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Australia's Anti-Dumping System  
Productivity Commission  
GPO Box 1428  
CANBERRA City ACT 2601

**Subject: Productivity Commission Review of Australia's Anti-dumping and Countervailing System**

**1. CSBP Limited**

CSBP Limited ("CSBP") is a major manufacturer and supplier of industrial chemicals and fertilizers into the mining, industrial, construction and agricultural sectors. At its Kwinana site in Western Australia, CSBP manufactures a range of fertilizers along with ammonia and ammonia-based products including ammonium nitrate and sodium cyanide. In addition, CSBP has a 50 per cent shareholding in Queensland Nitrates Pty Limited ("QNP") which operates a fully integrated ammonium nitrate facility near Moura in Central Queensland.

Acquired by CSBP in 2007, Australian Vinyls Corporation ("AV") is the sole Australian manufacturer of polyvinyl chloride ("PVC") resin, based in Laverton in Victoria. AVC also supplies a range of specialty products and chemicals including caustic soda, PVC processing additives, synthetic rubbers, specialty elastomers and wood plastic composite materials to the Australian market.

In recent years, CSBP and AV have successfully applied for anti-dumping measures to be imposed on imports of both ammonium nitrate and PVC.

CSBP welcomes the opportunity to provide comment to the Productivity Commission in its review of Australia's anti-dumping and countervailing system. CSBP's submission broadly follows the format of subjects issues raised for consideration in the Productivity Commission Issues Paper, released in April 2009.

## 2. The Government's Policy Commitment

In December 2006, Senator Joe Ludwig, the then Shadow Minister for Justice and Customs, put forward the Australian Labor Party's proposal for anti-dumping reform. These proposals were predicated on a commitment:

*"to the principles of robust Australian industry in an environment of free trade and fair international competition. To uphold these principles, Australia requires effective anti-dumping administration."*

Further, this commitment was reinforced in the Australian Labor Party's National Platform & Constitution, 2007:

*"Labor is committed to supporting a strong manufacturing sector.... and will strengthen anti-dumping measures to ensure that Australian industry is not disadvantaged by unfairly priced imports."*

Australia is an open market where import tariffs are at minimal levels for most goods and increasingly at zero, under various free trade agreements. CSBP considers that it is imperative that a strong anti-dumping system is maintained to ensure that Australian manufacturing industry is not disadvantaged through unfair trading behaviour.

## 3. Recent Anti-Dumping Activity

In 2000, CSBP joined other Australian ammonium nitrate manufacturers in an industry anti-dumping action against imports of Russian ammonium nitrate. Anti-Dumping measures were imposed against future Russian imports for a five-year period. In 2006, the measures were extended for a further five years on the basis that the Russian Government's controls on gas, the key raw material in ammonia production, continued to apply. Government control of the Russian gas market via the government-owned subsidiary Gazprom continues to the present time, with little evidence of reform having occurred since the measures were applied.

Anti-dumping measures also apply to Russian exports of ammonium nitrate in the US and EU (and have been extended following sunset review inquiries by their respective administrations). Certain anti-dumping measures on other Russian-sourced ammonia products such as urea and urea ammonium nitrate solutions have also been applied by World Trade Organisation ("WTO") members.

AV has also been an applicant for anti-dumping action against dumped PVC into the Australian market. At present, anti-dumping measures apply to PVC imported from the USA, Japan, Hungary, and Korea.

Over the past decade, anti-dumping measures applicable to PVC imports from Mexico, Brazil, Canada, France, Thailand and China have all lapsed following sunset reviews.

### 3.1 Usage of Current Anti-Dumping system

CSBP is concerned that the statistics on usage levels of Australia's anti-dumping system, quoted in the Issues Paper could be misinterpreted.

The quoted figure of an average of 13 new anti-dumping and countervailing cases each year over the decade to 2007/08 is calculated by multiplying specific products by the countries named in each application. The number of new products subject to anti-dumping and countervailing actions initiated during this period numbered approximately six each year.

The quoted figure of 13 suggests a greater recourse by industry to anti-dumping protection than is actually the case.

The diminished number of initiations in the last decade has occurred at a time when tariffs have been at minimal levels for several years, and increasingly at zero, with a growing number of free trade agreements. It is likely therefore that Australian industry overall has adjusted well in this period without a reliance on tariff protection.

Also, during the last decade, commodities have been in tight supply and corresponding prices have been at historical highs. Incidences of dumping have been understandably low, as have been the likelihood of successfully demonstrating injury from any such dumping. In recent months the cycle has turned and commodity prices have dropped significantly. It should be noted that industry is more vulnerable at these times.

### **3.2 Product and Country Incidence**

CSBP considers that the likely cause of the majority of anti-dumping actions in Australia applying to a relatively narrow range of basic industrial chemicals and plastics and metal products is reflective of the homogenous and fungible nature of these products.

PVC is an example where:

- the range of import sources is large;
- there is a low level of brand identification or distinguishing features which might otherwise differentiate product between sources and make import penetration more difficult;
- importers / traders have demonstrated a propensity to readily switch sources of supply (in particular, when anti-dumping measures have been imposed against a certain source); and
- there are otherwise no impediments to imports replacing local industry supply.

The growing concentration of Australia's anti-dumping measures on exports from Asia is also likely to reflect a shift in Australia's trading patterns. Merchandise trade statistics for the decade to 2007/08, available from the Department of Foreign Affairs and Trade, clearly show a dramatic escalation in Australia's merchandise trade with China and sharp increases in trade with Thailand, Malaysia, Singapore and Vietnam. At the same time, Australia's merchandise trade with the USA shows a relatively flat line. Further, the recently concluded Asea-Australia-New Zealand Free Trade Agreement ("AANZFTA") may also boost the pattern of trade within the region.

#### **4. Rationale for an Anti-Dumping System**

CSBP has invested substantially in manufacturing facilities in Australia since 1996. Capital investment in ammonium nitrate has totaled approximately \$500 million, with a further \$120 million invested in QNP. CSBP committed to large capital investments of this type on the assumption that it would compete against fair prices on the Australian market. Not long after commencing production at its new ammonium nitrate facility in W.A., Russian exports emerged at prices which were considered to reflect Russian variable costs of manufacture only.

AV has also invested significant capital in manufacturing facilities since 1996. In addition, a major logistics upgrade was undertaken in 2006 and an upgrade of the plant distributed control system in 2008. In 2009, a \$6 million water recycling project will be also completed.

Access to anti-dumping measures to remedy unfair trading behaviour is a reasonable expectation for Australian industry and attracts widespread community support – particularly in circumstances where manufacturers are competing against artificially low prices. The Australian Anti-Dumping System provides this necessary remedy and is transparent to all stakeholders encouraging full participation during the investigation process. The system is fair to all and this is reflected in the absence of challenges against decisions at the WTO. CSBP does not consider that there is support within the Australian community for the abolition of the system which ensures fair competition across national borders.

##### **4.1 Protection**

CSBP considers that a distinction should be made between tariff protection and unfair trading. The Government's goal of reducing industry protection, achieved through tariff reform and more recently through free trade agreements, should not be linked to the fundamental right of industry to protection from unfair trading.

CSBP is concerned that references to "protection" throughout the Issues Paper should be considered in this context during the course of the inquiry.

##### **4.2 Intermittent Dumping**

Periodically, AV experiences intermittent dumping, on a monthly basis, as some supply sources come and go quickly at opportunistic low, dumped prices. In a market where relatively small import volumes at dumped prices can have a pervasive effect, this behaviour is often injurious but can escape dumping action on the grounds that minimum volume levels are not met in accordance with legislative requirements.

The following provides some past examples of what might be described as intermittent dumping:

- In 1993 the local Australian PVC producers (at the time, ICI Australia and Auseon Limited) were unsuccessful in their application for anti-dumping measures against imports from Korea. Korean exporters were able to convince the Anti-Dumping

Authority (as it was, at the time) that export volumes had reduced and were to be regulated.

Following initiation of the 1993 action, Korean imports declined to hold less than 1% of total imports during the course of the inquiry. In the ensuing absence of measures, Korean imports jumped to 19% of total imports in 1995/96.

When the local industry initiated a further action in 1996, Korean imports again backed off and the Anti-Dumping Authority subsequently determined a lack of threat. Korean imports then doubled in 1998.

AV was finally successful in having anti-dumping measures applied to Korean PVC imports in 2000;

- After measures expired against PVC exports from Mexico in January 2002, the volume of imports resumed for a short period in mid 2002 with significant volume of around 2,500 tonnes at *prima facie* dumped prices;
- Imports from Pakistan appeared in the Australian market in mid 2002 and around 5,000 tonnes were imported at low, *prima facie*, dumped prices in 2003 before imports ceased around mid year; and
- Around 2,000 tonnes of PVC arrived from Netherlands in the first half of 2004 at very low, *prima facie*, dumped prices. Imports from this source have since been sporadic.

The example in respect of Korea also highlights a deficiency in the anti-dumping system whereby an exporter can adjust import volumes during the course of an inquiry in order to escape dumping measures at the time of final finding, only to resume previous behaviour which gave rise to initiation of anti-dumping action. This highlights a general lack of credence given by Customs to “threat” circumstances.

Overall, CSBP understands the difficulty of “policing” intermittent dumping behaviour through the anti-dumping system when such imports are not sustained over a reasonable period.

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

CSBP's responses to specific issues raised on the benefits and costs of the current system are as follows.

### **ISSUE**

*“Dumping and anti-dumping measures have a variety of short term and longer term effects on prices, product ranges and supply relationships in the markets concerned.”*

*“Many of these effects and ensuing impacts ... are similar to those that result from tariffs and other measures which raise the price of imports or otherwise restrict import levels.”*

**CSBP Response**

Anti-dumping actions for PVC and ammonium nitrate:

- have not impacted product ranges due to the homogenous and fungible nature of the product;
- have not adversely affected supply to the Australian market where traders have demonstrated an ability to readily switch sources of supply;
- have not restricted overall import levels given the number of available supply choices;
- have not restricted imports from the source country subject to anti-dumping measures but merely sought to impose a penalty on product found to be dumped at “unfair” prices; and
- does not restrict the availability of products at import prices reflective of prices within the geographical trading region.

**ISSUE**

*“Reduced competition in the marketplace might be expected to have implications for innovation and dynamic efficiency more generally.”*

**CSBP Response**

PVC and ammonium nitrate anti-dumping actions have not:

- reduced competition in the Australian market; or
- shielded CSBP / AV from the need to improve competitiveness.

**ISSUE**

*“What impact has Australia’s anti-dumping system had on your activities as a local producer facing competition, or the threat of competition, from dumped goods?”*

**CSBP Response**

The anti-dumping system provides some degree of certainty in the market for making pricing decisions, in the short term, and investment decisions for the long term.

**ISSUE**

*“Are there features of the current system that diminish the benefits received...?”*

## CSBP Response

Current arrangements allowing drawback of dumping duties subverts relief obtained through the imposition of anti-dumping measures. Penalties imposed on dumped imports which have been assessed as injurious to local industry can be refunded upon export of goods incorporating the dumped imports as an input to manufacture. The impact is either that:

- it denies the supply opportunity to the local producer; or alternatively
- the local producer is forced to offer rebates to match the size of the drawback in order to retain supply or partial supply.

When an applicant for anti-dumping measures has successfully demonstrated that it has sustained material injury from dumped imports, allowing drawback of the dumping penalty is a dilution of the Government's commitment to provide effective anti-dumping relief.

It is CSBP's view that the anomaly could be relatively easy to correct through regulation change. A regulation amendment could be made to prevent drawback on exported goods subject to anti-dumping measures, which are used to modify, or are otherwise incorporated as inputs to produce finished goods for export.

Moreover, the drawback system can operate as it has done in providing incentives for exporters without also encouraging imports of dumped goods at the expense of local industry supply. The drawback system and Government policy need not be compromised by repealing the provision allowing drawback of dumping duties.

Representations previously made to the government on this issue have not been addressed. As a result, the time and costs incurred by both the industry applicant and government, associated with the application and inquiry process, on the one hand, and the expected benefits to the applicant on the other, have been wasted.

CSBP also believe that in the comparison of normal value and export price in the dumping assessment, Customs too readily accepts due allowance adjustment claims by exporters without applying sufficient investigative rigour. Officers are too focused on verification and lack investigative endeavour when, in some instances, claims are clearly at odds with normal, international, business practice.

An example of this involved PVC and a Customs inquiry with an Indonesian exporter. Customs accepted that a royalty / management fee for the use of patent technology was only applicable to domestic sales in Indonesia. The fee was said to be not applicable to export sales / production.

Separation between domestic and export sales is not a consideration for a licensee. It is CSBP's understanding that you cannot licence technology in this way. While Customs reported verification of the exporter's licence agreement, it should have been considered highly suspect and was clearly not challenged as to its basis and rationale.

In this instance the moving of costs from exported goods onto domestic goods clearly contradicted wider industry practice and common sense analysis.

An improved willingness to discuss these issues with local manufacturers, industry consultants and independent industry reports, where available, would improve the process used by Customs.

The basis for some due allowance claims and the rationale for acceptance or otherwise ought to receive greater transparency in public file documents.

## **6. How Might the Current System be Improved?**

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

In respect of material injury assessments, it should not matter if a local producer matches dumped prices and thereby suffers reduced profitability or whether prices are maintained at the expense of sales volume. The outcome should be the same. Not all injury factors need to be present in a particular case. Injury can be manifest in respect of price effect injury alone or volume only related injury, or both.

It is CSBP's understanding that Australia's anti-dumping legislation caters for assessment in relation to threatened injury but, to CSBP's knowledge, no cases have been successful in this regard.

Despite legislative provision and compliance with WTO requirements, Customs has been averse to making decisions on representations based on threat alone, particularly in new cases applications.

In respect of the issue of injury assessment and profits foregone, it is CSBP's understanding that a loss of potential profits is a factor which can be taken into account when assessing "material injury".

Article 3.4 of the Anti-Dumping Code specifically directs that a determination of injury "*shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in... profits*".

While Australia's legislation does not use such precise language there is nothing in the wording of the legislation to preclude consideration of profits foregone. Indeed, from time to time, guidance on what is meant by "material injury" has been provided through Ministerial Directions.

A Ministerial Direction issued in 1991 provided some clarification on this matter. The Minister made it clear that "*material injury can occur when a company loses substantial market share in an expanding market and this was just as serious as the situation where an industry moves from growth to decline. Clearly in both situations there is a loss of potential profits*".

CSBP sees no reason why Customs is apparently reluctant to make such an assessment and finding which is consistent with both WTO and Australian legislation.

The Issues Paper has raised the prospect that anti-dumping measures have a limited tenure of ten years. CSBP does not support this proposal.



CSBP sees no reason to set a maximum ten year life for anti-dumping measures. Some examples of historical and current anti-dumping measures and their applicable duration is shown below

- PVC measures applicable to imports from Brazil, Mexico, Canada, France & China were extended once for a “life“ of 10 years, before Customs and the Minister decided they should expire;
- PVC measures applicable to imports from Saudi Arabia and Norway lasted only 5 years before a decision to allow them to expire;
- Only measures applicable to imports from USA, Japan and Thailand have been extended beyond 10 years. (Thai measures expired after 15 years); and
- Current anti-dumping measures on ammonium nitrate exported from Russia are due to expire in 2011. The government controls on gas pricing in Russia remain in force, with gas being sold at significantly lower levels than market-determined prices. There is clear evidence that the government control of gas prices is continuing, and is expected to continue for the observable future (with the government regulation determining the gas price published annually).

Anti-dumping measures on ammonium nitrate exported from Russia highlight the requirement that the continuation of measures beyond the five year norm, should be considered on a case-by-case basis (and not capped at a ten year maximum). Provisions exist during the life of the measures for interested parties to apply for a review or revocation of the measures as required. These provisions, along with participation in continuation investigations, provide interested parties with the opportunity to challenge the level and tenure of the measures.

A decision whether or not to extend measures is only made after a 155 day inquiry process after which the CEO of Customs must be satisfied, on the available evidence, *“that the expiration of the measures would lead, or would likely lead, to a continuation of, or recurrence of, the dumping and the material injury that the anti-dumping measure is intended to prevent”*.

The test for continuation cases is a positive test. That is, the CEO must be satisfied on certain matters. Accordingly, decisions to extend the life of anti-dumping measures are not taken lightly, as evidenced by the history results of PVC anti-dumping measures.

Any notion that “sunset” reviews lack rigour or it is relatively easy to have anti-dumping measures continued is misplaced and not supported by the facts.

## **6.2 Alternative approaches**

### **6.2.1 Public Interest test**

It is CSBP's view that the inclusion of a public interest test would be impractical for the following reasons:

- It is CSBP's understanding that while some anti-dumping regimes have a public or community interest provision, there have been very few cases heard, and any such cases have involved exceptional circumstances. Accordingly, the time and cost in designing procedures and processes for inclusion in Australia's legislation do not appear to be warranted;
- CSBP considers that the decision of the Minister to impose anti-dumping action is a discretionary one, thereby allowing for measures not to be imposed if appropriate. Further, Australia's application of the 'lesser duty rule' also ensures that measures are not excessive and are at levels no greater than is necessary to remove the injury from dumping. The lesser duty rule, therefore, can also be perceived as a form of public interest in managing anti-dumping measures;
- A de facto national interest test is already applied by the ACCC in merger and takeover cases where anti-competitive concerns are addressed. The ammonium nitrate and PVC industry is highly competitive with numerous sources of supply from local and imported producers. Anti-dumping actions have not limited supply to the Australian market;
- National or public interest cannot be measured over the relatively short period either during or immediately following an anti-dumping inquiry. It would be difficult, at these points, to measure future effect when, for example, a decision to not impose measures on public interest grounds ultimately led to the demise of the local industry which initiated anti-dumping action in the first instance.

CSBP is opposed to any changes to the current investigation process which would impose additional costs and timeframes to consider 'the broader economic impacts' of imposing measures in the context of an investigation. This process would be unworkable and discretionary, thereby increasing the level of uncertainty associated with the process. It would ultimately be viewed as biased, whether correctly or incorrectly, according to outcomes.

### **6.3 Could Dumping be addressed within competition policy?**

The Issues Paper raises the option of having dumping addressed under anti-competitive conduct provisions of the Trade Practices Act and, therefore, under the control of the ACCC. While anti-dumping and competition policy share a common focus on unfair competition, CSBP would be strongly opposed to any move from Customs and Border Protection to the ACCC on the basis of fundamental philosophical differences that such a change in administration would bring.

The ACCC promotes the following sentiments in its charter:

- *"Preventing anti-competitive conduct, thereby encouraging competition & efficiency in business, resulting in a greater choice for consumers in price, quality & service."*
- Prohibiting *"unfair trading practices to safeguard consumers."*

and

- The Commission “does not favour detailed regulatory processes & outcomes & seeks to minimise them.”

The ACCC is on public record as promoting reductions in tariffs and removal of the anti-dumping system altogether in order to achieve the aims expressed above. Indeed, in 2005 the ACCC made a submission to the Trade Measures Branch within Customs in an anti-dumping inquiry to review the factors setting the anti-dumping measures applicable to PVC from Korea, USA, Japan and Thailand. The Commission's concern that the inquiry outcome might “*lead to the abusive exercise of market power on Australian consumers (of PVC) through higher prices*” was misplaced.

Notwithstanding some issues and concerns, Customs and Border Protection is seen as:

- primarily neutral when compared to the overall charter and public statements from the ACCC which are biased against anti-dumping;
- housing built up expertise across all facets of an anti-dumping inquiry of injury analysis, market assessment, normal value and export price;
- has built up historical knowledge of past inquiries;
- has built up strong contacts with other dumping administrations; and
- housing built up knowledge of the Anti-Dumping Agreement and Australia's commitment in this regard, and having a presence within the WTO generally.

CSBP therefore supports the retention of Customs as the administering agency of the Anti-Dumping System.

## **7. Additional Suggested Improvements to the System**

The Anti-Dumping System has been the subject of a number of reviews since the early 1990s (Senate Inquiry 1991, Willett Review 1996 and Joint Study 2006) which have each contributed to improvements of the system. CSBP proposes some further additional refinements as follows.

### **7.1 Unsuitable Sales**

CSBP understands that changes to the Customs Manual following Australia's recognition of China as a market economy country for anti-dumping purposes has impacted the interpretation of the circumstances which constitutes a particular “market situation” rendering domestic sales unsuitable for normal value purposes.

The provisions relate to government influence impacting artificially low prices (and apply equally to all WTO member exporting countries).

CSBP is aware that a number of actions taken by various sectors of Australian industry have not succeeded in demonstrating the existence of artificially low prices. Investigations to date have been determined upon information sourced from only within the exporting

country – there being no comparison of selling prices and costs of the industry in the exporting country with prevailing prices and costs in an external market economy country.

The outcome of the present arrangements requires Australian industry to compete with prevailing prices and costs for Chinese exporters which are understood to be artificially low. As a result, Australian industry – unlike its counterpart industry in the US, Canada and the EU – are disadvantaged and operating at unprofitable levels. CSBP encourages benchmarking of selling prices and costs in investigations where artificially low prices have been evidenced.

## **7.2 Access to provisional measures**

A significant concern with the present administrative process is the delay in accessing provisional measures to obtain relief from injurious dumping. At present, Customs only publishes a preliminary affirmative determination (“PAD”) imposing provisional measures following release of the Statement of Essential Facts (“SEF”) at Day 110 of an investigation.

In investigations where timeframes are extended, access to provisional measures may not be achieved until up to Day 230 of an investigation (i.e. some seven-and-a-half months following initiation of an inquiry). Delays of this nature are unacceptable.

Provisional measures can be applied from Day 60 of an investigation. By this date, Customs is in possession of sufficient information from Australian industry, exporters and importers to determine, on a ‘preliminary’ basis, whether dumping, material injury and causal link are evident and future material injury is threatened.

CSBP supports the separation of the PAD decision from its current alignment with the SEF date, with a timing a close to Day 60 of the investigation as practicable.

## **7.3 Investigative skills**

Whilst CSBP supports retention of Customs as the administering agency of the Anti-Dumping System, it encourages ongoing skill development and enhanced investigative techniques of Trade Measures officers. The investigative processes of other administrations (e.g. Canada, USA and EU) extract detailed information on company ownership and structures which are not evident in Australian investigations. Information of this nature is relevant to the tracking of corporate losses, expenses and rebates to assist in establishing correct normal values and export prices for the subject exporter.

CSBP recognises that skills training is an ongoing commitment. That said, investigation techniques would be greatly enhanced through increased understanding of procedures followed by other WTO member administrations.

## **8. Conclusion**

CSBP considers that the current anti-dumping system provides Australian manufacturing industry with appropriate mechanisms of protection against unfair trading behaviour. With the adoption of a number of minor improvements, CSBP fully supports the architecture and administration of the current anti-dumping and countervailing system.

Should you require clarification or further information, please do not hesitate to contact Nick Moffatt, in the first instance, on (08) 94118 228.

Yours Sincerely,

Ian Hansen  
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