



AUSTRALIAN STEEL ASSOCIATION INC.
A0020339V ABN 24 762 435 928

PO Box 305, Burwood, Victoria, Australia 3125
Office: Suite 307/737 Burwood Rd., Hawthorn East Vic. 3123

Web: www.steelaus.com.au

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Developments in Anti-Dumping Arrangements

Productivity Commission Research Paper

Submission- Australian Steel Association

The Australian Steel Association appreciate the opportunity to provide a submission to the Australian Government Productivity Commission's research paper into Developments in Anti-Dumping Arrangements.

This response considers:

- 1) Recent changes and their effects
- 2) Proposed improvements.
- 3) Case Studies of recent anti-dumping activities, their effects on individual sectors and the broader economy along with proposed recommendations to deliver better outcomes.

1) Changes and their effects

Considering the Federal Government's 2011 Streamlining document, the primary recommendation of a bounded public interest test was not adopted on the basis "*that it is a costly and disproportionate response to the possible consequences that might arise from the small number of anti-dumping and countervailing cases brought in Australia each year*".

The Australian Steel Association note the dramatic escalation in steel based anti-dumping cases since the release of the Federal Government's Streamlining document and contend that simple process improvements can mitigate these concerns and achieve a better, more cost effective anti-dumping system that delivers micro-economic reform and productivity improvement to the economy.

Considering the more significant changes over the past few years:

(i) **Subjugation of the basis of determining Normal Values**

There has been concerted effort by parties within the ITRF forum to usurp the methodology for determining normal value as detailed in Regulations of Sections 2.1 and 2.2 of the ADA.

1. The CUSTOMS ACT 1901 - SECT 269TAC sets out a **clear hierarchy** for determining the normal value of goods in a market economy as:

Normal value of goods

(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of



export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

The rationale for this is that if a particular market situation can be invoked, the Applicant can seek to defer to S269TAC(6) of the ADA which states:

Where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the normal value of goods to be ascertained under the preceding subsections (other than subsection (5D)), the normal value of those goods is such amount as is determined by the Minister having regard to all relevant information.

What this means in practice is that rather than base the normal value on the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export, the Normal Value can be unduly influenced by the AD Applicant by deferring to a constructed cost.

In ITR 177 (Hollow Structural Sections), for example, the Applicant argued for the imposition of a hot rolled coil price based on an unrelated index that would have increased normal values by USD200 per tonne.

In another case, the Applicant advocated that

the non-injurious price for aluminium extrusions should be based on an unsuppressed selling price (USP) which has been calculated using the cost to make and sell information supplied by an Australian industry member, plus a reasonable amount of profit

i.e: at a price as determined in part by the Applicant!

Recommendation:

That deferral to alternate constructs of Normal Value only be considered by exception when the reasonable regulations of Sections 2.1 and 2.2 of the ADA have been exhausted consistent with WTO principles.

(ii) Lesser Duty Rule - Amendments

Australia's Lesser Duty Rule provisions are an important counter balance that reflect the 'intent' of Australia's Anti Dumping Act, consistent with WTO legislation and Article VI of GATT 1994 to apply anti dumping duties only to the extent required to address material injury.

The Australian Steel Association strongly question the introduced triggers that remove mandatory consideration of the Lesser Duty Rule.

Considering each:

- a) Where the Australian industry includes a number of small and medium enterprises:

The relationship between the principle of ensuring that any dumping duty applied does not exceed that required to remove material injury and the inclusion of small to medium enterprises is unclear.

As noted in the Productivity Commission Inquiry Report "the anti dumping system provides benefit to a small and decreasing range of import competing industries. But these benefits can come at a significant cost to downstream industries and other users of the goods concerned".



The vast majority of Australia's anti dumping and countervailing measures apply to a relatively narrow range of raw commodities or semi finished goods which are inputs to further manufacturing processes Applications are typically initiated by monopoly or near monopoly players who dominate their respective market .

By contrast, small to medium enterprises typically comprise the downstream users of these raw materials. As such the effect of applying dumping duties is akin to a tax on the inputs for SME's.

Considering the inclusion of small or medium enterprises as the basis for discarding mandatory consideration of the lesser duty rule potentially creates a circumstance where a significant benefit to the Applicant, via higher dumping duties, can be facilitated by garnering the support of a select number of small and medium enterprises with the negative impacts to the select SME offset by other means.

A preferred mechanism to address the interests of small to medium enterprises would be to undertake a broader bounded public interest test as was recommended as a key tenet of the Productivity Commission's 2009 inquiry.

b) Where a Particular Market Situation is identified.

The CUSTOMS ACT 1901 - SECT 269TAC sets out a clear hierarchy for determining the normal value of goods in a market economy as well as the methodologies to be progressed in the event of a Particular Market Situation.

Whilst a departure from establishing the normal value of goods according to the preferred method described in S269TAC(1) may result in a different dumping duty assessment than would otherwise apply, the robustness of the S269TAC legislation is such that Particular Market Situations are fully addressed.

Determination of a Particular Market Situation should not be the rationale for removal of the mandatory consideration of the LDR and the application of dumping duties to a level beyond that required to address material injury.

c) Where the exporting country has not adequately met its obligation to report subsidy programs under relevant World Trade Organisation(WTO) agreements.

The Australian Steel Association agree that all WTO compliant countries should report subsidy programs according to the relevant WTO agreements.

Proposed use of the `WTO Report of the Committee on Subsidies and Countervailing Measures' appears to be an appropriate mechanism to determine this allowing for supplementary notifications.

Recommendation:

Rather than be the basis for removal of the mandatory consideration of the Lesser Duty Rule, the ASA propose that:

- (i) The impacts of non compliance of subsidies be quantified & be an integral input to the determination of dumping duties subject to the LDR.



- (ii) That in order to counter any challenge to Australia's WTO status and ensure a balanced approach that any assessment of subsidies also takes into account Australian subsidies that directly affect the goods subject to an anti dumping investigation.

The WTO SCM Agreement Article 1 provides the definition of a Subsidy.

SCM Article 1.1(a) (2) mentions any form of income or price support in the sense of Article XVI of GATT 1994 which operates directly or indirectly to increase exports or reduce imports into a members territory.

In the context of recent anti-dumping investigations it would be appropriate that subsidies to Australian raw material providers be WTO declared and considered in the determination of any dumping duties and material injury assessment.

2) Proposed Improvements

(i) Bounded Public Interest Test

Contrary to the former Federal Government concerns expressed of a bounded public interest test being costly and a disproportionate response, the Australian Steel Association contend that a properly administered test, scrutinised with suitable industry based expertise, can better address the basis of an AD application and its broader effects on Australian businesses.

We contend that this can be simply achieved by a survey of the top six to ten Australian users of the goods to be affected by the AD action. A detailed understanding of the impacts of uplifted input costs to their business coupled with analysis of downstream economy effects will provide greater insight prior to incurring the extensive costs and disruption that result following the acceptance of an anti-dumping case.

By way of example, a 'one-off' analysis of a small number of Australian steel house framing and steel partitioning manufacturers prior to the acceptance of the numerous Hot Dipped Galvanised steel cases would provide understanding of the effects of uplifted input prices of their manufactured product that compete inter-materially (with timber) and against fully manufactured imports.

In many respects, the Australian Steel Association consider the enacting of a bounded public interest test as unfinished business that should be integral to any serious review of micro economic policy.

(ii) Anti- Dumping Commission based industry expertise

Anti-dumping has regrettably become fair game as a strategic tool to secure competitive advantage

Given that steel based applications represent the vast majority of anti-dumping cases, it is appropriate that the ADC be resourced with adequate independent industry based expertise to assess the 'market based' factors underpinning an anti-dumping application.

Enhanced scrutiny of the broader injury effects of an AD application at the application stage should result in a lowering of costs as improved acceptance criteria deliver higher quality outcomes.

Capricious and recidivist applications would be rejected prior to acceptance thereby averting the significant publicly funded costs and burden to industry associated with an unsoundly based AD application.



(iii) Introduce an independent investigating authority to consider the material injury and market impact components of an anti-dumping case.

A bifurcated investigation process, as exists in many of Australia’s peer countries, would provide better understanding of the ramifications of duties being applied on the recipients of higher input costs.

In this manner, competition and productivity considerations would be elevated to an appropriate level reflecting the national interest.

Country	Independent investigating authority	Unitary or bifurcated system	Decision-making (definitive duties)	Automatic or discretionary imposition of measures
Australia	No (ACS)	“Sequenced” bifurcated *	Minister for Home Affairs	Discretionary
Canada	Dumping: no (CBSA); Injury: yes (CITT)	Bifurcated	CBSA and CITT	Automatic
China	No (MOFCOM)	Semi-bifurcated	Tariff Commission of the State Council	Discretionary
EU	No (DG Trade)	Semi-bifurcated	Council (in future: Commission after consultation of Member States)	Discretionary
India	No (DGAD, Ministry of Commerce)	Unitary	Ministries of Commerce and Finance	Discretionary
New Zealand	No (Ministry of Economic Development)	Unitary	Minister of Commerce	Discretionary
South Africa	Yes (ITAC)	Unitary	Minister of Trade and Industry, Minister of Finance	Discretionary
USA	Dumping: no (ITA); Injury: yes (ITC)	Bifurcated	ITA and ITC	Automatic

Source: European Commission (2012)

* Australia has a unitary system for anti-dumping. The text in the European Commission study correctly identified Australia as having a unitary system. However, it would appear as though an error had been made in compiling the above table.

Source: European Commission (2012)

(iv) Related Parties

Adoption of a ‘Related Parties’ provision whereby if the Applicant of an anti-dumping action, is a substantive importer (directly or indirectly) of the subject merchandise, they be excluded from the industry for anti-dumping purposes and thereby be prevented from initiating related anti-dumping actions.

Under ‘Related Parties’ provisions, the US Act states that:

“If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry”.



(v) Vexatious Litigation Provision

That the Australian Anti-Dumping Commission introduce a Vexatious Litigation provision. It is envisaged that this provision should take the form of a medium term injunction (nominally of five years) in a similar manner to a Section 87B Undertaking to address the circumstances where a party has made capricious applications over an extended period of time with negligible or terminated investigation findings.

Hollow Structural Sections, as an example, have been the subject of virtually continuous AD application since 1999.

Use of Australia's anti-dumping provisions as a strategic opportunity is at odds with WTO and Australian Anti – Dumping intent to address injury due to goods found to have been dumped.

There is evidence of the effects of a S87B undertaking by the ACCC discouraging spurious AD applications.

Similarly a vexatious litigation provision would mitigate misuse of Australia's anti-dumping provisions for the competitive advantage of individual entities.

(vi) Review of the International Trade Remedies Advisory Service

Whilst we support the concept of a resource to assist SMEs in both initiating but more significantly responding to anti-dumping applications, the results to date have been less than satisfactory (refer Case Study 3)

Partly the sub optimal outcomes have resulted from a lack of specific industry knowledge.

Engagement of independent industry experts may be a more practical way to deliver this service coupled with clearer communication of the requirements from prospective participants.

Summary:

Whilst there have many positive developments since the Productivity Commission's 2009 Inquiry Report into Australia's anti-dumping and countervailing system, the primary recommendation of that report, a bounded public interest test, has still not been enacted in legislation.

This should be the immediate priority of anti-dumping policy reform.

Establishment of the International Trade Remedies Forum has been a constructive step however balanced representation including Australia's downstream manufacturing sector is a requisite function of this forum to ensure deliverables that are in the national interest.

The Productivity Commission noted that "the anti-dumping system provides benefit to a small and decreasing range of import competing industries. But these benefits costs can come at a significant cost to downstream industries ... and that there are some adverse impacts on Australia's overall economic performance".

Criticism by steel based applicants of the ADC as being "slow and disappointing" in its investigations and calls for "interim duties rather than waiting for the outcome of a lengthy investigation" reinforce the view that Australia's anti-dumping system is being used by a select number of industry participants for the purposes of securing Preliminary Affirmative Determinations as a disruptive marketing tool.

Australia should retain an anti-dumping system. However, in the Australian Steel Association's opinion the present anti-dumping system is out of balance.



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This is evidenced by the exponential increase in steel based anti-dumping applications since the release of the Federal Government's Streamlining document that seek to disrupt competitive market supply.

This imbalance is also reflected in 'anti-dumping opportunities' now constituting a 'strategic focus' for the select businesses that derive benefit from the system.

Australia's anti-dumping system is there to remedy injurious effects of 'dumped' imports. The system does not exist to deliver competitive advantage to a select few.

The Productivity Commission recently noted that "the biggest challenge for Australian industry is getting access to fragmented global supply chains". The Australian Steel Association support this contention noting the influx of semi-fabricated and fully manufactured goods that compete with Australia's downstream manufacturers.

Rod Sims, the Chairman of the Australian Competition and Consumer Commission has also commented that:

"Australia needs further reforms to make its economy more productive. Protecting companies with substantial market power which are engaging in exclusionary conduct that substantially lessens competition does the reverse".

Not redressing the imbalance that exists in Australia's anti-dumping system will in our opinion perpetuate competitive barriers, curtail micro-economic reform and thwart the productivity improvements needed by the broader Australian manufacturing sector.



Case Study 1:

Ascertained Export Price (AEP)

Customs Tariff (Anti Dumping) Regulation 2013 - Reg 5 indicates methods of working out interim dumping duty.

For ADC Case 2015/66 Review of Measures for Hollow Structural Sections (HSS) ex Korea, the outcome was a negative dumping margin (negative 6.7%) i.e: the finding was that dumping had not occurred.

Nevertheless a 'combination' duty measure was applied. This has the effect of applying a floor price (fixed price) to hollow structural sections exported from Korea.

The rationale for retaining an AEP (floor price) when dumping was found not to have occurred was that this is a 'Review' and that the original July 2012 case applied both an AEP and a dumping margin.

That is a negative dumping margin finding has only affected the 'dumping margin' component of the combination duty measure and not the AEP (floor price).

Summary:

Thus in effect a party that has been found not to have been dumping has a barrier to supply applied in the form of a floor price.

This is against the primordial 'Most Favoured Nation' principles of the WTO that countries cannot discriminate between their trading partners. More specifically applying a set price to a party is, in our opinion, price fixing, illegal and has the effect of substantially lessening competition in the markets where applied.

Remedy:

The remedy to this situation is to mandate that when dumping is found not to have occurred, there should be no penalty applied in accordance with WTO principles.



Case Study 2:

Related Parties Anti- Dumping Applications

ITR 177 (September 2011) was a dumping and countervailing investigation initiated by Onesteel (Arrium) for Hollow Structural Sections (HSS) exported from China, Korea, Malaysia, Taiwan and Thailand

It should be noted that the applicant ceased Australian manufacture of a significant proportion of the goods under consideration prior to the Application.

In particular, Hot Dipped Galvanised Pipe (HDGP) under 65mm outer diameter was being imported by the Applicant from Vietnam, a country notably excluded from their anti-dumping application.

The Applicant's HDGP imports have subsequently been transferred to a business based in Jebel Ali, a Free Trade Zone in the United Arab Emirates, also notably excluded from the anti-dumping application.

Regardless of the Applicant's HDGP product being supplied from import sources it has been able to retain Australian manufacturer status of HDGP.

Recent changes to provisions in the Customs Act 1901 that requires manufacturers to supply details of their manufacturing costs when seeking to revoke a Tariff Concession Order (TCO), or objecting to the making of a TCO have facilitated this charade.

Summary:

This has:

- Facilitated preferential importing by the Applicant from countries not nominated in their AD application
- Retaining Australian manufacturer status of HDGP affording the capability to thwart Australian fabricator applications for Tariff Concession Orders, thereby limiting the available sources of supply to other parties (refer case Study 3)
- Afforded the AD Applicant the right to screen and ultimately preclude competition from importing a product that they themselves import in significant volumes

Remedy:

The remedy to this situation is to:

- (i) Introduce AD Related Parties provisions as presently exist in Australian peer countries such as the United States. Under 'Related Parties' provisions, the US Act states:

"If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry".

- (ii) Separately there needs to be a comprehensive review of the claims made as to domestic production of a substitutable HDGP 65mm OD.



Case Study 3:

Repealing Australian fabricators Duty Exemption applications

Background:

Australia's Anti-Dumping Commission has rejected an appeal for an exemption from duties on imports of certain hollow structural sections (electric resistance welded pipes) on the basis that "like or directly competitive goods." are produced in Australia.

Anti-dumping duties were initially imposed in July 2012 on imports of the ERW pipes from China, South Korea, Malaysia and Taiwan. Countervailing duties were also imposed on all imports of the pipes from China with the exception of imports from Qingdao Xiangxing Steel Pipe and Huludao City Pipe Steel Industrial Co.

In late 2013, an Australian small to medium enterprise (SME) asked for an exemption from the duties, noting it had been advised that the relevant organisation had advised that it had "fully decommissioned" its capacity to produce "air blown" galvanized hollow sections in Australia

The SME sought an exemption for duties on imports of HDGP sections, "as identified by the zinc coating mass of approximately 300g/m²." The exempted goods from South Korea and Taiwan are subject to duties of 5%, while those from China and Malaysia are subject to 4% duties.

However, the Commission advised it would recommend to the parliamentary secretary that the exempted goods are "not eligible" for an exemption from the anti-dumping measures.

Summary:

One party has the right to import goods whilst being afforded the ability to curtail Australian small to medium enterprises the right to imports the same goods. Clearly, this has the effect of substantially lessening competition in the Australian market.

Remedy:

The basis of a party being afforded manufacturer status for HDGP product < 65mm, that it ceased manufacturing in 2011 needs to be comprehensively reviewed.

The review needs to consider:

- The tonnage that the business or any of its related parties imported for the review period, nominally from 2011.
- The amount of < 65mm HDGP sold to independent third parties for the corresponding period and the applications for which this product was used.
- Whether the <65mm HDGP produced in Australia is paltry and inconsequential relative to the volume of their imported HDGP, and whether the effect was to restrict competitive supply to the Australian market.



Case Study 4:

Duty Exemptions

ADC Case 198 Hot Rolled Plate from Japan and others

The chronology of events in this case is:

- (i) 12 December 2013 - Bluescope Steel (BSL) initiate anti-dumping case on Hot Rolled Plate.
- (ii) 10 September 2013 - Bluescope Steel (the AD applicant) place an order on an Importer (agent) for the supply of Hot Rolled Plate ex Japan that BSL are unable to produce.
- (iii) 16 September 2013 - ADC send final report to Industry Minister
- (iv) 19 December 2013 - Decision published after extended period to review.
- (v) 7 April 2014 - Bluescope Steel (the AD applicant) place a second order on the Importer for the supply of Hot Rolled Plate ex Japan
- (vi) 23 April 2014 - The Importer applies for a Tariff Concession Order (TCO) on the Hot Rolled Plate on the basis that there are no substitutable goods produced locally.
The proposition that there are no locally produced substitutable goods is categorically evidenced by the Applicant's (BSL) need to order the Hot Rolled Plate from Japan
- (vii) May - June 2014 - The Importer has the shipments of hot rolled plate arrive in Australia.
- (viii) 21 July 2014. - TCO approved by Customs effective from the application date of 23 April 2014.
- (ix) 23rd July 2014 - The Importer apply for a 'Duty Exemption' on the basis that as there are no substitutable goods, no dumping duty should apply.
- (x) 31st August 2015 - Exemption Application ultimately approved but only effective from the date of Application being 23rd July 2014.

Summary:

Fifteen months after supplying goods to the Applicant of the AD action, dumping duties are still being withheld

Why is there any issue regarding an Exemption when there are no substitutable goods produced?

Remedy:

Without a domestic producer of the goods under consideration there can be no injury.

All duties relevant to supply of this good, and in particular for orders supplied to the AD Applicant, should be refunded forthwith.



Case Study 5:

AD Appeals that have the Effect of Substantially Lessening Competition.

Request by Bluescope Steel for Review of a Termination Decision by the Anti-Dumping Commission – Galvanised Zinc Coated Steel exported from India 28th August 2015

The rationale provided by the Bluescope Steel in this instance was that a verification visit to India was not undertaken.

More significantly however is the claim that:

The Commission appears to have viewed BlueScope's import parity pricing model as referring only to competition across a theoretical single market, as opposed to evaluating the actual market dynamics of two clearly defined and separate market segments. This approach would only take account of the lowest single price in the market.

BlueScope contends that the Commission has erred in its price undercutting analysis

The key reasons as to why the Commission has erred in its assessment include:

- *Report No. 249 fails to reflect that BlueScope maintains a separate base import parity pricing ("IPP") benchmark model for both the distribution channel (CQ) and the building (structural steel) segment of the galvanised steel market;*
- *the two market segments are priced differently;*
- *it is therefore incorrect to compare prices in the distribution channel that are for CQ product, with prices in the building segment that are for structural steel direct to end-users, irrespective of source; and*
- *in recognising that the galvanised steel market is "price sensitive" the Commission did not fully consider the reality that Taiwanese exports of galvanised steel (mainly structural steel) do not compete directly with CQ grades*

Summary:

BSL are contending that they have been able to maintain a price premium and that they do not wish to have 'price sensitive' markets disturbed by goods that the ADC has found not to have been dumped.

This is a straightforward example of Australia's anti-dumping system seeking to be used for the effect of limiting competition and should simply not be permitted.

Remedy:

Whilst the issue of a verification visit to India is due consideration, the claims of sustaining 'price sensitive' sectors of one market players business by the exclusion of (non-dumped) competition, should be rejected outright.
