THESIS

ON

THE APPLICATION OF ANTI-DUMPING AND COUNTERVAILING MEASURES IN AUSTRALIA

SUBMITTED BY

RICHARD WHITWELL

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For me the task of the completion of this thesis was at first daunting. This was even though I had previously worked in the area as Director Dumping Operations in the Australian Customs Service during the early 1980s. However, thanks to the support of two very competent supervisors I felt that I was able to do some justice to the task. Professor Cutbush-Sabine was always encouraging, and always critical of the logic employed and in the consideration of the disturbing results which emanated from the study. Professor Andreas Lowenfeld always an inspiration with his font of knowledge going back to the early days of the development of the *GATT* treaty, and his constructive criticisms of the drafts helped me immensely. I consider that I was most fortunate with the quality of their supervision.

As I reside in Canberra and being an ex-student at the Australian National University, I was able to attend many research seminars in the Australia-Japan Research Centre and in the Faculty of Commerce. It was always the question of what is the thesis or proposition to be proved which was on everybody's mind in these seminars. They made me think critically about my own topic, which although in law relied upon the same methodology and need for the evaluation of the research results. I also managed to present parts of my thesis to a number of conference forums. These included papers delivered to academic colleagues at conferences of the Institute for International Development and Future Studies held at the University of Western Australia and later at the Swedish School of Economics in Helsinki, to the Law and History Society, the inaugural meeting of post-graduate students in law at the University of Melbourne, and two seminars at the Law School of the University of Technology, Sydney. I thank all those who entered into a critique of my approach to the analysis at those seminars, and to the post-graduate students in my lectures at the University of Technology who were exposed to draft parts of the thesis as supplementary teaching material.

I must also thank the staff of National Library of Australia who gave me a reader's ticket to the Petherick Room, the Australian National University Library where I am a life member, the Australian Customs Library in Canberra, and for the reading rites accorded to me by the New York University for the use of their Law Library. The completion of the thesis would not have been possible if I had not obtained a scholarship from the Australian Customs Service, and I had not extended leave to me at critical times during the process of writing. The University of Technology, Sydney supported the study and were helpful to me throughout my endeavour.

Finally, I should mention that I think that my daughters were pleased to see the finalisation of the thesis, as at times I may have been somewhat distracted from what others considered was the main task. I thank all those who have encouraged me, however, as with all individual works the errors and omission are solely my responsibility.

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ABSTRACT

The application of anti-dumping and countervailing measures has always been controversial, particularly, as they do not address the issue of the level of local value added in the production process. Are these measures simply industry assistance measures under another guise, or are they to protect the 'fair trade' framework to further the opportunity for free trade? All the indications are that these measures reflect the former option. However, the global political climate as represented through the *GATT* and now the *WTO Agreements* is to tolerate the imposition of both anti-dumping and countervailing measures provided they are applied according to the provisions of the *Agreements.* It is becoming increasingly more difficult for any nation state to abolish the right of their 'guest' industries to obtain anti-dumping or countervailing relief, given the economic power of multinational industries operating within their boundaries. The practical issue is for each nation state to use these measures in a way which is of least detriment to their economy.

Gruen in 1986 reviewed the application of the then *Customs Tariff (Anti-Dumping) Act 1975,* and found that there needed to be a tightening-up of the injury test applied to anti-dumping cases. It is recommended that Gruen's tougher injury standards be implemented forthwith. He also recommended a continuing role for the Industry Commission as the appeal body for a review of the facts, and for there to be a continuing assessment of the effects of the measures imposed. The government, however, created an Anti-Dumping Authority attached to the then Department of Industry Technology and Commerce (DITAC), whose member and officers came from that department. The principal function of this body was to review the preliminary decisions of Customs, and to recommend the imposition of duties or acceptance of an undertaking to the Minister. There was no provision for an independent review of facts. One of the results of the increased complexity of the existing process and consequently the law, is a large increase in litigation before the Federal Court. There is a need to simplify the administrative structure and the provisions of the domestic law. The latter should be accomplished by the incorporation of the provisions of the *WTO Agreements* directly into domestic law.

The espoused policy objectives of the government have not been met. The application of anti-dumping and countervailing measures favour import competing industries, and are against countries from which imports are growing. Korea and China have been singled out, with these countries showing the highest incidence of import weighted of anti-dumping measures. They also happen to be countries with which Australia has a trade surplus, a policy factor which is neglected by the administering authorities. There is a need to redress this imbalance. Predation identified by the government as a reason for taking anti-dumping action, has been shown not to be a reason for the application of anti-dumping duties in Australia.

As a small country, Australia should take advantage of the use of the *WTO* dispute settlement process in settling anti-dumping and countervailing disputes. Consultations should commence at the earliest possible stage in inquiries, with the view to the settlement of the dispute by trade negotiation so that the outcome can be beneficial to both parties. This may, for example, allow for the specialisation in production between the two Members. *WTO* dispute settlement is seen as a positive approach to dispute settlement, whereas the use of the domestic courts tends to elevate the dispute between the parties. The Department of Foreign Affairs and Trade needs to take a leadership role in settling all anti-dumping and countervailing actions through the *WTO* dispute settlement process, with a view to a positive outcome for both Members.

Placing an anti-dumping import tax on intermediate products entering Australia is counter-productive, as it increases the cost of inputs to downstream users. Temporary relief should be given by way of production subsidy, if the matter cannot be resolved through *WTO* trade consultations.