ATTACHMENT A.

Anti-Dumping Actions and Their Anti-Competitive Effects in a Low Tariff Regime

National Competition Policy calls for the review of all legislation affecting competition. Australian's anti-dumping legislation must be regarded as essentially anti-competitive in nature, given that it has no national interest provisions to weigh the competing interests of local producers vis-a-vis overseas exporters, importers, consuming industries and consumers generally, in terms of market effects and prices.

The adverse effects often extend to the shut-out of long-term overseas suppliers who usually provide the short-fall in local supply, an alternative source of supply, and/or a wider variety of the product concerned. These overseas suppliers are invariably forced into a spiralling price downturn caused by new low cost/price entrants to the market, and the pricing policies of local producers in reducing their prices still further to meet this low-priced competition.

The higher-cost longer-term overseas suppliers end up in a precarious position - facing the torturous road of anti-dumping action. No one really wins in this situation, with the higher-priced suppliers being taken out of the market by the imposition of highly protective price undertakings or uncompetitive anti-dumping duties. This leaves the lower-cost producers to undercut the prices of local producers still further and take-up the market share previously held by the higher-cost suppliers (and often some of the local producer's market share). This action in effect denies consumers and consuming industries the range of sources and products they require. At the same time it creates a small cartel of local producers and a few importers having control over the particular market.

This situation is exacerbated when the local producer/s also import/s the low cost product/s. Thus anti-dumping legislation is anti-competitive in nature, and conflicts with the trade practices provisions of the Trade Practices Act and the National Competition Policy.

Australia's anti-dumping legislation is based on its accession to the WTO Anti-Dumping Agreement (and its predecessors) thereby committing Australia to

introducing national legislation reflecting the provisions of the Agreement. The original intentions of the WTO Anti-Dumping Agreement were to combat the misuse of anti-dumping actions by certain countries and provide a balance between the competing interests of local producers and overseas suppliers. However, this balance has been progressively eroded over time mainly at the behest of E.U. and North American interests and the Agreement now contains particular provisions which tilt the scales in favour of local producers. In turn this has reduced the required balance in Australian's anti-dumping legislation and procedures.

Additionally, however, Australia's anti-dumping legislation, administration and procedures have been "hardened" further still through the policies of all three major political parties because of long-term protectionist ideologies and/or the reduction in tariffs to 5% for most industries. Through these policy approaches, supported by a persistent campaign by local producers and/or major industry groups, Australia's anti-dumping legislation and measures are being invoked as psuedo-tariff protection measures, protecting higher cost local producers not able to cope with the 5% tariff, and delaying the need for them to become internationally competitive.

Dumping occurs when an overseas producer sells his produce on the export market at a price less than that on his own domestic market. This is not illegal in itself and dumping occurs across a whole range of products exported by various countries – including Australia. However, anti-dumping action can be taken by the local producers if it can be established that the dumped-priced goods have and/or will cause material (i.e. not insignificant) injury to the local producer in terms of lost profits and/or market share (as well as other factors in some cases). A successful action for the local producer results in voluntary price undertakings (uplifts) by the exporter/s or the imposition of punitive "interim anti-dumping duties" which must be paid up-front on every unit entered by the importer. A final duty assessment can only be applied for after six months from the date of imposition of the interim dumping duties. This results in severe cash flow problems for the importer or the cessation of exports/imports altogether.

An anti-dumping action takes the form of an application for a notice to be issued imposing anti-dumping measures on the allegedly dumped-priced exports if causal link to material injury to the local industry is proven. It is to be noted that only a causal link needs to be established between the allegedly dumped-priced goods and material injury to the local industry – that is, dumping does not have to be the main or sole cause of injury. Customs undertakes a preliminary assessment of the case (20

days) and, if it believes the applicant has a prima facie case, announces a formal 155-day inquiry. This includes investigations at the premises of overseas suppliers, importers and the local producer/s, as well as submissions by various parties. If initial Customs inquiries find "de-minimus" dumping (i.e. is less than 2% when expressed as a percentage of the export price) and/or negligible volumes of imports (i.e. less than 3% of all imports of like goods), the inquiries must be terminated immediately by Customs. However, often this volume barrier is overcome by local producers instigating action against a number of overseas suppliers in the same application, alleging "cumulative" injury. In this situation, despite the fact that a number of countries account for less than 3% of all imports individually, action can be taken against all of these countries if their collective imports are above 7%. Thus it is now common for local producers to take a "scatter-gun approach" against a number of countries in lodging their complaints or applications.

Apart from this problem, the timing for investigations has been reduced, and independent review ceased through recent changes to the legislation and the abolition of the ADA some three years ago resulting from "hardline" government policies and the Willett Review. The Willett review had narrowly focussed terms of reference (expressing the government's/industry's desire for particular changes). As a result the review was dominated by local manufacturers and/or their representative bodies. No representatives of overseas exporting or importing interests put forward submissions – apparently feeling it was a waste of time. In other words the resulting Willett Report and recommendations were destined to be biased in favour of local producers.

The insertion of a National Interest provision was considered by the Willet Review team but abandoned because it was felt that the term and any resulting provisions would be difficult to define. This was not and is not a valid argument in the writer's view and it is now apparent that such a provision should be inserted into Australia's anti-dumping legislation to bring it into line with the competition provisions of Australia's Trade Practices Act.

A major step in this direction was recently taken by the Australian Competition and Consumer Commission (ACCC) in its examination of PaperlinX's (sole local producer of fine papers) acquisition of the remaining (52%) shares in Spicers Paper Limited (the major merchant group of local papers). Members of the Independent Paper Group (IPG), representing the major independent merchant, overseas mill agents and importers believed that this acquisition, combined with the use of anti-dumping actions for major long-run grades of paper (eg. A4 copy paper) would be

likely to further lessen competition in the fine paper market contrary to the provisions of Section 50 (Merger Provisions) of the Trade Practices Act.

The ACCC agreed that there were anti-competitive concerns with the proposed merger but believed these would be lessened by its acceptance of a number of court-enforceable undertakings in relation to the divestiture of two Spicers Paper merchants, the transfer of a major copy paper brand name to one of the divested merchants, and, most unusually, the inclusion of a provision in the undertakings for independent assessment of PaperlinX's anti-dumping applications. The ACCC stated that in making this decision it had regard to concerns in the industry that previous anti-dumping actions lodged by PaperlinX (and its predecessor) had a negative effect on competition.

The undertakings provide that, for the next three years, PaperlinX must obtain an opinion from an independent adviser regarding the prospect of success of a proposed anti-dumping action prior to lodging such an application with Customs. The undertakings stipulate that the independent adviser must certify that the "proposed anti-dumping action is made bona fide and not frivolously or vexatiously. Further details on the appointment of the adviser and his/her role have not yet been released by the ACCC but the IPG has written to the ACCC stressing that: -

- the adviser must be truly independent from all parties;
- the prime role of the adviser should be to assess the competition effects of any proposed anti-dumping action.
- the adviser should be fully familiar with the competition provisions of the Trade Practices Act as well as Australia's anti-dumping legislation.
- the adviser's role should extend to any future application for review, revocation or continuation of current anti-dumping measures on A4 copy paper and certain coated printing papers.

From the terms laid out in the press release, it is apparent that the competition effects (or "national interest" aspects) of any future paper anti-dumping applications will have to be assessed prior to the applications going forward to the Trade Measures Branch of Customs for its assessment in terms of the anti-dumping provisions of the Customs Act.

This precedent will hopefully lead to similar undertakings being imposed in mergers involving other import-sensitive (eg. chemicals and plastics) industries and thus the case for insertion of a national interest provision in Australia's anti-dumping

legislation may be strengthened. Perhaps the best scenario for this case to be made would be the future review of Australia's anti-dumping legislation and system by the Productivity Commission. In view of the shortcomings and lack of balance in the current system, the need for such a review is urgent and compelling.

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