

13 August 2021

Mr Karl Brennan
Manager, Anti-Dumping Policy Section
Trade and International Branch
Strategic Policy Division
Department of Industry, Science, Energy and Resources

By email: antidumping@industry.gov.au

Dear Mr Brennan

Exploring Further Anti-Dumping System Changes

1. We refer to the Department of Industry, Science, Energy and Resources (**Department**) stakeholder discussion paper "*Exploring Further Anti-Dumping System Changes*" (**Paper**). The Customs & International Transactions Committee of the Business Law Section of the Law Council of Australia (the **Committee**) appreciates the opportunity to provide its views on various aspects of Australia's Anti-Dumping System.
2. The Committee's response is focused on issues associated with the administration of law and we have elected not to comment on issues that may be perceived as being either pro-Australian industry or pro-exporter/importer.
3. In general, the Committee supports any measures that promote transparency and independence, increase timeliness and increase predictability and consistency of outcomes. The Committee's responses to particular issues raised in the Paper are set out below.

Background of Committee

4. The Law Council of Australia (**LCA**) is the peak national representative body of the Australian legal profession. The LCA represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.
5. The LCA is a federal organisation representing 65,000 Australian lawyers through their bar associations and law societies and Law Firms Australia.
6. The LCA is comprised of various sections and committees. Within the Business Law Section is the Customs & International Transactions Committee. Mr Ross Becroft, a former Committee chair, represents the LCA at meetings of the International Trade Remedies Forum (**ITRF**). The current Committee chair, Mr

Russell Wiese, also attends ITRF meetings in his capacity as a representative of a different industry body.

7. The Committee members have assisted local manufacturers, importers, exporters and industry associations in respect of all matters concerning the anti-dumping system.

Decision maker

8. The Anti-Dumping Review Panel (**ADRP**) is established under the *Customs Act 1901* to operate as a merits review body of decisions made by the Minister and the Anti-Dumping Commission (**ADC**). The Committee is concerned that the Minister is not legally required to follow decisions of the ADRP. For the ADRP to have a valid purpose it must exercise independent powers of review of anti-dumping decisions. To enjoy the confidence of exporters, importers and Australian manufacturers it must have both actual independence and the appearance of independence. Further to this, in other parts of the *Customs Act 1901* (e.g. s269SH), the review process replaces a decision without Ministerial approval, which could be an appropriate model for ADRP.
9. Independence must extend to its procedures, the appointment of its members, its thinking and application of the law. For instance, the ADRP should not be influenced by the ADC's Dumping and Subsidy Manual (**Manual**). The Manual represents the ADC's view of the law and its correct administration. The ADRP should be reviewing the policy, not merely ensuring that the ADC applies its own Manual correctly.

Duty Assessment

10. The Paper raises the concept of a retrospective duty assessment system. The ADC supports certainty of taxation and application of the law. Under Australia's current dumping duty assessment process, an importer knows the maximum amount of duty payable at the time of importation. The Committee is concerned that a duty assessment system that permits the amount of duty payable to increase at a later time would increase uncertainty. Such a system would not provide additional protection to Australian industry as the relevant goods would already have been imported and supplied to the Australian market.
11. Currently dumping duties are collected at the time of importation. The Department asks whether the retrospective collection of duties would remedy injury caused by dumping. If the maximum dumping duty payable is known with certainty at the time of importation, the delayed collection should not affect the protective impact of that duty. If the collection of duty is correctly administered, importers should have an expectation that duty will be payable, regardless of when that duty is actually collected.
12. The Committee is also concerned about the time and resources required by importers to obtain a refund of dumping duties via duty assessment and the length of time for the ADC to carry out duty assessments. The duty assessment process

should be streamlined (rather than conducting a 'mini-investigation') and should be concluded in a timely manner.

Review of measures

13. The Paper asks whether the *de minimis* threshold should be raised to 5%. The Committee is concerned with the timeframes in which investigations / reviews / inquiries are conducted by the ADC. In the Committee's experience, rarely are the ADC's activities conducted within the legislated timeframes. Two methods of addressing this issue are, firstly, to increase the funding of the ADC and, secondly, to limit the number of activities carried on by the ADC.
14. An objective method of reducing the caseload of the ADC would be to raise the *de minimis* threshold. Many Government bodies that conduct investigations on behalf of certain interest groups make choices as to which matters to investigate. A higher *de minimis* level would mean the ADC's resources are directed to those matters where the highest level of dumping is demonstrated. It may mean that the ADC's resources are not directed towards "nuisance" cases.

Merits review

15. The Paper asks if the ADRP is the appropriate merits review body for the Anti-Dumping System. An alternative body is the Administrative Appeals Tribunal (AAT). Anti-Dumping Investigations often include multiple exporters, importers and Australian producers. Each exporter may be impacted by issues that are unique to its individual dumping margin.
16. For this reason, the Committee believes that the AAT is not an appropriate merits review body. The AAT conducts reviews by hearing. A hearing involving multiple parties would be extremely lengthy and the Committee expects that it would increase the costs of administrative review.
17. The Committee believes that the ADRP should sit within the Attorney General's Department. The ADRP cannot be truly independent if its funding is within the control of the Minister whose decisions are being reviewed. The Attorney General's Department administers the Federal Courts and the AAT. It can be better expected to have in place systems and resources to ensure an efficient and objective Anti-Dumping administrative review system.
18. Further, placing the ADRP in the Attorney General's Department will help remove any actual or perceived structural bias that can exist if the review body is part of the same department that made the original decision.
19. Similarly, the appointment of ADRP members should be via a transparent and independent process. Long term appointment of independent ADRP members will help promote decision making that is free of any fear of the consequences that may flow from overturning decisions of the Minister of the ADC.
20. The Committee believes that the ADRP should continue to apply the "correct or preferable" criteria for reviews. The Paper sets out the high level of Ministerial and/or ADC decisions that are overturned by the ADRP. This shows that there is a

clear need for critical review of Anti-Dumping administrative decision making. Merits review is an important part of the process of improving administrative decision making.

21. The notion of a correct or preferable decision should be supported by empirical evidence. Given the overarching intent of Anti-Dumping and countervailing measures to protect businesses and the potential impost on Australian industry from additional duties being levied on inputs, it is incumbent on the ADC to test the impact of its decisions. The Committee would be pleased to assist the ADC in developing this area of inquiry further.
22. Without merits based review, there would be no critical assessment of whether the ADC and the Minister are making the correct or preferable decisions, as opposed to decisions that are simply lawful.¹ Without independent review of the administrative application of laws it cannot realistically be expected that errors in administrative decision making will be identified or the decision making improved.
23. Ultimately, merits based review ensures that the openness and accountability of decisions made by Government is enhanced. This is very important in the context of anti-dumping decisions as these decisions are potentially subject to a World Trade Organisation review process. Decisions made by the Minister may be more likely to be accepted by Australia's trading partners if the process is transparent and the subject of robust administrative review.

Transparency

24. The Committee is in favour of measures that increase the transparency of decisions that relate to the making and variation of dumping and countervailing duty notices. However, the Committee does not believe that decisions relating to the assessment of duty payable on individual imports should be public. Duty assessments are similar to individual tax returns. A duty assessment is a reflection of the application of an existing taxation law to an individual importer's circumstances.
25. Consistent with the desire for greater transparency, the Committee is in favour of the ADC publishing notices when an application for review of an investigation or review is made to the ADRP. The Committee is also in favour of the ADC informing relevant parties by email.
26. The ADRP timeframes for making submissions are relatively short and strictly enforced. It is appropriate that the ADC take steps to ensure that parties do not miss the opportunity to be involved in the review process simply as they were not aware that a review had commenced.
27. The Paper raises whether new information should be excluded from reinvestigations requested by the ADRP. In an administrative merits review, the

¹ Whilst the meaning of 'correct or preferable' should be clarified, this form of merits review is more effective than other forms of review of administrative decisions. For example, the ARDP merits review is to be contrasted with the more limited scope of review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977.

decision maker should ideally sit in the position of the original decision maker and be able to exercise the same powers as that decision maker.

28. Due to the nature of dumping investigations, the decisions that can be reached by the original decision maker can be dictated by how and what the ADC elects to investigate. If reinvestigations were limited to the originally gathered information, the ADC could effectively limit a future potential review by the ADRP by electing not to investigate an issue raised by an affected party.
29. This is not to suggest that the ADC would deliberately conduct an investigation in a manner to avoid certain outcomes on review. However, it is to be expected that the ADC would not investigate matters it did not consider relevant or would only investigate a matter in the manner that it believes to be correct. If the original ADC approach is in error, the only options to cure this error is to permit reinvestigations to take into account new evidence or overturn any ADC decision that involved an incomplete or incorrect investigation.
30. If a reinvestigation involves the collection and assessment of new evidence, procedural fairness can only be achieved if all affected parties have an opportunity to make submissions in respect of that evidence or the outcome of the reinvestigation.
31. The Paper raises the issue of whether notices should be published when there is an application for an assessment of duty. The Committee does not believe that this is necessary or desirable. The duty assessment process is in place to allow importers to have the dumping margin relating to their imports assessed in accordance with the findings in the original investigation / review. It is not part of the public process of conducting investigations / reviews.
32. Particular importers should have the option of seeking an accurate assessment of the taxes payable by them without having to publicly disclose that they are importing goods, what goods they are importing and from what countries they are importing.
33. While the Committee does not believe that applications for duty assessment should be public, if ADRP review of an assessment decision is sought, the Committee believes that there should be some public record of the ADRP decision.
34. The purposes of review of administrative decisions include improving administrative decision making and increasing public confidence in the administrative decision making process. Both of these outcomes are made more likely by the publication of ADRP decisions relating to assessments.
35. It is very likely that ADRP assessment decisions will contain confidential information. It would be possible for the decision to be published with the redaction of all financial data and the importer / exporter names. It may also be the case that the benefit of the publication of the ADRP decision will not be diminished by keeping the relevant good and country of export confidential.

Conclusion and further contact

36. The Committee would be pleased to discuss any aspect of this submission.

37. Please contact the chair of the Committee Russell Weise at rwiese@cgtlaw.com.au or on 0431 646 488 if you would like to do so.

Yours faithfully

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive style with a large, stylized 'G' and 'R'.

Greg Rodgers
Chair, Business Law Section