Arrium Limited
ABN 63 004 410 833

Level 40, 259 George St, Sydney NSW 2000
GPO Box 536, Sydney NSW 2000, Australia

P +61 2 9239 6666
F +61 2 9251-3042

arrium
MINING AND MATERIALS

1 October 2015

Ms Melinda Cilento
Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2600

Dear Commissioner,

Thank you for the invitation to contribute to the Productivity Commission's ("Commission") Research Paper examining the recent developments in Australia's anti-dumping arrangements.

Australia's anti-dumping system is essential to support sustainable, efficient and competitive markets for merchandise trade. It ensures that Australian industries that have achieved international competitiveness in a post-tariff (and non-tariff) barrier global trading environment are afforded a level playing field to compete fairly in the open and dynamic Australian market.

Arrium Limited ("Arrium") supports the Government's efforts to strengthen the anti-dumping system as a key enabler of its free trade agenda.

> *"Australia supports free trade, but free trade should also be fair trade," Mr Macfarlane said.*
>
> *"The dumping of goods from overseas is harmful to Australian businesses and action can be taken to prevent this behaviour under World Trade Organization rules. Where local companies are being injured by dumping practices they are able to seek trade remedies.*
>
> *"The changes will ensure that while Australia becomes increasingly open to trade, Australian industry is not left vulnerable to dumping by foreign companies."*[1]

It is important to recognise that Australian producers and manufacturers operate in the most competitive manufacturing region in the world with minimal to zero tariffs applying to goods imported into Australia[2]. In other words, Australian markets for merchandise trade are among the most competitive in the world, due in large part to the participation of local Australian industries (where they exist), importers, downstream value-adding industries or consumers (as the case may be). Such markets satisfy increasing consumer utility, at historically low cost[3].

The supply of dumped and subsidised goods into the Australian domestic market threatens the sustainability of competitive Australian markets over the medium to long term, as follows:

- In the medium-term, sustained price undercutting reduces supply-side factors within the market into which the dumped or subsidised goods are sold, as:

[1] Minister for Industry, the Hon Ian Macfarlane MP, *Joint media release: Levelling the playing field for Australian manufacturers and producers,* 15 December 2014

[2] Since 1983 Australia has entered into nine bilateral free trade agreements and one multi-lateral free trade agreement. DFAT analysis shows that typically >96% of all trade with these countries is conducted with a zero duty rate (Source: Submission by the Department of Foreign Affairs and Trade and AusTrade to the Parliamentary Joint Select Committee on Trade and Investment Growth, *Business Experience in Utilising Australia's Free Trade Agreements*, 17 July 2015 at p. 11)

[3] The Australian annual weighted median of other consumer price measures have remained below 3% since the period year-ending September 2011 (Source: ABS Cat No 6401.0)

- non-dumped and non-subsidised (legitimate) exporters exit the Australian market;
- legitimate importers of non-dumped and non-subsidised goods reduce their investment in establishing mature, efficient and sustainable markets with established distribution, customer support networks, and quality and innovation within the Australian economy; and
- local Australian producers of like goods to the dumped or subsidised goods are unable to attract capital to invest in increasing capacity, innovation and efficient technology to raise productivity due to poor returns on investment caused by the injurious effects of the dumped goods.

- In the long-term, sustained price undercutting results in further reductions in supply-side factors, and with time impacts demand-side factors as consumer utility is eroded:
  - loss of direct foreign investment by non-dumped and non-subsidised exporters who are unwilling to invest in the development of mature, efficient and sustainable markets with established distribution, customer support networks, and quality and innovation in the Australian market due to the risk of recurrent, 'episodic dumping' by exporters with a proclivity for dumping activity, or supported by country of export WTO-illicit subsidy programs[4];
  - the Australian market exit of importers of non-dumped, non-subsidised goods, as diminishing returns on investment affect these enterprises' capacity to invest in mature, sustainable distribution networks;
  - Australian industry exit as a result of an inability to attract and retain capital in the face of below-market returns on investment, together with the erosion and eventual exit of associated industries;
  - loss of future direct investment in rebuilding domestic production capacity due to the perception of investor risk of recurrent 'episodic dumping' by exporters with a proclivity for dumping activity, or supported by country of export WTO-illicit subsidy programs; and
  - loss of downstream competitiveness of end-users caused by medium-term price increases, and loss of microeconomic efficiency in their (upstream) supply markets.

In other words, any short-term market reductions in price (and increases in market volume) are lost in the medium and long-term. This is demonstrated in a series of market equilibrium graphs contained in *Box 1*, below.

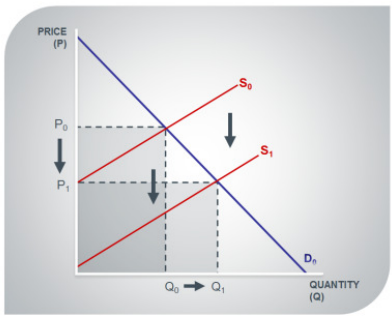
[4] One such example is the use of export tax rebate incentive schemes, design to promote export activity during periods of weak domestic demand. The *Centre for Economic Policy Research*, recently referred to the use of such measures by China as operating "what amounts to a **surgical system of export management, altering certain tax rebates to exporters to adjust the incentive to ship goods on to world markets**" [**emphasis added**] (Source: Evenett, S.J., *Global Trade Alert's Pre-G8 Summit Report,* Centre for Economic Policy research, London (2013) at p. 7.

Box 1: The effect of dumped and subsidised imports on domestic goods markets

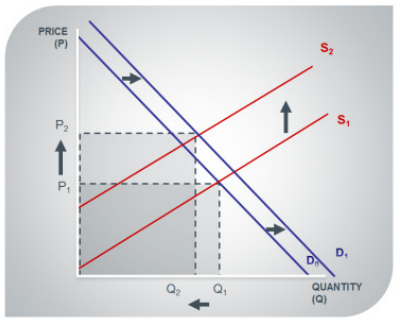
The short-term effect of dumped and/or subsidised imports on the domestic good's market is to increase supply by causing the supply (S) curve, below, to shift from S_0 to S_1, thereby increasing quantity of goods (from Q_0 to Q_1) and reducing the price of goods (from P_0 to P_1) (see *Graph 1*, below).

However, in the medium-term, the reduced price causes the demand (D) curve to shift from D_0 to D_1. Of itself, this would result in both an increase in price and quantity. However, the reduced price in the domestic goods market also reduces the attraction for investment in the domestic market by local producers and importers of undumped goods. As a result, domestic production and undumped import volumes decline, thereby causing the supply (S) curve to shift from S_1 to S_2, decreasing the quantity of goods (from Q_1 to Q_2), and increasing the price of goods (from P_1 to P_2) (see *Graph 2*, below).

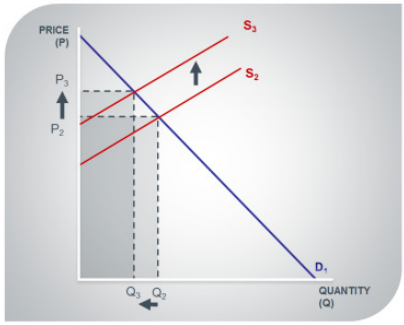
Over the long-term, the risk of 'episodic dumping', with the consequence of below capital markets' required returns on investment, makes capital for investment by the domestic industry, and importers of undumped and unsubsidised goods, more difficult and expensive to obtain. This in turn constrains capacity and reduces supply, causing the supply (S) curve to shift from S_2 to S_3. In extreme cases this also results in the exit of domestic industry and causes non-dumped and non-subsidised market participants to exit the market, further suppressing supply within the Australian market. This in turn causes the quantity of goods sold in the market to decrease (from Q_2 to Q_3), and the price of goods to increase (from P_2 to P_3) (see *Graph 3*, below).



Graph 1: *Short term effects*



Graph 2: *Medium-term effects*



Graph 3: *Long-term effects*

In summary, quite apart from the injurious impacts of dumping and subsidisation on domestic producers of like goods in the target market, dumping and subsidisation has serious impacts on the Australian market's competitive conditions, with the result that dumping and subsidisation may cause a substantial lessening of competition.

Arrium notes the argument of the Productivity Commission in its 2009 report[5] that:

> *"A long standing argument for anti-dumping measures is to counter predatory behaviour aimed at driving local suppliers from the market, in order to allow the overseas supplier to ultimately charge higher prices and reap monopoly profits. However, the market circumstances that would allow an overseas supplier to employ dumping to create anything other than a transitory monopoly are very narrow. Specifically, there would need*

[5] Productivity Commission, *Productivity Commission Inquiry Report No. 48: Australia's Anti-dumping and Countervailing System*, Canberra (18 December 2009)

> *to be limited competition amongst global suppliers of the goods concerned and constraints on the re-entry of local suppliers, or the emergence of new suppliers, once import price levels rose.*
>
> *"Significantly, for almost all of goods recently subject to measures in Australia, there have been multiple sources of global supply (see chapter 3). Reflecting this, most inquiry participants acknowledged that countering predatory behaviour is not the focus of Australia's anti-dumping system."*[6]

However, the above statement ignores the impact of dumping on the capacity of market participants, be they the local Australian industry or legitimate importers of non-dumped and non-subsidised goods, to invest the development of mature, efficient and responsive markets in Australia. By this, Arrium means investment in the market infrastructure that goes beyond just price; for example, investment in distribution networks (built around warehousing and short-lead delivery time frames), quality assurance and innovation in response to unique Australian market conditions, co-development and compliance with downstream customer product standards and specifications, and management of warranty, safety and liability assurance issues. Importers of dumped and/or subsidised goods engage in rent seeking behaviour, in so far as they obtain the benefit of the market infrastructure without absorbing those costs in their business. In the short-term, this may appear to be a sustainable value proposition; however, once domestic industry and legitimate importers exit the Australian market, prices either increase, or consumer utility suffers. Given the openness of the Australian market, it is unreasonable to assume that there would be a re-entry of local suppliers or the emergence of new suppliers once prices increase (as the Commission assumed would occur in its 2009 report), as the risk of recurrent dumping would suppress capital markets' appetite to invest in the Australian market, or result in charging such a high cost of capital to do so that local suppliers or potential new suppliers would be unable to compete.

In the balance of its submission, Arrium proposes to respond to the following matters to be considered by the Commission in its current Research Paper:

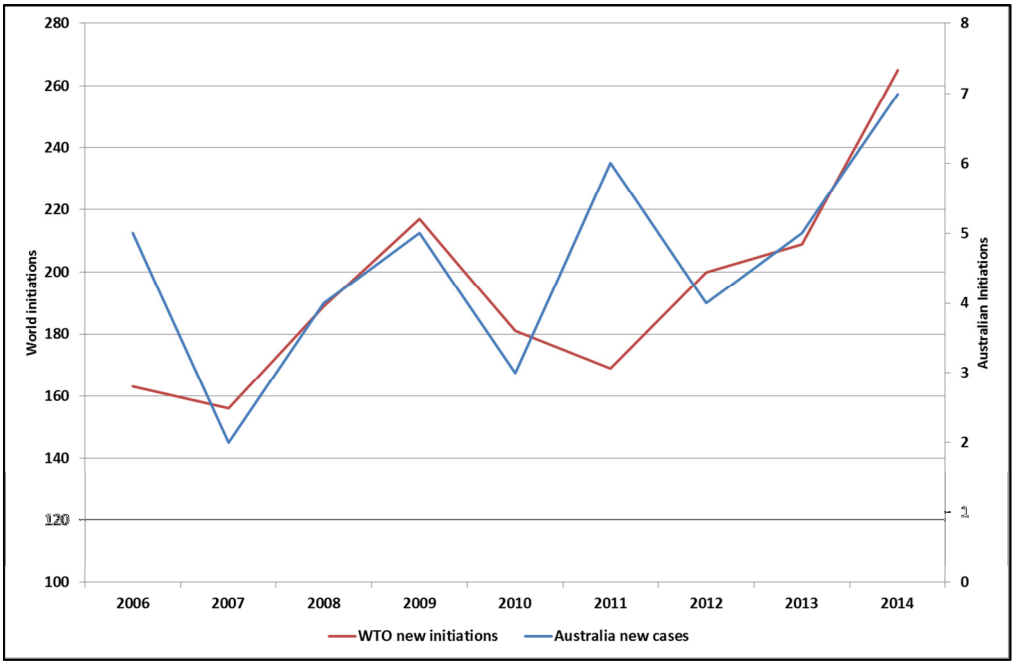
- trends in anti-dumping activity and possible drivers of these trends;
- how the anti-dumping system is operating, including outcomes for local industries and consequences for broader economic, trade and competition policy goals; and
- any opportunities to improve outcomes from Australia's anti-dumping system.

[6] *Ibid.*, at p. 41

Arrium Limited
ABN 63 004 410 833
Level 40, 259 George St, Sydney NSW 2000
GPO Box 536, Sydney NSW 2000, Australia
P +61 2 9239 6666
F +61 2 9251-3042

I. Trends in anti-dumping activity and possible drivers of these trends

At the outset, it is important to understand that international factors drive anti-dumping activity – not domestic Australian market factors. Therefore, it is no surprise that the incidence of international anti-dumping activity closely follows Australian anti-dumping activity, as *Graph 1* below, illustrates.



Graph 1: *Dumping and countervailing initiations (investigations), Australia and WTO total (Sources: Australian Anti-dumping Commission, Electronic Public File and WTO, https://www.wto.org/english/tratop_e/adp_e/adp_e.htm)*

Since 2010 there has been an increase in global anti-dumping activity, which has been reflected in an increase in Australian cases. The increase in anti-dumping activity has largely been caused by slowing rates of global economic growth, resulting in supply exceeding demand. In some industries, this is caused by production capacity that is not independent of demand factors. As a result, surplus supply that cannot be sold domestically (and to traditional export markets) must be sold through new export markets in an effort to support domestic market prices. Typically, new export markets are penetrated by *marginally pricing* the exported goods. 'Marginal pricing' or sales at marginal cost - that is, at less than the fully absorbed cost to make and sell the goods – is, in effect, dumping. However, it is important to understand that 'marginal pricing' and dumping will not necessarily dissipate when overall global economic demand conditions improve. This is because of disparity between regional economic conditions, in that as long as the economy of the exporter has surplus supply and capacity (albeit from different exporters from different countries), then the strategy of 'marginal pricing' will continue. The spiral of 'marginal pricing' and dumping is more likely to end only when the domestic (and traditional export) markets of the exporter have restored demand and supply equilibrium, and the exporter is again motivated to return to a strategy of full cost-absorption and profit. This relationship between global and regional economic conditions and the incidence of dumping may be seen in the trend for WTO new initiations tracked in *Graph 1* above, and the decline in anti-dumping activities just prior to the global financial crisis of 2008.

Certain goods, especially largely standardised 'commodity-type' goods, are particularly prone to being 'marginally priced' during periods of slowing economic conditions. This is because they are typically capital intensive, and have a high fixed cost structure (that may only be defrayed through output volume), and/or they are manufactured using technology that must be fully utilised – examples exist in the glass, steel, aluminium, chemicals and plastics industry.

In the steel industry, the use of the blast furnace to produce iron is an example of a commodity-type product being both capital intensive and relying on a technology that must be fully utilised, regardless of demand-side factors. As a result of China's reliance on blast furnace technology, the global (not just Australian) steel industry is experiencing an epidemic of dumped exports from China. This is explored in the following case study (refer *Box 2*, below).

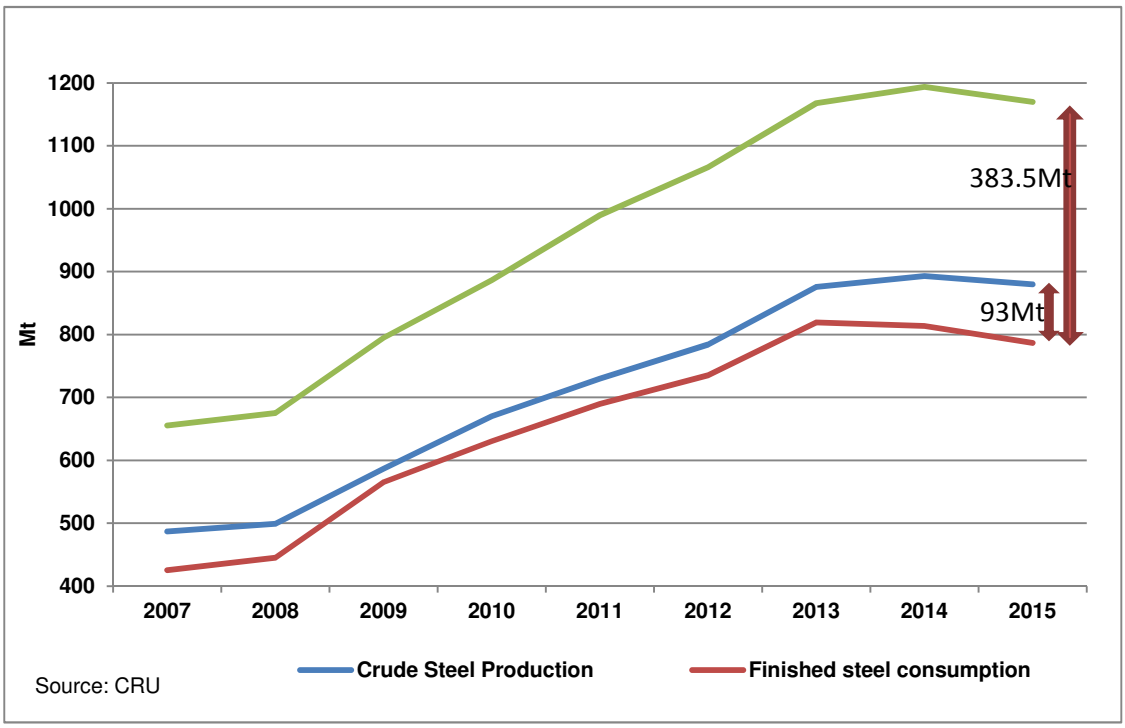
Box 2: *The relationship between China's steel capacity overhang and anti-dumping activity*

China is the world's largest crude steel producer and has the world's greatest steel production capacity.

In 2014, China accounted for 49.4% of global crude steel production, or 822.7 million tonnes[7]. Of China's total crude steel production, 93.9% is by blast furnace and basic oxygen furnace production[8]. Steel production by blast furnace and basic oxygen furnace technologies are not as responsive to demand drivers as Electric Arc Furnace steel production. The production of iron through a blast furnace is a continuous process. The furnace is heated constantly while being charged with raw materials from the top while it is being tapped from the bottom. The decision to reduce capacity on a blast furnace or shut down a blast furnace for an extended period must be made with the utmost caution. This is because each blast furnace has a specific design capacity and technical limits to utilisation reduction. The decision to operate below the technical utilisation limits inevitably leads, in the first instance, to major operational problems that can result in expensive repair and, at worst, critical failure and complete rehabilitation. For example, in 2009 the reline of the *No. 5* blast furnace at BlueScope's Port Kembla facility is reported to have cost AU$ 372 million and 100 days of lost production[9]. Under-utilisation of the blast furnace also risks the operation of the coke ovens that feed it (which are even less operationally flexible).

Therefore, Chinese steel producers are more exposed to either a domestic or global downturn in steel demand, generated by their inflexible production capacity. This problem is known throughout the international steel community as China's 'capacity overhang', and can be best illustrated through the graphic below:

[7] World Steel Association, *World Steel in Figures 2015*, Brussels (2015) at p. 9
[8] *Ibid.*, p. 10.
[9] https://www.hatch.com.au/Mining_Metals/Iron_Steel/Projects/bluescope_no5_blast_furnace_reline.htm (Accessed, 1 October 2015)



Graph Box 2.1: *Chinese domestic crude steel production, capacity and domestic finished steel consumption (millions metric tonnes)*

The decline in domestic finished steel consumption since 2013 has not been matched by a reduction in domestic crude steel production, resulting in a 'capacity overhang' of 93 million tonnes, which grew by 16.5% on the previous period (79.8 million tonnes). In 2014, China's export volume of steel equated exactly to the volume of capacity overhang, namely 92.9 million tonnes[10]. In other words, China has exported its production and supply-side problems to the world.

This has been met by a rush of trade remedy actions by international administrations seeking to redress the attempt by Chinese steelmakers to 'export' their problem to global steel markets. For example, in 2014, China was the target of 38 separate impositions of anti-dumping duties on steel products by international WTO mandated anti-dumping administrations[11]. In addition to anti-dumping actions by countries affected by China's steel capacity overhang problem, many have also sought urgent relief by use of safeguard's actions and other tariff and non-tariff interventions[12].

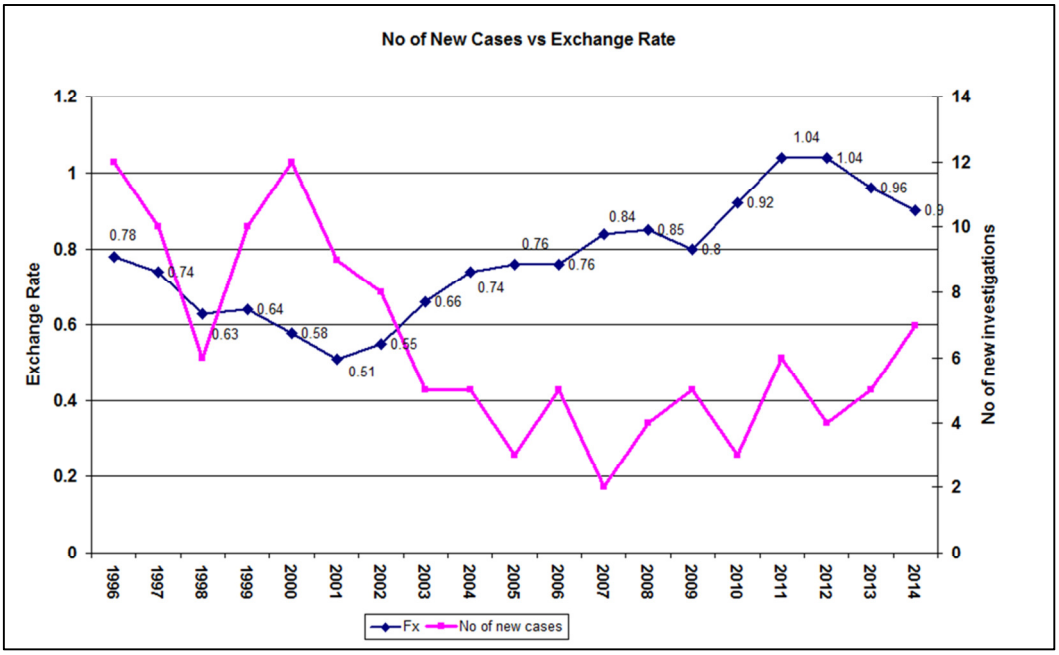
With resistance to dumped Chinese steel production by major global steel markets, Chinese exports of surplus 'marginally priced' (technically 'dumped') steel products are now targeting Australian domestic steel markets. In the case of Arrium's steel making business, OneSteel, this has resulted in the need to

[10] *Ibid.*, p. 27.
[11] UBS Global I/O, *Global Steel Supply and Demand*, 9 March 2015, p. 8.
[12] For example, in the case of *concrete steel reinforcing bar exported from China*, in addition to dumping and countervailing duties imposed by Canada and the European Union, four countries have increased import duties against Chinese exports of between 5% - 40%, Indonesia has imposed import quotas, and other countries have intervened by border control activities.

address the material injury caused by dumped Chinese production by applying for two new dumping investigations within the first half of 2015 concerning intermediate steel products exported from China[13].

Given that China's current steel production overcapacity (383.5 million tonnes) is **more than four times** China's steel production surplus (93 million tonnes), Arrium does not believe that the export of 'marginally priced' steel will abate any time soon (refer *Box 2*, above).

So strongly entrenched is the need for global producers of commodity-type products to displace domestic surplus supply through global merchandise trade markets, that even the recent devaluation in the Australian dollar on foreign exchange markets is completely de-coupled from the pricing decisions of foreign exporters who are prepared to sell surplus supply at a loss. Indeed, *Graph 2*, below, illustrates that the growth in anti-dumping activity in Australia is independent of exchange rate movements.



Graph 2: *AUD/USD exchange rate and number of new anti-dumping investigations (Sources: Reserve Bank of Australia and Australian Anti-dumping Commission)*

Therefore, given that Australian anti-dumping activity follows global trends, and that the devaluation of the Australian dollar exchange rate provides no real competitive advantage to domestic industries against dumped imports sold into the Australian market, Arrium considers that the number of applications for anti-dumping action is unlikely to abate and more likely to increase. As there is effectively no other means available to Australian industries to offset the price distortions generated in domestic markets by dumped and/or subsidised goods, the only WTO trade remedy available is an anti-dumping and/or countervailing application - in spite of the availability of the third limb of trade remedy actions, namely safeguards (refer *Box 3*, below).

[13] *Dumping Investigation No. 300*, 'Steel reinforcing bar exported from China'; and *Dumping Investigation No. 301*, 'Rod in coils exported from China'.

Box 3: Safeguards actions in Australia

Safeguard measures are not commonly used in Australia. However, this is not the case in overseas jurisdictions. Australia's most recent safeguard inquiries were held in 1998, 2008 and 2013, concerning the pig, pig meat and canned fruit (tomatoes and peaches) industries. None have resulted in the imposition of safeguard measures.

By contrast, our major trading partners are frequent users of safeguard measures. For example, in 2015 the *Indonesian Safeguards Committee* proposed a safeguards measure in the form of an import duty to be applied to wire rod imports to avoid further material injury to the Indonesian domestic industry.

Safeguard measures are emergency measures and they take the form of tariffs, tariff-rate quotas and quota restrictions. Safeguards can only be imposed as a response to unforeseen increases in imports that have caused serious injury to industry. The WTO *Agreement on Safeguards* requires that there is 'clear' evidence by the industry that the increase in imports has been 'unforeseen'. In particular, the evidence must show that the increase in imports has been 'recent enough, sudden enough, sharp enough and significant enough' to have caused or be likely to cause serious injury to the industry.

The imposition of safeguard measures by our nearby trading partners contribute to the problem of over-supply in global steel markets (discussed in *Box 2*, above). In the case of wire rod, Arrium found that the Chinese over-supply of goods, on meeting resistance in Indonesia and other economies that had already imposed anti-dumping measures, sought to be displaced into the Australian market. As a result, Arrium's steel making business, OneSteel, applied for the imposition of anti-dumping measures against Chinese exports of wire rod products in June 2015[14].

In the Commission's 2009 report, the concept of 'episodic' dumping was described[15] as a practise of 'hit and run' dumping. Implicit in the Commission's treatment of this phenomenon was the unsustainability of protracted dumping. Unfortunately, the Commission failed to account for the chronic 'capacity over-hang' that exists for certain capital intensive commodity-type products, which cannot be meaningfully reduced in the short-term without causing mass-social and economic dislocation in those exporting economies, and the role of foreign government subsidy programs plus export tax incentive schemes in sustaining over-capacity and surplus supply (refer *Box 4*, below). In other words, the emergence of capacity over-hang and widespread subsidisation of the exporting country's industries has resulted in a paradigm shift that means that the incidence of dumping will not automatically self-correct once global economic conditions return to a state of supply and demand equilibrium[16]. Therefore the Commission's view that "a concern to remediate episodic dumping might effectively become a rationale for long-term industry protection" is flawed.

[14] Anti-dumping Commission, *Dumping Investigation No. 301*
[15] *Productivity Commission* (2009), at p. 41
[16] Quite apart from any regional economic disparity resulting in supply/demand disequilibrium

Box 4: The emergence of Chinese countervailable subsidy programs

The Australian Anti-dumping Commission has consistently found the Government of China supports a number of countervailable subsidy programs across the steel, aluminium and chemicals industries.

Most recently in *Subsidy Investigation No. 237*, relating to Silicon Metal exported from China, the Anti-dumping Commission countervailed 39 subsidy programs with a margin of up to 37.6%.

Although significant in itself, the outcome of Australian subsidy investigations concerning China tend to understate the extent of countervailable programs in operation in China. For example, in the recently concluded *Canada Border Services Agency* investigation concerning steel reinforcing bar exported from China to Canada, the authorities there countervailed over 170 subsidy programs with a margin of up to 14.7%[17].

II. How the anti-dumping system is operating, including outcomes for local industries and consequences for broader economic, trade and competition policy goals

Australia's anti-dumping system ensures that the Australian economy encourages the growth, development and investment in industries with a truly sustainable comparative advantage. The export to Australia of dumped and subsidised goods causes price distortions within domestic markets. At one level, dumped and subsidised goods represent price distortion in that they are irrational price offers not reflective of the direct and tangible cost to make and sell the goods. As such, they are not sustainable and are therefore disruptive to efficient market operations in both the short and medium terms. Secondly, they represent price distortions in that they do not reflect the true economic cost of production, including negative externalities. Here, regard to the cost of occupational health and safety, environmental impact mitigation, basic employment standards and conditions cannot be reflected in the dumped and/or subsidised export price. And yet, Australian domestic industry members are required by law to incur these costs, and meet these standards. In being forced to compete against dumped and/or subsidised prices that are unable to recover their basic cost to make and sell (let alone negative externalities), the Australian industry and legitimate importers of undumped goods are penalised, and in the case of their exit from domestic Australian markets, the comparative advantage that they in fact held is also permanently lost.

The externalities referred to above are not just confined to broader economic and community outcomes, but also relate to microeconomic outcomes.

In terms of microeconomic outcomes, dumped and/or subsidised goods degrade the infrastructure of the Australian domestic markets in which the goods are traded. Australian industry members and legitimate importers of undumped goods invest in the infrastructure of their markets. In the case of the Australian steel industry, this involves (to name but a few):

[17] Canada Border Services Agency, *Statement of Reasons concerning the final determinations with respect to the subsidizing of certain concrete reinforcing bar originating in or exported from the People's Republic of China*, 4218-39 CV/138, Ottawa, (23 December 2014), p. 38.

- the distribution networks (including warehousing and just in time delivery terms);
- co-design to achieve product innovation and maximise the efficiency and value proposition of Australian downstream customers; and
- the creation and upkeep of product standards and conformance.

On the other hand, dumped and/or subsidised goods are rent-seeking in their behaviour, taking advantage of existing supply channels to market of industry standards, neither investing in or factoring the cost of such investment in their export price proposition to the market. Again, this represents a price distortion, and in economic terms causes disruption to markets in the medium to long term – especially if local industry or legitimate exporters exit the market. Where Australian domestic markets do not factor in these externalities, as occurs in the case of markets disrupted by dumped and/or subsidised goods, then the costs are either pushed downstream to the customer, or the market loses overall efficiency as the institutional structure (or infrastructure) of the market deteriorates. At its extreme, market participants with a true comparative advantage to compete in the market are forced to exit due to the artificially low pricing imposed upon it by the dumped and/or subsidised goods.

Although the anti-dumping system is not equipped to fully factor in all externalities, it does attempt to value the true comparative cost of economies. In the case of dumping, it does this by enforcing upon the exporter the discipline of exporting at prices no less than it profitably trades at within its home market – the assumption being that the price is reflective of microeconomic conditions and costs in that foreign market. In the case of subsidies, the system forces the exporter to account for the unsustainable advantages (i.e. non-comparative advantages) of its production, and rely only on its true comparative economic advantages. In this way, the Australian domestic industry is required to compete on fair terms.

That the Australian anti-dumping system is not anti-competitive is also evidence by the existence of the 'WTO –plus' adoption of the *Lesser Duty Rule*. This discipline ensures that where dumping and/or subsidisation is found to exist, that measures proportionate to the amount required to remove the injury suffered by the domestic industry is applied. In other words, there is no opportunity for the Australian domestic industry to create, as the Productivity Commission unfairly expressed in 2009, a "rationale for long-term industry protection"[18]. Although there are some problems with the operation of the *Lesser Duty Rule* (discussed below), it does provide a reasonable measure by which those manufacturers with a truly sustainable comparative advantage are allowed free and fair access to the domestic market unfettered by the price distortions caused by dumped and/or subsidised goods.

In this way, the anti-dumping system ensures that the microeconomic goal of efficient, competitive markets, reflective of sustainable pricing, is achieved.

[18] *Productivity Commission* (2009) at p. 41.

III. Opportunities to improve outcomes from the anti-dumping system

i. Form of measures

Currently, the efficiency of Australia's anti-dumping system is being eroded through the circumvention of measures imposed.

Circumvention is damaging to the operation of domestic markets in Australia, and precipitates price distortions and confusing price signals to market participants. The Anti-dumping Commission is contributing to this confusion through the use of *ad valorem* duties as the form of measures imposed. This problem can be easily remedied, and the solution was recently the subject of a recommendation of the *House of Representatives' Committee Inquiry*[19]:

> *"The Committee recommends that the Minister, in imposing any antidumping duties, should use a combination of duties in preference to a single duty. This should be the default position in each case, unless it can be demonstrated by the Minister that a single duty is more suitable than a combination"*[20]

Currently, the Anti-dumping Commissioner routinely imposes anti-dumping measures in the form of *ad valorem* duty rates. These are circumvented by exporters by simply further reducing the export price by the amount of the *ad valorem* duty rate. As dumping is a function of marginally pricing production, exporters are able to continue to make a contribution to margin even if circumventing the anti-dumping duties, as demonstrated in the example contained in *Box 5*, below.

[19] House of Representatives - Standing Committee on Agriculture and Industry, *Circumvention: closing the loopholes - Inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures*, Canberra, May 2015.
[20] Ibid., at p. xiii.

Box 5: Exporter circumvention of *ad valorem* duty rates

Exporters found to be dumping may continue to drop prices and cause injury to the Australian Industry.

Assume:

Normal Value of product	**= $660/t**
Full CTMS	**= $600/t**
Fixed costs	**=$120/t**
- Marginal cost (scrap, electricity etc)	***=$480/t***
Export price to Australia	**= $630/t**
Dumping margin ($30/$630)	**= 5%**
Based on 10,000t exports, contribution	**= ($630/t-$480/t) x 10kt = $1.5m**
Example 1 - Exporter reduces price by 5%	
Export price to Australia	**= $599 +5%DM ($628/t)**
Exporters contribution/t	**= $599-$480 = $119/t**
Exporter's annual contribution (based on 10,000 t)	**= $119/t x 10kt = $1.19m**
Example 2 - Exporter reduces price by 10%	
Export price to Australia	**= $567 +5%DM ($595/t)**
Exporters contribution/t	**= $567-$480 = $87/t**
Exporters annual contribution	**= $87/t x 10kt = $0.87m**

As the example in *Box 5* illustrates, even after the imposition of duties, the exporter is able to circumvent the measures and still make a contribution to margin (but not overall profit).

Australia operates a prospective anti-dumping collection system, where the administering authority determines in an investigation (or review) what the non-dumped price (i.e. "normal value") or the subsidy rate is, and those results are used to make an interim assessment of duty on each import transaction at the time of entry.

Thus, the injurious dumping or subsidisation is remedied, and companies know in advance what the actual fairly traded cost associated with each potential supplier is and can make informed decisions on choice of supplier and pricing.

The combination method gives importers and exporters a guide of an export price above which they can trade with certainty.

The bi-annual *Final Duty Assessment* process then permits importers to test whether or not each import transaction at the time of entry was in fact dumped or subsidised using contemporaneous data. If the goods were not dumped, importers are entitled to a repayment of duty.

On the other hand, there is no right or power to collect a short-fall in duty if the amount of dumping has increased, which can potentially occur under a prospective dumping duty collection system where *ad valorem* rates alone are applied.

In fact, where *ad valorem* measures alone are applied in a prospective dumping duty collection system, then this provides an immediate incentive to change pricing behaviour to avoid dumping duties – a reduction in export price reduces the amount of duty collected, with an increase in dumping activity over time.

In this case, there is no incentive for the importer to apply for a *Final Duty Assessment*, nor would there be an incentive for the exporter to apply for a variable factors review. It would be incumbent on the Australian industry to apply for a variable factors review, which cannot occur less than 12 months after the original imposition of duties (or previous review inquiry).

On the other hand, the combination method provides a built-in disincentive to reduce export prices to avoid duties, as to do so would result in an immediate increase in the duties assessed. Thus, not only would a combination method provide an effective remedy in a prospective duty assessment system, but it would also reduce duty collection problems.

Similarly, the combination method reduces the incentive to use 'difficult to detect' "off-invoice" discounts and rebates, as the *ad valorem* component is still applied to the higher of either the ascertained export price or FOB export price.

ii. Rationalising exemption to measures processes

Provisions exist within the *Customs Tariff (Anti-dumping) Act 1975* (the "*Dumping Duty Act*") that permit the Minister to exempt certain goods from interim duties in certain circumstances.

Subsection 8(7) of the *Dumping Duty Act* provides for the exemption of goods from interim dumping duty, and subsection 10(8) applies similar provisions for the exemption from interim countervailing duties. The provisions allow for the Minister, by a notice, to exempt goods from interim duties where satisfied, *inter alia*:

(a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade; or

(b) that a Tariff Concession Order (under Part XVA of the *Customs Act*) ("TCO") in respect of the goods is in force; or

(c) that the goods, being articles of merchandise, are for use as samples for the sale of similar goods.

Arrium supports the use of the exemption provisions where a current TCO exists. There is significant experience and legal precedent (both in merits and judicial review jurisdictions) in the operation of TCOs. The same cannot be said of the grounds for exemption under paragraph (a). Indeed, because the exercise of the Minister's discretion under paragraph (a) is not subject to merits-like review, and would only be subjected to judicial review in the most extreme circumstances of administrative decision making failure, it is unlikely that practice and precedent will evolve in a coherent or legally correct manner.

Further, Arrium notes that the language contained in paragraph (a) appears to represent a legacy from the antecedent anti-dumping provisions contained in the *Customs Tariff (Dumping and Subsidies) Act 1961*[21]. Reference to the antecedent Act suggests that "like or directly competitive goods" had the same meaning as the term "like goods" does under the current provisions of Part XVB of the *Customs Act 1901* ("*Customs Act*"). Support for this interpretation may be found in section 269TG of the *Customs Act,* which reflects the language of the equivalent provisions found in the now repealed Act of 1961.

In other words, reference to "like or directly competitive goods" in the *Dumping Duty Act* should be interpreted no differently to the term "like goods" under Part XVB of the *Customs Act*. Such a view would be in no way inconsistent with the purpose of the provisions of subsections 8(7) and 10(8) of the *Dumping Duty Act*, because the aim of those provisions, specifically paragraph (a), are to create an exemption in circumstances in which "like or directly competitive goods" or "like goods" are "not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade". Therefore, the purpose of the exemption is not to distinguish a separate class of the goods based on their properties or characteristics, but rather in terms of the condition on which they are sold into the Australian market.

However, this is in no practical way different to the circumstances under which a TCO may be granted under Part XVA of the *Customs Act*. In other words, paragraph (b) is duplicated by paragraph (a).

Section 269C of the Customs Act provides that a TCO may be made in the following circumstances:

> *"For the purposes of this Part, a TCO application is taken to meet the core criteria if, on the day on which the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business."*

Sections 269D and 269E define the terms "goods were produced in Australia" and "in the ordinary course of business", respectively. However, for the purpose of this submission, it is Arrium's position that the circumstances in which a TCO should also cover the field is apparently anticipated by paragraph (a).

Arrium notes that exemption applications under the *Dumping Duty Act* are growing in number. The majority of applications still relate to TCOs, which - where they exist and remain current - are routinely granted. Given that the existence of a TCO should cover the circumstances under which an exemption under

[21] The *Customs Tariff (Anti-dumping) Act 1975* repealed the Customs Tariff (Dumping and Subsidies) Act 1961.

paragraph (a) is granted, we consider the latter redundant. In fact, given the circumstance under which a paragraph (c) exemption will be made is rare, Arrium submits that the exemption provisions under the *Dumping Duty Act* should be revoked, and exemptions routinely granted in the case of TCOs while they are in force. This will reduce the resources required within the Anti-dumping Commission required to administer a scheme that duplicates the work performed by the TCO Branch within the *Department of Immigration and Border Protection*.

iii. Improving transparency

Once imposed, it is impossible for stakeholders in the anti-dumping system to monitor or measure the efficacy or enforcement of anti-dumping measures.

As the goods subject to measures are often narrower than a single tariff classification, or in some cases may be subject to several different tariff classifications, it is seldom possible to rely on published *Australian Bureau of Statistics* data alone. This is further compounded by confidentiality requests by importers that permit the suppression of import statistics.

Therefore, once anti-dumping measures are imposed, Arrium advocates for the publication of a periodic declassified report of:

- total volumes of imported goods subject to anti-dumping duties;
- total value of anti-dumping duties collected; and
- total volume of goods subject to duties by country of origin and port of discharge (subject to confidentiality).

The aggregation of this data should ensure that individual exporters and importers are not identified, while still permitting stakeholders to comment on the effectiveness of the measures.

iv. Whole of government approach to anti-dumping system

Notwithstanding the 'machinery of government' changes in March 2014 with the transfer of the Anti-Dumping Commission from the former *Australian Customs and Border Protection Service* to the *Department of Industry, Innovation and Science*, the former Customs (now *Department of Immigration and Border Protection*) remains responsible for duty collection, compliance and enforcement. Arrium submits that a restatement of *Border Protection's* responsibilities in Australia's anti-dumping system needs to be made, together with initiatives designed to facilitate collection, compliance and enforcement of measures.

One such initiative would be the routine use of the *Border Protection's Infringement Notice Scheme* where the 'successful' outcome of an anti-circumvention inquiry is the imposition of the correct amount of duty payable by the importer, backdated to the date of initiation of the inquiry. Currently, there is no penalty for circumvention activity. Therefore, there is an incentive for exporters and importers to 'chance' the system, and to do so regularly. The solution would be simple, requiring that 'circumvention activity' be prescribed as an offence under Clause 4 of Schedule 1 ABA of the *Customs Regulations*.

v. Rationalising the account for profit under the Lesser Duty Rule

As noted above, the *lesser duty rule* operates within the Australian anti-dumping system to ensure that the amount of dumping and/or countervailing duty is not greater than is necessary to prevent injury or a recurrence of the injury.

The calculation of the non-injurious price ("NIP") provides the mechanism whereby this lesser duty provision is given effect. The NIP is the minimum price necessary to prevent the injury, or a recurrence of the injury, caused to the Australian industry by the dumping and subsidisation.

The Anti-dumping Commission will generally derive the NIP from an unsuppressed selling price ("USP"). The USP is a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports.

One approach to calculating the USP is the weighted average of the most recent verified industry cost to make and sell ("CTMS") information of the Australian industry applicant plus a reasonable amount for profit.

Currently, the Anti-dumping Commission considers the following options for determining a reasonable amount for profit:

> *"- weighted average profit rate (% mark-up) achieved by the industry in the most recent period unaffected by dumping, with a preference for a 1-year minimum; or*
>
> *"- profit rate (% mark-up) from the Australian industry's similar category of goods (where the data for similar category of goods is verified)."*

Although, the Anti-dumping Commission acknowledges that there may be circumstances where it is unreasonable to use either of the two options above for determining profit, the Anti-dumping Commission may consider the use a profit rate (% mark-up) calculated:

> *"- with regard to return on investment – **where the resultant price is considered reasonable**; or*
>
> *"- from appropriate profit surveys."*[22] *[**emphasis added**]*

Arrium considers that the current problem with the application of the *Lesser Duty Rule* in the Australian anti-dumping system is that the first two options allow for a devaluation of the return on investment required by capital markets in order for the survival of the Australian industry. The correct and preferable approach is that a reasonable amount of profit should be determined from an assessment of the required return on investment, having regard to reinvestment requirements in plant and equipment to ensure ongoing improvements in efficiency and productivity. The Anti-dumping Commission's caveat limiting the rate of return to "the resultant price" being "considered reasonable" is arbitrary and imposes an artificial view on the requirements of the industry to remain sustainable.

[22] Anti-dumping Commission, *Dumping and Subsidy Manual*, December 2013, p. 129.

Arrium submits that the Anti-dumping Commission's policy should be revised on this element of the *Lesser Duty Rule*.

vi. Improving evidentiary standards

Arrium is observing a decline in the Commission's evidentiary standards. A growing element of exporter and importer information is not being verified according to the standards applied under WTO practice, namely on-the-spot verification. In some cases, some exporters are being subjected to on-the-spot verification, whereas others are not – with wildly varying results. Further, post-investigation processes, such as reviews, inquiries and assessments, are not being subjected to any form of verification.

The *Customs Act* provides for the "sampling" of exporter information under section 269TACAA in certain circumstances, thereby providing the means by which the Anti-dumping Commission, and therefore the Parliamentary Secretary (as the delegate of the Minister), may be satisfied as to the reliability of information in those prescribed circumstances. Therefore, by implication, where the circumstances prescribed by section 269TACAA are not satisfied, then the Anti-dumping Commission is required to examine the information obtained from all exporters to the investigation (review or otherwise). The *Customs Act* is, unhelpfully, silent on the meaning of 'examine' in this context. However, as a matter of statutory interpretation, regard may be had to the WTO *Anti-Dumping Agreement*, specifically, Article 6.6, which provides in part:

> *"authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based"*

Indeed, the practice of on-the-spot verification is entrenched in Article 6.7 of the WTO Agreement, which provides:

> *"In order to verify information provided or to obtain further details,* ***the authorities may carry out investigations in the territory of other Members as required****, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation…"* (**emphasis added**)

Furthermore, the procedures described in Annex I to the WTO Agreement establish the practice of on-the-spot verification. This is the most common and acceptable standard applied by other Member States, and is considered best and sound evidentiary practice.

Therefore, it is Arrium's view that if the Anti-dumping Commission is unable to examine the information of each exporter's information to the standard required under the WTO Agreement, then the option of sampling is open to it. It is not open to the Anti-dumping Commission to apply a wholly haphazard approach to the examination of exporters' information, generating starkly varying outcomes, and therefore potentially discriminating against some exporters with preference granted to others, and with different standards of examination applied to the Australian industry and other interested parties.

This problem is further exacerbated in the case of post-investigation procedures, such as reviews, inquiries and assessments, where no verification of exporter or importer information occurs. This often results in a reversal or a deterioration of the original investigation's result as exporters and importers seek to 'game' the anti-dumping system on the assumption that on-the-spot verification will not occur. This is not only an inefficient outcome, but is completely unacceptable to Arrium.

Urgent reform is required to improve the evidentiary standards within Australia's system. A failure to do so will erode confidence across stakeholders and discriminates against interested parties.

vii. Revision of application form to encourage downstream applicants to apply

Arrium supports the need for greater use of Australia's anti-dumping system by its customers in the case of downstream dumping.

Often categorised by a large number of small and medium sized enterprises -spread across the country, potential downstream users of the system find it difficult to coordinate the resources necessary to complete the current application process. The approved form (B108) has not changed substantively for over a decade. The amount and consolidation of information required is extremely onerous for large numbers of disaggregated downstream members of an industry affected by the imposition of measures on upstream material inputs.

Arrium refers the Commission to the approach applied by the European Commission ("EC"), where following the initiation of an investigation on the strength of an application by a single or number of members of the downstream industry (subject to the support thresholds being met), other producer members of the industry are engaged directly by the EC through a tailored producer questionnaire[23], and SME producer members (specifically) are targeted through a tailored, SME-targeted questionnaire[24]. This assists a large number of members of a downstream industry to pursue their interests under the anti-dumping system, without the significant resources and delays that are otherwise incumbent under the Australian system's approach. It is observed that applications made by a large number of industry members are simply not present in the Australian anti-dumping system[25].

Conclusions

Arrium supports free and fair trade, and works actively towards achieving operational efficiency and improvements to productivity in line with world's best practice. However, the presence of dumped and/or subsidised goods in domestic Australian markets puts at risk their sustainability and degrades their efficient operation over time.

[23] An example of a typical producer questionnaire may be found at http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151937.pdf (Accessed, 30 October 2015)
[24] An example of a typical SME producer questionnaire may be found at http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151936.pdf (Accessed, 30 October 2015)
[25] The largest number of co-applicants was in *Dumping and Countervailing Investigation No. 177*, with three (3) industry applicants.

Arrium Limited
ABN 63 004 410 833

Level 40, 259 George St, Sydney NSW 2000
GPO Box 536, Sydney NSW 2000, Australia

P +61 2 9239 6666
F +61 2 9251-3042

Without an anti-dumping system, less efficient suppliers are permitted to engage in rent-seeking behaviour within markets established and supported by the domestic industry and legitimate importers, who invest in the infrastructural settings of the market and reflect those costs in their value proposition to their customers. Dumped and/or subsidised imports are permitted to undercut that value, without reflecting these externalities in their price.

Dumping is reflective of 'marginal pricing' caused by supply/demand disequilibrium, and is most prominent in markets for 'commodity-type' goods with high fixed costs or production technology that does not easily adjust to demand factors. Periods of global economic downturn tend to be marked by an increase in anti-dumping activity, as suppliers are unable to clear goods through domestic (and traditional export markets) on a fully cost absorbed basis and profit, and look to unprofitably off-load supply to new markets at 'marginal prices'. However, regional economic disparity may also generate the motivation for some suppliers to export goods at less than full-cost plus profit. Subsidies incentivise this practice and artificially allow exports of goods destined to erode legitimate competitors with a true comparative economic advantage in the target market.

The Australian anti-dumping system is generally fair; however, there are areas that warrant improvement to ensure that it continues to support the creation of competitive and sustainable markets for goods in Australia. Some of these improvements relate to policy settings that can be easily improved. For example, the imposition of measures according to the combination method (as compared to *ad valorem* duties), improving the *Lesser Duty Rule* to reflect capital market conditions for economic reinvestment and improvements in operational productivity, non-discriminatory evidentiary standards according to existing legislative permissions, greater transparency of the quantum and impact of imposed measures, and application processes that encourage the participation of small and medium sized downstream industries.

Some reforms that would require minor legislative adjustment include rationalising the duty exemption process and clarifying the role of *Border Protection* in the collection, compliance and enforcement of measures.

Finally, Arrium submits that Australia's anti-dumping system is worthy of ongoing whole-of-Government support and improvement, as it has the capacity to sustain both broader economic and microeconomic market objectives.

If you would like clarity on any of these points, please do not hesitate to contact me.

Once again, Arrium thanks the Commission for the opportunity to participate in this important research initiative.

Yours sincerely,

Stephen Porter
General Manager Trade