5 November 2014

Professor Ian Harper
Chair
Competition Policy Review Panel
The Treasury
Langton Crescent
Parkes
Australian Capital Territory 2600

Dear Chair and Panel Members

Submission in response to the Competition Policy Review draft report

ABB welcomes the opportunity to comment on the draft report of the competition review and would like to congratulate the Panel on its comprehensive work to date.

Introduction and summary

ABB notes that the issue of the inconsistency of Australia's anti-dumping laws and administration with competition law and principle is an issue that has not been considered in the draft report. ABB is aware that its submission on these matters was provided late in the development of the draft report.

However, consistent with the views expressed by the Panel in the draft report, we submit that the Panel should consider anti-dumping as:

- an area of law that should be added to the list of regulatory priority areas for further consideration; and
- an important consideration with regard to the Panel's proposal that sources of competition be explicitly defined to include imports and potential imports.

ABB submits that many aspects of present-day anti-dumping regulatory and policy arrangements are directly and egregiously inconsistent with competition law and regulation, including the following:

- the absence of application of a "long term interest of end user" or similar test;
- the different treatment of commercial pricing decisions that would be regarded as "normal business practice" when engaged in by a domestic firm; and
- 2012 ministerial guidance that can only be interpreted as suggesting to the Anti-Dumping Commission ("the ADC") that it should protect (indeed, overprotect) domestic competitors, rather than protecting competition.

The proposal by the Panel to define competition to explicitly capture the competitive influence of imports or potential imports into domestic markets is undermined by the operation of anti-dumping laws. These laws and regulations are creating barriers to imports not faced by domestic industry, and providing quasi-protectionist measures. Where dumping investigations and measures impact on imported goods, those goods and the businesses that use them are not allowed to compete on equal terms with domestic goods and businesses. The extent of this market intervention goes far beyond any reasonable concept of protection from unfair trade.

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The proposal to include a form of effects test in Section 46 of the *Competition and Consumer Act* 2010 throws into relief the inherent conflict between competition law and the anti-dumping regime.

ABB submits that the Panel has rightly identified the need for reform of laws restricting parallel imports, saying they operate similarly to import restrictions such as tariffs that shield markets from overseas sourced competition. While parallel import restrictions can create import monopolies, the application of anti-dumping regulation promotes domestic monopolies.

There is no long term interest of end user test in the anti-dumping regime to mitigate the risk posed by these market distortion effects when anti-dumping remedies are considered by the Anti-Dumping Commission. Successive reviews of anti-dumping arrangements have considered the question of a national interest test, which takes into account wider considerations, such as the interests of end users and consumers. ABB sees absolute merit in the adoption of such a test. Equally, ABB calls for greater rigour in the definition and determination of what actually constitutes injury, so that markets are not open to manipulation by inefficient or moribund market participants. That is, domestic industries exposed to competition will by definition have their inefficiencies or lack of innovation exposed. Anti-dumping regimes must not act to protect industries from the consequences of these internal inefficiencies.

ABB's ongoing experience with the Australian anti-dumping system

As described in ABB's primary submission, ABB and the companies from which it originated have operated in Australia since the late 19th century. ABB directly employs more than 2,000 people in Australia. Globally, ABB employs more than 150,000 people across 100 countries, and enjoyed revenues of US$42 billion in 2013.

In our primary submission, ABB provided a summary of the investigation of ABB's imported power transformers – a statutory process supposed to be completed in 185 days that been extended four times and had dragged on for 406 days at that time. At the time of our first submission, ABB Australia had been advised that no-dumping margins[1] had been found by the ADC in respect of all four of its overseas suppliers, yet the investigations continued. At that time, the ADC had advised ABB that it was considering yet another form of calculation that would extend its investigation further and could result in a reversal of the no dumping findings.

Since then, ABB has been advised that the ADC has employed an internationally controversial methodology in its determination of dumping, known as "zeroing", and that this calculation had resulted in a new preliminary finding of a *dumping margin* of 3.6% on imports from Thailand, compared to a *no dumping margin* of 10% that the ADC had found using the previous method. The same reversal of the ADC's margin calculations, from a *no dumping* position to a *dumping* one, was advised to ABB in respect of its imports from Vietnam.

Zeroing is a practice of discounting those imports where there is found to be no dumping margin and instead basing the dumping margin calculation *only* on those instances (ie, sales) where the comparison of the imported price to the normal (or home market) price indicates that dumping has occurred.

That is, the net effect of zeroing is to disregard export sales that are not dumped in calculating a dumping margin on a weighted average basis.

Not only was this the first time, to ABB's knowledge, that the ADC has used "zeroing"[2] but, in doing so, the ADC has acted contrary to guidance in the Explanatory Memorandum to the *Customs*

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1 "Dumping" occurs where an exporter's home market price for a product is less than its export price for the same product. This generates what is known as a dumping margin (or "positive margin"). The reverse situation - where an exporter's home market price for a product is more than its export price for the same product – generates a no-dumping margin (or "negative margin").

2 In *Trade Measures Report No 39 – Certain A4 Insert Ring Binders from Malaysia* (11 May 2001) the Australian Customs Service made reference to the adoption of a Section of the Act - Section 269TACB(3) - that the Anti-Dumping Commission has in ABB's current case used as an excuse to apply "zeroing", but it is not clear whether "zeroing" was used in that 2001 case.

Amendment (Anti-Dumping Amendments) Act 2011. This explicitly states that Australia proposed to *"maintain its long-standing practice"* of not applying zeroing.[3]

Further, the adoption of this methodology occurred over a year after the commencement of the antidumping investigation, and subsequent to the application of the more usual methodologies that had yielded no dumping outcomes for all of ABB's imports.

These experiences confirm ABB's view that the administration of the anti-dumping regime is being conducted in a partial manner, with a bias toward finding positive evidence of dumping, even if that requires novel approaches to be used in investigations. The ADC's administration of the anti-dumping system does not take place in a policy vacuum, and accordingly ABB must surmise that it is current-day policy settings that are driving such behaviour.

The protectionist and anti-competitive extreme that has been reached is no better demonstrated than by the *Ministerial Direction on Material Injury* issued to the ADC in 2012.[4] In part, this Direction is to the effect that there should be no minimum share of the Australian market at which the ADC determines it is possible to conclude there is injury to the domestic industry, and that even evidence that the Australian industry's sales and profits are increasing less quickly than they would absent dumped imported competition is sufficient to find that "material" injury has been caused to the industry.

ABB submits that:

- the effect of the "zeroing" test is to almost automatically conclude that dumping has occurred in any given situation of competition between domestically produced products and imports; and

- the ministerial directions to the ADC render the test of whether those imports have caused material injury meaningless.

Accordingly, it can be concluded that almost all imports into Australia that are competitively priced are exposed to the imposition of dumping duties at the behest of an Australian industry producing the same product.

Implications for consideration of effective competition policy

ABB submits that the implementation of anti-dumping regulations in Australia has become so extreme that is irreconcilable with the principles and regulatory application of competition law. These regulations now represent a serious impediment to the market, to consumers, and to imported competition.

As we discussed in our initial submission, ABB believes this area of regulation has been captured by interest groups and does not strike a balance between the legitimate interests of the domestic industry to be protected from unfair importing practices and the interest of the broader community and of national economic welfare in maintaining vibrant and domestic markets that are exposed to both domestic and international competition.

For this reason, ABB believes that the Panel must consider anti-dumping regulation for inclusion in its list of priority areas for review.

Zeroing – clear discrimination against imported competition

As ABB has now experienced, and as we have described above, "zeroing" is just one example of a practice that has crept into anti-dumping administration and that is inconsistent with competition

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[3] That Australia does not wish to apply "zeroing", and that it does not wish its trading partners to do so, is reflected in two of Australia's most recent free trade agreements (Article 6.8 of the Korea-Australia FTA and Article 7.2 of the Malaysia-Australia FTA).

[4] http://www.adcommission.gov.au/reference-material/documents/ACDN2012-24.pdf

regulation. The use of "zeroing" to determine if a product has been dumped is directly inconsistent with the principles applied in the administration of competition law.

Zeroing, as applied in the case of allegations against ABB in the transformer market, has the effect of discounting circumstances where an importer is found to be selling its products at a margin above the normal price, and focuses only on those sales where there is a dumping margin. The practice of zeroing is comparable to suggesting that any decision by a domestic firm to sell goods or services at below cost in a particular circumstance constitutes anti-competitive conduct, whether or not the firm has significant market power and whether or not the decision causes a lessening of competition. Indeed it is far worse, because in the anti-dumping context it is not only a below cost sale that constitutes dumping – it is any sale that is below the exporter's home market price, *even if both the home market price and the export price are fully profitable*.

The practice of zeroing denies foreign producers the right to compete in the Australian market on the same terms as domestic producers. Clearly and obviously, it is detrimental to consumers, and contrary to competition policy, to maintain such differential treatment. Yet this appears to be the message that has now been sent to foreign exporters and local importers by the approach adopted by the ADC in relation to the dumping complaint levelled against ABB and other power transformer exporters.

ABB believes that the present operation of the anti-dumping regime undermines the Panel's proposed changes to the definition of competition. Essentially, there is an uneven playing field for importers. ABB agrees that, in a globalised economy, the competition regulator should consider competition from imports as being no different from domestic production. However the anti-dumping instrument as it is presently being administered in Australia provides far too extensive protection for domestic industries, shielding them from the need to compete.

The commercial impacts ABB now faces because of zeroing, and because of other aspects of the thinking of the ADC regarding injury to the domestic industry, are profound, as are the implications for the competitive operation of the energy markets that are affected by this process. Zeroing has not been applied to all exporters, and some will not have dumping duties imposed on them. Accordingly ABB will be held back from competing on the same terms as the domestic industry and other importers. The situation ABB now finds itself in is absurd. It is as far removed from the direction of 30 years of policy that has intended to create a more competitive and international economy as one can imagine.

Normal competition is not "injurious" nor is it a "circumvention" activity

ABB would also like to feature two other matters. The first of these is the way too easy instruction that the *Ministerial Direction on Material Injury 2012* gives to the ADC in relation to the assessment of whether injury has been caused by dumping. We refer you to our previous submission in this regard, and to our explanations above. These directions allow weak impacts on an Australian producer that are nothing more than *competitive* to be treated as being *materially injurious*.

The second is the set of "anti-circumvention" laws that were hurriedly introduced by the previous government. The law that says that an importer that pays dumping duty on an imported product and makes a profit on its resale of that product can then be penalised by even higher dumping duties is nothing short of scandalous.[5]

ABB now observes that a House of Representatives inquiry into "anti-circumvention" was announced on 16 October 2014.[6] To ABB's great concern, the terms of reference for the inquiry, and political statements made about the inquiry, suggest a strong and continuing bias among policy makers against import competition, to the extent that dumping measures are considered to be for the purpose of "punishing" importers and that anti-circumvention laws are not tough enough. The chairman of the House of Representatives Standing Committee on Agriculture and Industry, in announcing the inquiry, said it was motivated by complaints from the Australian steel, aluminium and food industries that

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5 *Customs Act* 1901, Section 269ZDBB(5A)

6 http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping

importers were changing their practices after the imposition of a dumping duty, and suggested this was *"not acceptable"*. At no point in the press release announcing the inquiry is it suggested that there may be a legitimate, competitive explanation as to why a business should change its practices in these circumstances.

These attitudes from policy makers are creating a growing sense that imported competition is unwelcome in Australia.

Conclusion

There are contradictions between anti-dumping policy and competition policy. ABB's point is that aspects of the current implementation of Australia's anti-dumping regime are *fundamentally* and *extremely* inconsistent with competition policy. ABB submits that a careful reconsideration of the anti-dumping regime from the perspective of competition policy is warranted.

The Panel should be concerned that the seemingly arbitrary application of Australia's anti-dumping laws will create new and higher barriers to trade, after Australia has been reducing tariff barriers and further reductions are being negotiated down to minimal or zero levels. The better approach is suggested by competition law, which uses concepts of *market power* and *injury to competition* as its protective mechanisms to ensure that domestic and international players compete fairly in Australian markets.

Policy makers should work to ease the trade-distortive effects of the ever-increasing number of anti-dumping obstacles that are being created. Competition policy dictates that antidumping law must be less arbitrary and less tilted in favour of domestic industries. This will require the concepts of "unfair" trade practices in domestic and in international trade to demonstrate greater convergence.

ABB finds support in the findings of the Productivity Commission in its 2010 report *Australia's Anti-Dumping and Countervailing System*, in particular in its findings that:

> *The 'political economy' argument for retaining the system would be strengthened by changes to address a number of deficiencies in the current arrangements which can add to the costs for the community. In particular…. there is no consideration of the wider economic impacts of anti-dumping measures… measures can too easily become akin to long-term protection, or outdated in the face of changing market circumstances…*
>
> *Introduction of a 'bounded' public interest test, drawing on similar provisions overseas, would be a practical means to take account of wider impacts and prevent the imposition of measures that would be disproportionately costly.... The test would embody a presumption in favour of measures where there has been injurious dumping or subsidisation… But it would also detail a small number of specific circumstances where measures would not be in the public interest - for example, where they would be ineffectual in removing injury; or would impose large costs on downstream users relative to the benefits for the applicant industry.*[7]

ABB is not the only international business that has serious concerns about the impact of anti-dumping rules and of the investigating authorities that administer them on its ability to do business. As well as banning practices like "zeroing", and ensuring that injury is truly "material" and not just imagined, we see a role for formal involvement by the ACCC or one of its Commissioners in the administration of anti-dumping law.

Even if the issues are complex or beyond the scope of the Panel to resolve the Panel is asked to recognise that there is a pressing need for reform of the anti-dumping regime and to at least consider making a recommendation that this be a topic for further urgent review to bring the regime into line with the global nature of the Australian economy, to reduce regulatory barriers to market entry and participation, and to promote competition and the benefits that flow from competition. This is the mandate of the Panel, and the mantra of the draft report.

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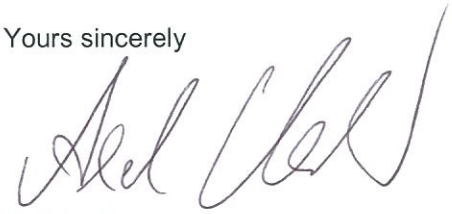
7 http://www.pc.gov.au/__data/assets/pdf_file/0006/93750/anti-dumping.pdf at page X.

We ask the Panel to consider this in its further deliberations, and to make a recommendation or recommendations which result in further investigation of the anti-dumping regime with a view to correcting the clear contradictions between that regime and competition law and policy.

Yours sincerely



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