

Customs Trade and Transport Update

24 June 2011

Gillard Government announces proposed reforms to Australia's Anti-Dumping and Countervailing regime

Introduction

By way of joint media release ("Media Release") from the Minister for Home Affairs & Justice and the Minister for Trade dated 22 June 2011, the Gillard Government (formerly known as the Australian Federal Government) announced it would:

"make the most important improvements to Australia's anti-dumping regime in more than a decade to improve its effectiveness, while re-affirming Australia's commitment to world trading rules".

Background to the reforms

The Media Release together with the release of other explanatory information and the Government's response to the Inquiry into the Australian anti-dumping and countervailing system by the Productivity Commission is part of the recent close attention to the wider Australian Anti-Dumping and Countervailing Regime ("**Regime**"). This has included the review by the Productivity Commission, a number of recent Federal Court cases and an Inquiry by the Senate Economics Legislation Committee ("**Committee**") into the provisions of 2 new Anti-Dumping Bills introduced into Parliament. One of those Bills was introduced by the Independent Senator Xenophon and sought to make substantial changes to the Regime and practice to address perceived weaknesses in the Regime and augment the powers of the Australian Customs & Border Protection Service ("**Customs**") and local manufacturers to oppose imports of goods from overseas at an unfairly low prices.

The review by the Committee extended to a broader based review of the Regime much of which suggested that the Australian Government was not seen to "do enough" to eliminate unfairly cheap imports or assist Australian industry in its opposition to such imports. I was involved in making submissions both to the Inquiry by the Productivity Commission and to the Inquiry by the Committee and in both cases appeared before both bodies to also provide evidence in person.

Some details of the proposed changes are below.

Reforms to the Regime

The Media Release from Government summarises changes as follows.

Improved timeliness through:

- a 45% increase in Customs staff working on anti-dumping issues over the next 12 months to ensure cases are dealt with more efficiently;
- introducing provisional measures at an earlier opportunity to remedy the negative effects of dumping sooner; and
- introducing a 30 day time limit for Ministerial decisions on anti-dumping cases.

Stronger compliance through:

- a dedicated resource within Customs to boost a monitoring of measures to ensure compliance; and
- combating attempts to circumvent anti-dumping duties.

Improved decision making through:

- greater use of trade and industry experts in investigating complaints;
- the introduction of a more rigorous appeals process supported by more resources;
- clarifying the list of injury factors that could be claimed by domestic industry and clarifying Customs' approach to industry determinations; and
- providing flexibility in allowing extensions of time to complete complex cases.

Better access to the anti-dumping system through:

- a new Support Officer to support small and medium businesses and downstream manufacturers and producers to actively participate in anti-dumping investigations;
- improving access to imports and subsidies data and clarifying the data requirement for making an application;
- clarifying the parties who can participate in investigations to include relevant industry associations, unions and downstream industry; and
- providing a more flexible basis for parties wishing to seek a review of existing measures.

Greater consistency with other countries through:

- consideration of the practices and decisions of other countries;
- allowing Australian companies to combat a wider range of subsidies; and
- an associated document issued by the Government entitled "*Streamlining Australia's Anti-Dumping System. An Effective Anti-Dumping and Countervailing System for Australia*" provides more details of the proposed reforms which will be effected in part by changes to practice and in part by introduction of new legislation in the immediate future.



Government response to the Productivity Commission report

The document detailing the reforms also includes the Government's response to the recommendations of the Productivity Commission Inquiry. This reflects that the Government will implement 15 out of 20 recommendations in whole or in part.

While adoption of a number of the recommendations is welcomed, the Government has not accepted what I consider to be the most important of those recommendations namely the introduction of a "bounded public interest test". The test would have provided that even if dumping had been established which was causing material injury, there also needed to be comparison of that injury to the benefits of the import of goods at an artificially low price on the basis that such cheaper goods are actually advantageous to consumers. Measures would only apply where injury outweighed benefits. In many economics texts, economists are relatively unconcerned about the prevalence of dumping arguing that cheaper imported goods are, in fact, better for consumers.

Issue of the Report by the Senate Economics Legislation Commission

The Committee has now also released its report ("Report") and recommendations into the 2 Anti-Dumping Bills currently introduced to Parliament.

In paragraph 10.2 of the Report it states:

"The Committee recommends that the Senate reject the majority of amendments proposed by the Bill. Of primary concern is that, if enacted, many of the proposals:

- could result in an unfair burden being imposed on various parties which they would be unable to meet;
- are likely not to meet their stated objectives in practice;
- would be practically difficult for Customs to administer; or
- are likely to be non-compliant with Australia's WTO obligations."

However, subject to those comments, the Committee did support some of the other proposals contained in the Bill together with other recommendations examined during the course of the Inquiry. We will need to see whether the Government (and any necessary supporting parties) adopts the recommendations in the Report. It is also noteworthy that there were minority reports of Senators Cameron and Pratt together with a dissenting report from Independent Senator Nick Xenophon (who proposed the main Bill under consideration).

Preliminary views on the proposed reforms

Clearly, the true nature of the proposed reforms have yet to be clarified. Regime change is not easy. The exact changes to practice will need to be set out and we will need to review the legislation affecting other amendments. In addition, many of the proposed "reforms" only stand as a reiteration of existing practices. However, some of my preliminary views are as follows.

- As mentioned before, some of the "reforms" are already in place and will merely change in a small practical way.
- I am pleased that the reforms include a proposal that advisers to parties involved in an Anti-Dumping or Countervailing investigation be given access to more information than is currently being provided, on a confidential basis. This will help to deal with the frustration which advisers feel when so much information provided in an investigation is done on a "confidential" basis.
- The provision of additional information from the Australian Bureau of Statistics will be of significant benefit.
- The proposed provisions to stop parties circumventing the effect of Anti-Dumping measures are very welcome.
- The adoption of a 30 day period within which the Minister is to make decisions is welcomed although there is provision for a longer period in "extenuating circumstances" which I anticipate will be invoked in a number of cases.
- As stated above, I am disappointed that the Productivity Commission recommendation regarding the inclusion of a bounded "national interest" test is not being accepted.
- I am disappointed (and somewhat confused) as to the proposal to remove the Trade Measures Review Officer ("TMRO") as a party able to review certain decisions made during an investigation. My experience is that the TMRO works extremely well with limited resources and I would have thought that additional resources to the TMRO would have afforded the proposed outcome of better administrative review of decisions. The proposed replacement of the TMRO by the inclusion of a "Review Officer" may create concerns given that in any particular case the Review Officer will be selected from a panel with relevant expertise. Clearly, appointments to that Panel will be eagerly sought.

- I have concerns about any provisions which will lead to the earlier introduction of provisional measures where Anti-Dumping or Countervailing practices are considered to have happened even when the entire review process has not been completed. While this may assist competing local manufacturers, those parties importing the relevant goods will need to deal with the administrative and financial burden of such provisional measures from an earlier stage and, if the measures are not finally confirmed, will need to seek refunds of duty paid or other mechanisms adopted to cover such provisional measures. This seems potentially to be unfair.
- The Government has announced that implementation will be facilitated through an "International Trade Remedies Forum". According to the Government, the Forum will comprise representatives of manufacturers, producers and importers as well as industry associations, trade unions and relevant Government agencies. My concern is that the representation on the Forum may be unduly skewed in favour of those in Australia seeking the wider and more imposition of Anti-Dumping and Countervailing remedies.

Conclusion

In and among all the hyperbole leading to the announcement of the reforms, one thing needs to be made clear. None of these changes will have impact on legitimate cheap imports acquired from overseas. It is only in circumstances where there are actual and proved breaches of the Regime that any additional duties will be imposed on imported goods. Cheap imported goods are not necessarily "evil" and, in fact, are welcomed by the majority of consumers. The ability to produce goods cheaply overseas is a global economic reality arising out of different costs and labour regimes throughout the world. That said, a number of the amendments proposed by the reforms are welcomed. However, I remain concerned that this was an opportunity to introduce more wide-ranging and comprehensive reforms which the Government has failed to adopt.

Contact us

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