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RE: Automatic sunseting of legislative instruments Proposal to remake the Statistics Determination 1983 Consultation paper

Introduction

This submission comes from the non-government members of the 'Access to Import Data Subcommittee' (the subcommittee) of the International Trade Remedies Forum, namely: The Australian Chamber of Commerce and Industries, Australian Paper, the Australian Workers Union, Bluescope, Capral, the Construction, Forestry Mining and Energy Union (Chair) the Food and Beverage Importers Association and Liberty One Steel.

The subcommittee is a working group of the International Trade Remedies Forum (ITRF), and is assisted by the Anti-Dumping Commission as secretariat to the ITRF and other relevant government agencies through the provision of information about government policies and processes.

On behalf of the non-government members of the sub-committee, we thank the Treasury for the opportunity make this submission.

The entities of individual members of the subcommittee may make separate submissions which focus on the priorities of their respective organisations.

As explained in our subcommittee's terms of reference, access to trade data is important for interested parties seeking to apply for anti-dumping and/or subsidy measures and make submissions in Anti-Dumping Commission cases. Transparency of trade data can also assist stakeholders to assess the effectiveness of anti-dumping and countervailing measures and their market impacts, including to identify non-compliance and circumvention of measures.

In addition, we contend that there are broader benefits of improved trade statistics and information availability (which are jurisdictions provide their industries) (while protecting commercial interests) generally, as well as for the specific purpose of improving accessibility of interested parties to the anti-dumping and countervailing system.

The Australian Bureau of Statistics (ABS) is an important source of trade data for interested parties. The ABS's approach to the release of data is subject to legal constraints under the Census and Statistics Act 1905 and the *Statistics Determination 1983*.

We note that the scope of this consultation by *The Treasury* of the *Statistic Determination 1983* (the Determination) does not cover other matters or other related legislation, such as the collection of information under the Act or the release of information of a personal or domestic nature in a way that is likely to enable the identification of a person providing that information. The terms of reference of our subcommittee, somewhat likewise, confines us to consider the ways to improve access to trade data *within* the current legislative framework to assist all interested parties to interact with the anti-dumping system. This submission is written with due regard to these two sets of limitations.

Contention

The sunseting of the Determination on 1 October 2018 provides an opportunity for Australia to modernise its processes for making available statistical information about products imported into Australia in a way which will be to the benefit of Australian industry and other interested parties to Australia's anti-dumping and countervailing system. Of predominate concern to non-government members of the subcommittee is import data which is currently able to be suppressed on confidentiality or privacy grounds by the Australian Bureau of Statistics (ABS).

The Census and Statistics Act, 1905 allows parties associated with imports of a particular product to request that the name of the country of origin (and the associated values and volumes) be suppressed in the reporting by the ABS. Section 12 of the Act states:

(1) The Statistician shall compile and analyse the statistical information collected under this Act and shall publish and disseminate the results of any such compilation and analysis, or abstracts of those results.

(2) The results or abstracts referred to in subsection (1) shall not be published or disseminated in a manner that is likely to enable the identification of a particular person or organization. (Our emphasis)

This section, in regards to imports, is currently operationalised by the Determination as per envisioned in Section 13 of the Act. The relevant sections of the Determination state that:

"Information ...may, with the approval in writing of the Australian Statistician, be disclosed except where ... in the case of information relating to an organisation – a responsible officer of that organisation...has shown that such disclosure would be likely to enable the identification of that particular person or organisation... information in the form of statistics relating to foreign trade, being statistics derived wholly or in part from Customs documents."

The justification for determining this provision of the Act in this way in an era of supposed free, transparent and open trade in a dynamic global economy is highly questionable. The provision in terms of its relation to trade has been described as a post-colonial anachronism from the 1900s. (It was intended to protect Australian importers that sought goods from sources other than the 'mother country' and its dominions.)¹

Furthermore, the explanation provided by the ABS for the determination in relation to import data in its current form, namely that it: "...Enjoys a high level of community trust and cooperation because the community is confident that the information it provides to the ABS will be protected... [If the ABS lost] that confidence, the community may not provide information to the ABS, or may not provide accurate information, both of which would reduce the quality of ABS statistics,"² lacks authority.

The Productivity Commission (PC) argued in response to the ABS's proposition that it: "Does not share the concerns of the ABS that the Bureau's reputation for integrity, and the public's confidence in the security of material provided to the Bureau, would be undermined by a common sense approach to publishing data that is available elsewhere. In this regard, it is notable that for import

¹ IndustryEdge, Paper Cuts - Critical analysis of copy paper imports into Australia, 2012, p 3.

² See Productivity Commission, 'Australia's Anti-dumping and Countervailing System', Report no. 48, December 2009, Canberra, (available online@ <http://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf>)

data, the ABS does not rely on any voluntary participation by stakeholders — rather, it acquires that data directly from Customs.”³

Rationale and recommendations

In 2010 the PC evaluated Australia’s anti-dumping and countervailing system. In its assessment it identified that applicants and potential applicants for antidumping measures were having difficulty developing applications.

The PC identified a particularly frustrating aspect of the system for potential applicants was when data published or available on request from government agencies in other countries — which may closely approximate data that has been suppressed by the ABS — is sometimes used by an applicant for anti-dumping measures. The PC point out that in cases like this: “the effect of the confidentiality provisions is simply to increase the time and expense involved in seeking antidumping protection without having any ultimate material impact on the availability of the information concerned.”⁴

In most instances, import/export statistics at country level are available from other sources but obtaining this information increases time and cost for Australian businesses already suffering injury from dumped imports.

Australian industry applicants challenge the ABS’s interpretation of the legislation that exports statistics at the tariff commodity level by country enable the identification of a particular person or organisation. Whilst an importer or exporter may be able to demonstrate to the ABS that in a particular month, all the export statistic data exactly matched the details of their imports, nobody else, apart from the company and Border Force knows this. To Australian industry’s knowledge, no trader, importer or exporter has exclusive rights to export all the products in a particular tariff code from a given country to Australia.

Ultimately, back in 2010 the PC concluded that there was a strong case for some change to the arrangements. It acknowledged that also, while there may be small differences in import and export data ensuing from timing differences and variations in statistical codes, this does not negate the general argument in favour of publication.

Recommendation 1:

1 a) The sub-committee recommends that the ABS does not grant confidentiality to import trade statistics at a country level by tariff code unless an importer or exporter can demonstrate over a 12 month period that they are the sole importer or exporter of all the products within that tariff code from a particular country.

1 b) The sub-committee recommends that the Australian Bureau of Statistics does not make import trade statistics confidential unless Australian industry members have been given the opportunity to demonstrate that similar information has been published by, or is available to the public, from a business, organisation or any official or government body.

Some non-Government members of the subcommittee are particularly concerned about the wide and disproportionate usage of confidentiality provisions and the possibility of it being utilised in an attempt to mask dumping activity or the circumvention of measures. The Anti-Dumping Commission

³Ibid.

⁴Ibid.

has stated that approximately 30 percent of Australia's steel import volumes data is confidential (with no information on country of origin).⁵

Of further concern is that the ABS in its information paper, effectively, encourages companies involved in the trade of dumped goods to apply for suppression of data in a way which may hinder the levying of measures and even the detection of circumvention activity of existing measures by allowing data to be made confidential before an activity even begins.⁶

In our view current arrangements which allow the suppression of data to potentially mask dumping and countervailing activity are highly problematic.

Recommendation 2:

2 a) The Australian Border Force/Department of Homeland Security publish the following aggregated statistics for each good subject to anti-dumping and countervailing measures:

- Volume of goods imported in the previous quarter (subject to interim duties and/or undertakings);
- Value of goods imported in the previous quarter (subject to interim duties and/or undertakings);
- Value of duties collected in the previous quarter, and;
- Value of interim duties repaid following the completion of final duty assessments in the previous quarter.

Conclusion

Some of the principles contained in The Treasury's discussion paper, such as proposed change a) "Release of information already available to the public (Clause 3)" and proposed changed d ii) "Access to an increased range of de-identified unit record level business information (Clause 7 (1) (b))" espouse principles consistent with is recommended in this submission. Despite this, the detail of the proposed changes in the discussion paper if implemented would still fall well short of changes required to ensure that Australia has a fit for purpose regime for the access of import data needed to promote a responsive trade remedies system acting in a dynamic global trading environment.

The modest recommendations contained in this submission, if accepted and implemented would go some way in providing a more balanced environment between promoting distinct objectives of protecting privacy and having a system which allows interested parties to have timely and more cost effective participation in the anti-dumping and anti-circumvention system.

The subcommittee would appreciate the opportunity to be consulted before a final decision on a new determination is made and for this purpose we invite the Treasury's consultation team to attend our next subcommittee meeting. *Ends*

⁵ Australian Anti-dumping Commission, *Analysis of Steel and Aluminium markets report to the Commissioner of the Anti-Dumping Commission*, (August 2016) Melbourne, p 24.

⁶ For example: See ABS Publication; "International Trade- Requests to Confidentialise Data", which states: *Reasons for requests for confidentiality (include) ..."an imported commodity may be the subject of an anti-dumping inquiry"; "In cases where a claim is based on trade that is about to start"*