Australian Government

Australian Customs and Border Protection Service

Customs House
5 Constitution Avenue
Canberra City ACT 2601

Phone: 02 6275 6800
Fax: 02 6275 6796

The Secretary
Senate Select Committee on Australia's Food Processing Sector
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Bryant

I refer to your email of 11 July 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 Australian Food Processing Sector. 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 that provides an overview of Australia's Anti-Dumping and Countervailing System and highlights aspects of the system relevant to Australia's Food Processing Sector.

Thank you again for the opportunity to participate in the inquiry. Should you require any further assistance please do not hesitate to contact me by telephone on 02 6275 6396, or by email to justin.wickes@customs.gov.au.

Yours sincerely

Justin Wickes
A/g National Manager International Trade Remedies

29 September 2011

Customs and Border Protection's Submission to the Senate Select Committee on Australia's Food Processing Sector

Overview of Australia's Anti-Dumping System

Australia has had an anti-dumping system, in one form or another, for over 100 years. The anti-dumping system in its current form is governed by two key World Trade Organization (WTO) agreements:

- The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-Dumping Agreement"); and
- The Agreement on Subsidies and Countervailing Measures ("the Countervailing Measures Agreement").

The WTO agreements do not prohibit dumping or all forms of subsidies. Instead the agreements govern the use of trade remedies where dumped and/or subsidised goods cause, or threaten to cause, injury to domestic producers. These agreements are being reviewed in the context of the current Doha round of multilateral trade negotiations. A range of issues are still being negotiated.

What is dumping?

Dumping occurs when goods are exported to Australia at a price that is below the "normal value" of the goods – usually the domestic selling price of the goods in the country of export.

Dumping, a form of price differentiation between markets, is not prohibited under international trade agreements. However, remedial action may be taken where dumping causes (or threatens to cause) material injury to an Australian industry.

What is a subsidy?

A subsidy is any financial assistance (or income or price support) paid by a foreign government, either directly or indirectly, that confers a benefit. If the effect of the subsidy causes (or threatens to cause) material injury to an Australian industry, remedial action may be taken.

The anti-dumping system in Australia

The Australian Customs and Border Protection Service (Customs and Border Protection) administers the anti-dumping system. Customs and Border Protection is responsible for conducting anti-dumping and

countervailing investigations and implementing decisions of the responsible Minister.

Before any action may be taken against dumped or subsidised goods, the Australian industry concerned must provide prima facie evidence of dumping (or a subsidy) of goods exported to Australia and, that it has suffered material injury as a result.

This is done through an application to Customs and Border Protection for an investigation into the alleged dumping and/or subsidisation and its effect on industry's performance.

Customs and Border Protection has up to 20 days to determine whether there is an Australian industry producing like goods to the allegedly dumped or subsidised goods and whether there are reasonable grounds for the publication of a dumping or countervailing duty notice.

If there are reasonable grounds, Customs and Border Protection commences an investigation. Customs and Border Protection issues a public notice advising of the claims made by the applicants and the details of the investigation process. In addition, Customs and Border Protection writes to all known importers and exporters of the goods advising them of the investigation.

Following the initiation of an investigation, Customs and Border Protection will collect and analyse data from parties involved with the overseas production and importation of the goods into Australia, as well as the Australian industry that is claiming to be injured.

In advising importers and exporters of the initiation of an investigation, Customs and Border Protection will also seek information on relevant import and export transactions. Generally, submissions from importers, exporters and any other interested parties are due within 40 days from the commencement of the investigation. Customs and Border Protection may visit the premises of the importers and exporters to verify the information provided and undertake further investigations.

Investigations with the exporter are concerned with assessing a normal value and establishing whether dumping or a subsidy exists. In the case of a subsidy, Customs and Border Protection also consults with the foreign government concerned.

From day 60 of the investigation period, Customs and Border Protection may impose provisional measures (in the form of securities) on imports of the goods. This will only occur when there is sufficient information available. A statement of reasons - a Preliminary Affirmative Determination - would accompany such action.

On or before day 110, Customs and Border Protection must issue a Statement of Essential Facts on which it proposes to base its report to the Minister. Interested parties then have 20 days to lodge submissions in response.

After consideration of submissions, Customs and Border Protection will report its conclusions and recommendations to the Minister on or before day 155 of the investigation.

Where claims regarding dumping and/or subsidisation, injury and causation are made out, the Minister may impose duties (anti-dumping duties and/or countervailing duties) which will apply to the importation of those goods into Australia for a five-year period.

An alternative remedy to imposing duty is for the Minister to accept a price undertaking from the exporter. By this means, the exporter agrees that future trade will be at or above a minimum export price (equal to the normal value or subsidy inclusive price). Such undertakings also usually apply for a five-year period.

Appeals process

Any appeal by an interested party against the Minister's decision must be lodged with the Trade Measures Review Officer within 30 days of the announcement. Other parties have a further 30 days in which to lodge submissions in response to the grounds of appeal. The Review Officer must make recommendations to the Minister within 60 days of the public notification of the review.

Judicial review

Parties involved in an anti-dumping or countervailing investigation also have recourse to judicial review[1]. Judicial review is also provided under section 75 of the Constitution, which grants the High Court jurisdiction in any case in which the Commonwealth is a party.

Anti-dumping activity trends

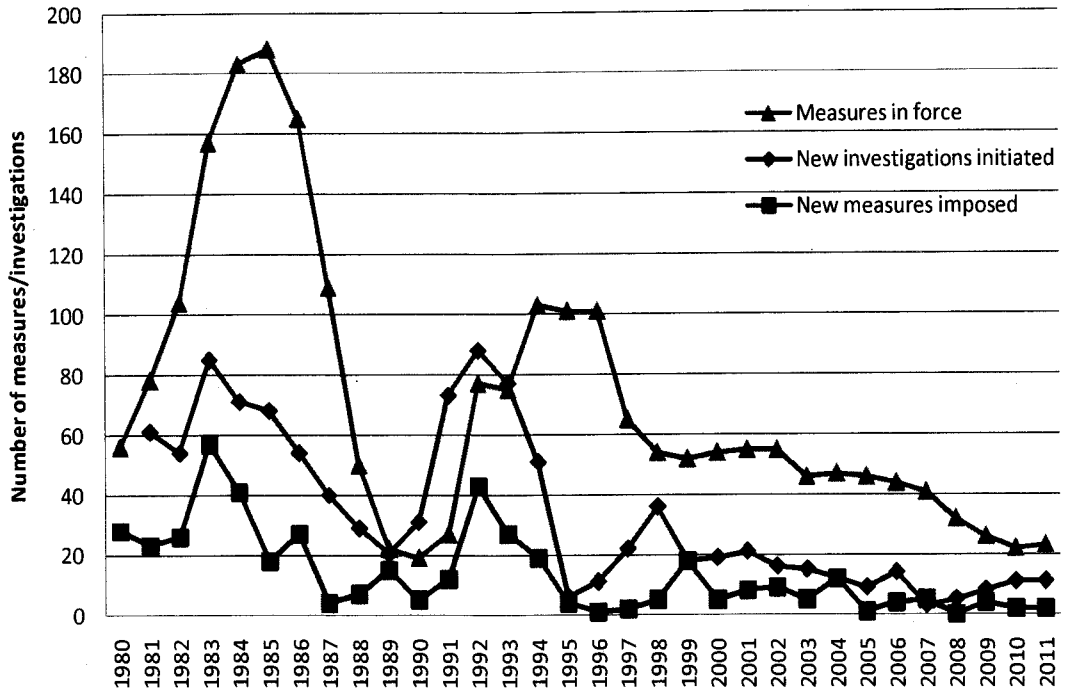
Australia's anti-dumping activity has been declining over the past 30 years.

In the decade to 2010-11, Customs and Border Protection initiated around 10 new anti-dumping investigations each year. In contrast, the number of cases investigated in the 1990s averaged over 40 each year.

The number of new measures imposed has similarly fallen - from an average of around 14 each year during the 1990s to around four each year over the past decade.

The reduction in new measures, together with the expiration of some existing measures, saw the total number of measures in place fall to 23 as at 30 June 2011 (covering 18 products from 13 countries).

[1] Pursuant to the *Administrative Decisions (Judicial Review) Act 1977*



Australia's Anti-Dumping and Countervailing Activity 1980 to 30 June 2011

Provisions for primary producers

Like Canada and the USA, Australia has provisions that allow primary producers to join processors in applying for measures against dumped processed agricultural goods (see Appendix). The intention is to extend anti-dumping protection to primary producers who experience injury as a result of dumping of the processed product rather than the raw commodity.

However, there are claims that the 'close processed agricultural goods' (CPAG) provisions are ineffective, insofar as primary producers cannot apply alone for measures against a dumped processed product because their raw product is not generally 'like' the processed item.

Arguments have been put to the Government that changes should be made to facilitate direct access to the anti-dumping system for producers of CPAGs without the need to rely on the cooperation of processors because of the following:

(a) processors standing to benefit from the availability of cheaper imports may be unwilling to 'lead' the application process; and

(b) the requirement that the raw product must be devoted completely or substantially to the processed product — can similarly preclude cooperative action.

However, the consistency of Australia's CPAG provisions with WTO rules has, at various times, been questioned in the cases relating to currants

exported from Greece and glace cherries from France and Italy. Similar Canadian and US provisions have been the subject of cases before WTO dispute panels, for example, inconsistent action by the USA against lamb exported from Australia and New Zealand.

It is also unclear that, in practice, the provisions could be of benefit to primary producers. In its 2009 Report, the Productivity Commission (the Commission) claimed that it had received no evidence that the outcomes of any cases have been materially affected by a capacity to examine injury over a wider output base.

The Commission recommended that (Recommendation 6.1):

The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:

- *whether the provisions have had a meaningful impact on the outcomes of any past cases*
- *if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances*
- *whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements, and what benefits and costs would ensue*
- *what arguments would justify the retention of the provisions more generally*
- *what changes, if any, should be made to the provisions in light of the above.*

The working group should consult with interested parties and publish a draft report for comment.

Close Processed Agricultural Goods (CPAG) Working Group

In response to the Commission's Report, the Government agreed with Recommendation 6.1 and announced that an agricultural products working group comprising industry representatives and relevant Government agencies will be convened to examine the CPAG provisions and report to the Government. The establishment and membership of the CPAG Working Group was discussed at the inaugural meeting of the International Trade Remedies Forum on 29 August 2011 and its membership is being finalised. The first meeting of the working group is scheduled for 29 September 2011.

APPENDIX

CPAG Provisions

Under the CPAG provisions of the *Customs Act 1901* when sections 269T(4A) and 269T(4B) are read together mean that "like goods" can be "close processed agricultural goods" (CPAG) if the Minister is satisfied that:

(a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods, and

(b) the processed agricultural goods are derived substantially or completely from the raw agricultural goods, and

(c) either:

(i) there is a close relationship between the price of the processed agricultural goods and the price of the raw agricultural goods, or

(ii) a significant part of the production cost of the processed agricultural goods, whether or not there is a market in Australia for those goods, is, or would be, constituted by the cost to the producer of those goods of the raw agricultural goods.

The definition of "raw agricultural goods" means goods directly obtained by the undertaking of any agricultural operation or any fishing operation.

The definition of "agricultural operations" under section 269T of the *Customs Act 1901* means:

(a) the cultivation or gathering of crops; or
(b) the rearing of live-stock; or
(c) the conduct of forestry operations;
and includes:
(d) viticulture, horticulture, or apiculture;
(e) or hunting or trapping carried on for the purpose of a business.