Anti-Dumping Authority

Tender dumping

Report No. 77
June 1992

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The Hon David Beddall MP
Minister for Small Business,
Construction and Customs
Parliament House
CANBERRA ACT 2600

Dear Minister

I forward to you the Authority's report No. 77 on tender dumping in accordance with Subsection 9(1) of the Anti-Dumping Authority Act 1988

Yours sincerely

D J Fraser
Member
26 June 1992.

Anti-Dumping Authority

GPO Box 9839, Canberra, ACT 2601

The Hon David Beddall MP
Minister for Small Business,
Construction and Customs
Parliament House
CANBERRA ACT 2600

Dear Minister

I forward to you the Authority's report No. 17 on tender dumping in accordance with Subsection 9(1) of the Anti-Dumping Authority Act 1988.

Yours sincerely

D J Fraser
Member
25 June 1992

CONTENTS

1 PRELIMINARIES

1.1 The reference

The Anti-Dumping Authority is established under the *Anti-Dumping Authority Act 1988*. Section 5 of that Act defines the functions of the Authority. One such function (see s5(d)) is 'to prepare and give to the Minister reports under section 9'; and s9(1) of the Act in turn states that:

> The Minister may, by notice in writing delivered to the Authority, request the Authority to consider, and prepare and give to the Minister a report on, an anti-dumping matter specified in the notice, and the Authority shall comply with the request as soon as practicable.

On 25 February 1992 the Minister for Small Business, Construction and Customs, Hon. David Beddall MP, acting pursuant to s9(1) of the Act, asked the Authority to inquire into and report on 'tender dumping' in Australia. A copy of the Minister's letter to the Authority is at Attachment 1.

That letter stated, *inter alia*, that the Authority should examine the adequacy of the current legislation and recommend changes to overcome inadequacies or shortcomings identified during the inquiry. The Authority was also asked to have regard to Australia's obligations under the Anti-Dumping Code and the Subsidies and Countervailing Code of the General Agreement on Tariffs and Trade (the GATT), a multinational agreement to which Australia is a signatory.

1.2 Inquiry procedures

1.2.1 Call for submissions

The Minister's letter said that he envisaged that the Authority would report to him within 120 days.

The letter was received by the Authority on 26 February, which meant the report had to be forwarded to the Minister by Thursday, 25 June 1992.

Notices appeared in the *Australian Financial Review* and the *Commonwealth Gazette* of Wednesday, 4 March 1992 advising that the inquiry had commenced and inviting interested parties to make submissions to the Authority by 17 April 1992. A special Australian Customs Notice (ACN 92/50 of 12 March 1992) was also issued, to publicise the inquiry and invite submissions.

In addition, the Authority wrote to various industry associations, trade unions, Federal and State purchasing utilities and Departments, foreign embassies and other

parties whom the Authority thought might have some interest in the inquiry. In all, 75 such organisations were contacted.

During the inquiry, officers of the Authority met with representatives of a number of industry associations and State Government organisations.

1.2.2 Policies of the European Community, Canada and the United States of America

The Authority became aware early in the inquiry that the Canadian Government had been particularly concerned in the early 1980s about tender dumping and had, about that time, introduced into its legislation provisions designed to cope with the problem. It was clear, too, that the policies of some other major users of the GATT Anti-Dumping Code might be relevant to the Authority's inquiry.

A senior officer of the Authority therefore visited Canada, the USA and Belgium (home of the EC) to discuss tender dumping with officials of these governments and with representatives of industry in these countries.

1.2.3 State Government policies

The processes employed by Australian State Governments and State instrumentalities in calling tenders were (it became obvious early in the inquiry) likely also to be of interest to the Authority. To gain a first-hand appreciation of these processes, the Authority arranged for one of its senior officers to visit relevant State personnel and discuss with them their respective Governments' policies for the procurement of capital equipment.

2 THE CONCEPT OF TENDER DUMPING

2.1 Dumping and anti-dumping action

Goods exported to Australia are said to be 'dumped' if the export price of the goods is less than their normal value in the country of export.

The Australian Government's stated policy is that it will take action if, and only if, dumping causes or threatens material injury to the Australian industry producing like goods to those being dumped, or hinders the establishment of such an industry. That policy is enshrined in Australian legislation: see the *Customs Act 1901* (particularly Part XVB), the *Customs Tariff (Anti-Dumping) Act 1975* and the *Anti-Dumping Authority Act 1988*.

If these conditions are met, the 'action' taken is (usually) the imposition of a special duty of customs on all future imports of the goods in question. That duty is (usually) the amount needed to bring (in effect) the export price of the goods up to their normal value. The reader interested in more details may consult any of the Annual Reports of the Anti-Dumping Authority.

2.2 Provisions of the General Agreement on Tariffs and Trade and of the Australian legislation

Australia is a signatory to the GATT Anti-Dumping Code and her anti-dumping legislation is based on that Code.

Article 2 of the Code defines dumping as follows:

> 2.1 For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Of crucial importance to this inquiry are the words 'introduced into the commerce of another country'. The Code does not explain what precisely is meant by these words, nor are they used in Australia's legislation.

Perhaps curiously, Australia's anti-dumping legislation does not define the term 'dumping'. Subsection 269TG(1) of the *Customs Act 1901* states, in summary, that:

> where the Minister is satisfied, as to any goods that have been exported to Australia, that: (a) the amount of the export price of the goods is less than the amount of the normal value of those

> goods; and (b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, ... the Minister may [take anti-dumping action].

These words (and the very similar ones used in s269TG(2) of the Act) give effect to two aspects of the Code. One is that they implicitly define 'dumping': a condition for anti-dumping action is that the export price of goods is below their normal value. The other is that they implicitly define 'introduced into the commerce of another country' as meaning that the goods in question must *have been exported* to Australia.

2.3 A loophole?

These implicit definitions make perfect sense in the vast majority of dumping cases: the Australian industry producing (say) garden chairs becomes aware of competition from imported chairs which it believes are being dumped, i.e. exported at a price less than their normal value in the country of export; the industry lodges a dumping complaint; the Minister becomes satisfied, as a result of inquiries by Customs and the Anti-Dumping Authority, that the goods are indeed dumped and that the dumping is threatening material injury to the industry; the Minister takes anti-dumping action, which means that a special duty is levied on all future imports of the chairs from the exporter in question; and the threat of injury is thereby removed.

It is argued, however, that there is a minority of cases in which these definitions render anti-dumping action quite ineffective.

Suppose that an Australian purchaser (a State Electricity Authority, say) wants to buy a very large and complex piece of equipment (an electrical transformer, say) which will take months or years to build. The purchaser calls for tenders for the supply of the equipment. Companies within the Australian transformer industry submit tenders – and so does an overseas supplier. That last supplier quotes the cheapest price and wins the contract. The Australian industry believes that the overseas supplier has quoted at a dumped price – a price, that is, lower than the normal value of such a transformer in the supplier's own country. The Australian industry lodges a dumping complaint. The usual investigations show that the offer was indeed at a dumped price and that the loss of the contract represents material injury to the Australian industry.

What can the Minister do?

For a start, he cannot take anti-dumping action at that time: he cannot be satisfied, *as to any goods exported to Australia*, that ... , since no such goods *have* as yet been exported to Australia.

He can of course take anti-dumping action when the transformer eventually arrives, and impose a duty on it. But what good does that do the local industry? The transformer may not arrive for months or years; the injury (the loss of the work of constructing the transformer) was suffered by the industry at the time the contract with the overseas supplier was signed; and the imposition of a duty months or years later is merely punitive and does nothing to relieve that injury.

This, then, is the concept of 'tender dumping': that injury may be caused by the mere acceptance of a tender for supply from overseas, long before the goods in question are actually exported to Australia and thus long before anti-dumping action may be taken.

3 THE EXTENT OF THE PROBLEM

3.1 General comments on the submissions received

Chapter 2 above explains the concept of tender dumping. The Authority could, of course, have written these words at the very beginning of the inquiry: they constitute a definition, in principle only, of a problem that *could* possibly arise. One aim of the Authority's inquiry was to establish whether such a problem actually did arise in practice.

As mentioned in Chapter 1, the Authority invited submissions to its inquiry through the media and by writing directly to some 75 organisations. Interested parties were advised that the closing date for submissions was 17 April 1992, allowing them 40 days for lodgement.

By 17 April, the Authority had received only *one* submission.

A number of parties had telephoned before that date to advise that their submissions would be 'a few days late'. Some of these never did arrive. Others came in a lot more than 'a few days' late – one submission was received only three days before the Authority was due to report to its Minister.

By the final week of the inquiry, the Authority had received submissions from only nine organisations. Most of these were industry associations – only one submission was received from an individual company, and that company was based in Singapore.

The Authority is grateful to those parties who did provide submissions.

That said, the Authority was surprised by the general lack of information supplied to the inquiry by many associations and companies which purportedly were concerned about tender dumping. One industry association went so far as to ask the Authority to canvass its members directly, as the association itself was unable to get even a spark of interest out of them in supplying information – notwithstanding that its members complained bitterly about tender dumping and were pleased when the Government announced that an inquiry was to be undertaken.

Submissions made on behalf of Australian 'supplier' industries were unanimous in expressing deep concern about the *idea* of tender dumping, and about the threat which it *could* pose. Initially, however, absolutely no data were provided to indicate the *extent* of the problem or to indicate that a real, as opposed to theoretical, problem did indeed exist. This was despite the fact that the Authority had written beforehand to almost every organisation which eventually provided a submission, asking for as much hard data as possible.

The Authority made its views on the worth of these submissions clear to some of the authors, and some further information was eventually put before it.

The Authority also met with a number of organisations to discuss their submissions. The Authority found these meetings useful and wishes to thank the participants for their time and effort.

The Authority operates a public file system whereby all (non-confidential) submissions received are placed on a file which can be accessed by any member of the public. The various notices announcing this inquiry advised that this system would operate: yet only a handful of people sought access to the file – and almost all of these were consultants, not involved in the inquiry, who perused the file out of general interest.

The remainder of this chapter summarises, and comments upon, the information put before the Authority relevant to estimating the extent of tender dumping. It is organised into three parts, relating respectively to arguments put by the 'sellers', i.e. those organisations representing Australian companies which tender to supply equipment and feel themselves threatened by tender dumping; by the 'purchasers', i.e. those issuing requests for tenders and signing contracts to buy; and by other participants. It does not purport to cover every point raised in submissions. The full text of (non-confidential versions of) all the submissions is on the – thin – public file held by the Authority and accessible by any member of the public.

3.2. The sellers' arguments

3.2.1 AEEMA

The Australian Electrical and Electronic Manufacturers' Association Limited (AEEMA) was by far the most active participant in the inquiry – particularly on behalf of its members in the transformer industry. The association provided several submissions and met with the Authority. In addition, a senior officer of the Authority visited a number of transformer manufacturers to discuss their concerns.

The initial submission from AEEMA was completely devoid of data in support of its claim that tender dumping was a real problem for some of its members. Some information was later provided – but there was very little, and that which was provided appeared selective and was certainly inconclusive.

For example, in response to a written request by the Authority for information on sales in Australia of transformers in the last few years by the local industry and by overseas suppliers, AEEMA initially supplied data on Australian sales by overseas suppliers between January 1979 and March 1981. When the Authority pointed out that the data could hardly be called up-to-date, it was advised that information which had been supplied to the Authority in the context of a recent dumping case

(Transformers from Austria, see ADA Report No. 74 of May 1992) might fill in the gaps. It didn't.

AEEMA was eventually able to supply the information shown in Attachment 2 to this report: a list of ten occasions since 1982 on which, in the Association's view, tender dumping had occurred relating to the supply of electrical transformers. The first four entries relate to dumping from Finland, against which anti-dumping action was taken several years ago. The fifth and seventh entries relate to cases which have come before the Authority. In neither of these were the conditions for anti-dumping action established. The reader will note AEEMA's comment against entry number 7: 'price dumping proved'. That is correct: the Authority's Report No. 74 did indeed state that the export price was less than the normal value of the transformer – but only by 1.3 per cent, and only when the exchange rates (between Australian dollars and Austrian schillings) on certain specific dates were used; had the Authority used the exchange rates applying on slightly different dates, it would have concluded that the transformer was not dumped. And items six, eight, nine and ten in Attachment 1 hardly provide strong evidence that goods were dumped and that the dumping caused or threatened material injury.

No information was provided by AEEMA which would have allowed these alleged instances of tender dumping to be seen in the context of total Australian purchases of transformers.

The Authority also asked for financial data relating to the three local transformer companies for the last three years so that it could gain some appreciation of the general health of the industry. No such information was provided.

AEEMA submitted some data on tenders for electrical cable over recent years. Again, the information seemed tendentious. Thus it contained prices said to have been bid by local and overseas companies for sales which eventually went to the overseas firms, but gave no information at all on tenders won by the local industry. The covering letter said that 'As can be observed [from the attachment] there are numerous instances of where overseas suppliers have dumped on the Australian market'. In fact, the papers attached (provided in confidence and therefore not appended to the present report) showed only that on the listed occasions Australian bids had lost out to lower bids from overseas. They contained no information at all which showed dumping by overseas suppliers.

3.2.2 MTIA

The Metal Trades Industry Association of Australia (MTIA) provided a submission to the inquiry and also met with the Authority. As a result of the meeting, a further submission was lodged.

The MTIA believes that tender dumping is a problem of some magnitude in Australia. It provided virtually no evidence in support of that view.

The Association mentioned a call for tenders by a port authority and quoted the prices bid by one Australian and two Japanese companies: the three prices were in the rough proportions of 100, 90 and 80, the Australian being the dearest. The submission went on: 'As the manufacturing processes for this product are largely automated, it is difficult to establish why the Australian bid is so much higher. It is therefore suspected that there may be tender dumping ...'.

The second example provided related to an overseas company which is 'making significant impacts into [the relevant Australian] market'. The submission continued:

> Whilst we are not in possession of actual tender pricing, we understand that [the overseas company] is consistently 20-30% below Australian manufacturers' bids... It is difficult to establish why Australian bids are apparently so uncompetitive.

MTIA's only other 'case study' concerned a company which had lost a contract and which stated that 'The successful tenderer was an imported product at prices we established as being dumped in comparison to ours and we believe other locally manufactured and imported products'. The Authority notes that goods are 'dumped' when the export price is below the normal value of like goods *in the country of export*: the price of similar goods *in Australia* has nothing to do with the matter.

3.2.3 HEMA

The Heavy Engineering Manufacturers Association (HEMA) did not provide a submission to the inquiry. Instead, it asked for a meeting with the Authority – one week before the end of the inquiry.

The Authority agreed, of course, to the meeting; but it expressed to the Association its concern that, since no written submission was being made to the inquiry, the views expressed to the Authority could not be challenged, supported or otherwise commented on by other interested parties.

At the meeting, HEMA explained that its members obtain considerable business through the tendering system. Many tenders are called by private companies (as distinct from government utilities) and it is common practice for these companies to limit a request for tenders to participants of their choosing.

A major concern expressed by HEMA was that, although its members were convinced from time to time that a tender contract had been awarded overseas at a dumped price, they would not mount a dumping case for fear of being excluded

from future tenders – regardless of whether or not dumping measures were imposed.

HEMA explained that it was thus unable to provide any information to the Authority on the incidence of tender dumping.

3.3 The purchasers' arguments

3.3.1 Woodside Petroleum Limited

In its submission to the Authority, Woodside Petroleum Ltd said that it had only one experience of potential tender dumping. The overseas bidder had been advised that it would have to pay any dumping duty which might be imposed. The overseas firm subsequently withdrew its tender.

3.3.2 ESAA

The Electricity Supply Association of Australia represents the electrical generation, transmission and distribution industry throughout Australia. That industry is the major Australian purchaser of large electrical transformers.

In a submission to the Authority received late in the inquiry, ESAA provided a list of purchases of large (greater than 10 MVA) transformers since 1985 by electricity utilities in Western Australia, Victoria, New South Wales, Queensland and the Northern Territory (it stated that figures for Tasmania and Western Australia were unavailable at the time of writing). For each such purchase, the list showed the country of origin of the goods bought. ESAA further stated that all purchases of small (less than 10 MVA) transformers had been from Australian manufacturers.

The Authority compared the list with the information provided by AEEMA. The list did not, of course, contain details of Tasmanian and Western Australian purchases. One other overseas purchase mentioned by AEEMA did not appear on it, but it appears that this was an honest – and understandable – mistake: in a list of the sources of purchases made in 1989, the typist had typed 18 'Australias' instead of 17 'Australias' and one 'Austria'.

The amended list is reproduced at Attachment 3 to this report.

3.4 Other submissions

3.4.1 Australian Customs Service

In its submission to the Authority, the Australian Customs Service said that its records showed only four cases in the last five years in which tender dumping had been the major issue.

4 POSSIBLE SOLUTIONS

4.1 Other countries' experience

4.1.1 Canada

From the mid–1960s to the early 1980s, Canada's electrical transformer and generator industries were the major users of the anti-dumping system. During that time, Canada experienced significant growth in its hydroelectric power generation. Several applications for anti-dumping action were successful.

The industries were, however, most concerned at what became known as 'the one free bite'. The phrase was used to refer to the situation where anti-dumping action was taken – but only against imports resulting from *later* contracts. No action was possible against the goods imported under the contract which gave rise to the original complaint.

It may be useful to pause at this stage to consider how the Canadian legislation was then structured. The *Anti-Dumping Act 1968–69*, the governing legislation prior to 1985, contained the following words:

> Section 2(1), interpretation: 'Sale' includes agreement to sell.
>
> Section 10(1) : The export price of any goods... is an amount equal to... the exporter's sale price of the goods.

One condition for anti-dumping action was that the export price, so defined, of goods was less than the normal value of the goods.

Thus as Canadian legislation then stood (and this feature has been retained), an application for anti-dumping action could be considered at the time when dumped goods were *sold*, that is at the time when an *agreement* to sell was signed. There was (and is) no need to wait until the goods had physically *been exported* to Canada.

The term 'sale' had thus traditionally been interpreted to mean that a *contract* had been entered into: that is, that there had been an offer, an acceptance and a consideration.

In July 1982, however, a watershed case arose involving exports of hydro-electric generators from an Italian company, Ansaldo. In that case the administering authority, Revenue Canada, stated that: ' ... an anti-dumping investigation was initiated on the basis of the Ansaldo *irrevocable tender*' (emphasis added).

The term 'irrevocable tender' in Canada is defined in the common law of contract. In *Queen v Ron Engineering, 1981*, for example, the relevant court of law stated that:

> The significance of the bid [i.e. the tender] in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide.
>
> The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender.

The crucial aspect of regarding an irrevocable tender as a sale is that it allows a dumping inquiry to commence, and hopefully to be completed, before the purchaser enters into a contract with a supplier. While the purchaser is evaluating the various offers, a dumping inquiry can be conducted and a preliminary finding reached. A finding that an irrevocable tender (i.e. a 'sale') by an overseas supplier is at a dumped price and that the dumping threatens injury to the local industry does not prevent the purchaser from contracting to buy the dumped product; it does however ensure that he does so in the full knowledge that anti-dumping measures would be applied.

Ansaldo, the Italian company referred to earlier, lodged an appeal against Revenue Canada's decision to include irrevocable tender within the definition of 'sale'. Having lost the case, it then appealed to the Canadian Federal Court of Appeal. That Court's decision, handed down in 1986, upheld the approach taken by Revenue Canada.

The court relied, in part, on the earlier case of *Queen v Ron Engineering*, but also made the following comments:

> We do not think that the words 'agreement to sell' found in the definition of 'sale'... should be given a technical meaning...
>
> The reference in the definition of 'export price' in subsection 10(1) to sale price does not, in our view, engage the non-limitative definition of sale in subsection 2(1). That definition is of the word 'sale' as a noun; the fact that the same word is used adjectively in subsection 10(1) does not require such a contract actually to have been concluded for there to be an export price. Indeed 'sale price' is not a term of art and its ordinary meaning is quite broad enough

> to cover the price at which a party binds itself to enter into a contract of sale.
>
> An irrevocable tender constitutes an undertaking to sell at the tender price.

In 1984, while action was still being pursued in the Canadian courts, the EC, acting on behalf of Italy, sought formal consultations with Canada under the auspices of the GATT on whether the decision that an irrevocable tender constituted a sale was consistent with the GATT Anti-Dumping Code. Of specific concern to the EC was whether the requirement of Article 2 of that Code was being met, i.e. whether the product had at that point been 'introduced into the commerce' of Canada. The EC argued that it had not.

Discussions were held, but became deadlocked. The EC did not pursue the matter further. On one view, this could be interpreted as meaning that it had ultimately accepted that the Canadian interpretation was in fact consistent with the GATT Code.

The Canadian Government later amended its anti-dumping legislation. One amendment changed the definition of 'sale' to:

> 2(1) 'sale' includes leasing and renting, an agreement to sell, lease or rent and an irrevocable tender.

This put beyond doubt Revenue Canada's interpretation that 'sale' included an irrevocable tender. (The change also reflected an increasing tendency for Canadian companies to acquire goods through a leasing agreement or to rent goods).

That amending legislation also introduced a new definition of 'importer', again as a direct result of concern over tender dumping. Experience had shown that the main purchasers of transformers and generators, Government-owned utilities in the various Provinces, had tended not to buy directly from the exporter: instead, they purchased through an importer, often a subsidiary of the exporter. The concern was that anti-dumping measures, even if put in place, did not impact directly (at least in the short term) on the beneficial owners or purchasers of the equipment. The view was held that if the 'real' buyers did not have to pay duty, there was little to discourage them from purchasing from overseas at prices they knew to be dumped. The Act therefore gave Revenue Canada the power to deem, in effect, that the utility was the importer.

Although the transformer and generator industries were the main users of anti-dumping arrangements in the late 1970s to early 1980s, since the new legislation was introduced in early 1985 there has not been one anti-dumping case involving these industries.

One view expressed to the Authority was that this could be attributed, in part, to the effectiveness of the new legislation. Industry representatives, on the other hand, said that since late 1984 the Canadian transformer industry had been experiencing strong demand – so strong that it was not interested in applying for anti-dumping action.

The fact remains that the 1985 legislative provisions have not as yet been used.

4.1.2 The United States of America

The US legislation is similar to that of Canada in as much as goods do not have to be physically exported to the US before it can be established that they are dumped.

The Tariff Act of 1930 is the relevant legislation for anti-dumping and countervailing matters. Section 731 of that Act states that:

> If ... the administering authority determines that a class or kind of foreign merchandise is being, *or is likely to be, sold* in the United States at less than its fair value and ... by reason of imports of that merchandise or by reason of sales (*or the likelihood of sales*) ... [emphasis added]

It is clear that the *likelihood* of a sale is sufficient for anti-dumping action to be taken: the goods need not have been exported or imported.

The US has not had the type of problem experienced by Canada with tender dumping. It is not clear, therefore, whether an irrevocable tender offer would or would not be viewed by the US courts as constituting 'entering the commerce' of the country.

4.1.3 The European Community

Compared to Canadian and US law, the EC legislation is much less conducive to resolving tender dumping cases. The following excerpts from Council Regulation (EEC) No. 2423/88 are of relevance:

> Article 2.1: An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

> Article 2.2: A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

> Article 8(a): The export price shall be the price actually paid or payable for the product ...

Two points may be noted from the above. First, as with Canada and the US, a good can be regarded as dumped within the EC as soon as a contract for its sale has been signed: note the definition of export price as the price paid *or payable*. The good does not have to be physically exported. Secondly, a doubt was expressed as to whether Article 8(a) would encompass the situation where a firm offer or irrevocable tender had been made but had not yet been accepted, i.e. where no contract had as yet been signed.

The EC has had no experience of tender dumping occurring within its member States. One view expressed by Australian industry was that this was largely a reflection of the 'closed shop' nature of EC tenders, overseas firms not being invited to respond to government requests for tenders.

4.2 Suggestions raised in submissions

4.2.1 AEEMA

In essence, the Australian Electrical and Electronic Manufacturers' Association recommended that the Canadian approach to tender dumping be adopted in Australia: that is, that an irrevocable tender should be a sufficient basis for instituting anti-dumping action and that the end user should pay any dumping duty eventually imposed.

AEEMA also argued that Customs (and by implication, the Authority) should use consultants with relevant expertise when conducting inquiries involving capital equipment. A spokesman said, however, that such consultants should be employed only when needed and not as a matter of course on every inquiry into the dumping of capital equipment.

4.2.2 MTIA

The Metal Trades Industries Association recommended that there be public openings of tenders submitted to all Federal, State and Local Government purchasers. This system, MTIA argued, would facilitate the lodgement of a dumping complaint early in the selection process.

MTIA also proposed a system under which a local company which had lodged a tender for capital equipment valued at $500 000 or more, and which suspected that an overseas tender might be at a dumped price, could lodge a complaint with the utility which had called for tenders. If the utility still wished to buy the overseas product, the issue would be referred to the Federal Ombudsman as an impartial arbitrator. If, in turn, the Ombudsman was satisfied that the overseas bid was at a dumped price, the local industry would lodge a dumping complaint with Customs. The usual procedure for a dumping investigation would then apply.

MTIA further argued that, even when no complaint was lodged by an Australian tenderer, a government purchaser receiving an overseas tender which quoted a price 10 per cent or more below that tendered by an Australian company should satisfy itself that the overseas goods would not be dumped before awarding the contract to the overseas firm.

4.2.3 Customs

The Australian Customs Service submission acknowledged that if a local industry lost a sale through tender dumping, the injury might be sustained before the industry could initiate a dumping complaint. Customs did not, however, believe there was sufficient justification to introduce special measures in relation to tender dumping.

In ideal circumstances, Customs said, there might be some scope to 'fast track' the consideration of a complaint of tender dumping. In the main, however, timeframes could not be shortened: doing so would deny equity to all parties and would adversely affect Customs' ability to consider the issues properly.

Customs suggested that the most significant assistance to industry might be achieved by Government purchasers including a warning in all tender documents that dumping duties would be applied if the goods in question were found to be dumped and caused or threatened material injury to an Australian industry, and if all levels of government operated an open tender system.

4.2.4 HEMA

The Heavy Engineering Manufacturers' Association supported the introduction of the Canadian system on the basis that it might send a signal to purchasers of capital equipment that the Government was cracking down further on unfair competition.

4.2.5 ESAA

The Electricity Supply Association of Australia stated that electricity supply is one of this country's competitive advantages: Australia, it said, now has the third lowest average industrial electricity price in the OECD. It was greatly concerned at any proposal which threatened to add to the costs of electricity supply.

ESAA recommended that, rather than the Government introducing regulatory controls aimed at dealing with tender dumping, there be discussions among ESAA, AEEMA, MTIA and HEMA on cooperative mechanisms to ensure that all suppliers are fairly treated and that dumping by overseas suppliers is strongly discouraged.

ESAA advised that it had recently initiated talks with AEEMA to this end.

4.2.6 Woodside Petroleum Limited

The Woodside submission made no recommendations for change to the anti-dumping system. It expressed the view that Australian buyers were unlikely to purchase capital equipment from overseas if the local product was of satisfactory quality, safety and fitness for the purpose. Price, Woodside said, was not always the dominant criterion; and factors such as life-cycle costs could play an important role in the purchasing decision.

4.2.7 APEA

The Australian Petroleum Exploration Association expressed concern that the notice advising the public of the inquiry had mentioned oil rigs. The Authority wrote to the Association and explained that the examples of possible tender dumping mentioned in the notice had been hypothetical, and intended only as illustrations.

The Association believed that anti-dumping action should be taken only when that action would produce a clear net benefit to Australia. It too pointed out that price was not the only determinant in deciding on the successful tenderer.

APEA noted that bureaucratic controls on the purchase of plant and equipment could result in uncertainty or cost imposts and could reduce the international competitiveness of Australian firms.

4.2.8 AMIC

The Australian Mining Industry Council pointed out that many factors other than price are taken into account in choosing a supplier, and that these other factors can often be decisive. Anti-dumping duties might therefore be imposed when there was no prospect of a local firm being chosen.

Like APEA, the Council was concerned that bureaucratic controls on the tender process could lead to uncertainty and to a greater reluctance by overseas suppliers to submit tenders.

4.2.9 JEMA

The Japan Electrical Manufacturers' Association said that the Code allows action to be taken where a tender contract leads to a continuing pattern of exportation over a period of time, but makes no provision for action against the exportation of some types of capital goods – including goods which, in essence, fall within the definition of tender dumping given earlier in this report.

JEMA believes that any special legislation to deal with tender dumping would be contrary to the Code and would have the unintended result of reducing competition

by discouraging overseas suppliers from tendering in Australia and by discouraging local buyers from purchasing overseas.

4.2.10 Midland Metals Overseas

Midland Metals Overseas Pte Ltd is a distribution company based in Singapore which has participated in a number of dumping inquiries initiated by the electrical cable industry in Australia.

The company believes that allegations of tender dumping are no more than a ploy by Australian manufacturers to disqualify overseas firms from winning tenders in Australia. It noted that over the last three years the vast majority of anti-dumping action in Australia has involved imports by private companies – not by government utilities, the main users of the tender system.

The company expressed the view that the government tender system in Australia was open and public and that the process itself tended to discourage dumping, as the Australian companies were usually advised of the overseas bids during the evaluation process [this last point does not accord with the Authority's understanding of the practice of government purchasers: see below].

5 STATE TENDERING PROCESSES

5.1 Introduction

The processes used by State Governments and their instrumentalities in calling for and assessing tenders were mentioned by several parties in submissions to or discussion with the Authority.

To gain a first hand appreciation of these processes, the Authority visited a number of the States.

The following comments are not intended to be even a synopsis of such procedures; they merely mention some aspects of relevance to this inquiry.

5.2 The selection process

There are considerable differences among the States in their approach to the tendering process.

In some States, the organisations responsible for purchasing capital equipment are virtually autonomous in that they set their own purchasing rules (subject, of course, to the scrutiny of State auditors). In New South Wales, for example, the utilities responsible for electricity, gas, water and the like are either statutory authorities or incorporated, semi-commercial organisations, and do not have to comply with common-user purchasing policies.

In some others, in particular Victoria and Western Australia, State purchasing policy applies to all instrumentalities, be they departments, statutory authorities or semi-commercial organisations. Of relevance to the present inquiry, these two States prohibit instrumentalities from purchasing overseas if there is a strong *suspicion* that the goods would be dumped. Queensland, on the other hand, has no such prohibition; it sees anti-dumping action as a matter for the Federal Government.

Most if not all such instrumentalities Australia-wide evaluate tenders for the supply of capital goods on a 'whole of life' basis: that is, the evaluation and eventual selection takes account of the *total* costs of buying, installing and testing a piece of equipment *and* of running it over its economic life. The evaluation process often uses dedicated and sophisticated computer software. The result can be, and often is, that the tender with the lowest purchase price is not the one which wins the contract.

To put spending by these organisations in some perspective, government procurement by tender in NSW alone runs to about $5.5 billion annually. Of this amount, only some $800 million is subject to central purchasing guidelines (products such as rubber bands, toilet rolls and light bulbs). The remainder, a large

proportion of which relates to construction works, is generated by State authorities and incorporated bodies.

Considerable concern was expressed by some State organisations about any process which might be introduced as a result of the Authority's inquiry which could unduly interfere with current procedures and which might discourage overseas companies from participating in future tenders.

5.3 Public opening of tenders

Of the States visited by the Authority, only Queensland conducts public opening of tenders.

The process is not 'public' in the sense that anyone can attend: attendance is limited to those organisations which lodged tenders.

Nor are the full details of each tender or of the evaluation made public. The only figure revealed is the purchase price bid by each participant. No details are given of factors such as technical differences, conditions of payment, whole–of–life costs and so on: factors which, of course, can significantly influence the selection process.

Most other States provide no information at all on the value of the successful bid – let alone the unsuccessful ones. At least one State, however, issues a list, after the contract is awarded, showing a ranking of the bids. The ranking is usually on whole-of-life costs rather than on purchase price.

All States appear to have a counselling procedure for local companies who fail to qualify.

5.4 Time taken in evaluating tenders

The time from the receipt of tenders to the signing of a contract for supply varies considerably. For regularly purchased, relatively unsophisticated goods like ballpoint pens or shredding machines, it can be as short as a few days. The evaluation of a large power transformer or a huge sewerage valve, on the other hand, may take many months.

The Authority's overall impression is that in the vast majority of State purchases of capital equipment, the evaluation of tenders and award of the contract takes only a few weeks. The exceptions, which usually involve goods of high unit value requiring complex technical evaluation, take anything from two months to a year to complete.

6 VIEWS OF THE AUTHORITY

6.1 On changes to the Commonwealth anti-dumping law

The Australian legislation could be changed to reflect the Canadian concept that an irrevocable tender may be considered as a sale (although the GATT-legality of this concept seems not quite beyond question); or, as a halfway step, to put beyond legal doubt that the signing of a contract for supply may be taken to be a sale, and thus to bring Australia into line with the USA and the EC.

Is there a real problem in *practice* which such a change could fix?

Some submissions quoted cases where orders had been lost to overseas suppliers, and argued that the losses were the results of tender dumping.

The Authority notes the almost complete lack of *fact* underlying this latter assertion. In many of the cases quoted, the argument seemed to be that 'the price from overseas was lower than the price we quoted, so it *must* have been dumped'. Such a comparison, of course, says nothing at all about whether goods are dumped: the correct comparison is between the export price and *the normal value in the country of export*. And anyway, the argument sounds a bit like that used by the person who applies for a job he just knows he'd be perfect for, and doesn't get: the winner 'must be someone's cousin'.

That said, the Authority cannot for an instant assert that no contract is ever lost because of tender dumping. From the beginning of this inquiry it has been clear that the possibility exists.

The reasonable person's conclusion from the evidence, however, must surely be that if it does happen, it doesn't happen often.

The list at Attachment 3, provided by the Electrical Supply Authorities Association, puts purchases of electrical transformers from overseas into some perspective. It was received only late in the inquiry, and the Authority could not, therefore, check the accuracy of each entry; and it is incomplete, omitting as it does Tasmanian and South Australian purchases. The conclusion must still be that the vast majority of large transformers, and all or practically all small transformers, purchased by Australian authorities are made in Australia.

The fact that an Australian industry *sometimes* loses a contract to an overseas company may perhaps be a pity, but is not too surprising: it could indeed be taken as a sign that the Australian industry is facing competition and is competing well. If the industry *frequently* loses to overseas, the Government may need to do something: protect the industry from competition, perhaps, by imposing a tariff or

even a ban on imports; or (and perhaps preferably) put in place measures aimed at getting the local industry's competitiveness up to scratch. Or (and this is the question before the Authority) the problem might be that the legislation protecting other Australian industries from injurious dumping does not, for some reason, protect *this* industry, and thus needs to be changed.

But the Authority has heard no evidence which would lead it to conclude that there are such frequent losses, in the industry producing transformers or in any other industry.

Moreover, a representative of the Heavy Engineering Manufacturers' Association made the point that its member companies were unlikely to lodge formal complaints about dumping, seeing such behaviour as not being in their own best interests. The Authority understands the point – but notes that changes to the legislation of the kinds mooted during this inquiry are unlikely to alter these companies' views.

The Authority concludes that there are no signs of any real need to change the legislation.

So: should the legislation be changed anyway?

There is of course an argument in principle, that if some other country has some specific legal provision according extra protection against dumping to its industries, Australia should have it too. But the argument is dangerous: if Australia were to go around picking the eyes out of other countries' legislation in this way, it would end up with an anti-dumping system far more protective than that of any other country – and, perhaps, not too much time would elapse before other countries started to turn nasty about exports, dumped or not, from Australia.

There is an argument, too, that the change would cost Australia nothing and could possibly gain some Australian industry something, so should be made.

Against this argument, the Authority makes two points.

First, the change is intended to make anti-dumping action in some sense easier: and anti-dumping action *always* imposes costs on Australians, and *almost* always imposes costs on Australian *industries*.

Secondly and more specifically, the intent of the Canadian 'irrevocable tender' provision (which by the way seems never to have been tested) is to allow a dumping investigation to be completed before a contract for overseas supply is signed.

But could a dumping inquiry be completed (or even brought to the stage of a preliminary finding, at which time provisional anti-dumping measures can be put in place) without causing a significant delay to the tender evaluation and selection

process? A preliminary finding takes some 100 days, and a full inquiry 220 days, from the time a complaint is lodged with and accepted by Customs (and the Authority notes in passing that these times are far shorter than the equivalents in Canada, USA or Europe). If complaints are not to be made frivolously or even maliciously, the applicant needs to have (and Customs needs to check that the applicant has) *some* sort of evidence that the goods from overseas are being tendered at a dumped price; and getting such evidence also takes time. Yet the Authority's understanding is that, in the large majority of State purchases of capital equipment, the evaluation of tenders and award of contract takes only a few weeks. A change to anti-dumping law to encourage dumping complaints to be brought immediately after tenders close would, if it worked, certainly also slow the processes of most State (and private) purchasers of capital equipment, and could thus add to their costs.

The Authority concludes that the legislation should not be changed.

6.2 On other suggested changes

One submission suggested that a State instrumentality, finding that an overseas bid was at a price 10 per cent or more below that of an Australian tender, should be required to assess whether or not the goods from overseas might be dumped. But how would the instrumentality do this, and how long would the assessment take? There are good reasons why Customs is allowed 100 days to reach a preliminary finding in a formal inquiry: one is that the assessment of the normal value, in the country of export, of like goods to those being exported to Australia can be a highly complex matter, particularly if the exported good is to be built to order. To aid in the task, Customs maintains offices overseas, staffed with people familiar with local accountancy practices and able to verify information provided to them by exporters. Would each State instrumentality be able to assess whether goods were dumped, and to do so faster than could Customs?

The Authority has similar worries about the idea that the (State or Commonwealth) Ombudsman should be brought into the whole matter. The Ombudsman's office (like the purchasing instrumentality) could no doubt develop the same skills in dumping inquiries, and the same overseas network, as are presently possessed by Customs; but how would this improve the efficiency or effectiveness of the anti-dumping system?

Some submissions called for adoption by all States of the Queensland practice of 'public' opening of tenders. The Authority is sympathetic to the idea in principle: glasnost in government decision-making is a Good Thing. It is less than convinced, however, that the Queensland system provides an important extra precaution against *dumping*. It might reveal that an overseas supplier had bid a lower price than had an Australian company; but purchasing decisions are often made after considering many more factors than the purchase price. In any case (and as noted above), the comparison of an export price with an *Australian* price says nothing at all about

dumping: dumping occurs when an export price is less than *the normal value in the country of export*.

The Authority will recommend no formal action to the Minister: the evidence placed before it does not warrant any, and the Authority has no desire to add unnecessarily to the complexity of purchasing large items of equipment by tender or to load extra costs on some Australian industries to achieve very doubtful benefits for others.

The Authority notes in any case that the suggestions considered in this section go to actions by the States, not by the Commonwealth; and even then are concerned only with the purchasing decisions of government or semi-government bodies, excluding altogether those of private companies.

6.3 An offer

The Authority notes with approval that some steps have recently been taken to promote regular dialogue between ESAA on the one hand and AEEMA, MTIA and HEMA on the other: see section 4.2.5 above. It stands ready to help in any way it can in this process, consistent with its other duties.

The Authority makes this offer too: it invites any Australian company, industry or industry association which believes that tender dumping is causing it problems to discuss the matter informally with the Authority at any time.

In making this offer the Authority has of course no wish to cut across existing processes: an industry which believes that it has *prima facie* evidence that dumping is causing or threatening it material injury should discuss the matter immediately with the Business Liaison Section of the Dumping Branch of the Australian Customs Service, and not waste time talking to the Authority. But a company, industry or association may have a more general worry that tender dumping is somehow escaping the net of the Government's anti-dumping policy, and may wish to talk the subject through. The Authority, if asked, will listen carefully.

7 RECOMMENDATIONS

The Authority recommends that the Minister take no action.

The Authority draws the Minister's attention to the comments made in section 6.3 above.

LIST OF ATTACHMENTS

ATTACHMENT 1

TERMS OF REFERENCE

Minister for Small Business, Construction and Customs
The Hon. David Beddall, MP

DL 26/2

Mr Don Fraser
Member
Anti-Dumping Authority
GPO Box 9839
CANBERRA ACT 2601

Dear Mr Fraser

As you will be aware one of the matters raised during the Government's review of the anti-dumping system was the adequacy of the legislation to deal with claims by Australian industry that it has lost tenders in Australia to overseas companies for the supply of plant and equipment because these companies were quoting at dumped or subsidised prices ("tender dumping").

Pursuant to subsection 9 (1) of the Anti-Dumping Authority Act 1988, I hereby request that the Authority inquire and report on tender dumping in Australia. The report should examine, inter alia, the adequacy of the current legislation and should recommend changes necessary to overcome any inadequacies or shortcomings identified in the course of the inquiry.

In reporting on this matter, the Authority should have regard to Australia's obligations under the GATT Anti-Dumping and Subsidies and Countervailing Codes.

I would envisage that the Authority would report to me within 120 days of receiving this reference.

Yours sincerely

DAVID BEDDALL

CANBERRA OFFICE
Suite MF45, Parliament House, Canberra, 2600. Ph: (06) 277 7080 Fax: (06) 273 4571
MINISTRY FOR INDUSTRY, TECHNOLOGY AND COMMERCE

ATTACHMENT 2

EXCERPT FROM AEEMA'S SUBMISSION OF 9 JUNE 1992

TENDER DUMPING IN THE AUSTRALIAN TRANSFORMER MARKET SINCE 1982

1. **Hydro Electricity Commission of Tasmania (HECT) Contract ED2005 - Tender November, 1984 about $650K**

   One 150MVA 200/110kV Auto Transformer ex Stromberg, Finland

   ABS Statistics show import March quarter 1986 - one unit $445K VFD.
   Dumping duty imposed early 1987 - approximately $40K

2. **HECT Contract ED2002 - Tender May, 1985 about $830K**

   One 160MVA 18/250kV Generator Transformer - ex Stromberg, Finland

   Security taken at time of import
   "Substantial Dumping duty Imposed - late May, 1987"
   ABS Statistics show a Clearance for Home Consumption March quarter 1987 - one unit at $797K VFD.

3. **HECT Contract ED2008 - Tender August 1985 about $360K each**

   2 x 31.5MVA 110/22kV Transformers ex Stromberg, Finland

   Initial dumping security imposed about January 1987

4. **STATE ENERGY COMMISSION OF WESTERN AUSTRALIA (SECWA) contract 2/SS4 - Tenders March 1985**

   One 300MVA 330/220/29kV Auto Transformer ex Stromberg, Finland

   Delivery early 1987 - substantial dumping security taken

5. **Melbourne City Council 1990**

   500kVA Dry Type Transformers from the Republic of Korea (ADA) Report No 41).
   Price dumping found - no material injury.

6. **SECWA 1989**

   1-60MVA from EBG Austria. Dumping suspected but no application made to ACS. Subsequent investigations show it was a dumped price.

7. **SECWA 1990**

   1.140MVA from EBG Austria. Dumping suspected and application made to ACS.
   Price dumping proved - no material injury.

8. **FAR NORTH QUEENSLAND ELECTRICITY BOARD (FNQEB) 1990 (?)**

   EBG tendered at a dumped price for one (1) 80MVA transformer.

   GEC won the contract however, the Australian industry investigation into Australian price levels indicated that EBG's offer was a dumped price.

9. SECWA 1991

EBG tendered to SECWA for 1-140MVA. No details of price but it was considered as dumped.

Contract won by Wilson with significant price suppression.

10. HECT 1991

EBG have tendered for 200MVA, 50MVA and (we believe) 90MVA transformers.

ag:cs:tdump

ATTACHMENT 3

AMENDED LIST TO ESAA'S SUBMISSION OF 19 JUNE 1992

Purchases of transformers larger than 10MVA by major electricity utilities in Western Australia, Victoria, New South Wales, Queensland and the Northern Territory, 1985 - 1992

Year ordered or delivered	Size(MVA)	Country of manufacture
1985	150	Australia
	70	Australia
	20/40	Australia
	3x10	Australia
	60	Australia
	30	Australia
	300/300/60	Finland
	2x25	Australia
	4x60	Australia
	120	Australia
	2x60	Australia
1986	4x60	Australia
	25	Australia
	2x200	Australia
	3x20/33	Australia
	2x55	Australia
1987	2x20/27	Australia
	2x20/33	Australia
	2x370	United Kingdom
	2x20/27	Australia
	200	Australia
	2x375	Australia
	6x15	Australia
	50	Australia
	2x10	Australia
	10	Australia
1988	20/27	Australia
	3x20/27	Australia
	2x45	Australia
	2x25	Australia
	60	Australia
	150	Australia
	27	Australia
	390	Japan
	132	Australia

1989	2x600	Australia
	3x60	Australia
	3x60	Australia
	2x90	Australia
	36/45/60	Austria
	20/27	Australia
	350	Australia
	2x490	Australia
	144	Australia
	45	Australia
	120	Australia
	200	Australia
	2x30	Australia
	4x37	Australia
	4x15	Australia
	60	Australia
	3x80	Australia
	60	Australia
1990	15/19	Australia
	2x390	Australia
	390	Australia
	5x20/27	Australia
	3x20/33	Australia
	27	Australia
	140	Austria
	50	Australia
	2x25	Australia
1991	60	Australia
	37	Australia
	5x375	Australia
1992	150	Australia
	90	Australia
	200	Australia
	2x375	Australia
	40	Australia
	2x375	Australia

Purchases of transformers smaller than 10MVA by major electricity utilities in Western Australia, Victoria, New South Wales, Queensland and the Northern Territory, 1985 - 1992

Year by year figures not supplied by all states. Total value of purchases: $153 million - all from Australian manufacturers. These figures do not include purchases by NSW County Councils or Victorian metropolitan distributors.

ADA REPORT — TENDER DUMPING

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