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## **Submission to the Productivity Commission's review of Australia's Anti-Dumping System.**

### **Executive Summary**

SULO MGB (Australia) Pty Ltd (SULO) welcomes the opportunity to provide a submission to the Productivity Commission's review of Australia's Anti-Dumping System.

SULO considers itself to be a stakeholder of the Anti-Dumping System, having been involved as a member of an applicant industry seeking anti-dumping measures in 2005. The experience gained through its active participation in the inquiry process provides SULO with the benefit of being able to comment on matters raised in the *Issues Paper*.

SULO considers that access to an effective Anti-Dumping System is essential for Australian manufacturers to address unfair trading behaviour. SULO supports the ongoing roles of Customs and the Minister as administrator and decision-maker, respectively. The decision-making role of the Minister is discretionary, thereby empowering the Minister with the authority to decide on the imposition of measures.

SULO is aware that the administration of the Anti-Dumping System was reviewed in 2006. Certain recommendations have been implemented which have increased transparency of the system. Further refinements are also required. These include:

- Earlier access to provisional measures;
- Inclusion of profits forgone and loss of market share in a growing market as factors to be considered in the material injury assessment to local industry;
- Expanding the list of review decisions to include rejection of an application for the continuation of measures;
- Exposure to training of investigation officers by other administrations; and
- Improved access to ABS information for anti-dumping applications.

SULO does not support the extension of investigation timeframes to incorporate a public interest provision. Such a proposal would increase uncertainty associated with the process and result in a 'picking winners' philosophy. The current role of the Minister to apply discretion in imposing measures is considered adequate.

## **Background**

SULO is a privately-owned company operating one of the largest plastic injection moulding facilities in Australia. The company manufactures and sells two-wheeled mobile garbage bins (“MGBs”)(wheelie bins), industrial bin lids, MGB mini bins, resource recovery systems, four wheeled MGBs, clinical containers at its Somersby facility located on the Central Coast of NSW.

SULO was founded in Germany in 1890 and remained a family-owned business until its sales in 2004 to a consortium of investors. With the success of MGB technology during the 1970s, SULO established an Australian subsidiary in 1983, and built its MGB factory in 1997. In March 2005 SULO became 100 per cent Australian owned, following a management buy-out of the Australasian operations from its German parent.

Operating a state-of-the-art injection moulding plant SULO manufactures high quality, durable containers and provides access to a world of waste management expertise through the SULO Group.

In September 2005, SULO and Nylex Limited – two manufacturers which accounted for more than 80 per cent of Australian production of MGBs – made an application for anti-dumping measures against exports of certain MGBs from Malaysia. In October 2005, Customs and Border Protection (“Customs”) initiated a formal investigation into the Australian industry’s claims. On 5 June 2006, the then Minister applied interim dumping duties to future exports of MGBs from Australia.

The Malaysian exporter of MGBs the subject of the dumping duty notice requested the Trade Measures Review Officer (“TMRO”) to review the Minister’s decision. The TMRO identified certain matters that should be reinvestigated. The Minister directed Customs to reinvestigate the matters identified. Customs’ reinvestigation affirmed the original finding, with the interim duties remaining in place.

Subsequent to the investigation involving Malaysia, the Australian industry sought relief against MGBs exported from Thailand. Customs’ commenced an investigation into the Australian industry’s claims, however, during the course of the inquiry Customs established that exports from Thailand were less than 3 per cent of the total import volume into Australia. The investigation into exports from Thailand was terminated.

SULO’s experiences with the Anti-Dumping System form the basis of this submission to the Productivity Commission’s review into the Anti-Dumping System.

## **Recent anti-dumping activity**

SULO believes the recent decline in anti-dumping activity can be attributed to two factors, namely:

- (i) The improvement in economic activity over the last few years; and
- (ii) The difficulties associated with accessing anti-dumping measures.

SULO acknowledges that satisfying the legislative requirements for an adequately documented application is difficult. Further, uncertainty is evident at each critical stage of the decision-making process – particularly during the exporter verification visit used to determine normal values. SULO briefed Customs’ investigators prior to the visit to the Malaysian exporter, to inform Customs of typical cost factors and recent international prices for key raw materials. On the basis of this information and a not so unfamiliar understanding of the Malaysian operation, SULO was somewhat surprised at the level of dumping margin determined. SULO was alarmed when a short time later, Customs contacted the company to advise that an error had been made in the dumping margin calculations and the revised margin was half of that originally determined.

Following imposition of interim duties by the Minister, the uncertainty continued with an appeal to the TMRO (by the exporter) and the subsequent reinvestigation by Customs. The whole process from application preparation phase to the Minister's acceptance of Customs' affirmation was two years. Whilst the measures have been reviewed and remain in place, the investigation process is protracted and unwieldy.

Of greater concern, however, is the uncertainty associated with the exporter verification visit where the applicant industry is provided minimal insight into the:

- breadth of sales that are viewed as relevant domestic sales;
- extent to which claimed costs are in accordance with typical industry costs; and
- value of due allowances (adjustments) to normal values to assess whether these are in accordance with industry practice.

The exporter verification process can be frustrating for the applicant industry as it is during this phase of the investigation where it is established whether dumping has occurred. SULO considers that the uncertainty surrounding the exporter visit, combined with other aspects of the investigation process (e.g. timeframe extensions, slow access to provisional measures, the ease upon which a review is launched) can lead to an assessment that the overall process is too difficult – perhaps contributing to a decline in applications over recent times.

### **Rationale for the Anti-Dumping System**

Access to an effective Anti-Dumping System is essential for Australian producers to seek relief from unfairly priced imports. SULO cannot comment as to the intentions of exporters to predatory price, however, as a minimum intermittent dumping occurs from time to time as producers with excess production capacity seek to move volumes to maintain operating efficiencies.

The impact of the intermittent dumping is disruptive. Once a foothold is established, the likelihood of increased sales volumes (again at dumped prices) at the expense of Australian industry becomes attractive. The dilemma for the Australian industry becomes evident – does the industry respond via the Anti-Dumping System as soon as it can demonstrate material injury or does it compete directly with the unfairly priced imports? SULO's experience suggests that the Australian industry would seek remedies under the Anti-Dumping System. Hence the need for access to remedies in a timely manner – not a protracted process that creates further uncertainty.

SULO considers that in the absence of trade barriers the Anti-Dumping System is a 'speed hump' that encourages fair trade. It is an essential remedy in the multi-lateral trading environment that ensures Australian industry can continue to supply its own domestic market – provided it has the opportunity to compete on the basis of fair prices.

### **Benefits and costs of the current system**

The impact of anti-dumping measures is to "correct" an unfair advantage achieved by marginally-priced exports to Australia. The described "benefit" is no more than a return to market conditions that prevailed prior to the on-set of the injurious dumping. SULO's experience involved a period of two years of market uncertainty before measures were ratified by the Minister (although it was nine months from application preparation until provisional measures were imposed). The Anti-Dumping System does not compensate the injured industry; it is purely intended to address future exports.

Any perceived benefit to the applicant industry, therefore, involves a return to market conditions unaffected by dumping.

Australia's Anti-Dumping System utilises the non-injurious price mechanism (or 'lesser duty rule') which ensures that measures imposed are not at a level higher than is necessary to remove the injury caused by the dumping. High dumping margins determined by Customs are not reflected in measures imposed – the non-injurious price is the benchmark for duties collected by Customs.

The Anti-Dumping System provides access to measures for industries that have suffered material injury from dumping. The measures are imposed only **after** the injury has occurred, and only at a level which is sufficient to remove injury. The benefits of the Anti-Dumping System deliver no more than the expectation that an industry can compete in a market against fairly priced imports.

SULO does not agree with the view that the imposition of the measures contributes to reduced competition, and reduced innovation and efficiency. On the contrary, anti-dumping measures provide certainty for longer-term investment decisions and permit manufacturers to commit to innovative developments to enhance production supply.

### **Improvements to the system**

The *Issues Paper* identifies proposed improvements to the Anti-Dumping System in two broad categories – architecture and administration. In terms of enhancements to System architecture, SULO offers the following comments:

*(i) provisional measures*

Access to provisional measures (under current practice) is linked to the date of publication of the Statement of Essential Facts (“SEF”). Consistent with the WTO Anti-Dumping Agreement, provisional measures can be imposed from Day 60 of an investigation. SULO supports the separation of the decision to impose a preliminary affirmative determination (“PAD”) and the SEF. SULO considers that a PAD imposing provisional measures is achievable from Day 60.

*(ii) Five-year term for measures*

SULO supports retention of the present five-year life of measures. A five-year period is considered reasonable to permit an industry to recover from the impact of the injurious imports that occurred prior to the measures being imposed. The five-year tenure of measures in Australia is definitive with a continuation investigation completed prior to the expiry of the five-year term. The five-year term applied by other WTO administrations does not necessarily include the ‘sunset’ (or continuation) investigation period. Provisions exist for the review and/or revocation of the measures by interested parties during the five-year term.

*(iii) A ten year life for measures*

SULO does not support a ten-year ‘life’ for anti-dumping measures. Each case should be considered on its merits. It would be ill advised to remove measures if the circumstances which existed in the exporting country prior to imposition continue to prevail. Again, provisions are available to interested parties to seek reviews and/or revocation of measures during the life of the measures.

*(iv) Information burden on applicants*

SULO recognises that the applicant industry must include in its application a basis upon which ‘reasonable grounds’ exist for the publication of a dumping duty notice. The information burden on the applicant industry, however, is extensive.

Financial statements must be prepared in the format required by Customs. This often requires a significant financial resource commitment, as the company does not readily maintain financial records in the format required by Customs. In addition, information on domestic prices in the country of export is often difficult to obtain – thereby jeopardising an application if the submitted information fall short of expectations.

The Anti-Dumping Questionnaire is similarly demanding. SULO does not perceive that any aspect of the required information is unnecessary – provided that a ‘cooperative’ exporter responds with the same level of detail in the exporter questionnaire as has been required of the Australian industry.

(v) *Material injury indicators*

SULO views profits forgone and loss of market share in a growth market as relevant injury indicators in assessing the health of the applicant industry. SULO understands that the indicators are consistent with the range of factors to be considered in examining material injury to a domestic industry as identified in the WTO Anti-Dumping Agreement.

SULO supports the inclusion of profits forgone and loss of market share in a growth market as additional factors to be considered in the health of the applicant industry (along with all other factors identified in S.269TAE (1) and (3) of the Customs Act).

(vi) *Freeze on reapplication*

SULO does not support the introduction of a freeze on reapplication for measures following an unsuccessful application. In SULO’s experience, the failure of an application may be beyond the influence of the applicant industry – as occurred with the termination of the MGB ex Thailand investigation where it was only confirmed during the conduct of the investigation that the country of origin of certain MGBs had been incorrectly disclosed (resulting in import volumes ex Thailand falling below the 3 per cent threshold).

Unsuccessful applications may not be related to the failure of the applicant industry. SULO also considers that the screening process for new applications is sufficiently robust to ensure that only genuine applications are initiated.

(vii) *TMRO Appeals*

SULO notes that the rejection decision associated with an application for the continuation of measures is not a “reviewable decision”. Consideration is required for the inclusion of decisions to reject an application for the continuation of measures as a “reviewable decision”.

The Joint Study in 2006 made a number of recommendations to improve the administration of the Anti-Dumping System. SULO welcomes the implementation of these reforms including the electronic public file and improved disclosure concerning documentation placed on the public file. SULO provides the following comments concerning items identified in the Issues Paper concerning the administration of the System:

(i) *Roles of Customs and Minister*

SULO supports the ongoing roles of Customs and the Minister as administrators and decision-makers of Australia’s Anti-Dumping System. The System has previously involved a bifurcated process – however, the process was found to be flawed with parties withholding information until the latter stages of the investigation process.

SULO considers the current arrangements are effective and suitable to the requirements of Australian industry.

(ii) *Improved access to ABS information*

It is SULO’s view that providing improved access to Australian industry applicants in respect of ABS data would enhance the information included in an application to demonstrate ‘reasonable grounds’. Conversely, improved access could also ensure inaccuracies relating to actual import volumes are not relied upon.

(iii) *New information for TMRO review*

SULO does not support a change to the present practice of limiting new information to the TMRO review process. A change to current practice would likely result in 'gaming' and undermine Customs' investigation process.

(iv) *Accelerated decision-making*

SULO would welcome accelerated decision-making on the basis that the quality of the investigation is not compromised. In particular, early publication of a PAD is a required as an urgent reform.

(v) *Skilled investigation teams*

SULO is aware that the Joint Study examined means of improving the skills of investigation teams via training. Consideration should also be given to enhancing investigation techniques through shared training programs with other WTO administrations (e.g. Canada, EU and USA).

(vi) *TMRO powers*

It is suggested that the TMRO be provided with powers to substitute new findings following the review of a decision. SULO does not support such a proposal. Customs' role as investigator enables it to fully assess the circumstances relating to a decision. The TMRO does not benefit from the same exposure to the circumstances of the decision, nor should it have equal powers of the Minister (to overturn the decision, for example, to impose measures). It is therefore only reasonable that a re-investigation be recommended – enabling Customs to re-focus on the specific issue and providing a recommendation to the Minister (for final decision).

## **Alternative Approaches**

The *Issues Paper* canvasses the option of introducing a broad 'community interest' provision by 'embodying' a public interest test within the "anti-dumping regime". The suggestion is that the current investigation process should include the consideration of such a provision.

It should be noted that the decision of the Minister to impose interim duties is a discretionary one. Also, the measures to be imposed are tempered by the non-injurious price – that is, the measures are not greater than is required to remove the injury caused by the dumping.

The decision of the Minister and the operation of the non-injurious price, are each mechanisms by which the broader community interests are considered under the current Anti-Dumping process.

SULO does not support the introduction of a public interest provision into the current anti-dumping investigation process. It is envisaged that problems would likely arise in promoting one industry's benefit over the cost to another industry sector. Further, the introduction of a public interest consideration into the investigation process will result in extended investigation timeframe's, further delaying access to anti-dumping measures.

The suggestion to consider Australia's anti-dumping provisions within the context of the anti-competitive behaviour conduct provisions of the Trade Practices Act due to the apparent link with predatory pricing behaviour is also not supported. As indicated, predatory behaviour has not been identified in anti-dumping investigations over recent years, hence the link is somewhat tenuous at best. The TPA is concerned with domestic competitive behaviour and addressing violations across Australia's borders may prove difficult to prosecute.

SULO considers that Customs as a separate agency administering the WTO Anti-Dumping Agreement and WTO Subsidies Agreement within the Customs Act continue to represent the most effective means to addressing unfair trading behaviour.