



Australian
Competition &
Consumer
Commission

**Supplementary submission to the
Productivity Commission review of Australia's
anti-dumping and countervailing regime**

December 2009



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Introduction

1. On 23 March 2009, former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs (**the Minister**), the Hon. Chris Bowen MP, announced that the Productivity Commission (**PC**) would conduct an inquiry into Australia's anti-dumping and countervailing system (the **existing anti-dumping regime**).
2. On 31 July 2009, the Australian Competition and Consumer Commission (**ACCC**) made a submission in response to various issues raised in the PC's earlier issues paper (the **initial submission**). Among other things, the ACCC's initial submission noted that:
 - Imports are an important element of the competitive environment in Australia and that the existing anti-dumping regime may produce outcomes which are inconsistent with the focus of the *Trade Practices Act 1974 (Cth)* (the **TPA**) to promote and protect the competitive environment for the benefit of consumers.
 - There are key practical considerations which need to be considered when determining whether dumping could be addressed under the anti-competitive conduct provisions of the TPA including relevant timeframes, transparency, jurisdictional issues and the applicability of remedies.
 - Consideration should be given to the impact of anti-dumping applications—and the imposition of measures—on the competitive process, together with consideration of the impact on an individual competitor or sector.
3. On 10 September 2009, the PC released its draft inquiry report (the **draft report**), which made a number of draft recommendations to modify the existing anti-dumping regime.
4. The ACCC welcomes the opportunity to provide a further submission following the release of the draft report. This supplementary submission provides information which may assist the PC's further consideration of the existing anti-dumping regime, recommended modifications, and issues raised in submissions in response to the draft report. Given the role and functions of the ACCC, this supplementary submission only relates to the impact of the existing anti-dumping regime on the

competitive environment and the application of a ‘bounded’ public interest test (draft recommendation 6.1).

The proposed public interest test

5. The draft report, among other things, makes a draft recommendation that a ‘bounded’ public interest test should be introduced (draft recommendation 6.1) (the **proposed public interest test**). The PC contemplated that the proposed public interest test would embody a starting presumption that measures should be introduced—where material injury has been caused or is threatened—unless it would demonstrably not be in the public interest to do so. It was contemplated that circumstances in which it would not be in the public interest to impose measures would include:

- where measures could eliminate or significantly reduce competition in the domestic market for the goods concerned
- where the resulting price for the goods concerned would still be significantly below competing local suppliers’ costs to make and sell
- un-dumped or non-subsidised ‘like’ goods are readily available at a comparable price to the dumped or subsidised imported goods
- the dumped or subsidised imports are not the primary cause of the injury being experienced by the local industry
- the local industry’s share of the domestic market for the goods concerned is less than 20 per cent or
- the imported goods in question are being exported at a price which covers the overseas supplier’s costs and a reasonable profit margin.

6. It was also contemplated that, among other things, the Australian Customs and Border Protection Service (**Customs**) would routinely consult with the ACCC as to whether the imposition of measures might give rise to significant competition issues in the market for the goods concerned.

Submissions from market participants

7. The ACCC notes that a number of submissions from market participants in response to the draft report have raised particular concerns in relation to the proposed public interest test.
8. Specifically, a number of market participants¹ have submitted that:
 - the purpose of the existing anti-dumping regime is to protect Australian industries from ‘unfair’ competition and predatory behaviour
 - the introduction of the proposed public interest test would limit access to redress for dumping and
 - the proposed public interest test will reduce the opportunity for Australian industries to take action to protect against predatory behaviour and may force Australian firms to exit the market.
9. As noted in the ACCC’s initial submission, while predatory pricing is not a term defined by statute, it is generally understood to occur when a company sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market.²
10. Section 46 of the TPA deals generally with misuse of market power and subsections 46(1AAA) and 46(1AA) have the stated aim of addressing predatory pricing³— these prohibitions both link conduct which is predatory in nature to the concept of supplying goods or services *for a sustained period at a price that is less than the relevant cost* of supply. This link acknowledges that, while low prices are generally associated with vigorous competition and efficient markets, it is not always the case that lower prices are reflective of a more efficient market outcome. The importance

¹ See, for example, submissions from the Trade Remedies Task Force (4 November 2009), PolyPacific Pty Ltd and Townsend Chemicals Pty Ltd (6 November 2009), CSR Limited (6 November 2009), Australian Plantation Products and Paper Industry Council (6 November 2009), OneSteel Limited (6 November 2009) and BlueScope Steel Limited (9 November 2009).

² ACCC (2009), *Submission to the Productivity Commission review of Australia’s anti-dumping and countervailing regime*, page 7.

³ *Trade Practices Legislation Amendment Bill 2008*, Explanatory Memorandum.

of determining the motivation for the behaviour is highlighted in *ACCC v Boral Besser Masonry Ltd*:

If [a dominant firm] reduces its prices...below variable cost, then it may be easy to attribute to the firm an anti-competitive objective, and to characterise its behaviour as predatory. But if one finds a firm that is operating in an intensely competitive environment, and a close examination of its pricing behaviour shows that it is responding to competitive pressure, then its conduct will bear a different character.⁴

11. As noted in the ACCC's initial submission, however, the ACCC considers that the existing anti-dumping regime appears to apply to a broader scope of conduct than that which would ordinarily be considered anti-competitive.⁵
12. The ACCC understands that the proposed public interest test has been designed with the aim of increasing the capacity of Customs and the Minister to take into account wider impacts in determining whether or not to impose anti-dumping or countervailing measures—one such impact is the impact on competition.⁶

When are measures likely to impact competition?

A general approach to determining a substantial lessening of competition

13. The proposed public interest test contemplates that the imposition of measures would *not* be in the public interest in those situations where:

the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned.⁷

14. As outlined in the initial submission, the ACCC has experience in assessing the impact on competition of the behaviour of firms (for example, relating to boycotts or agreements that otherwise restrict dealings) and changes in the structure of

⁴ [2003] HCA 5 at [129].

⁵ ACCC (2009), *Submission to the Productivity Commission review of Australia's anti-dumping and countervailing regime*, page 14.

⁶ See, for example, PC (2009), *Australia's anti-dumping and countervailing system—Draft inquiry report*, page 83.

markets (for example, as a result of mergers and acquisitions). Depending on the nature of the conduct in question, an element of the test applied by the courts may include whether the conduct results or is likely to result in a substantial lessening of competition.⁸

15. Determining whether a substantial lessening of competition results, or is likely to result, from certain conduct will include consideration of a range of factors influencing the competitive environment including:

- import competition
- barriers to entry
- market concentration and the availability of substitutes
- the existence of countervailing power and
- whether the market is characterised by vertical integration.

16. Many of these factors are replicated in the merger factors.⁹ The importance of any one of these factors will depend on the particular conduct, circumstances and market/s in question.

17. Generally, it can be said the impact on competition will be likely to be substantial if there is a “real chance”¹⁰ it will create or confer an increase in market power that is “meaningful or relevant to the competitive process”.¹¹ An indicator of the likelihood of a substantial lessening of competition will be whether there is a real chance that prices will increase in a way that is both significant and sustainable. Other indicia

⁷ *ibid.*, page 91.

⁸ ACCC (2009), *Submission to the Productivity Commission review of Australia’s anti-dumping and countervailing regime*.

⁹ See section 50(3) of the TPA; also canvassed in ACCC (2009), *Submission to the Productivity Commission Review of Australia’s anti-dumping and countervailing regime* and ACCC (2008), *Merger guidelines*.

¹⁰ See *AGL v ACCC (No. 3)* [2003] FCA 1525.

¹¹ See *Rural Press Limited v ACCC* [2003] HCA 75 at [41].

include a reduction in the quality of products without a compensating reduction in price, less range or variety or lower customer service standards.

The impact of measures on competition

18. As indicated above, the importance of any one factor in determining the impact on competition as a result of particular conduct—or, in the case of the anti-dumping regime, the imposition of measures—will turn on the effectiveness of all other possible constraining influences.
19. In the context of the impact of the imposition of anti-dumping measures, the ACCC notes that the application of measures could have the effect of ‘softening’ the effectiveness of imports as a constraining influence in the market. Whether this effect is likely to be substantial will depend on the particular circumstances of the matter; however, as a general guide, it is likely to be most significant when the affected imports play a considerable role in influencing the pricing and supply decisions of domestic firms—for example, where domestic markets are already highly concentrated, barriers to entry are significant and there are few (but significant) alternative import sources. These factors together will influence the extent to which an increase in the price of the relevant imported product (which will necessarily occur if measures are imposed) translates into a significant and sustainable price increase in the relevant market, or substantially reduces competition to lower prices further.

Predatory behaviour

20. As outlined above, a number of market participants have submitted that the proposed public interest test will remove the ability of domestic firms to respond to predatory behaviour by international competitors. The ACCC concurs with concerns expressed regarding predatory conduct, regardless of whether it occurs domestically or internationally.
21. However, as detailed in the initial submission, the ACCC considers that the existing anti-dumping regime may result in measures being imposed even in circumstances

in which the conduct of the importer is not predatory in nature.¹²

22. The ACCC considers that the imposition of measures is unlikely to significantly adversely affect competition in circumstances where the conduct of an importer is genuinely predatory in nature. Rather, the ACCC's concern is with the likely effect on competition where measures are imposed in circumstances where there is no evidence of anti-competitive pricing practices by importers.

Summary

23. The impact on price will be an important consideration in determining whether a significant reduction in competition is likely as a result of the imposition of measures. However, in making such a determination, it is vital to:
- distinguish between an increase in the price of the relevant imported product and an increase in the market price of the product—it is the latter effect that the ACCC considers will determine whether there is likely to be a significant reduction in competition as a result of the imposition of measures and
 - determine whether an initial “low” price is reflective of efficient pricing—and a competitive market—or instead reflects anti-competitive behaviour.

Other markets

24. Additionally, as outlined in the ACCC's initial submission, anti-competitive effects may arise in markets *other than* ‘the domestic market for the goods concerned’ referred to by the PC.
25. Consider a situation where a domestic manufacturer produces both an input, Input X, and a product which uses this input, Product Y. The domestic manufacturer faces little competition domestically in the market for Input X; however, there are importers who supply Input X to Australia. There are a number of alternative Australian producers of Product Y. The domestic manufacturer of Input X lodges an anti-dumping application against importers of Input X. This, in turn, leads to an

¹² See also the PC's draft findings with regard to the prevalence of predatory behaviour in anti-dumping applications at Box 2 and pages 41 to 42 of the draft report.

increase in the price of imports of Input X, which increases the input costs faced by competing Australian firms producing Product Y. Accordingly, the ability of competing firms to effectively constrain the domestic producer of Input X in the downstream market for Product Y is substantially hindered.

Other matters

26. While the ACCC appreciates that the PC's current task is a broad one, aimed at considering the effectiveness and impact of Australia's anti-dumping system, there are a number of issues of detail and administration that the ACCC considers are worthwhile highlighting, even if briefly.

- It is not clear who will carry the burden of proof in demonstrating circumstances in which the imposition of measures would not be in the public interest (including whether the requirements of the specific circumstances referred to by the PC have, or have not, been met).
- Depending on the above, it may be the case that, in certain circumstances, insufficient information will be available to parties including the ACCC to comment on the likely impact on competition of measures.
- In certain circumstances, the range of products and sources of competition captured by the characterisation of 'like' goods and the 'domestic' market (both terms referred to in the articulation of the proposed public interest test) may not coincide with the consideration of the relevant anti-trust market which focuses on available substitution possibilities.
- As indicated above, the effect on competition may arise in a market or markets other than the market for the goods concerned.
- The ACCC is likely to continue to determine, on a case by case basis, whether the particular circumstances of a merger investigation warrant the acceptance of

an undertaking under section 87B of the TPA relating to the initiation of future anti-dumping applications.¹³

Conclusions

27. The ACCC notes that PC's draft recommendations attempt to broaden consideration of both the costs and benefits associated with the imposition of anti-dumping measures, including insofar as such measures would have the effect of adversely affecting competition.
28. The ACCC considers that the extent to which the imposition of measures is likely to eliminate or significantly reduce competition will be influenced by a range of factors, including:
- market concentration, barriers to entry, the significance of import competition and countervailing power of buyers
 - whether an increase in the price of an imported product as a result of the imposition of measures will be likely to translate to an increase in the market price of the product, or a reduction in competition to lower prices further and
 - whether the conduct said to be countered by the imposition of measures is anti-competitive in nature.

¹³ See the PC's reference to the ongoing need for this practice in *Australia's anti-dumping and countervailing system—Draft inquiry report* (2009, page 85).