Australian Government

Australian Customs and Border Protection Service

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The Secretary
Senate Standing Committee on Economics
PO Box 3100
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Dear Mr Hawkins

I refer to your email of 16 March 2011 to the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection), inviting Customs and Border Protection to make a submission to the inquiry into the Customs Amendment (Anti-Dumping) Bill 2011 (the Bill). The CEO has asked me to respond on his behalf.

As the agency responsible for the administration of Australia's anti-dumping and countervailing system, Customs and Border Protection has an interest in the outcome of the inquiry. Please find attached a submission concerning the Bill, specifically focusing on the administrative impact of the proposed amendments.

I understand that the Department of Foreign Affairs and Trade (DFAT) will be making a written submission to the Committee regarding the potential impact of the Bill on Australia's international trade obligations relating to trade remedies.

Should the Committee consider it useful, Customs and Border Protection would be available to provide confidential oral briefing to the Committee at any hearing regarding the Bill.

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

Yours sincerely

Sue Pitman
National Director Trade and Compliance

13 April 2011

Customs and Border Protection's submission on the Customs Amendment (Anti-Dumping) Bill 2011

Regarding the requirement in Clause 4 of the Bill for an independent review of the anti-dumping and countervailing system, Customs and Border Protection notes that the Productivity Commission has also recommended a future independent public review of the anti-dumping system and it would be preferable not to duplicate such processes.

The following table provides comments on each item in the Bill. The descriptions of each amendment and the issues addressed are taken from the Explanatory Memorandum to the Bill.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
1	269T(1)	Includes trade union organisations, some of whose members are directly concerned with the production or manufacture of like goods, within the definition of 'affected party'	This will enable representatives such as the AWU, AMWU, CFMEU, etc. to be directly involved in any investigation or review process to appropriately represent their members whose jobs may be at risk as a result of dumped goods	Amending the definition of 'affected party' only affects a party's rights in reviews, not investigations. Any application for review by trade unions would need to contain the information required by s.269ZB and the approved form. Also, the proposed provision is not explicitly limited to trade unions that represent members directly concerned with the production of like goods in Australia.
2	269T(1)	Includes trade union organisations, some of whose members are directly concerned with the production or manufacture of like goods, within the definition of 'interested party'	This will enable representatives such as the AWU, AMWU, CFMEU, etc. to be directly involved in any investigation or review process to appropriately represent their members whose jobs may be at risk as a result of dumped goods	Amending the definition of 'interested party' only affects a party's rights in investigations, not reviews. Customs and Border Protection's current practice is to include trade unions on the list of interested parties to an investigation whenever such an organisation expresses interest in a particular investigation. This amendment does not affect the ability for a trade union to make an application for anti-dumping or countervailing measures, which already exists. However, in accordance with the requirements of s.269TB, any application must be supported by a sufficient part of the Australian industry and contain the information required by the Act and the approved form. Also, the proposed provision is not explicitly limited to trade unions that represent members directly concerned with the production of like goods in Australia.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
3-4, 7	269TACB, 269TAE(2A), 269TAG	Amendments allow that, where dumping has been proven and material injury has been proven, the presumption is that the material injury is as a result of dumping rather than any other factor	Currently, subsection 269TAE(2A) lists other factors that can be considered by the Minister as the cause of the injury, even though dumping has been proven to have occurred	In an anti-dumping investigation Customs and Border Protection is required to make a determination of whether or not there is injury and whether that injury was caused by dumping and/or subsidisation. Consistent with the WTO Anti-Dumping Agreement (Article 5), Australia's legislation requires an application for anti-dumping measures to contain sufficient evidence that dumping has caused material injury to the Australian industry. Thus, in practice an investigation commences on the basis that *prima facie* evidence supports the allegation that dumping has caused injury. In conducting an investigation Customs and Border Protection has an administrative fact-finding role and ascertains facts based on careful consideration of all available evidence.
5	269TAE(3)(h)	Expands the consideration of economic factors by the Minister to include "impact on jobs"	Currently, this paragraph only states "the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of goods of that kind or like goods"	When conducting an investigation, Customs and Border Protection currently considers price, volume and profit effects as well as other economic factors, including employment, in assessing the extent and causes of injury to Australian industry. Customs and Border Protection found injury in the form of a decline in employment numbers in the following cases in the last five years: • Hollow structural sections from China; • Demountable truck wheel rims from China; and • Greyback cartonboard from Korea. In addition to examining the number of persons employed, Customs and Border Protection will also consider the nature of the employment (eg hours worked and whether there has been a shift from full-time to part-time employment). Accordingly, it is unclear how this amendment would affect existing administrative practice.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
6	269TAE(3)(m)	Expands the consideration of economic factors by the Minister to include "impact on capital investment"	Currently, this paragraph only states "the ability of persons engaged in the industry, to raise capital in relation to the production or manufacture of goods of that kind, or like goods" and "investment in the industry"	When conducting an investigation, Customs and Border Protection currently considers price, volume and profit effects as well as other economic factors, including investment in the industry, in assessing the extent and causes of injury to Australian industry. Customs and Border Protection found such injury in the following cases in the last five years: • Hollow structural sections from China – reduced return on investment, reduced attractiveness for reinvestment; • Demountable truck wheel rims from China - reduced return on investment, reduced capacity utilisation; • Processed dried currants from Greece – reduced return on investment and reduced attractiveness for re-investment for dried currant growers; • Greyback cartonboard from Korea - decrease in return on investment; • Mobile garbage bins from Malaysia – reduced return on investment; and • Sodium bicarbonate from China – reduced return on investment. It is unclear how this amendment would affect existing administrative practice.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
8	269TB(1)	- Makes the Application for Dumping and/or Countervailing Duties form a Legislative Instrument - Allows supporting evidence to be provided as part of the Application for Dumping and/or Countervailing Duties to be as recent as 90 days prior to the application being made, as well as other information as prescribed by the regulations	Currently, the Application for Dumping and/or Countervailing Duties form does not specify a minimum period for data provision. However, it states that "sufficient data must be provided to substantiate the claims made. If yearly data is provided, this would typically comprise a period of at least four years (for example the current financial year in addition to three prior years). Where information is supplied for a shorter period, applicants may consider the use of quarterly data". Stakeholders have advised that this extensive period of time for evidence to be collated means that injury to their industry is already caused before any submission can be made.	The current application form was designed in consultation with the Australian industry. It is an approved form under s.269TB(4)(b). The *Legislative Instruments Regulations 2004* declares that an instrument prescribing or approving a form is not a legislative instrument (Item 5 of Part 1, Schedule 1). The Explanatory Memorandum to the Regulations explains the rationale for this: "prescribed or approved forms are administrative in character because they facilitate the processing of an application for an entitlement. They do not determine or alter the content of the law." Further, instruments made under Part XVB of the *Customs Act 1901* are specifically declared not to be legislative instruments under the same regulations (Item 6 of Part 2, Schedule 1). The Explanatory Memorandum explains that this is "in order to avoid the possibility of non compliance with the [WTO Anti-Dumping] Agreement". The form does not specify a minimum period for data provision. The current application form requests data over several periods to evaluate industry trends and correlate injury with dumped imports. Customs and Border Protection requires sufficient historical data (generally three years) to demonstrate that injury has been attributed to dumping, not that injury has been occurring for the past three years. There may be circumstances where it is possible to establish injury over short time periods, such as 90 days. However, an investigation can not be initiated unless there is sufficient *prima facie* evidence that the injury has been caused by dumping.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
9-10	269TB(6), 269TC(4)(b)	Allows small manufacturers (whose individual production of like goods may not account for more than 50% or less than 25% of the total production or manufacture of like goods in Australia) to make applications and, where a supporting application(s) has been independently lodged and the cumulative production accounts is greater than 25% of the total production or manufacture of like goods in Australia, then the applications may be considered by the CEO as per normal	Some small manufacturers have advised that they do not feel comfortable liaising with other manufacturers because they don't wish to share information, or they may not be aware of all of the details, may not have the resources, or they may not want to draw attention to themselves, etc. These amendments will enable the CEO to consider individual applications in cognate where the cumulative total production is greater than 25%	It is unclear how these amendments are administratively workable. Under s.269TC(1) an application must be rejected unless it complies with s.269TB(4), which requires it to be supported by a sufficient part of the Australian industry. These amendments will allow the industry support threshold to be met by a single application considered together with supporting applications. Under the amendments the supporting applications will not be called for until after a decision not to reject an application has been made. However, it will be impossible to pass the amended industry support threshold test unless supporting applications are lodged prior to the CEO's consideration of the application under s.269TC(1). Customs and Border Protection notes that in practice the initiation of an investigation can have an immediate trade chilling effect in the market. If an investigation were to be initiated on the basis of a single application and no subsequent supporting applications were lodged to meet the industry support threshold test, market behaviour and prices may have already been affected, despite the initiation ultimately failing.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
11	269TC(4)	- Allows supporting evidence provided as part of the Application for Dumping and/or Countervailing Duties to be as recent as 90 days prior to the application, as well as other information as prescribed by the regulations - Inserts a provision that the CEO may have regard to any new or updated information provided by an interested party that reasonably could not have been provided earlier and to consult with persons with expertise in the relevant industry	Currently, the Application for Dumping and/or Countervailing Duties form does not specify a minimum period for data provision. However, it states that "sufficient data must be provided to substantiate the claims made. If yearly data is provided, this would typically comprise a period of at least four years (for example the current financial year in addition to three prior years). Where information is supplied for a shorter period, applicants may consider the use of quarterly data". Stakeholders have advised that this extensive period of time for evidence to be collated means that injury to their industry is already caused before any submission can be made	As per Item 8 regarding the first part of the amendment. It is unclear how the mandatory requirement to have regard to new information interacts with subsections 269TDAA(3) and 269TEA(4), which state that the CEO is not obliged to consider late submissions if to do so would prevent the timely publication of the statement of essential facts or timely preparation of the report to the Minister, respectively. In practice it may be difficult to determine whether information “reasonably could not have been provided earlier”. The Act already allows the CEO to have regard to any other matters considered relevant, and in practice Customs and Border Protection often considers information supplied after 40 days of publication of the notice. It is unclear how the mandatory requirement to consult industry experts would work in practice and it may have significant cost implications for Customs and Border Protection. There is no indication of the requisite qualifications or experience a person would need to be considered an industry expert, or how such experts would be identified or engaged. Such ambiguity could result in litigation under the ADJR Act on the grounds of failure to take into account a relevant consideration. There is also no guidance on dealing with conflicting expert advice. Nothing in the Act prevents the use of independent experts and Customs and Border Protection has sought independent expert advice on several occasions, including for the following cases in the last five years: • Aluminium extrusions from China; • Clear laminated safety glass from China and Indonesia; • LLDPE from Canada and the US; and • Hollow structural sections from China, Korea, Malaysia, Taiwan and Thailand.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
12	269TC	- Where the CEO accepts an application, this amendment provides that the importer of the imported goods which is the subject of the application bears the onus of proving that the goods have not been dumped or are not subsidised for export into Australia - Any material lack of cooperation would lead to a presumption that the imported goods are dumped goods	Currently, local manufacturers are spending hundreds of thousands of dollars gathering evidence to build a case. This will put the onus of proof on the alleged importer to prove that the goods are not dumped. This is also intended to expedite the process	Once an investigation is initiated Customs and Border Protection is required to determine whether dumping is occurring. The question of dumping is not a binary 'guilty/not guilty' type of inquiry: Customs and Border Protection makes specific numerical findings based on data that is tested through verification processes. The factors that determine whether dumping is occurring (export price and normal value) are numbers generated through a series of calculations. The starting point for these calculations is data provided by the Australian industry as *prima facie* evidence of dumping in its application. This data is tested, refined and recalculated based on information provided throughout the course of an investigation. This amendment seeks to place the onus on importers to establish that goods have not been dumped or subsidised. In practice importers may have little, if any, relevant evidence to determine these issues. Generally, exporters (and in the case of subsidies also foreign governments) are the best source of this evidence. The legislation already allows the Minister to have regard to all relevant information to determine export price and normal value where there is no or limited cooperation from importers and/or exporters. This information can include the *prima facie* evidence of export price and normal value provided by industry in its application.

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13	269TD(1)	Removes the 60 day requirement before the CEO can make a preliminary affirmative determination	This means that securities can be collected from the importer of the alleged goods as soon as an investigation has been initiated. This is intended to protect local manufacturers while an investigation is ongoing, as investigations can last up to 155 days, if not more, and so the application of duties on the alleged dumped goods will ensure no injury is caused to local industry	Section 269TN already allows, in certain circumstances, retrospective anti-dumping duties to be applied, up to 90 days prior to the imposition of securities.
14-15	269TD(2)(a), 269TDAA(2)(a)	- Enables the CEO to forecast and consider potential impacts on the relevant and related Australian industries, including but not limited to employment (including the multiplier effect - where a decrease in employment in one sector triggers further unemployment in related sectors), capital investment and market operations, when making a decision to apply a preliminary affirmative determination - Provides for relevant industry experts to be consulted as part of this consideration	-	Section 269TG already allows anti-dumping measures to be imposed where material injury is threatened by dumped imports. Section 269TD already allows the CEO to make a preliminary affirmative determination (and thus impose securities) on the basis of a threat of material injury caused by dumped imports. Determinations of a threat of material injury are subject to s.269TAE(2B). As per Item 11 regarding the requirement to consider information from industry experts.
16-18	269TE(2), 269TEA(3)(a), 269TEB(4)	In a number of circumstances the CEO is required to have regard to or is permitted to consider new or updated information that reasonably could not have been provided earlier, and to consult with persons with expertise in the relevant industry as part of an investigation or review	-	As per Item 11. Additionally, it appears that the references to 269TC(4A)(b) in all three proposed provisions are actually meant to be references to 269TC(4B)(b).

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19-22	269TG(3A)(a)/(b), 269TH(4)(a)/(b), 269TJ(12)(c)/(d), 269TK(6)(c)/(d)	Where a person has provided information to assist the Minister to ascertain values and prices relating to dumped goods, the Minister is not required to include this information in the dumping or countervailing duty notices or in any other way	Currently, the subparagraphs state that the CEO may notify persons who would be affected parties. This removes this permission	Customs and Border Protection provides natural justice by disclosing details on the level of anti dumping duties to bona fide importers. If these details were not disclosed, importers would not be aware of their tax liability until after importation, and would not know how the level of duty has been calculated.
23	269X(3)(a)	- Where the CEO proposes to take into account any relevant information that was not supplied by the applicant but by an alternate source, the CEO must give the applicant a copy of the information unless it has been claimed by the supplier to be confidential - In this instance, the applicant may be provided a summary of the information in a form that allows reasonable understanding of the information but which does not breach confidentiality or adversely affect the interests of the provider of the information	Currently, the applicant is provided the information unless the CEO believes it would adversely affect the business or commercial interests of the provider of the information, and allows the applicant to make a submission within 155 days in response	Customs and Border Protection envisages difficulties administering this amendment, which may require the CEO to make a non-confidential summary of third party information. It is unclear whether the consent of the third party is required (to confirm that the non-confidential summary does in fact not breach the claimed confidentiality) and what happens if a non-confidential summary cannot be agreed upon. It would be easier to administer a provision similar to that in s.269ZJ(5), which would require the third party to provide the non-confidential summary and give the CEO power to disregard the information if an adequate non-confidential summary is not provided.
24	269ZC(1)	Inserts a requirement for relevant and related Australian industry experts to be consulted by the CEO within 20 days of Customs receiving an application for review of anti-dumping measures	Currently there is no provision for experts to be consulted	As per Item 11. Additionally, it is unclear what the purpose is here, and depending on the purpose it would likely be impractical to do so within 20 days.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
25	269ZC(1)(b)	Where an application for review of anti-dumping measures is lodged, this amendment requires if the CEO is not satisfied, having regard to the application, any new or updated information that reasonably could not have been provided earlier or any information from persons with expertise in the relevant industry as part of consultations, then the CEO must reject the application	Currently, the paragraph only requires that the CEO have regard to the application and other information that the CEO considers relevant, it does refer to consultation with experts or new or updated information	As per Item 24.
26	269ZD(2)(a)	In formulating the statement of essential facts, this amendment allows the CEO to have regard to any new or updated information that reasonably could not have been provided earlier, and to consult with persons with expertise in the relevant industry as part of any investigation and review	Currently, the paragraph only specifies the application and any submissions received by Customs within 40 days after the publication of the notice	It is unclear how the mandatory requirement to have regard to new information interacts with subsections 269ZD(3) and 269ZDA(4), which state that the CEO is not obliged to consider late submissions if to do so would prevent the timely publication of the statement of essential facts or timely preparation of the report to the Minister, respectively. In practice it may be difficult to determine whether information "reasonably could not have been provided earlier". The Act already allows the CEO to have regard to any other matters considered relevant, and in practice Customs and Border Protection often considers information supplied after 40 days of publication of the notice. As per Item 11 regarding the requirement to consult industry experts.
27	269ZHC(1)	Makes the Application for Continuation of a Dumping Duty and/or a Countervailing Duty Notice or Continuation of an Undertaking form a Legislative Instrument	-	As per Item 8.

Item	Affected provision	Description of amendment	Description of issue addressed	Customs and Border Protection comment
28-31	269ZHD(1), 269ZHD(1)(b), 269ZHE(2)(a), 269ZHF(3)(a)	Inserts requirements for the CEO to consider new or updated information that reasonably could not have been provided earlier and consult persons with expertise in the relevant industry and related industries	Currently, there is no reference to new or updated information or consultation with industry experts	As per Item 26.
32	269ZX	Includes trade union organisations, some of whose members are directly concerned with the production or manufacture of like goods, within the definition of 'interested party' in Division 9 of the Act which relates to Review by a Review Officer	-	Nil comment, except to note that the proposed provision is not explicitly limited to trade unions that represent members directly concerned with the production of like goods in Australia.
33-47	269ZZ(1), 269ZZE(2), 269ZZE, 269ZZF, 269ZZG(2), 269ZZK(6), 269ZZL(2)(a)(i), 269ZZQ(1), 269ZZQ 269ZZS(3), 269ZZT(4), 269ZZU(3), 269ZZUA(5), 269ZZUA, 273GA(1)	Various amendments affecting the conduct of reviews and functions of the Review Officer	-	Nil comment, as Customs and Border Protection does not undertake the review function.