TRADE REMEDIES TASK FORCE

RESPONSE TO
THE AUSTRALIAN LABOR PARTY DISCUSSION PAPER ON AUSTRALIA'S ANTI-DUMPING ADMINISTRATION
A FAIR GO FOR AUSTRALIAN INDUSTRY:

Introduction

The Trade Remedies Task Force (TRTF) welcomes the Labor Party's stated position in the Discussion Paper that it supports the use of anti-dumping and anti subsidy measures to correct distortions in trade that cause injury to Australian industry through unfair competition in the Australian market.

This statement reflects the Labor Party's current National Platform, which states that a Federal Labor Government would:

> maintain a strong anti-dumping scheme to ensure Australian industry is not disadvantaged by unfairly priced imports … Anti-dumping legislation ensures that overseas exporters do not hurt our industry by selling their products in Australia at a lower price than they charge in their home markets. **Where there is an allegation of dumping, it should be independently and urgently investigated by the Australian Customs Service.**

The TRTF is concerned that the Discussion Paper brings into question current ALP policy, as well as the conduct of dumping investigations by the Australian Customs Service. The rationale given in the Paper for a re-evaluation of the role of the Australian Customs Service is that Customs now has a much greater focus on performing the functions of a border security agency. This role would be further accelerated under a Labor Government.

The Discussion Paper puts the view that the location of functions such as the administration of anti-dumping within a border security agency is no longer regarded as appropriate. However, in coming to this conclusion, there is no consideration in the Paper of the current advantages of Customs continuing to retain an anti-dumping administration, and ways that it could be improved.

The Discussion Paper claims that the best option is for these functions to be moved to the Australian Competition and Consumer Commission (ACCC). The TRTF strongly opposes this proposal, as well as the Paper's proposal to establish a panel to consider anti-dumping applications.

During the last 12 months the TRTF has been actively engaged in the Government's Joint Study Review of Australia's anti-dumping administration. It is disappointing that some of the outcomes of the Study - particularly in relation to the pre initiation and initiation stage of an investigation, and assistance to be provided to SMEs – appear to have been overlooked in the Discussion Paper.

The TRTF is also extremely concerned that implicit in some of the views expressed in the Discussion Paper is that anti-dumping and countervailing actions are considered to be motivated by protectionism, and are regarded as a form of industry assistance. The TRTF completely rejects these assumptions. Both measures are recognised by and enshrined in World Trade Organization rules. They form a vital part of a properly functioning international trading system, one which acts to address distortions in trade caused by unfair competitive practices. The aim of such measures is to restore effective competition to the international market place.

Not only does the TRTF strongly believe anti-dumping administration should remain with Customs, but the TRTF also supports the continued role of the Minister for Customs as the final decision maker.

The TRTF believes that the Discussion Paper does not put forward strong arguments to show that present organisational structure and statutory timeframes have been ineffective. Nonetheless, the TRTF has been working over the last 12 months to improve the operation of the anti-dumping system, and with this objective, the TRTF provides the following proposals for consideration by relevant Shadow Ministers.

The TRTF comments are set down in the order dealt with in the Discussion Paper.

1. Access to information

The question of access to information prior to lodgement is of particular concern to those seeking to lodge an application. The TRTF agrees with the Paper's comments that import volumes and values can be hidden by the breadth of the statistical classification, or by the non-disclosure of statistical data on the grounds of confidentiality.

This issue was examined by the Joint Study, where it was concluded that there would need to be some form of legislative amendment to overcome the confidentiality requirements imposed on the ABS. The TRTF was disappointed that its recommendation to address this ongoing problem was not adopted in the Joint Study review.

The Discussion Paper proposes the establishment of a confidentiality agreement between the ABS and the agency administering anti-dumping applications. The TRTF strongly supports reform to the system to allow an appropriate release of statistical data. However, the TRTF feels that the confidentiality agreement proposal may not be sufficient to overcome the legal obstacles currently blocking the sourcing of information from the ABS.

The TRTF would strongly support some form of legislative amendment to address this problem.

2. Assistance to applicants

The Discussion Paper states that it is necessary – for reasons of procedural fairness - that the agency providing advice on the preparation of a complaint be separate from the agency making the decision as to whether or not to initiate the case.

This issue was addressed in the Submission made by the TRTF to the Joint Study[1], where it was noted that it was not WTO-inconsistent in having an assistance function for applicants provided by an anti-dumping administration, provided that the officers who provided such a service took no part in an investigation if the case on which they advised was initiated.

The reason why the TRTF strongly supports retaining this function within an anti-dumping authority is that the officers of the authority are very experienced in anti-dumping matters, and are therefore better-equipped to provide advice to applicants than officers of other agencies. It also means that applicants can benefit from the efficiencies of a "one stop shop" approach.

Reference is made in the Discussion Paper to the option of AusIndustry being the agency to provide this advisory service to potential applicants. The WTO Anti-Dumping and Subsidy Agreements, and Australian legislation in these areas are highly technical, as is the investigative process. To date AusIndustry has not been involved in any anti-dumping or subsidy cases and currently does not have the relevant expertise to advise potential applicants

---

[1] As noted in the WTO *Handbook on Anti Dumping Practice* at pages 28-29, it is sometimes problematic for applicants to meet the information requirements of Article 5.1 of the WTO *Anti Dumping Agreement.*

"It is the experience of many investigating authorities that this situation is exacerbated by the fact that their domestic industries do not always have a sufficient understanding of the process. Assistance with the process is sometimes offered by the governments, especially in a case of small to medium-sized enterprises.

However in order to safeguard the objectivity of the investigators to be involved in the investigation, if and when initiated, and to ensure that their early exposure to the details of the matter before initiation will not compromise the requirement that the investigation be conducted in an unbiased manner, authorities might consider appointing different staff members as investigators to those who assisted the applicants in the pre initiation stage of the process "

The TRTF acknowledges that members of the Dumping Liaison Unit who advise an applicant about a draft application cannot have any role in the subsequent dumping investigation. ………………."[1]

on the inherent complexities. The TRTF recommends that these functions remain with the one agency – namely Customs.

3. Better guidance for SME applicants

The TRTF agrees with the Discussion Paper concerning the particular difficulties faced by SME's in lodging an anti-dumping application. SME's are at a disadvantage because of their limited resources. As stated in the Discussion Paper, in many countries, such as South Korea and Thailand, a foreign exporter is able to obtain assistance from its home government in any anti-dumping or anti-subsidy case, in contrast to our practice in Australia, where SMEs do not receive assistance in actually undertaking a case.

The issue of assistance to SME's is of particular concern to the TRTF and was the subject of submissions to the Joint Study. The outcomes of the Joint Study in this area, which established an information liaison function within Customs to help advise companies on procedural matters, were positive first steps and were endorsed by the TRTF.

The Discussion Paper further proposes that AusIndustry provide expert guidance to SME's throughout the case, from starting the complaint to its finalisation. However, it is unclear in the Discussion Paper what form of actual assistance would be provided. The TRTF maintains its position that Customs retains the level of expertise necessary to assist SMEs with advice on anti-dumping matters.

4. Access to legal precedents and decisions

The Discussion Paper proposes that the administering authority provide a web directory on anti-dumping which integrates the public and available private sites providing specific information on anti-dumping and subsidy matters. This proposal is supported by the TRTF.

5. Proposed Creation of an Initiation Panel

The Discussion Paper proposes that a special Panel be established to determine if an application should be initiated. It recommends that the Panel be comprised of experts in trade, industry and competition policy. It is unclear from which agencies these "experts" would be drawn. Presumably they would be from Departments such as Industry, Science and Resources; Foreign Affairs and Trade; and Treasury. The ACCC (which the Discussion Paper proposes as the anti-dumping administration) would not be a part of the Panel.

The Discussion Paper claims that the advantages of a Panel approach are that it:

(i) separates the initiation decision from the investigation phase

(ii) would eliminate vexatious and frivolous claims

(iii) allows the consideration of policy alternatives and international relations issues at the earliest stage of an inquiry.

The TRTF strongly opposes the proposal to have a Panel determine whether or not a case should be initiated. In addition to such a proposal being WTO-inconsistent, the TRTF believes that such an arrangement would be potentially unworkable in practice and could result in investigation timeframe extensions due to the roles of two administrations (one for initiation, one for investigation).

An examination of the stated "advantages" of these factors is set out below:

Independent screening of applications

For the reasons referred to in the TRTF's first submission to the Joint Study, there is no WTO requirement to have a separate body to report on initiation decisions from the investigation.

While the WTO Anti-Dumping Agreement does not bar a separate body from carrying out such a function, the TRTF is not aware of any other country that has a separate initiation body that is completely independent from the agency that carries out the actual investigation.

The principal reason for recommending that the anti-dumping authority retains control over the screening of applications is because the authority which carries out the subsequent investigation has the best-qualified personnel, and is therefore most appropriate to carry out the initial evaluation.

The TRTF believes the proposed appointment of officials from different agencies such as the Departments of Industry, Science and Resources; Foreign Affairs and Trade; and Treasury is impractical. The staff appointed from these agencies would not have either the knowledge or experience to be able to conduct a proper verification process. This is understandable, given that these agencies play no substantive role in the administration of Australia's anti-dumping system.

Furthermore the work that is envisaged to be performed by the independent body would not be the same as the day-to-day work performed by the officers coming from other agencies. This means that there would be a critical gap in their knowledge, and there would also be little incentive for those persons to develop the required skills to the required standard. It would also be difficult to bring all the relevant officials together within the tight time frame required to ensure that the evaluation took place within the specified period.

Elimination of vexatious claims

The TRTF is of the firm view that there is negligible risk in Australia's current anti-dumping system for encouraging vexatious applications, given the

substantial information and evidence required of applicants at the early stages of the process. The present “pre-screening” phase eliminates the potential for any so-called vexatious complaints.

At present the Application Form used in Australian anti-dumping cases is comprehensive in its requirements for information, particularly in relation to injury[2]. An applicant is required to provide detailed information on injury which addresses all the injury factors set out in the WTO Anti-Dumping Agreement and under Australian law. They are required to index all these factors from a common base point for a period of three years prior to the one year injury period identified in the application.

The information requirements for an applicant and for an authority to evaluate an application, and the standard of evidence required in order to initiate an application, are clearly stated in the WTO’s Anti-Dumping and Subsidies Agreements. All these factors rule out frivolous applications being lodged.

Further, the question of the appropriate evidential standard to be used in evaluating a dumping application, and the methodology to be used by officers of the anti-dumping administration, were examined by the Joint Study.

The Joint Study recommended:

(a) the adoption of comprehensive guidelines for the examination of a formally lodged application. Those guidelines have as attachments:
   - Evidential Standards
   - Deficiency List Examples
   - Example of Initiation/Rejection Report Template;

(b) providing applicants with guidelines for completion of Parts A, B and C of the Application form; and

(c) that it be a criminal offence for a false declaration to be made by an applicant in lodging an application.

Unfortunately, there is no consideration of any of the findings and recommendations of the Joint Study in the Discussion Paper on these matters, notwithstanding that they are fundamental to concerns expressed in the Paper.

Consideration of policy alternatives and international relations issues at the earliest stage of an inquiry

[2] The Australian application form appears in ‘A Handbook on Anti Dumping Investigations” by Judith Czako, Johann Humann and Jorge Miranda as a model application form.

It appears that there are two main reasons for this Panel Proposal set out in the Discussion Paper. The first one is to review an application for consistency with a broader policy perspective, namely, a public interest test. This interpretation by the TRTF is supported by the statement in the Discussion paper (p. 16) that

> Given the Panel set up in Proposal 4 to consider wider policy issues, it is also worthwhile considering whether there is any national interest remaining in having the Minister intimately involved in the decision making process

This proposal to have regard to a "national interest" test is inconsistent with the obligations imposed on anti-dumping authorities under the WTO Anti-Dumping Agreement. The Agreement makes it clear, the only information required in the Application is that set out in Article 5.2 of the Anti-Dumping Agreement, and the basis for the evaluation of that information is the test set out in Article 5.3 of the Agreement[3]. Neither provision makes any reference to any consideration of "national interest".

This proposal in the Discussion Paper to have regard to public interest considerations at the initiation stage of an investigation injects a policy element into an administrative stage of the process. This is inappropriate, as

---

[3] Articles 5.2 and 5.3 of the Anti-Dumping Agreement:

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

policy considerations should guide and inform the design of an anti-dumping mechanism, rather than being considered in the administration of the program.

The second reason the Discussion Paper promotes the Panel proposal is so that the Panel could be used to advise applicants of other courses of action which may ultimately result in better outcomes for an applicant than the imposition of anti dumping or countervailing measures. The TRTF does not consider that the screening process, with its strict time sensitivities, is an appropriate stage for the consideration of options. These should be canvassed with the potential applicant prior to commencing an anti-dumping case.

Once an application is lodged, other courses of action could only be considered within the notification period, which ranges from 5 to 19 days from the date of lodgement of the application.

To be effective, consideration of other options would have to occur at an earlier point in time such as when industry was seeking advice on whether or not to lodge an application[4]. The current practice with anti-dumping cases is that applicants only lodge applications when there is no alternative remedy available.

The Discussion Paper also proposes that the Panel, on considering a lodged application, should examine policy (including international relations) issues at the earliest stage of the inquiry. It is asserted that if the complainant decides to proceed it is better that alternatives be explored prior to notification of the government from which the goods are exported.

The TRTF would point out that there is an important distinction between anti-dumping and subsidies actions that needs to be made at this point. The WTO Subsidies Agreement requires consultations with the government of the exporting country, because subsidies are a conscious policy of a foreign government. In contrast, in an anti-dumping case, the dispute is between two private commercial parties. Because of this critical difference, the WTO Anti-Dumping Agreement does not require consultation with other governments.

The Paper's proposal for the Panel to undertake such an examination in an anti-dumping action would bring inappropriate material into the review. The TRTF would concur that policy considerations are important, but they should be considered in the *design* of an anti-dumping system, rather than imposed onto individual cases during an anti-dumping process.

Taking the latter approach would reduce the consistency in decision making, as well as adding substantially to the complexity and time taken for an anti-dumping case. In addition, it would introduce a Stage Two to the

---

[4] It would be open to an agency such as AusIndustry to provide such advice but they would not need to be a formal part of the dumping process.

administrative process of an investigation – similar to the former Anti-Dumping Authority's previous involvement.

One of the critical needs consistently stressed by the TRTF is that anti-dumping cases and the imposition of dumping measures need to be carried out as quickly as possible, given the serious and immediate commercial ramifications of dumping to a competitor's market. The Panel proposal in the Discussion Paper would completely work against this imperative.

6. Competition policy considerations

The Discussion Paper highlights the view put forward by some parties of the need to take into account competition policy considerations as part of the injury assessment component of anti-dumping investigations. The Paper suggests that this function be performed by either the Productivity Commission or the Australian Competition and Consumer Commission (ACCC).

The Discussion Paper makes reference to the Coles Myer submission to the Joint Study carried out last year, in which Coles Myer stated that there should be a separate injury assessment body. The Submission referred to the Canadian model as an example. Canada has anti-dumping investigations carried out by the Border Service Agency, with injury assessments undertaken by the Canadian International Trade Tribunal.

The test proposed in the Coles Myer submission was one which would firstly, investigate whether the goods are dumped and then determine whether

"*because of that*, [they caused] *material injury to competition in an Australian industry"*

What is meant by "competition" or how it should be defined are not apparent in either the Coles Myer submission or the Discussion Paper.

The TRTF believes that this proposed test does not reflect the WTO Anti Dumping Agreement. Nor is it used in Australia or in any other anti dumping regime. The TRTF would point out that the Coles Myer proposal is made from the perspective of an importer, which would potentially benefit from dumping on the Australian market. Their concerns do not take into account the broader consideration, recognised by the WTO and anti-dumping law and practice in Australia and most other countries, that dumping is a potentially injurious activity.

The TRTF strongly believes that the current policy must be retained, that is, a finding of injury can only be made in cases where the injury is sustained by an industry producing like goods.

The Discussion Paper states that there is a need to link the issue of "competitiveness" as used in the WTO Anti-Dumping Agreement with that of injury. "Competitiveness" is a term used in a particular test in the Agreement

that is considered when cumulating the dumped imports from multiple countries in a single anti-dumping action. The Discussion Paper, in seeking to introduce the criterion of competition to the Australian anti-dumping system, misleadingly refers to a provision in the Anti-Dumping Agreement which is not relevant, because it relates to a particular technical test for the cumulation of goods, rather than the notion of competition used in competition policy.

7. Proposed new administrative arrangements

At present, the function of considering an application and carrying out an anti-dumping investigation rests with Customs. The implementation and monitoring of measures is also carried out by Customs. Following the results of the Joint Study, the role of assisting companies, particularly SMEs, as to the processes involved and information required in an anti-dumping case, is to be also carried out by Customs. There is a limited right of appeal to the TMRO (a body within the Justice and Customs portfolio), with the final decision maker being the Minister for Customs. Beyond this process is the right to appeal to the Federal Court under the Administrative Decisions (Judicial Review) Act.

In contrast, the Discussion Paper proposes a model involving six separate bodies:

- The ACCC becomes the anti-dumping authority.
- A separate Panel comprising experts from several agencies to be appointed to approve or reject an application
- The appointment of an appeal body the Australian Competition Tribunal (ACT), and then
- appeal from the ACT on questions of law to the Federal Court
- The monitoring of anti dumping measures to remain with Customs.
- AusIndustry to provide assistance to potential applicants and to SMEs

The TRTF believes that this proposed fragmentation of functions would be a backward step compared to the present process, particularly given that in-depth expertise on anti-dumping matters in the Australian Government is not widespread, and time frames are critical. Further, the proposals for various pre-screening, initiation and panel processes involving different government agencies neglects to take account of the main reason why Customs is charged with the administering of the Anti-Dumping function (as in other administrations worldwide) – a role responsible for administering commercial transactions across the Customs barrier.

The Discussion Paper makes the proposition that moving the anti-dumping function to the ACCC would be more efficient, as it would consolidate functions. However, given the substantial differences that exist between the objectives, guidelines and focus of the ACCC and the anti-dumping agency, the TRTF believes that this proposal is fundamentally flawed.

The Discussion Paper also argues that the ACCC should become the anti-dumping authority because Customs is now more focussed on becoming a law enforcement and border protection agency, and its resources should not be used to administer anti-dumping. It argues that the ACCC is the agency that understands the application of competition and related issues and has considerable expertise in conducting commercial investigations, and therefore is qualified to be the agency responsible for anti-dumping.

Customs or ACCC as the Anti-Dumping Administration?

The TRTF is strongly opposed to transferring the anti-dumping administration from Customs to the ACCC. At present, Customs administers anti-dumping from a perspective of seeking to redress the impact of dumping on individual companies, as provided for by the WTO and the enacting Australian legislation. In contrast the ACCC operates from a radically different perspective, one which places greater emphasis on the interests of consumers, in the context of domestic competition policy.

The implementation of the different objectives of the WTO's (and Australia's) anti-dumping regime and domestic competition policy are not mutually exclusive. However, there would be serious adverse implications in transferring the administration of anti-dumping to the ACCC, as the objectives and guidelines of the new host agency would undermine the effectiveness and focus of the anti-dumping regime, to the detriment of Australian industry.

Over time as personnel changed, the culture and philosophy of the ACCC as a competition policy and consumer "watchdog" would become the guiding principle. Such an approach is not appropriate for a function involving the application of a regime designed to assess the competing arguments on dumping and remedy the injuries done to companies by the unfair dumping of products by overseas competitors.

It is widely accepted that there is an important difference in emphasis between anti-dumping and competition policy. Anti-dumping is concerned with ensuring fair competition between companies competing in the global marketplace, through a focus on the specific parties involved in an instance of anti-dumping, while domestic competition policy has a goal of promoting competition in the Australian marketplace in support of broad economic policy goals. The ACCC defines its role as:

> …promoting competition and fair trade in the market place to benefit consumers, business and the community. [the ACCC's] primary responsibility is to ensure that individuals and businesses comply with the Commonwealth competition, fair trading and consumer protection laws.

Existing anti-dumping regimes appropriately, and consistent with the WTO Agreement, have a focus on the commercial parties directly involved, rather than considerations of the broader issues involved in the ACCC's competition policy analysis.

Anti-dumping does not, and should not, protect Australian industry from fair competition. Indeed, anti-dumping measures ensure that effective competition is restored through the imposition of measures to remove unfair (dumping) practices to enable effective and fair competition to occur.

There is an underlying assumption in the Discussion Paper that little, if any, emphasis is accorded to providing robust mechanisms for industry to counter the injurious affects of dumping. Rather, the focus is on downstream users.[5]

However, it is important to make clear that Australia's anti-dumping regime already takes into account the interests of consumers, in so far as those needs can be met through the application of the Lesser Duty Rule. This Rule refers to the practice of not imposing a dumping duty at the full margin of dumping that has been found, rather to only impose duty to the level required to compensate for the injury to the domestic industry.

There has been no proposal in the current Doha Round of WTO negotiations that there be any change to the Anti-Dumping Agreement to provide that injury would be defined in terms of injury to competition in an industry rather than material injury to an individual company, as is the case now.

Although the Discussion Paper goes to great lengths to argue the incompatibility of Customs as a border control agency having an anti-dumping function, there is no discussion of why, for example, in Canada the function of administering dumping is performed by a border control agency.

Customs has a clear advantage with regard to the long-standing experience and knowledge of its personnel on anti-dumping issues, a knowledge base which is non-existent in the ACCC. Moving this function to the ACCC would involve a fragmentation of related functions across a broader range of agencies, diluting the expertise available, and contributing to its further erosion.

A key weakness of the Discussion Paper's line of argument is that the injury analysis function is seen as the only function that is relevant to an anti-dumping inquiry. The need to have people experienced in the investigation of dumping - in determining normal values and export prices, in making appropriate adjustments etc., and in understanding of the WTO Anti-Dumping and Subsidies Agreement are ignored. These credentials reinforce why Customs should remain the key anti-dumping administration agency.

[5] . There is no reference at all to the fact that Australia applies the "lesser duty rule" so that any measures imposed now in an anti-dumping case are only to the extent necessary to remove the effect of injurious dumping.

The area of skills has been an issue on which the TRTF has focused during the Joint Study. The TRTF has consistently advocated that we must ensure these critical skills are present in Customs in order to be effectively equipped to deal with the complex commercial and accounting issues which need to be addressed in anti-dumping cases.

As a consequence of the proposed transfer of anti-dumping to the ACCC, the Discussion Paper further proposes that the appeal function be taken from the TMRO and be placed instead with the Australian Competition Tribunal. Beyond this, appeals on questions of law would go to the Federal Court.

According to the Discussion Paper, the proposed model obviates the need to have the Minister as a decision maker because national interest type considerations would be dealt with by the Panel process.

8. Role of the Minister as decision maker

The Discussion Paper asserts that if the Minister's role as the final decision maker is removed from the anti-dumping process then the political element is removed, in favour of a more technical approach.

The TRTF believes that there are compelling arguments for the Minister to maintain his current role. The criteria used to determine material injury contain a wide range of factors, none of which in their own right may be determinative. Allowing the Minister to have a determinative role enables the executive arm of government to consider policy considerations in the eventual outcome.

It is more appropriate that broader policy considerations only enter into the process at the beginning and end stages of (a) designing the mechanism; and (b) with the exercise of ultimate ministerial discretion in particularly contentious cases. This follows a model used in other areas of government administration.

The TRTF supports the introduction of a fixed time limit on the Minister making his decision on receipt of a report. It is in the interest of all parties that there is finality to the process. The TRTF believes that the time limit for the Minister's decision making be limited to 90 days after he has received the recommendation from Customs.

The removal of the Minister as the final decision maker would seem to necessitate his replacement by a full merit review by a judicial or quasi-judicial body. This would be counter to the broader policy goal of streamlining the process. One of the key aims of the Willet report, upon which the present anti-dumping system is based, was to ensure that there was a comprehensive consideration of a case by one agency, to speed up processing times, and remove the frustration of dealing with more than one administrative body.

The TRTF is concerned that removing ministerial involvement could well result in a return to a non-workable two stage process, comprising a determination by the anti-dumping authority, followed by a complete (that is including merits) review by another body. This would be likely to substantially lengthen the process and result in major additional expenses for applicants. In particular, SMEs would see the system as becoming even more complex and expensive, irrespective of the strength of their claims.

9. Transparency in providing information to ensure legitimacy of process

Access to confidential information

The TRTF has reservations over the adoption of an Administrative Order Process (AOP) proposed in the Discussion Paper, as used in the US, because it would add further complexity and expense to the process. This view is supported by the report commissioned by the European Commission, which recommended against the implementation of such a process.

In Australia, the system currently allows for companies that are considering taking an anti-dumping action to choose whoever they want to engage to prepare the case. The concern the TRTF has regarding a proposed AOP system is that it would force much greater reliance on legal frims, and remove the flexibility that exists now. To be effective and equitable any revised process in Australia would have to include both lawyers and non lawyers. To limit access to lawyers only (and to experts engaged by lawyers) would mean that companies taking an anti-dumping action would need to engage legal firms, most likely resulting in a substantial increase in costs.

The TRTF sees no net benefit in changing the current arrangements. It should be noted that access to information that would be covered by an AOP would be available if a case subsequently went to the Federal Court.

Access to detailed statement of reasons

The TRTF notes the Discussion Paper calls for a detailed statement of reasons for findings to be made available under a non disclosure order. The TRTF seeks clarification of how this proposal differs from the current requirement for a statement of reasons to be provided.

10. An efficient administration with no party unnecessarily burdened

The Discussion Paper proposes a revised investigation structure, in which a Preliminary Injury finding can be made early in the investigation, followed by a Preliminary Dumping determination, a final Dumping and Injury Finding, and a separation of the expert teams responsible for dumping and injury assessment.

The TRTF believes that the proposal in the Discussion Paper to impose Provisional Measures only upon the establishment of “serious injury” to

domestic industry is not consistent with WTO rules. It increases the onus for industry and is opposed by the TRTF. The TRTF refers to its submission to the Joint Study on the application of Provisional Measures, which in essence stated that Provisional Measures ought to be imposed at Day 60.

The Discussion Paper proposes that provisional measures would be imposed at Day 135, which is the date at which the preliminary finding of dumping is made (Appendix 1). At this stage there would be verification of exporter information, with the preliminary finding of injury already having been made at day 60. The Paper proposes that provisional measures be collected by Day 135, or at Day 60 if there is evidence of continuing dumping and serious injury to the domestic industry.

Subsequent to the preliminary finding being made there would be a further period from that date up until Day 200 for further submissions and possible meeting of parties, further verification and finalisation of injury/causal link analysis. There would be a draft report prepared at Day 195 and a final opportunity for discussion with affected parties. Final duties would be imposed after Day 200. There would be a further 30 day period allowed for an appeal to the Australian Competition Tribunal, and if this right was exercised, it would result in the entire process ending at Day 270.

The TRTF is of the view that there seems to be a fundamental misunderstanding in the Discussion Paper, evidenced in the linking of a Preliminary Finding and the imposition of provisional measures. The Discussion Paper quotes Articles 7 and 10 of the WTO Anti-Dumping Agreement as the relevant provisions.[6]

The imposition of provisional measures is permissible when the authorities judge such measures necessary to prevent injury – meaning material injury - being caused during the investigation. There is no such term as "serious" injury used in the Anti-Dumping Agreement or Australian domestic legislation, and the term "serious" can only be understood to refer to injury that is greater than material injury. This represents a winding back of the rights of applicants that is, in the view of the TRTF, inconsistent with the Anti-Dumping Agreement.

---

[6] Article 7 provides that:

Provisional Measures may be applied if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comment

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

It would appear that under the proposal in the Discussion Paper, applicants would have to wait until Day 135 before provisional measures were imposed (the date of determination of a Preliminary Finding). The exception to this would be cases of "serious injury", in which an applicant would be entitled to have provisional measures imposed from Day 60.

On another issue, the TRTF cannot understand the rationale underlying the proposal to not require exporters to provide detailed information in an Exporter Questionnaire before a preliminary determination of injury is made. Under the proposal the exporter questionnaire has to be returned by Day 65. While the Paper claims that this proposal would assist exporters, It is the TRTF's view that exporters would gain no additional benefit.

The verification of the injury elements prior to a preliminary finding of injury takes place between Day 30 to Day 60, and the most likely scenario is that any such finding either of injury or no injury will not occur until Day 60.

This would mean that if there is a preliminary finding of injury, an exporter would have 5 days to complete and return a form. Complying with this time frame would seem to be impractical, leaving an exporter with the following options:

- Collect all the necessary information and provide the completed form. Given that all the expense is in the collection of the information then there is no real cost saving in simply waiting until after day 60

- Take the risk and not supply any information. If exporters were confident that they had not dumped it would be in their commercial interests to provide the information

- To do as the paper suggests and provide general information. This approach would be impractical as generalised or partial information would be of little probative value, and its relevance would be highly questionable

The most practical solution would be for the exporter to complete and forward the exporter questionnaire, meaning that the new proposal offers no substantial improvement for exporters over the current process.

11. Monitoring Outcomes

The use of internal market prices by industry as an indication of injury is noted in the Discussion Paper as being questioned by some commentators. The Paper proposes that this question could be addressed by the ACCC. It is the opinion of the TRTF that this information again should be considered by the anti-dumping authority, with no particular improvement apparent in having this consideration undertaken by the ACCC.

The question of a reference to consider the difficulties faced by producers in relation to “close processed agricultural goods” is addressed in our comments on Appendix 5 below.

12. Appendix 2

The TRTF notes that Appendix 2 in the Discussion Paper is a general comment on the international policy context, which provides an overview of the arguments for and against anti-dumping regimes.

The TRTF notes the Discussion Paper’s assertions that:

- the imposition of dumping duties and the time taken by an anti-dumping administration to reach a decision are cited as examples of a change in the level of assistance provided to domestic industry; and

- an anti-dumping administration needs to be conscious of the economic impact the imposition of dumping duties can have on Australian industry as a whole.

The TRTF strongly opposes these propositions.

The TRTF rejects the idea that the imposition of measures and the time taken to consider the imposition of measures can be characterised as some form of protection or undue assistance to industry. As noted earlier, anti-dumping measures are provided to address a form of unfair trading, and are recognised by the WTO and most countries as such.

The statement about anti dumping administrations needing to be mindful of the effects of their decisions does not reflect the international policy context, and is merely a proposition made in the Discussion Paper. Given that the lesser duty rule is currently applied in Australia’s anti-dumping determinations, then the option which would seem to be canvassed in the Discussion Paper is not to impose any measures at all.

The Paper proposes a regime that results in measures imposed on dumped imports not being applied to a company that produces for the export market. This is effectively the application of a public interest test and is contrary to the current law and practice of making anti-dumping determinations based strictly on the evidence provided by the parties directly involved in the case.[7]

---

[7] The type of factors that are mentioned for example the inability of a company to supply goods would be dealt with by the issue of causality. The issue of quantity, quality and competitive price are all issues which to an extent depend on the subjective views of an importer or end user. Dumping administrations will disregard quality as meaningful criteria. The issue of competitive prices would appear to reflect the fact that once dumping measures are in place the price of the goods go up. Again others complain that they should pay the competitive dumped price.

13. Appendix 5

Appendix 5 in the Discussion Paper highlights the difficulties faced by primary producers in being considered part of the domestic industry by virtue of the operation of the provisions which deal with "close processed agricultural goods". The TRTF would support primary producers having access to the anti-dumping system.

In terms of the substance of Appendix 5 the TRTF notes that the most relevant WTO authority is the decision of the WTO Panel and Appellate Body in the Lamb Meat case, which is omitted[8]. The reference to the use of Article 4.1(ii) is considered misplaced.

[8] Technically the Lamb Meat cases were to do with Safeguards so is not something that a panel would necessarily have to have regard to a dumping case. However in that case Australia successfully argued that producers meant the producer of the like good. This effectively would mean that producers such as those meant to be assisted by the " close processed agricultural goods" definition that is downstream input suppliers would no longer be considered as producers of the like product.