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Australia's anti-dumping system

Productivity Commission

GPO Box 1428

Canberra City ACT 2601

Transmitted by Email to: antidumping@pc.gov.au

This submission represents the views of Dow Chemical (Australia) Limited (DCAL) and provides a balanced consideration of the subject matter consistent with our activity as both a medium-sized local producer and also a long term reseller of imported products in competition with other local producers in Australia.

Overall, DCAL recognises the value of an anti-dumping system to both a local producer and a long term supplier of imported goods. It is apparent that only a relatively small group of industries in Australia are in a position to utilise the system and even within such a band, relatively few companies avail themselves of it.

The broad value of the system is in terms of supporting the continuity of supply of goods and services as well as technology & innovation to downstream industries. The absence of the system may arguably yield intermittently lower priced goods than otherwise, but the consequent volatility in price and supply in the absence of a committed local producer or long-term (locally-based) importer mitigates the benefit of such price effects and the final economic outcome would, in our opinion, be less desirable.

It is notable that an unfortunate outcome of the anti-dumping system, as it is currently legislated and interpreted, is that it is open to misuse and may, to the extent it is abused, protect uncompetitive local industries and deny access of downstream industries to globally-sourced products and technologies at a competitive cost. Therefore we believe the system is in need of significant revision in order to for it to deal effectively with a new era of international investment in production capacity particularly in the Asia-Pacific region.

The key points and recommendations which DCAL wishes to make:

1. In its early years (1970s-80s) following adoption of GATT/WTO principles, the anti-dumping system proved to be of positive benefit to the economy at large in supporting stable business conditions (described in the submission) for both local industry and long-term importer/suppliers and thus supported the consistent provision of needed goods and services to downstream industries.  
More recently there have been major changes in the Asia-Pacific industrial environment from which the Australian economy should, ideally, be able to derive economic benefit in terms of enduring competitive cost inputs.  
Although competing Australian industries still require a viable anti-dumping system to counter predatory or excessively aggressive behaviour from Asia-Pacific exporters, the mechanisms inherent in the current anti-dumping system are in need of revision in order to avoid outcomes which deny access for downstream

industries in Australia to the economic benefits of the Asia-Pacific industrial evolution. Of particular note is the basis for assessment of Normal Values (see item 6 below).

In general, the administration of the current antidumping system is highly weighted towards a strictly accountant-driven process with little regard for business intentions or the usual conventions and mechanisms surrounding the conduct of any particular business under investigation.

2. Experience demonstrates that dumping is intermittent, but is short-lived in the face of an effective anti-dumping application. In the majority of instances, dumping activity occurs during periods of rapidly changing prices which are the result of: (i) economic disruption at a regional Pacific or global level, or, (ii) the entry of new, aggressive exporters seeking position in the Australian market.

Whereas the aggressive behaviour of new entrants can result in injurious dumping, the instance of apparently dumped pricing due to broad economic disruption, if viewed in suitable time-frames, may not correlate with intentional dumping, injurious or otherwise.

3. The data and information requirements for an initial anti-dumping application require significant effort and time to accumulate and develop. Due to the nature of intermittent dumping, especially in the form of a new aggressive entrant, there can be significant injury incurred in the time taken before a Customs "Preliminary affirmative determination (PAD)" can be obtained.

DCAL would prefer to see the system adjusted to a two-stage application:

- (i) A less extensive initial application by local industry for anti-dumping protection yielding more timely interim measures which should include more use of "price undertakings" by exporters.

In this submission we describe the predictable relationship between the prices of goods and publicly available information sources (indices) which are commonly used as a benchmark for regular price adjustment and therefore lend themselves as a tool for indication of aggressive pricing behaviour of an importer (and their exporting supplier). Such information sources can also provide a basis for determining an approximate normal value. Therefore this tool can provide a reasonable basis for an initial application for measures and for obtaining a PAD in a more timely manner.

- (ii) A final application for measures must still be completed and this will require the same final level of information as the current system.

4. In conjunction with a more flexible and timely system for the anti-dumping application, and in consideration of the relatively short life of intermittent dumping, the time period for the imposition of measures should be shorter: three (3) years maximum would be more appropriate.

5. The Continuation ("Sunset") Review process, as now practised by Customs, is less rigorous than the initial application process in determining the need for continued measures. There is significant potential for the resulting determinations to be contradictory in terms of actual industry conditions versus the "threat" of future dumping. Given their intermittent nature, and the typical sources of injurious dumping, there is a need for revision of this process:

- The Customs deliberation process for Continuation should be the same as for a new application for anti-dumping measures.

- The period of the Continuation of Measures should be consistent with the intermittent nature of dumping (per item 4 above) and, if based on the suggested more rigorous assessment process, be a 3 year extension.  
*(Alternatively: If the current, low-rigor process is maintained then the extension period should be limited to two (2) years with no further extensions available.)*
6. The process for determination of Normal Value needs to accommodate vastly changed industry/supply conditions in the Asia-Pacific region.  
Since the 1970s when Australia's anti-dumping laws were enacted, the nature of exporters has dramatically changed in their source and scale. Today the export source of product is likely to be a very large capacity producer whose output is targeted at multi-country regions of the Pacific.  
In particular, the sales of goods in the country of residence of the production facility will almost invariably represent a small or insignificant proportion of total output and, in isolation, will not be representative of the real price intent of the exporter enterprise.  
Normal values need to be based on a majority of the output of an exporter in order to yield representative figures for normal values and thereby avoid inflated price outcomes for the Australian economy.
  7. Under any revised system, the issue of "like goods" will no doubt continue to be contentious between the local industry and an exporter because the opportunity for manipulation remains. DCAL recommends that Customs, in their investigation phase, seek advice from downstream users of the goods in order to better resolve conflicting opinions of local industry and exporters on the definition of like goods.
  8. Information is the key ingredient for an industry to quickly and effectively investigate whether it is subject to dumping activity and to construct a viable submission for anti-dumping protection. The most valuable source of information for many industries is the import statistics data provided through the Australian Bureau of Statistics (ABS).  
The provisions for suppression or consolidation of import statistics by the ABS should be removed.
  9. The assessment of "unsuppressed selling price (USP)", which determines levels for "non-injurious price (NIP)" for exporters, is opaque and open to abuse by industry.  
It is also apparent that changing economic conditions, including exchange rates and regional/global prices affected by supply/demand swings, can undermine the effectiveness of NIP determinations. Such oscillations can cause the NIP levels to be either non-protective of local industry or excessively punitive on exporters depending on the impact of the economic swings. DCAL suggests that NIP levels and consequent Price Undertakings can be linked to broader industry price indices and also to reflect relevant exchange rate impacts in order to regularly adjust NIP levels which otherwise can only be addressed via the time-consuming and expensive Review of Measures process.
  10. The processes surrounding imposition of "interim dumping duties" (IDDs) and the recovery of paid IDD ignore the ongoing competitive behaviour of an affected exporter and are overly onerous in terms of data and burden of proof in order for an exporter to recover such duties.  
A consequence of the inflexibility of the system is a rise in ascertained export

price, when an exporter may apply additional margin to export pricing, which thus reduces profits of the local agent and reduces taxes paid to the Australian economy.

This may be a desired punishment for “predatory” exporters, but when long-term import/suppliers are inadvertently captured in the fall-out from anti-dumping actions against such aggressive actors, the impositions of the IDD system are a deterrent to cost effective provision of goods & services to the Australian economy.

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In the following Introduction section and the ensuing sections which answer various questions posed in the Issues Paper, the above key points will be illustrated and expanded upon.

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## Credentials:

This submission represents the views of Dow Chemical (Australia) Limited (DCAL) and is written from the viewpoint of a medium-sized local producer which is also a long term reseller of imported goods in competition with other local producers in Australia. DCAL has operated in this fashion in Australia for over 50 years and in that time has undertaken a number of anti-dumping actions from the early 1980s through to the late 1990s. DCAL has also participated in anti-dumping investigations in which it has been the local reseller for imported goods accused of being dumped. Consequently, DCAL regards itself as able to contribute constructively to the review and reform of the anti-dumping system in Australia.

DCAL activities in Australia are in the supply of intermediate products to downstream users for further processing. Supply is from local production of Polyether Polyols, Glycols and Styrene-Butadiene emulsion polymers and also from imports of a range of chemicals, specialty chemicals and plastic resins.

In the following submission DCAL will focus on the value created for downstream users by the presence of local producers and also of importers of goods and services where the latter are committed to a long term strategic business presence in Australia. With regard to the latter, DCAL's particular experience in Linear Low Density Polyethylene (LLDPE) is a relevant example: DCAL introduced LLDPE products into Australia in the 1980s and these proved technically superior to different types of Plastic resins in common use (from local producers and importers) and successfully established a large downstream demand for LLDPE products through the 1990s.

In the early 1990s a local producer of other Plastic resins (xxxxxx) invested in local manufacturing capability for LLDPE to compete against imports. In a recent (2008) Review of Measures, the findings by Customs concerning their Unsuppressed Selling Price (i.e. cost to make and sell plus a profit margin) indicated a substantially higher cost structure than for regional LLDPE manufacturing operations in Asia-Pacific (by DCAL estimations) which may explain the local industry's claimed propensity for injury due to imports, dumped or otherwise.

This would also explain why, in the past 10-15 years, this local producer has aggressively pursued anti-dumping actions against sources of imported goods and utilised all aspects of the legislation to support higher prices to the market. DCAL shifted its product mix to grades of LLDPE which were and are largely complementary to the offerings of the local industry and has thereby maintained its strategy to be a long term import supplier of goods and services valued by the downstream industry.

## Introduction:

In this submission DCAL will address some of the specific questions raised in the Productivity Commission Issues Paper, but it is appropriate to firstly describe a framework for our comments based on our 50 years of participation as both a producer and an importer to the Australia industry.

The Australian Anti-dumping legislation describes the protagonists in any investigation principally in terms of the source of goods: there is the "local industry" which is apparently in conflict with the "exporter". The participation of the local reseller and of the downstream users of the imported goods is of secondary relevance and only addressed in the "arm's length" test of business separation between the local

agent and the exporter. In our opinion, this attitude, inherent in the legislation, leads to significant deficiencies in the outcomes of anti-dumping investigations and decisions.

Furthermore, it is relevant to the intent of the Inquiry (to consider the **“economy-wide effect of imposing anti-dumping measures”**) to take aboard the concept that the economic benefit of the downstream industry is served by having competitive sources of product and service on an enduring basis and that such various sources will include both local producers and committed long-term import suppliers of goods and services. By contrast, a truly dumping exporter can only provide a limited benefit to downstream Australian industry and that being in terms of a temporary price offering which is not long-lasting (irrespective of antidumping action) so is of no enduring benefit to the economy at large.

In the “more commodity” types of goods which have historically been the focus of anti-dumping actions, it is quite common for pricing to Australian downstream industries to be relatively transparent by being readily referenced to industry price publications (e.g. ICIS-LOR for chemicals and plastics, etc.) which monitor prices for many types of goods in countries and regions across the globe. The common business vernacular for pricing in Australia, as a result of the presence of anti-dumping legislation, has seen the ubiquitous use of terms such as “non-dumped import parity” or “import parity” or just “parity pricing”; all of these descriptive terms point to the fact that pricing references exist which provide varying levels of predictability (for consumers) of price offerings in the Australian market as well as a reference for the competitiveness of those offerings across a broader geography than just the Australian market.

Our experience is that when true dumping does occur, the Australian market price deviates significantly below such reference “parity” price levels (see Exhibit A), but in other cases where dumping is assessed (especially under disrupted economic conditions) there may be only limited duration, or indeed no deviation from such parity price (Exhibit B).

In our experience the nature of the importer is a key factor in determining the potential for dumping as well as the actual incidence of dumping. DCAL, both as a local producer and as an importer, recognises that “importers” which make long term commitment, including investment in infrastructure and resources, to market and sell goods & services in Australia in competition with a local producer, do so with a strategy to provide a competitive product offering and to generate profitability to both the local agency as well as to the exporting supplier of the goods – only in that way can a stable, long term business be sustained. Conscious, injurious dumping of goods, with the consequence of business disruption caused by an anti-dumping action, cannot be a part of a sustainable business strategy.

So if dumping does not occur intentionally on the part of a “long-term importer” then why does it occur from time to time?

It is DCAL’s experience that injurious dumping, and consequent anti-dumping action, has occurred for one of a very few reasons:

- (i) A significant economic disruption, usually in the form of inflation and then rapid deflation of a supply-demand bubble (as for example in 1995 and 2008), which causes prices in related markets to rise strongly and then fall sharply and deeply. The current methods of comparing exported goods’ selling prices against exporting country normal values will almost inevitably result in catching

in-transit shipments of goods where export price cannot match the rapidly changing pricing in the destination market and the goods are then deemed to either be “export dumped” in a rising market or to be “sales dumped” in a falling market because the importer may suffer temporary losses.

Even though such short-term effects would most likely be insufficient to obtain a first instance decision for Anti-dumping Measures, such effects can be, and are interpreted liberally in situations of Review of Measures or a Continuation (“Sunset”) review.

In the recent case of a Review of Measures and Continuation Review regarding Polyethylene exports from Thailand, such a temporary dislocation was interpreted as indicative of future threat of injury (if Measures were to be removed) despite the evidence of a long period of non-injurious export of the goods during which the local producer admitted to excellent and consistent business performance. This is an incongruous outcome of the Review and Continuation elements of the legislation.

Analysis of pricing data for LLDPE (see Exhibit B) over the period of the measures against a Thai exporter yields compelling evidence that the exporter (and importer agent, DCAL) demonstrated no aggressive or predatory pricing behaviour. Given that market pricing of LLDPE in Australia is mostly determined by exports from SE Asia, use of publicly available price data (e.g. ICIS-LOR) for that region demonstrates a close correlation with the Australian prices expressed in common currency terms.

In Exhibit B it is clearly apparent that Australian LLDPE pricing movements correlate with changes in ICIS-LOR index price for base commodity LLDPE (“C4LLD”). Furthermore, the Exhibit B demonstrates that the Australian market price of imported product responds to changes in price in SE Asia and re-establishes a relative margin following bubble-like price disruptions. Therefore, despite the interpretation under the anti-dumping system of dumping behaviour by the exporter, the reality demonstrated by the comparison with regional competitive prices is that there was no intent to dump and every intention to recover pricing to an industry-established competitive base.

The use of such public price indices provides a tool for assessment of dumping behaviour which can both speed up initial applications for anti-dumping measures by local industry, and also eliminate egregious errors in assessing dumping behaviour against exporters in such short term disruptive circumstances.

- (ii) The other most observed cause of dumping is the entry of a new source of imported goods seeking a competitive position in the Australian market which can result in price undercutting by the new entrant to obtain share of demand and this leads to a downward price spiral in which both a local producer and the above-mentioned “long-term importer” can suffer price and profitability impact. In our experience, a resulting anti-dumping action does cause the new entrant to retreat or disappear, but often the long-term importer is also subjected to anti-dumping measures (against its exporting supplier) despite recovering price promptly to previous non-injurious levels.

On one hand, the response to the new entrant by the long-term importer may indeed have caused them to dump and to have been a partial contributor to injury of both the local producer and its own business; on the other hand, the imposition of punitive measures for 5 years (plus the apparent ease of obtaining extensions for additional 5-year periods) is an inordinate punishment for an

importer (and their supplying exporter) for what was a temporary and third-party induced situation.

An example of this situation is evident in the competitive situation in the late 1990s which led to a Dumping Finding on Flexible Slabstock Polyols (FSP) in 2001. In Exhibit A the historical pricing data from that period has been updated to 1Q2009 and, as for Exhibit B, the graphic compares ICIS-LOR reported prices for SE Asian FSP with FSP pricing in the Australian market on a common currency basis. The difference in prices (the “delta”), which is on a quarterly basis for FSP, is “noisier” than for the monthly determined prices of LLDPE (Exh.B) because of intra-quarter currency swings, but the result is largely similar to the LLDPE comparison with the exception of the determined dumping period 1999-2000. It is clearly apparent that the price relationship to SE Asia “parity” collapsed in that period due to aggressive, dumped pricing by a Korean exporter, but was also not recovered back to normal level margin until late 2001 after the anti-dumping measures yielded sufficient effect.

In this case an exporter from [xxxx], represented by a long-term import agent (xxxxxxxx), incurred Measures for a 5-year period despite the fact that the entry of a new source of goods from South Korea was the instigator of a downward price spiral and that export source disappeared subsequent to imposition of Measures (while the [xxxx] exporter returned to non-injurious export pricing levels).

COMMENT: the above causes of intermittent dumping demonstrated quite different impacts on prices when comparing Australian market prices for the goods against publicly reported market pricing information. This type of information provides a clear opportunity to create an analysis tool to permit a more rapid indication of dumped pricing, but at the same time to avoid incongruous determination of dumping behaviour when external factors are at play (and where the intent of an exporter/importer remains for long-term, non-injurious participation in the market).

DCAL also suggests that a new factor is now apparent which clouds the assessment of normal values and yields incorrect decisions on the presence or threat of dumping. In the regional environment, including Asia-Pacific and the Middle-East, there has been rapid growth in global scale production facilities which are vastly larger in capacity than the demand presented in the country in which the capacity resides. This trend started in the late 1980s, examples being the global scale Propylene Oxide and Flexible Polyether Polyol facilities built in Singapore from that period, but has accelerated throughout the past 20 years with the building of large capacity facilities (e.g. for Polyethylene and Polystyrene) in Thailand, Singapore and Middle-Eastern countries which are built as export-dedicated operations.

There is the obvious implication of lower cost goods from such sources placing competitive pressure on local producers in Australia and elsewhere; however, the less obvious, but equally important implication concerns the meaning of “normal value” for these exporting enterprises and countries. With exports being much greater than local consumption in all of these cases, the pricing in the producing country can be, and often is, higher than the local destination region such as South-East Asia where aggregate consumption is vast and which represents the intended strategic target for the new plant capacity.



To carry this issue one step further, and in doing so to address the wider economic impact of anti-dumping measures, the downstream industry in Australia (i.e. the customers of local producers and importers) are very often in competition with imported processed products from the broad array of SE-Asian manufacturers who have access to regionally-priced supply of inputs (the goods) from these large-scale producers. However, because of the obsolete approach of the anti-dumping system to normal value determination, Australian downstream users of the goods may be denied access to goods at competitive, SE Asia market related prices due to the inflationary effect on Australian prices of the goods arising from use of the unrepresentative domestic values in the exporting country.

We then reach the absurd situation where, in the case of Thai exports to Australia, a free trade agreement (FTA) ensures duty-free importation of goods to Australia, but normal value determinations for such exports are based on duty-barrier inflated domestic prices in Thailand. To add insult to this situation, Thai exports of the goods to other SE Asia countries are under a regional FTA and therefore at lower base prices than in the Thai domestic market (and notably, all exports would then be erroneously assessed as dumped). Processors in, say, Malaysia purchase the goods at the FTA price and export goods to Australia to compete against Australian processors whose cost-of-goods is inflated by the antiquated normal value determination methodology.

The clear implication of this is that the current execution of the anti-dumping system can effectively consolidate a structural economic disadvantage to Australian industry.

The clear need arising from this evidence is that a broader basis is needed for addressing “normal value” which would be better represented by assessing the major proportion of the sales of goods, including both domestic and exports to the surrounding region.

## **Questions Raised in the Issues Paper**

### **Recent anti-dumping activity**

#### ***Usage levels (p.7 of Issues Paper)***

The Issues Paper, in various descriptions and graphics, demonstrates both an overall decline in usage of the anti-dumping system and a certain pattern of usage which is relevant to comments made elsewhere in this submission.

It is our view that the periods of identified decline in usage can be attributed to a few key factors:

- a) In times of buoyant business conditions, as for much of the period 2001-2008, the conditions which drive injurious dumping are absent: exporters are able to profitably sell product in their domestic and regional markets and are less inclined to use a low-price strategy in order to establish and grow new presence in the Australian market.
- b) Via re-engineering, down-sizing (or other synonym for people reduction), the size of business organisations in Australia has continually reduced since the 1980s so there are fewer internal resources, and certainly fewer of the requisite experience in organisations, to assess and undertake anti-dumping actions, even with the assistance of external expert consultants.
- c) The anti-dumping system, with its protracted procedures and the resulting costs, both in dollar terms and in consumption of the firm's resources, are a deterrent to both applying for protective measures and to defending against such actions. DCAL experience is that mounting or defending an anti-dumping action can cost \$50-100,000 in direct cash outlay and a similar amount in terms of people resources at the importing and exporting locations.

The above clearly results in fewer applications, but also may explain why “the proportion [of measures] in place for over 5 years has grown”. In simple terms, importers who transgress (for whatever reason) into injurious dumping are equally lacking in resources, experience and budget to respond to Anti-dumping actions or to oppose Continuation applications by the local industry.

Clearly there are negatives for the wider economy in these outcomes: the local industry may too readily capitulate to dumped imports and close operations; conversely importers, as valuable suppliers of goods and services may exit or reduce their business offerings to the local customer base in order to mitigate actions.

Elsewhere in our submission, DCAL has suggested that anti-dumping actions often arise during times of economic dislocation such as the rapid inflation or deflation of supply-demand-driven price bubbles as a result of changes in broad economic factors. This is clearly evident in the pattern of new investigations (Figure 2 of the Issues Paper):

- a) The global recessionary periods of the early 1980s, and again in the early 1990s, precede and overlay peaks in new investigations in those periods.
- b) The few years up to and including 1995 were ones of strengthening demand and led to a price bubble which deflated in 1995. The incidence of new

investigations understandably declined up to 1995 when exporters had ample target markets, but promptly bounced upwards in the latter half of the 1990s as supply exceeded demand and those exporters had to defend or penetrate wider-ranging markets such as Australia.

***Why is anti-dumping activity heavily concentrated in a few key industries?*** (p.9 of Issues Paper)

Previous comments are in part relevant to this question: only those companies of sufficient size, and willingness, are going to maintain the required staff resources and underwrite the cost and effort to take action against dumped imports. Similarly, it is these companies which are likely to have business at risk with volumes of goods sufficiently large to warrant the anti-dumping exercise.

The nature of the goods is also a predictor of the utilization of anti-dumping actions by local industry: where the goods are the products of large volume plants with relatively simple raw material and utilities inputs there is greater facility to measure the presence and impact of imports which are sourced from very similar types of plants. Another key feature for such products is the availability of public information on regional and global industry, including regular (weekly) reporting of pricing. The latter is a critical feature for such goods because local pricing in Australia most often correlates closely to such price indices and is a tool for analyzing whether price aggression is occurring from an exporter to Australia. More discussion on this will follow in regard to “intermittent dumping” and with reference to Exhibits A & B.

Industries, irrespective of size, with goods comprising many “raw material” inputs and/or yielding many product lines targeted to different uses, will find difficulty to either justify the effort of anti-dumping action or to develop the required data and information to carry through a case.

In reality, information is the key raw material for a successful anti-dumping application. Industries such as the steel industry or the larger-demand chemical and plastics industry, which produce what could loosely be called “commodity” (or reasonably interchangeable) products, will be able to obtain information crucial to assessing whether their market is impacted by imported goods and whether there is a likelihood of the goods being dumped:

- Import statistics (via ABS), or export statistics from exporting countries, can provide useful information about volume of product and price, but only where the Tariff Item is relatively uncomplicated and adhered to by importers. Examples in our experience are Polyethylene, Propylene Glycol, Propylene Oxide based Polyether Polyols.

In this regard, the ease with which the ABS statistics can be blocked for reason of commercial confidentiality is a deterrent to effective data acquisition. Also the ability of importers to switch to incorrect import classifications in order to avoid detection is a serious concern.

- Such “commodity” products are very often traded widely on a global and regional basis and are consequently the subject of regular (weekly) price and supply publications. The ICIS-LOR reports, for a wide range of chemicals and plastics, represent one of a number of public data sources available by subscription.

If the Australian local industry can identify a source of imported product then it

has a good tool through such reports to determine regional or country prices for the goods in order to determine the likelihood of dumping.

- The “commodity” nature of such products may have a common range of end-uses, but the issue of “like goods” is still not straightforward and remains open to manipulation for the assessment of normal values.

## **Countering predatory behaviour (p.11 of Issues Paper)**

***“For the sort of goods that have been the focus of investigations in Australia, how likely is it that an overseas supplier could employ dumping to secure an enduring monopoly supplier position in the Australian market?”***

From our experience of such markets, it is extremely unlikely for a monopoly to be established in Australia by any such producer (and even less likely for it to endure). In theory, if an exporter has a large scale, cost advantaged plant with spare capacity, then they may choose to take a position in the Australian industry in an effort to fully utilise capacity. With the cost to ship to Australia and to service the customer base, the margin returns from Australian sales would not be as high as from sales closer to the export location. Even if a significant share position is established, it is inevitable that the supply-demand curve will change towards balanced or even tight supply and the exporter will be able to sell out their capacity closer to home at far higher returns than is afforded by a “monopoly” strategy in Australia.

In other words a rational exporter will eventually drive up prices in the Australian market to the point that they achieve an optimum return on their production capability, and this will therefore allow the entry of other suppliers to the Australian market.

## ***Avoiding the costs of “intermittent” dumping (pp.11-12 of Issues Paper)***

***“What effect does intermittent dumping have on local industries?”***

The preamble in the Issues Paper captures quite well the negative impact of “intermittent dumping” on local industry, but does omit an additional victim of this practice and that is the impact on established long-term importers of goods. Such participants can have an enduring position, appearing to downstream users as providing the same level of service and commitment as a local producer. Such a supplier profile is the result of investment in product inventory, people and facilities for a long term importation business strategy in Australia.

Such participants are also negatively impacted by “intermittent dumping” by third parties, but can suffer well beyond the disappearance of the intermittent dumping. If the long-term local supplier gets caught in the inevitable downward price spiral caused by the dumping activity it is possible that they may also temporarily dump injuriously and an anti-dumping investigation against all exporters may cause imposition of Measures which otherwise would not have occurred for such a long-term participant. In the opening remarks to this submission there is an example of such an outcome.

***“Is Australia’s current anti-dumping system a significant deterrent to intermittent dumping?”***

Intermittent dumping is very often caused by new entrants to the Australian market and is characterized most often by price-undercutting which spreads rapidly across the market and may create injury in a very short period.

On the other hand, intermittent dumping on the part of a long-term importer, if it occurs, is usually a result of sharp changes in broader economic or market supply/demand conditions and is not characterized by price undercutting in the local market (see Exhibit B).

A new entrant is unlikely, in our experience, to have researched and understood the implications of the Australian anti-dumping legislation. They may make an aggressive push, using low prices, into the local market and cause price suppression across all suppliers. Once an anti-dumping case is underway, market pricing usually returns to some parity price based on usual import sources; if the new entrant finds itself unable to achieve a share of market at such prices then they depart. However, the damage is already done in the form of price suppression especially because of the long duration of the dumping whilst an application for anti-dumping measures is drafted in all its detail and rigor.

The major problem with the current anti-dumping system is the time required by the local industry to bring together the required data and then develop information of sufficient depth and detail to obtain a “Preliminary affirmative determination” with imposition of interim dumping duties (IDDs). In order to achieve more rapid relief from price impacts of dumping, preferably by obtaining “price undertakings” from affected exporters, we recommend that industry be able to lodge an initial or preliminary submission which is less data intensive and utilises a more business-logic oriented process. The ensuing final submission should require the currently demanded level of detail to follow within a strictly enforced time period. This flexibility will have the benefit of mitigating the injury to local industry, but not remove from them the obligation to prove their case.

Also, because the intermittent dumping is such a short-lived effect, the anti-dumping measures should have a more limited life of up to 3 years maximum. The reasoning for this is that, by the discussed definition of intermittent dumping, the exporter has exited or at least ceased injurious dumping and market conditions are no longer affected by that instance of intermittent dumping so there is no case for a long period of measures.

By the same logic, the ability to continue measures should be curtailed by enforcing the same rigour on the decision as for an initial application for measures, and, if granted, be limited to an additional 3 years.

Given the above recommendation for a more rapid system to achieve initial IDD, this brings to the fore the issue of information; it is our recommendation that:

1. Import statistics, which are a highly valuable and effective source of information on dumping activity, have no restrictions placed on them. Currently it is very easy to make application to the Australian Bureau of Statistics (ABS) to have varying levels of data suppressed on any tariff item.
2. More cognizance be given by Australian Customs’ investigation process to the use of published information of a type which is well-established and respected

by various levels of the relevant industry as a reference for supply & demand conditions and pricing of like goods in the country and/or region of export. The ICIS-LOR data on Chemicals and Plastics represent one of a number of such information sources.

## **The benefits and costs of the current system (p.12 of Issues Paper)**

Apart from considering the impact of the system on a producer or importer, it is important to look at the benefits or otherwise of the anti-dumping system on downstream users of our products as their inputs. It is sometimes stated by parts of the business community that the abolition of the anti-dumping system would yield lower prices of goods. In our opinion such benefits would be short-lived given that, in the current environment of free trade agreements, zero duties, etc., market pricing in Australia is largely established at a parity basis to Asia-Pacific levels and therefore a rational exporter would seek an equivalent return from sales to all export destinations.

The absence of an anti-dumping system could also create a less reliable business environment (e.g. in terms of understandable pricing relationships of raw materials and products across regional countries) to support the significant investment in either local plant or, in the case of long-term importers, the needed people and facilities to provide a broad range of products, services and technology to Australian industry. Australian industry may well suffer by being restricted from the ready availability of leading-edge product and technology as major long-term suppliers move to a trader-oriented business model which seeks business, but without the costly commitment of resources or plant capacity.

### ***“What impacts has Australia’s anti-dumping system had on your activities as:”***

- **a local producer...**

Competitive pressure in the past 20 years has increasingly come from Asia-Pacific based producers of goods. One major, long-term import source is Singapore and is subject to a zero tariff rate under a free trade agreement. The various past anti-dumping actions has, until recently, tended to keep pricing levels consistent with non-dumped, or at least non-injurious, export prices.

Published market data from ICIS-LOR provides a reasonably reliable view of competitive pricing in SE Asia and other regions and the resulting transparency in regional competitive pricing provides a level of comfort to downstream Australian industry on the competitiveness of prices offered in the Australian market.

This situation reflects upon the accessibility of the anti-dumping system and reinforces statements elsewhere in this submission that the ABS data should not in any way be restricted as this is the most timely source of information on which local industry can base a judgment to apply for anti-dumping measures.

- **a local firm importing goods...**

DCAL has been a long term importer of Polyethylene and other goods into Australia. In the case of Polyethylene, DCAL has sourced a wide range of products from the

global Dow Chemical operations and supplied these to downstream users in Australia. Since the start up of a local producer of LLDPE, DCAL has had to adjust its imported product mix toward one which is largely complementary to the range of products supplied from the local industry.

The business strategy has been to operate from a local inventory of goods with a full sales & service model which the customer base would regard as equivalent to the product offering of the local industry.

Despite the fact that our product mix is not directly competing against the goods from local industry, DCAL has in recent times been caught up in Review of Measures and Continuation Review activities involving its products sourced from a regional Asia-Pacific location. Even though the imports from that source, since an anti-dumping finding in 2003, were not found to have been injurious, and despite the fact that the local industry admitted to enjoying excellent business performance through the period, the Review of Measures outcome called for new interim dumping duties and the Continuation Review decision was for a further 5-year imposition of measures.

The basis of these contradictory causes-&-effects was that dumping occurred in a recent period during which the Asia-Pacific supply-demand balance was severely impacted and prices, regional as well as in Australia, initially rose and then collapsed dramatically. In-transit inventories of goods were caught as being dumped during this period of disruption and, even though no injury was attributed, this was heralded by the local industry as evidence of future predatory dumping.

Clearly, in the case of Review of Measures and Continuation Review, the current anti-dumping system has burdens of proof and hurdles of performance which are too lax or are biased towards maintaining anti-dumping measures in place despite, in this case, there being clear proof of a healthy local industry and no proof of injury caused by imported product from Thailand.

***“What are the longer term implications of Australia’s anti-dumping system for investment, innovation and productivity across the economy?” (p.13 of Issues Paper)***

The presence of an effective anti-dumping system will allow local industries to continue to provide technically and commercially attractive products to downstream industries in Australia. Furthermore, to the extent that the anti-dumping system does not inadvertently penalize them, the system also provides a supportive environment for long term importer-suppliers to supply a broad range of goods and services to the local downstream industries both in competition with local industry and to also complement the product offerings of local industry. This is all to the benefit of downstream users in terms of productivity and, through access to leading edge global technologies, it enhances innovation opportunities for the downstream industries.

However, it is notable that an unfortunate outcome of the anti-dumping system, as it is currently legislated and interpreted, is that it is open to misuse and may, to the extent it is abused, protect uncompetitive local industries and/or deny access of downstream industries to globally-sourced products and technologies at a competitive cost.

## How might the current system be improved?

(p.13-16 of Issues Paper)

### ***Modifications within the existing system architecture***

The comments and recommendations that follow are based on the DCAL experience with the chemicals and plastics industry in which we participate in Australia, both as a local producer and as a long term importer/supplier. The key drivers behind these comments have been discussed elsewhere in this paper, but are worth reiterating: it is our experience that dumping is intermittent and is caused by disruptive forces in basically two forms: (i) new importing entrant discounting for volume; (ii) large scale regional shift in economic factors which affect supply/demand and short-term pricing across a broad geography.

It is also our experience that the determination of “normal value” according to current procedures yields unrepresentative outcomes, to the detriment of the Australian economy at large.

Issues:

- 1) “standing requirements”: contemporary industry conditions have changed dramatically since the 1970s when GATT outcomes were adapted into the Australian anti-dumping regulations. Exporters of that time were occasionally regional Asia-Pacific (in particular Japan) producers with some excess capacity to export versus their large volume in-country demand; most often, however, major producers from North America or Europe with excess capacity to sell across the Pacific region were the regular exporters into Australia. In proportion to the total sales by such producers, their in-country domestic sales were vastly bigger than exports to Australia and the use of the country normal value was entirely valid.

In the past twenty years, imports to Australia increasingly come from regional Asia-Pacific producers which have evolved into large, even global-scale, operations built with a business strategy to supply across nearby countries of Asia-Pacific. In proportion to exported sales, the in-country sales from such facilities range from insignificant (as in Singapore) to minor (as in Thailand). Consequently the assessment of “normal value” is no longer a simple in-country consideration, but should encompass the strategically intended sales activity across all long-term target sales territories.

- 2) The “like goods” test, in our experience, has ranged from easily specified as for the Flexible Slabstock Polyol case, to excessively complex and opaque as for the Linear Low Density Polyethylene (LLDPE) case.

In the latter case, the internal composition of the polymer across the variety of grades of LLDPE is correctly identified as a differentiating factor, but the specialized nature of the then defined “like goods” resulted in Customs identification of a small proportion of sales at a high selling price in the country of origin (Thailand) which did not reflect a real situation had the entirety of sales, inclusive of exports to the local region, been taken into account.

Therefore it is our recommendation that Customs take note of how goods are utilised by downstream industries in order to differentiate the arguments of local industry versus importers. To obtain such reliable evidence, it is recommended that Customs recognise the importance of input from downstream users and include them in its investigation phases.



It is also of interest, in the particular case referenced above, that the Customs assessment was that the Thai producer also dumped into “third countries”: this is not a logical deduction, especially from a business viewpoint, as the investment in such plants was for the specific role to service broad regions of Asia-Pacific, including Australia, and therefore the intended profitability of the entity also includes such exports.

This is an excellent example of the point we wish to emphasise, that when only minor sales of goods are made in the country of manufacture and the vast majority is exported then there is the possibility for unrepresentative normal value determination based on those unrepresentative domestic volumes. A consequent biased outcome results in higher normal values being nominated which negatively impacts the Australian downstream industries at large.

Furthermore, the so-called “5% sufficiency of sales” test was relevant to the dumping scenarios of the 1970s & 80s when excess production capacity could be exported to other parts of the world without negative impact on the domestic market of the exporter. However, this rule has no relevance in the new era of investment in global scale plants in Asia-Pacific and the Middle East, where the resulting capacity is as much invested for Australia and SE Asia at large as it is for the country of residence of the facility.

To the extent that injurious dumping does not occur, the Australian industry at large should be given maximum opportunity to benefit from such Asia-Pacific investments along with other countries in the competitive environment of the Asia-Pacific region.

- 3) The time period over which normal values are assessed is a critical element given that intermittent dumping involves short-term shocks to pricing. The time period should be longer and potentially, in the case of long term importer/suppliers to the Australian industry, be multiple years. Exhibits A & B will be used below to illustrate this recommendation.

It has been discussed elsewhere in this submission that both the local industry and a long-term importer/supplier are negatively impacted by the “shock” of either a new, heavily-discounting entrant to the Australian market or a broad regional economic disruption.

For example, where a major regional price bubble (e.g. 1995, 2008) causes a short term mismatch of the export price of goods “on the water” versus market price in Australia, the use of an appropriate time period in the normal value assessment would avoid erroneous findings for dumping. Exhibit B demonstrates this very effectively for LLDPE sales in Australia during of periods of price disruption since 2004; it is clear that the importer re-established the long-standing price profile following each disruption and, by implication, never sought to dump injuriously. Comparison with Exhibit A (dumped FSP from Korea) where the new entrant, by way of aggressive pricing, clearly disrupted price relationships and only after imposition of anti-dumping measures did the market price profile resolve to one very similar to Exhibit B.

However a long term importer/ supplier can easily be found dumping in the midst of such disruption, but would not be found to be intent on injurious pricing behaviour if an appropriate time period were be used in the assessment process. This is especially an issue for a Continuation review where the interpretation of such intermittent dumping activities is less focused on actual performance (of the exporter and the local industry), but more on notional arguments about future threat, irrespective of past activity. The recent LLDPE Continuation review is an

instance where local industry, even though acknowledging very consistent, profitable business, pointed to growth of “world scale” LLDPE production plants in the Middle East and Asia-Pacific which would somehow increase the threat of dumping from Thailand. The fact that such new facilities would logically suppress normal values across the entire Pacific region, and therefore lower the threshold for dumping to occur, did not figure in this nebulous proposition.

The lower levels of rigor by Customs in testing such a proposition by local industry under a Review of Measures or Continuation Review (as opposed to an initial Application for anti-dumping) can and does lead to outcomes which are not in the interests of the economy at large.

- 4) Commission’s background paper (pages 14-15) lists a number of possible **“modifications within the existing system architecture”**. One of the issues raised is whether **“...the basis for calculating a non-injurious price is sufficiently rigorous..”**

We wish to make two observations on non-injurious pricing (“NIP”) as they directly relate to a number of recent cases against exports of linear low density polyethylene (“LLDPE”) from Thailand. Both matters are presented as an illustration of the contradictory and obscure nature of elements of the current system.

- a) NIPs are presently assessed and their levels finalized only after Customs concludes its findings on the existence of an alleged causal link between material injury and dumped imports. The purpose of the NIP calculations is to apply the “lesser duty” rule when determining appropriate levels of interim dumping duties to be imposed sufficient to remove the effects of material injury from dumping.

We recognise that the global anti-dumping convention does not exist to prevent the practice of dumping, but rather as an avenue for industries seeking recourse to remedial action where material injury is sustained as a direct consequence of dumping.

In the initial case (2003) involving the imposition of measures against LLDPE from Thailand, a margin of dumping was found, but the relevant export prices were never found to have breached the corresponding NIP threshold. In other words, export prices for LLDPE from Thailand were not found to have been at levels to cause material injury to Australian industry.

Therefore, we observe a complete contradiction with Customs’ decision to impose measures while at the same time, having concluded that export prices were non-injurious. It further suggests the Customs process for identifying and assessing the possible causes of material injury is significantly deficient and needs to be revised substantially. We recommend NIP calculations be introduced into that process to ensure a more consistent (and equitable) outcome on the findings of any causal linkage between dumping and material injury.

- b) NIP calculations are based upon local industry’s “unsuppressed” selling prices which comprise its “costs to make and sell” (“CTMS”) plus a reasonable margin for profit. In its more recent assessment (during a review of measures against LLDPE in 2008), Customs calculated a revised NIP threshold which was 57% higher than that estimated by DCAL for the same period. We are

therefore inclined to question either the veracity of its calculations or the true cause of injury to the local industry, for the following reasons:

- The Dow Chemical Company (a parent to DCAL and the Thailand based exporter of LLDPE) is the world's largest manufacturer of LLDPE. The manufacturing technology used by Australian industry to produce LLDPE is, in fact, licensed from The Dow Chemical Company. In the circumstances and with intimate knowledge of the likely costs associated with production, DCAL believes it can produce reasonably accurate estimates of CTMS, unsuppressed selling prices and NIPs. Nevertheless, Customs' assessment of the NIP for Australian industry was 57% higher than the estimates prepared by DCAL.

We can only assume therefore, that either the Australian industry was accorded an unrealistically high profit margin or that its cost base was grossly uncompetitive by international standards. The latter further suggests that any perceived material injury to Australian industry could be directly attributed to its inability to remain globally competitive.

- Notwithstanding the subsequent imposition of a substantially higher NIP, Customs made the contradictory observation (in Trade Measures Report no. 134 of May 2008) that Australian industry had enjoyed strong profit growth and buoyant trading conditions over the review period when the NIP threshold was actually 33% lower than this newly imposed level.

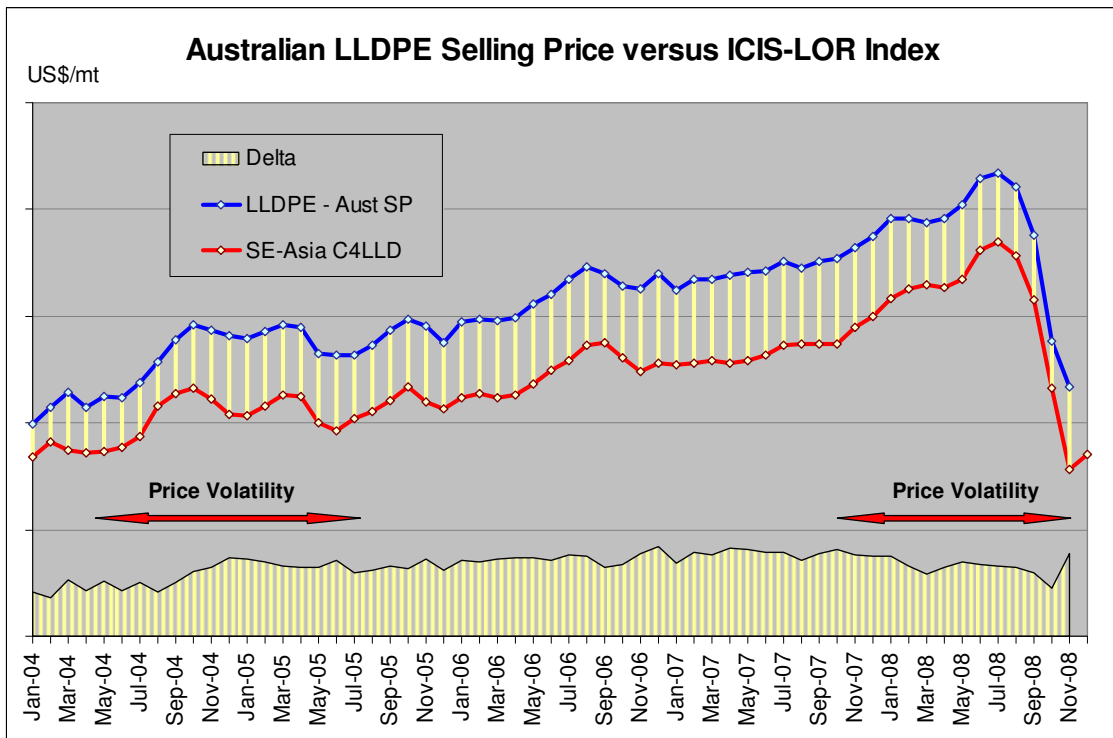
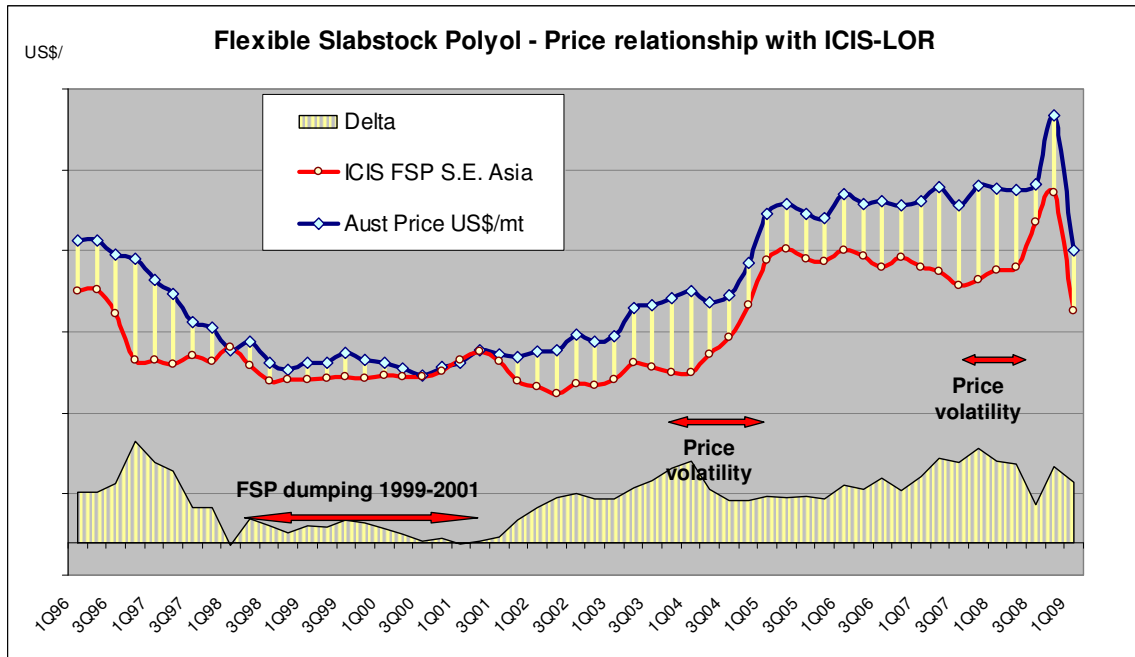
Ignoring the contradictory Customs assessment, the NIP level implied from the pre-Review period is totally consistent with DCAL's calculation of unsuppressed selling prices and NIPs for the local Australian industry. The incongruous result of Customs' assessment therefore has profound implications for downstream customers who rely upon globally priced inputs to remain internationally competitive.

For the reasons expressed above, we find the system (or rather, its administration) at times to be contradictory as well as obscure and does little to engender confidence that the formal assessments of non-injurious pricing, material injury and causality are managed in an impartial and equitable manner.

- 5) The concept of “**zeroing**”, as understood from some examples cited in cases between USA and Europe, is problematical in our view. It is a method which biases any calculation of the dumping margin of goods towards a finding of higher dumping margin. Per discussion elsewhere, intermittent dumping in Australia leads to short term price disruptions and our experience, as an established importers of goods, is that this results in periods of positive as well as negative dumping margin (*according to current Customs interpretation*) as the price disruption settles, but if averaged over a sufficient period the result would not suggest injurious dumping or the intent for injury to the local industry. The use of “zeroing” would erroneously lead to a finding of much higher dumping margin and, absent a countering qualitative assessment of intent, could lead to imposition of dumping duties and thus higher prices to downstream industries in Australia.
- 6) **Period of anti-dumping measures:** for the reasons specified elsewhere in this submission, DCAL recommends changes to the period of measures in conjunction

with alteration to other procedures. We suggest that procedures be altered such that a Preliminary affirmative determination along with interim measures can be obtained quickly and be based on a more limited initial submission of data and information. However the burden of proof should be no less onerous on the local industry and a strict time limit apply in which a full submission, consistent with current requirements (but also taking into account other recommendations of this submission) be made.

Consistent with this understanding of dumping cause and effect, the period of a final determination should be limited to no more than 3 years. The Continuation process should have the same level of rigor as an initial determination and a similar limited duration. If the low level of rigor of the current Continuation process is maintained then the duration of the continuation should be more limited, at 1 or 2 years, and there be no further Continuations; thereafter further measures should be obtained via a new application.



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There are further questions posed in the Issues Paper which are beyond our experience to comment upon.

We are happy to conclude at this point and would apologise for the repetition of points in the submission which we deemed necessary to respond the particular questions and statements.

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**D. John Williamson**

**Dow Chemical (Australia) Limited**

Phone: 61-3-9226 3559; Fax: 61-3-9226 3562;

Mobile: 0412 179622

Email: [jwilliamson@dow.com](mailto:jwilliamson@dow.com)