ACTU
australian council of trade unions

level 6 365 queen street
melbourne victoria 3000
t +613 9664 7333
f +613 9600 0050
w actu.org.au

President Gerardine (Ged) Kearney
Secretary Jeff Lawrence

The Hon Senator Annette Hurley
Chair, Senate Economics Legislation Committee
Email: economics.sen@aph.gov.au

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Dear Senator Hurley

Customs Amendment (Anti-Dumping) Bill 2011

I am writing on behalf of the ACTU, AMWU, AWU and CFMEU.

Thank you for the opportunity to give evidence to the Committee's inquiry into the Customs Amendment (Anti-Dumping) Bill 2011 ('Bill').

We are pleased to provide the following answers to a number of questions taken on notice.

1. Application of WTO rules *(ACTU questions 1 & 2)*

While giving evidence to the Committee, we provided our considered view that clause 12 of the Bill is consistent with relevant WTO Rules.

Since giving our evidence, we have reviewed the submission of JELD-WEN Australia Pty Ltd and the joint submissions of the Law Council of Australia and the Law Institute of Victoria. We have also had the opportunity to further discuss this issue with two leading academic international trade lawyers.

Following those deliberations we are confirmed in our initial views. We now set out in full our analysis and explanation of our position.

Analysis of WTO rules

The *Anti-Dumping Agreement*[1] and *Subsidies Agreement*[2] set out a process for dealing with complaints of dumping and actionable subsidisation. When a complaint is made, the investigating authorities must decide whether there is a prima facie case based on 'sufficient' preliminary evidence (arts 5.3, 5.8).[3] If there is, they must begin an investigation. They must write to all interested parties and invite them to present relevant evidence (art 6.1).

If no material is submitted, or material is submitted that is insufficient to refute the complainant's allegations, decisions may be made on the basis of the 'facts available' (art 6.8). Interested parties are to be warned of this possibility (cl 1, Annex II). In some cases the only 'facts available' will be the material submitted by the complainant, although this material must be treated with 'special circumspection' and should (where practicable) be verified through an independent secondary source (cl 7, Annex II).

If the only material before the investigating authorities is the complaint itself, the investigating authorities may still make positive findings about the matters at hand. In relation to complaints of dumping, the authorities must be satisfied of three things: that dumping has caused injury.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, 1994.
[2] *Agreement on Subsidies and Countervailing Measures*, 1994.
[3] For reasons of brevity, we make reference only to the provisions of the *Anti-Dumping Agreement*; the *Subsidies Agreement* has similar provisions.

When investigating the first element, the fact of dumping, the investigating authorities cannot impose an 'unreasonable' burden of proof on the complainant (art 2.4). Accordingly, in cases where no other parties have submitted material, and the complainant has but forward a 'sufficient' prima facie case of dumping, it is reasonable to proceed on the basis of the 'facts available' (art 6.8).

When determining the second element of a dumping complaint, 'injury', the investigating authorities must conduct an 'objective examination' of the effects of dumped goods on the domestic market, and can only make a finding of injury based on 'positive evidence' (art 3.1). Once again, if the material provided in the complaint establishes, in a positive way, that injury has occurred, this ground is made out. This may occur in the absence of any submissions from other parties. Indeed, it is hard to imagine how submissions from other parties could assist the investigating authorities in determining whether or not injury has occurred, given that the nature and extent of any injury is likely to be known only by the party that suffers it.

The third element of a dumping complaint is causation: proof that the dumped goods have caused, or threaten to cause, injury to domestic industry. Here, the decision must be 'based on an examination of all relevant evidence *before the authorities*' (emphasis added). In other words, the authorities are entitled to proceed on the basis of a complaint alone. A further evidentiary rule applies where the complaint is one of injury that may be suffered in future. In these cases, a determination of a 'threat' of injury must be 'based on facts and not merely on allegation, conjecture or remote possibility', and the authorities must take 'special care' in deciding the question (arts 3.7, 3.8). However, provided a complaint of threatened injury is based on well-established facts, it is clear that it can succeed even in the absence of evidence from other sources.

Slightly different rules apply to complaints of subsidisation. Under the *Subsidies Agreement*, subsidisation occurs where three elements are made out: a specific actionable subsidy causes injury to domestic industry. For the first element, the authorities must conduct their *own* investigation into whether a prohibited subsidy has been provided. If foreign firms and governments do not provide information, decisions can be made on the 'facts available' (art 12.7). However, a finding that a subsidy is specific must be 'clearly substantiated on the basis of positive evidence' (art 2.4). Clearly, in a case with *no* evidence about the foreign government's conduct, this cannot be satisfied. However, investigations cannot be initiated without 'sufficient' evidence from a complainant relating to the existence of a subsidy. Clearly, this is a form of 'positive' evidence that may suffice to satisfy the authorities — in the absence of any other evidence — that a prohibited subsidy has, in fact, been granted.

The second element of a subsidisation complaint is injury. Here, the *Subsidies Agreement* is relatively identical to the *Anti-Dumping Agreement* in requiring an 'objective examination' of the effects of the subsidies, and 'positive evidence' of injury. Once again, this can be established (and often is established) in the absence of evidence from parties other than the industry claiming the injury.

The final element is causation. The question of causation is to be determined by 'an examination of all relevant evidence *before the authorities*' (emphasis added) (art 15.5). In addition to any material submitted by the complainant, the authorities must also consider whether other 'known factors' are causing injury to domestic industry (art 15.5). As before, if a claim is made of threatened (rather than actual) injury, the authorities can only act if there are 'facts' showing 'clearly foreseen and imminent' changes to current circumstances which make injury 'likely' in future (art 15.7). However, as always, it is open to the authorities to be satisfied of these matters on the 'facts available', without the co-operation of foreign firms or governments (art 12.7).

WTO dispute mechanisms

If a country as aggrieved by the manner of investigation conducted by another country, the aggrieved party may refer the dispute to a Panel, convened by a WTO Dispute Settlement Body.

In hearing a complaint, the Panel must determine whether the national authority's 'establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective' (art 17.6(i)).

Senator Cameron has asked us about the WTO Appellate Body case of *US — Hot-Rolled Steel*. In that case, the United States was investigating allegations of dumping by three Japanese companies. Two of the companies submitted a response after the deadline had passed, and so the response was disregarded by the US authorities. The third company told the US that it was unable to comply with the request for information because a daughter company was refusing to provide the information; the US ruled that the company had failed to co-operate with the investigation and proceeded to make decisions based on the information before it. Dumping duties were ultimately imposed on products exported by the three companies.

In response, Japan complained to a WTO Panel established pursuant to the *Anti-Dumping Agreement*. The Panel ruled that the US should have accepted the two companies' material late, and should have assisted the third company in obtaining information from its subsidiary. These findings were upheld by the WTO Appellate Body.[4]

This case does not, at all, stand for the proposition that a country's laws cannot reverse the onus of proof in relation to dumping inquiries. The case turns on its own facts, which relate to late lodgement of material and also information-gathering within corporate groups. All the case does is provide an orthodox application of the rules contained in the *Anti-Dumping Agreement* – in particular, what article 6.8 means when it refers to a party that 'refuses access to, or otherwise does not provide, necessary information within a reasonable period'.

With respect, those who wish to rely on this case in the present debate seem to be mixing up two different issues. It is true that this case does discuss the burden of proof – but that is the *burden of proof in proceedings before the Panel*. In Panel proceedings, the burden of proof rests with the complainant as a matter of law; however, as a matter of logic and evidence, if the complainant brings a prima facie case which the defendant does not 'effective refute', then the complainant must succeed.[5]

However, as the Appellate Body made clear in the same case, the question of the burden of proof before the Panel is different to, and should not be confused with, the evidentiary burden which national decision-makers face when conducting dumping and/or subsidisation inquiries. The Appellate Body said:[6]

> *In considering Article 17.6(i) of the Anti-Dumping Agreement, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the Anti-Dumping Agreement, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts.*

Accordingly, we do not think that the *US — Hot-Rolled Steel* case stands in the way of passing clause 12 of the Bill.

We now turn to make some brief remarks in relation to the Bill.

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[4] (2001) WT/DS184/AB/R.
[5] Panel decision: (2001) WT/DS184/R, [7.28].
[6] At [55].

The Bill

Nothing in clause 12 of the Bill is inconsistent with the WTO rules set out above.

Even if passed:

- Customs will still have to notify affected foreign governments of receipt of a complaint (s 269TB(2B));
- Customs may still reject the complaint if there do not 'appear to be reasonable grounds' for making the complaint (s 269TC(2));
- After accepting a complaint, Customs must still provide foreign firms (and domestic importers) with an opportunity to put their case (s 269TC(7), (8));
- If foreign firms (and/or governments) provide a response, this may suffice to rebut the presumption that clause 12 of the Bill would impose, and satisfy Customs that no dumping or subsidisation has occurred;

The only change will be that if foreign firms (and/or governments) fail to provide a sufficient response, Customs will have express authority to rely on the 'facts available', including any material in the complaint which is safe to rely upon) in coming to conclusion that dumping and/or subsidisation has occurred.

Indeed, we note that it is arguable that this is already the position under Australian law. Currently, the Minister may impose a dumping or countervailing duty if he or she is 'satisfied' that dumping or subsidisation has occurred (s 269TE, 269TG). According to rules of administrative law, the Minister does not need perfect information before he or she can come to a state of 'satisfaction'; it suffices if they have sufficient evidence in order to form a reasonable satisfaction that the matter is established on the balance of probabilities: *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Accordingly, in our view, even without the amendments proposed by clause 12 of the Bill, the Minister can act on the 'facts available' in cases where the foreign firm does not provide any countervailing evidence. However, we support the amendment as it puts the Minister's powers beyond doubt.

The Bill is drafted in terms of reversing the 'onus of proof'. It also could have been drafted in terms of clarifying the Minister's powers to make a decision on the basis of the facts available to him or her. We note that this language would be more consistent with the terms of the WTO instruments.

2. Views and responses of trade unions overseas (*ACTU question 3; CFMEU question 1*)

We have nothing to add to our remarks given in evidence.

3. Industries affected by dumping and subsidisation *(ACTU question 4; AMWU & AWU question 1; CFMEU question 2)*

The Australian manufacturers that are most affected (or likely affected) by dumping and/or subsidisation include producers of: aluminium extrusions; steel and steel products (such as steel sheet and fasteners); glass and glass products; finished products, such as curtain walls; timber and timber products (including paper products); chemicals and fertilizers; plastics and polyethylene tubing; outdoor barbecues; laminated flooring; copper products; renewable energy technology; and biofuels, amongst others.

Overseas countries that are also victims of dumping identify these products, among others, as some of the most regularly threatened. See, for example, the list of 'active investigations' into allegations of dumping and subsidisation conducted by the United States' International Trade

Commission (www.usitc.gov/secretary/fed_reg_notices/701_731) or Canada's International Trade Tribunal (www.citt.gc.ca/dumping/preinq/determin/piin2i_e.asp).

Ultimately, it is not just this short list of products that are affected. All manufacturers that are trade-exposed are at risk of dumping due to the weakness of our anti-dumping system (in comparison to other comparable countries), which makes Australian manufacturers a 'sitting duck' for predatory pricing and intermittent dumping.

We refer the Committee to Dr Jones' evidence, which followed our testimony during the oral hearings in this inquiry. Dr Jones gives an Australian industry participant's comparative analysis of a recent anti-dumping and countervailing duties decision relating to coated paper imported to the United States (see proof Hansard pages 36-37 and 39).

4. Softwood timber *(CFMEU question 3)*

Senator O'Brien asked whether the low price of European softwood timber might not be due to dumping, but rather due to the expanding biofuel market in Europe.

Theoretically, it is possible that European production has a naturally competitive advantage over Australian production. If this were the case, then the low prices would not be cause for complaint. However, this assessment would rely on the products being offered by these European companies at a comparable low price (or cheaper) in the European market than the price offered in the Australian market (also taking into account freight costs, etc). The jury is still out on this specific scenario, due partly — we contend — to a lack of transparently available data, as explained before the inquiry and in our various submissions.

An alternative possibility is that the biofuel industry is subsidised by European governments, and that the subsidy may provide an unnatural advantage to the European forestry industry over the Australian industry. The subsidy could mean that wood products can be sold by the European producers at artificially low prices, both in Europe and Australia. According to independent reports, each year European governments provide more than €3 billion in subsidies to the biofuel industry.[7] Under the current regime, it would take several months' (if not years') work, and thousands of dollars in research and legal costs, in order to prove that the subsidies are causing material injury to Australian industry and that countervailing duties should be imposed. By that time, irreparable damage to the Australian industry might have been done.

Senator O'Brien also raised the issue of firm's internally cross-subsidizing production costs across different product lines. It is agreed that this can make it difficult to establish what the 'normal' price of a product is in the home market. This is also relevant to the specific case of timber. Customs recently conducted an investigation into the alleged dumping of plywood into Australia. It was impossible to establish the 'normal' domestic price of plywood in Malaysia, because the largest Malaysian producer, Samling, consistently sold plywood at a loss (which was offset by profits in other business divisions). Accordingly, Customs was forced to try to infer the 'normal' domestic price from the cost of the main input of plywood production: raw logs. Even then, Customs was not well placed to determine the true domestic price of raw logs: Samling claimed that it was US$80 per m^3; the applicants claimed it was up to US$250 per m^3. Ultimately, Customs determined that it was probably between US$88 and $214 per m^3. On these figures, Samling was found not to have dumped plywood into Australia – although other Malaysian producers were found to have discounted plywood by more than 20% in the Australian market.[8]

In conclusion, we submit that in the context of complex intra-corporate arrangements, opaque government subsidies, and unreliable information provided by foreign firms, Customs (and local

[7] Global Subsidies Initiative, 'Biofuels: At What Cost?' (July 2010) <www.globalsubsidies.org/files/assets/bf_eunion_2010update.pdf>.

[8] Australian Customs, *Alleged Dumping of Certain Plywood Exported from Brazil, Chile, the People's Republic of China and Malaysia* (4 August 2010) <www.customs.gov.au/webdata/resources/files/MicrosoftWord-100804Report156-Termination.pdf>.

industry) is in an impossible position in trying to tackle dumping and unfair government subsidies.

5. Response to the Productivity Committee Inquiry report *(ACTU question 5; AMWU & AWU question 2; CFMEU question 4)*

The AMWU, AWU and CFMEU have made a specific response to the report of the Productivity Committee's report into Australia's Anti-dumping and Countervailing System.

The joint response is available at <www.customs.gov.au/webdata/resources/files/SUB10-CFMEUAWUandAMWU.pdf>.

In brief, the unions oppose the introduction of the public interest test proposed by the Committee.

In terms of Senator Cameron's question about the broader debate taking place on globalisation, we note that many scholars, such as Professor Dani Rodrik, have made the point that in order to achieve 'smart globalisation', we need to put in place institutions that share the benefits of globalisation across society.

6. Australia's trade policy *(ACTU question 5; AMWU question 1)*

Unions believe in fair trade, not unfettered free trade. Our position is more fully set out in the following extract from the 'Infrastructure, Industry, Transport and Trade Policy' passed by the 2009 ACTU Congress:

Growth and Social Justice through Fair Trade

33. Congress agrees that sustained and balanced economic development requires that governments retain the capacity to regulate labour, product and capital markets in ways most appropriate to their particular economic and political circumstances. There is no one-size-fits-all model of trade. Public ownership, import regulation and substitution, state subsidies and price regulation all have a potentially valuable role to play.

34. Congress also notes that trade is not simply an economic issue: it has important social and political dimensions and implications. In particular, trade policy constitutes a potentially powerful means for enhancing the rights and welfare of workers in other countries.

35. Congress condemns trade agreements that directly or indirectly encourage the accumulation of wealth from international trade on the basis of poverty wages, dangerous working conditions, the repression of collective organisation and labour rights, and environmental destruction.

36. Congress calls for trade agreements that provide for the improved conditions of workers by requiring signatories to adopt appropriate core labour, human rights and environmental standards.

37. In particular, Congress agrees that trade in people is not acceptable. Congress therefore opposes any trade agreement which seeks to regulate the number of migrants to Australia. Migration must remain entirely a matter for immigration policy.

38. Congress supports the following initiatives:

a) Government should not enter into further bilateral or regional trade agreements until the present recession has passed and the shape of the post-crisis world economy becomes clear.

b) All future proposed trade agreements must be open to full parliamentary oversight and democratic approval prior to being signed. This should involve:

i. The independent modelling and evaluation of trade agreements before they are signed;

ii. *An assessment of the gender dimensions to projected changes to levels of investment, employment and wages;*

iii. *Explaining to the wider community, in the most accessible form possible, the assumptions that have been used to model the impacts of proposed trade agreements - particularly where they relate to topics such as wages, employment and investment.*

c) *Trade agreements should be explicitly designed to reinforce and build upon domestic industrial policy priorities, the pursuit of a full-employment economy and a fairer Australia. To this end trade agreements should:*

i. *Retain or enhance the autonomy of government in Australia to design and implement policies in the following areas: the regulation of financial institutions and international financial transactions; climate change; government procurement; import regulation; media content and the cultural industries; public ownership; public services; foreign ownership; research and development; transportation services; indigenous affairs; organisations and enterprises; the provision and regulation of essential services such as health, education, water, electricity, telecoms and postal services; the movement and employment of temporary migrant workers.*

ii. *Preserve Australia's Pharmaceutical Benefits Scheme.*

7. Position on the government's Bill *(ACTU question 6; AMWU & AWU question 3; CFMEU question 4)*

The unions support the Customs Amendment (Anti-dumping Measures) Bill 2011.

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Thank you again for the opportunity to participate in this inquiry.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

Joel Fetter
Director, Policy and Industrial
ACTU