will be determined by the Minister having regard to all relevant information. In other words, the presumption, in the absence of the necessary information, will be that the domestic selling price has been significantly affected by government".

And as also set out in page 9 of the Explanatory Memorandum to the Bill.

> "This amendment will effectively put the obligation on an exporter from an economy in transition to show that the domestic selling price of goods is not significantly affected by government in order to have the general rule of price paid or payable for like goods sold in the ordinary course of trade apply".

While recognising that Article 15 of the Protocol does place an onus on exporters in the PRC to provide evidence regarding the existence of a market economy, it is our view that the mechanism proposed, which involves the distribution of questionnaires and adverse differences being drawn from a failure to respond to questionnaires or failure to respond in a manner deemed acceptable, is too onerous and is contrary to the Implementation Agreement and the Protocol. This conclusion is underlined by the lack of expertise by unsophisticated exporters in the PRC in dealing with ACS questionnaires. As discussed above, the questionnaire mechanism should provide for an exporter to apply for and be granted an extension of time to respond to the questionnaire regarding the status of the "economy in transition" and for assistance to be provided. This would be consistent with the provisions of the WTO Implementation Agreement described above and would also be consistent with practice in other countries such as the US. These are discussed in more detail in paragraphs 3 and 4 below.

3. Section 269TC(8) complies with the WTO Implementation Agreement to the extent that it grants 30 days to the exporter to answer a questionnaires seeking to have a dumping duty applied to imports. However, there is no provision for an extension should one be required. This is especially important when dealing with unsophisticated exporters in the PRC. The Government should advise exporters that they can apply for an extension of time, provide information on how to do so and for authorities to give proper consideration to a request for an extension of time were practicable to ensure consistency with Article 6.1 of the WTO Implementation Agreement. The Bill should expressly provide for extension periods on request. There are "extension provisions" but they do not apply to a questionnaire pursuant to Section 269TC(8). At the moment, the provisions of Section 269TC invite parties to make a submission in response to an original prima facie determination that dumping exists. Section 269TC(6) states that:

> "Despite the fact that a Notice under this Section specifies a particular period for **interested parties** to lodge submissions with the CEO, if the CEO is satisfied by representation in writing by an interested party:

(a) the longer period is reasonably required for the party to make a submission; and

(b) that allowing a longer period will be practicable to the circumstances, the CEO may notify the party in writing that a specified further period will be allowed for the party to lodge a submission".

It should be noted that the proposed regime for the new 269TC(8) is entirely different. This specifies that a questionnaire is to be issued to **exporters** and requiring the questionnaire to be completed within a prescribed time, failing which certain adverse consequences will be drawn. Section 269TC(8) is different to seeking submissions from an interested party. So, as it stands, the extension provision **will not** apply to exporters receiving questionnaires as part of the CEO making the prima facie decision. The Section also states that if the questionnaire is not completed or is not completed in an appropriate form, then the investigation of dumping duties **will** proceed on the basis of Section 269TAC(5D) (in other words, they will be deemed to be in an economy in transition and price control situation, with normal value determined by the Minister). The provisions of Section 269TC(8) are therefore effectively self-executing provisions stating that if the requirements are not meet by a prescribed time, then there will be deemed normal value determined by the Minister. The additional difficulty is that it falls to the CEO to determine whether a response has been adequately made. It is recommended that Section 269TC(8) be re-drafted to reflect these recommendations in terms of enabling exporters to seek a time extension to respond to a questionnaire.

4. Article 6.13 of the Implementation Agreement obliges authorities to take into account difficulties experienced by interested parties in providing information requested and to provide assistance where practicable. This Article makes it clear that Customs authorities can provide assistance. There are equivalent provisions in the US Customs Legislation (a copy of which is annexed marked "**F**") which enables the US Customs Service to provide assistance to interested parties. The ACS may be concerned that they do not provide assistance where there was potential for an accusation to be later leveled of providing misleading information. Such a concern is inconsistent with the acknowledged expertise of officers of the ACS in handling dumping inquiries. If assistance can be provided to "interested parties" (and is provided elsewhere), why should such assistance not be afforded to exporters being obliged to answer a questionnaire, especially where failure to answer the questionnaire is "fatal"? There is no suggestion that the ACS can be seen to be unfair, merely that the ACS should be able to provide some assistance to exporters in the completion of the forms, taking into account that failure to complete forms or inaccurate completion of those forms can have significant adverse consequences for the parties.

5. The proposed sub-Section 269TAC(5D)(d) provides that one of the bases upon which the Minister can proceed to determine normal values when dealing with an economy in transition is if the answers given to the questionnaires provided under 269TC(8) by the exporter of the exported goods do not provide a reasonable basis for making the determination under the Subsection. This may be at odds with Article 6.8 of the Implementation Agreement which entitles decisions to be made even in the absence of information from an "interested party". Further, Article 5 of the associated Annexure II to the Implementation Agreement regarding "Best Information Available" states that:

> "Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, providing that the interested party is acted to the best of its ability".

It is our view that the provisions of Subsection 269TAC(5D)(d) may, in principle, be contrary to Article 6.8 of the Implementation Agreement. It is suggested that the Subsection should be amended to reflect that it is only if the answers to the questionnaire **and** the ACS's inquiries do not provide a reasonable basis that there is a market economy, that the Normal Value for goods from an economy in transition is to be determined by the Minister. The Subsection should reflect the "Best Information Available" provisions.

6. The language of the questionnaire provisions in Section 269TC(8) concentrates on a questionnaire being provided to "exporters" nominated in an application for a dumping duty notice. However, Article 15(a)(i) of the Protocol uses the term "producer" as the person from whom the information is to be sought regarding the economy in transition. It may be that a producer is not necessarily the exporter. Accordingly, it is our recommendation that questionnaires should be provided both to exporters and to the producers of goods (should they be different).

7. The pure reliance on complete answers to questionnaires meeting some high standards appears contrary to Article 5 of Annexure II to the Implementation Agreement regarding "Best Information Available" described above.

8. The "economies in transition" provisions should have "sunset" provisions for their application to the PRC in the manner consistent with Article 15 of the Protocol.

RECOMMENDATIONS TO ENSURE COMPLIANCE BY AUSTRALIA IN ITS OBLIGATIONS TO THE PRC PURSUANT TO WTO INTERNATIONAL AGREEMENTS

As requested by the Terms of Reference of the Committee, we recommend that the following amendments be made to the Bill. Please note that to be consistent with the Terms of Reference, these proposals are made solely in relation to the economy in transition provisions applying to the PRC. However, it is our view that they will also improve compliance for other "economies in transition" outside of the PRC.

As a starting point, these recommendations are aimed at ensuring that the proposed amendments to Sections 269TAC(5D) and (5E) and Section 269TC do not exceed the provisions of Article 15(a) of the Protocol and are consistent with the Implementation Agreement, taking into account the particular situation for exporters in the PRC.

1. The proposed amendments obliging exporters in the country of export to provide answers to questionnaires in a particular way, with an adverse consequence to follow from the failure to do so or the failure to do so properly, be amended in a manner consistent with the "Best Information Available" provisions set out in Article 5 of Annexure II to the Implementation Agreement and Article 6.8 of the Implementation Agreement. The ACS should be obliged to make a proper determination as to whether a market economy exists in accordance with the material provided to it rather than merely making a preliminary assessment that the information is not comprehensive based on "best information" available.

2. The amendments to the obligations to answer a questionnaire be amended as follows:

   (a) Amend the questionnaire provision in a manner consistent to Article 6.1.1 of the Implementation Agreement and other provisions of Section 269TC to

specifically oblige the ACS to inform an exporter that they are entitled to an extension of time to respond to the questionnaire and the grounds on which an extension may be available.

(b) Questionnaires are to be provided to "producers" and "exporters" in the manner contemplated by Article 15(a) of the Protocol (to the extent that they are different).

(c) Include a provision by which an exporter is advised that they may seek assistance from Customs in completion of the questionnaire and the grounds on which assistance may be available in a manner consistent with Article 6.13 of the Implementation Agreement and US provisions.

3. The Explanatory Memorandum for the Bill be re-issued to clarify that the amendments to the provisions regarding economies in transition are also aimed at reflecting the requirements of the PRC in the Protocol.

4. Set a sunset provision for the effect of the "economy in transition" provisions applying to the PRC that is consistent with Article 15 of the Protocol.

5. Amend the "economy in transition" provision to clarify the situations in which a country is no longer an economy in transition and the requirements to apply for that country to be excluded from those provisions.

6. Additional consideration be given as to whether other "economies in transition" are also adversely effected by the Bill.

The LIV and the CIT Committee would be pleased to assist further in the drafting of these proposed amendments.