

31st March 2011

Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia



Senate Economics Committee
economics.sen@aph.gov.au

Attn: Committee Secretary

Please provide a copy of this letter and the attached submission to members of the committee.

Thank you for the opportunity to respond to the Senate Standing Committee (Economics) Inquiry into the Customs Amendment (Anti-Dumping) Bill, 2011. The CFMEU represents thousands of members whose employment relies on local industry being afforded the opportunity to compete against imports on a fair and level playing field. Therefore, ensuring that Australia has a properly configured anti-dumping system is core business for the union. The prevalence of a weak anti-dumping system has the potential to decimate thousands of Australian jobs.

Alleviation from material injury caused by dumping is local industry's right including under the World Trade Organizations' (WTO) Anti-Dumping Agreement (ADA). It has been observed by our members that other countries are able to balance their responsibilities in order to protect local industry against the excesses of unfair trade through the applying of anti-dumping and anti-countervailing duties whilst concurrently remaining compliant with their international obligations much more effectively than Australia, despite Australia having the same international obligations under the WTO. This situation needs to be urgently addressed.

It is the union's view that the government has a duty to ensure that local industry is afforded the maximum amount of security to prevent encroachment from unfair trade whilst remaining accommodating to our broader international trading strategy framework. In this sense, the CFMEU considers Australia's anti-dumping system seriously flawed. The anti-dumping system, time and time again has proven to be inaccessible, expensive, complicated and unresponsive to the concerns and requirements of local industries and unions.

The government and agencies responsible to implement an anti-dumping system which prevents the targeting of Australian jobs and guarantees local industry's right to compete in our domestic market on a level playing field are partly restricted due to limitations in the Customs Act. Legislative amendments are one of a number of mechanisms that may be required to be utilised in order to reconfigure the system to ensure its responsiveness and effectiveness to local industry and the workers, families and communities which rely on it.

These proposed amendments represent a good start in the complex and multi-faceted task ahead of reforming the anti-dumping system for the national interest. The CFMEU is pleased to contribute to this inquiry and looks forward to opportunities to appear before the Committee.

Sincerely,

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The CFMEU supports the following amendments in the Customs Amendment (Anti-Dumping) Bill, 2011 on the following grounds:

1. *Insertion of a provision that trade union organisations, some of whose members are directly concerned with the production or manufacture of like goods into the definition of 'affected parties' and 'interested parties'*

CFMEU grounds for support:

Aligning Australia's anti-dumping system with the anti-dumping systems of like economies (including the USA) which consider trade unions relevant affected and interested parties makes sense. This amendment can play a role in properly reconfiguring the system due to the fact that it may contribute to overcoming some factors preventing the application of anti-dumping duties on dumped imports such as:

- Firms feeling they are unable to make complaints because there are a small number of businesses operating in the Australian domestic industry who are too easily identifiable by large customers (who may be directly involved in the dumping activity) with a track record of commercial retribution.
- Other instances where firms are unable to make complaints because of the globalised nature of their businesses creating a conflict of interests. For instance domestic manufacturers in some cases are owned by global businesses that also import competing product into Australia; this is not merely an internal issue because the dumping actions affect the wider public interest of sustained employment and investment in the Australian economy.

The amendment proposing the insertion of the provision allowing 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 may also help to combat the above. The CFMEU's preference would be for unions to have applicants rights to initiate cases and for this to be explicitly enshrined in the Customs Act.

2. *Insertion of a provision that for instance where dumping has been proven and material injury has been proven, a presumption exists whereby the material injury is determined to be as a result of dumping.*

CFMEU grounds for support:

A stated presumption of the causality of the material injury by the dumping within the Customs Act is necessary, especially under the operation of the current system. It is possible for this amendment to work within the context of the WTO ADA. The ADA states that material injury cannot be attributed to dumping when it is caused by other factors. The CFMEU has been perplexed by Australian Customs and Border Protection Services' (Customs') recent findings that have attributed 'injury' to local industry from dumping but not 'material injury' which has been deemed to have been caused by other factors, despite admissions in the investigations and reinvestigations that the dumping has occurred and that it has undercut the applicants.

- There is scope for the government to re-define 'material injury' as there is a lack of authoritative definition in the international or national context. The CFMEU's view is that 'injury' is not immaterial when it causes or threatens to cause job losses. 'Contribution' needs to be considered as a factor in causality at the very least and this would be consistent with the ADA in our assessment.
- The amendment would affectively provide a direction to Customs to be far more vigilant in requiring firms involved in dumping to submit a more convincing argument than they are currently required to. They should be required to prove that material injury is caused by other factors than their dumping activity and that these other factors have not been caused or contributed by their undercutting behavior, for instance material injury deemed to be from 'domestic competition'. This directive is necessary.

This amendment is particularly pertinent in the absence of other changes to the system (some of which are proposed in this bill) such as those necessary to accurately determine the occurrence of dumping. For instance, currently a Customs determination may be made that material injury should be attributed to 'non dumped imports' even when 'non dumped imports' have been dumped (or countervailed) and it is only considered 'non-dumped' due to weaknesses in the anti-dumping and countervailing system. This could mean that proven dumping gets off without penalty due to a misinterpretation, technicality, exploited loophole or an oversight by Customs in another part of an investigation despite the fact that the dumped imports are still contributing to material injury as much as the so called 'non dumped imports'.

- 3. *Insertion of a provision for the consideration of the "impact on jobs" and any "impact on capital investment in the industry" as part of relevant economic factors in relation to an Australian industry in determining whether or not material injury is threatened.***

CFMEU grounds for support:

This amendment would assist Customs which is currently required to predict the behavior of importers when analysing not just if dumping causes but *threatens* to cause material injury to Australian industry and whether the threat is '*imminent and foreseeable*'. The difficulty of this task is evidenced by the recent example of a revocation of duties at the recommendation of Customs which arguably encouraged the setting up of a distributive centre in Australia at the lower end of the value adding chain by the dumpers and subsequently had a negative impact on jobs and capital investment in the applicant industry in question and potentially does on an ongoing basis. Clearly the example highlights the necessity of the amendment being adopted and complimenting a workable definition of material injury which does not determine job losses as 'immaterial'.

The amendment would be additionally complimented and complementarily to the further amendment proposing enabling Customs to forecast and consider potential impacts on the relevant Australian industry and related industries, such as on 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 deciding to make a preliminary affirmative determination or in its statement of essential facts.

- 4. *Insertion of a provision for the requirements that the application for Dumping and/or Countervailing Duties form be a legislative instrument and allow supporting evidence provided to be as recent as 90 days prior to the application being made to be submitted as well as other information as prescribed by the regulations.***

CFMEU grounds for support:

This amendment is necessary because Australia's current system is unresponsive. The time it takes to prepare cases is greater than the time usually required by a firm to alter its parameters sufficiently to avoid the specific complaint. This contributes to dumping occurring unchecked because firms have low expectations of success and in a cost/ benefit analysis decide not to use limited resource on pursuing anti-dumping trade remedies.

- 5. *Insertion for provisions for new and updated information to be provided during application, investigation and review that reasonably could not have been provided earlier by interested parties and for relevant industry experts to be consulted as part of any investigation and review***

Insertion that an applicant in application for a review may provide new or updated information that could not have reasonably been provided earlier.

Insertion of a provision for the requirement that that the Minister, if they accept a recommendation by the Review Officer to require the CEO to reinvestigate a finding or findings, must, in writing, require the CEO to have regard to any new or updated information that has been subsequently provided and which reasonably could not have been provided earlier as part of its investigation.

Insertion of a provision for the requirement that the CEO 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.

Insertion of a provision for the 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.

CFMEU grounds for support:

These amendments are necessary as it is considered that accepting new information from applicant parties, interested parties and Australian industry experts which could not be reasonably expected to be provided earlier throughout the application, investigation, reinvestigation, appeals and or review (the entire process)-is a requirement in the interest of an accurate finding being made.

It is anticipated that the amendments will in all likelihood prevent loopholes in the system being exploited by dumpers and prevent unjust and incorrect findings such as 'no dumping' and/or 'no dumping causing material injury'

- 6. *Insertion of a provision that for the case of 'commercial in confidence' material the applicant may be provided a copy of information by the CEO by way of a summary which allows a reasonable understanding of the information that will not breach confidentiality or adversely affect the person supplying the information.***

CFMEU grounds for support:

It is anticipated that providing the opportunity for counter argument by the applicant, interested parties and industry experts of 'commercial in confidence- explanations' by firms accused of dumping would avoid the instance of unjust and incorrect findings being made. This amendment compliments amendments allowing interested parties, industry experts and the applicants to provide new information to the investigation at various stages, as discussed.

It would be anticipated that such an amendment is consistent with attempting to overcome the problem of inaccurate findings such as 'no dumping' or 'no dumping causing material injury' being made.

- 7. *Insertion of a provision for where the CEO does not reject an application, the importer of the imported goods which are the subject of the application bears the onus of proving that the imported goods have not been dumped or subsidised for export into Australia. Any material lack of cooperation on the part of the importer of the imported goods would lead to a presumption that the imported goods are dumped goods.***

CFMEU grounds for support:

This amendment is necessary in order dissuade domiciled importing firms from not cooperating with the Australian Customs and Border Protections service out of commercial interest which has been a characteristic of a number investigations recently conducted by Customs. Non-cooperation or refusing to answer to the case leveled against the exporters in exporting countries or the importers in Australia implies guilt and should be treated this way.

- 8. *Insertion of a provision for the removal of the 60 day requirement before the CEO can make a preliminary affirmative determination during an investigation and insertion of provisions for the Review Officer to make affirmative decisions during a review, enabling interim duties to be collected.***

CFMEU grounds for support:

This amendment is a significant improvement particularly where domestic employment is considered to be at risk. The CFMEU's preference would be in this circumstance, an automatic mechanism applying duties 'on allegation' until at least the conclusion of the dumping investigation.

- 9. *Insertion of a provision allowing a decision of the CEO, the Minister or the Review Officer to be applied to the Administrative Appeals Tribunal for review.***

CFMEU grounds for support:

This amendment is necessary as the current legislative process affords aggrieved parties the ability to raise objections to the Trade Measures Review Officer who can request a reinvestigation. However, once Customs undertakes such a reinvestigation, should the determination change there is no formal process to enable the new aggrieved party to be represented. There is an option to pursue errors of law through the Federal Court, but this is limited and does not permit review of the merits of the finding. Some mechanism needs to be provided to enable representations outside a Federal Court appeal of errors and the Administrative Appeals Tribunal may be appropriate.