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# **ROLE OF AUSTRALIA'S PUBLIC INQUIRY SYSTEMS IN THE ADMINISTRATION OF REGULATORY TRADE MEASURES**

**Robin Burnett\***

## **I. INTRODUCTION**

In Australia in 1982 there was a debate over the Federal Government's response to pressures exerted by Broken Hill Proprietary (BHP), the large steel company, for protection against steel imports. The company sought protection in the form of anti-dumping duties and the imposition of tariff quotas. Both forms of protection involve different kinds of public inquiries. The Australian Government's handling of the complaints by BHP has led many people to look critically at the Australian system of public inquiries in the administration of regulatory trade measures. Questions which have been raised in relation to public inquiry procedures in the United States suddenly have assumed relevance in the Australian context. These questions are directed at (i) identifying the purpose of the public inquiry system and (ii) ascertaining whether that purpose is being abused by the Government.

This article sketches the Federal Government's response to Australian steel industry pressures and then attempts to explain, if not to justify, that response by providing a critical analysis of three types of public inquiry in the process of imposing tariff and non-tariff restrictions.

## **II. THE AUSTRALIAN STEEL STORY**

The Australian Government was initially persuaded in 1981

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to levy cash securities, in effect provisional anti-dumping duties, on a range of steel imports from member countries of the European Community. In turn, the Australian authorities persuaded Australian firms, in October 1981, to accept voluntary price undertakings by importers of South Korean steel. This expedient enabled the Government to avoid holding a public inquiry on the dubious question of whether South Korean steel was being dumped in the Australian market — a public inquiry being a prerequisite to imposing anti-dumping duties. By May 1982, however, the Australian industry was complaining that it had been duped: the price undertakings were inadequate to protect it from South Korea's low-priced steel. Accordingly, while officials investigated this allegation, BHP and its wholly-owned subsidiary, John Lysaght (Australia), persuaded the Government to send a "reference" (initiate an inquiry) to the Temporary Assistance Authority to investigate the question of temporary protection for the Australian industry against steel imports from South Korea. At the same time, on May 25, the Government sent a "reference" on the matter, as provided under law, to the Industries Assistance Commission.

BHP asked for the imposition of quota restrictions on steel imports. It conceded that there had been little decline in its sales to May 1982, but it argued that the degree of import penetration indicated that there would be a significant deterioration in the future. The company agreed that in the event of the introduction of quotas, it would raise its domestic prices. It contended, however, that any price increase would not have particularly deleterious effects on users because, in most cases, the cost of steel was low in relation to users' total costs.

After a well-attended public hearing, involving over forty witnesses, the Temporary Assistance Authority advised the Government that it was not clear that the deterioration in BHP's position was due to imports. The deterioration was due to a number of factors of which the general economic downturn, domestically and internationally, was probably the main determinant. The Authority rejected the request for import quotas, observing that these would substantially reduce much needed competition in the industry, and instead recommended a temporary increase in tariff rates. The Authority also pointed out that the Industries Assistance Commission Act of 1973, which governs its deliberations, requires it to report on the level of assistance needed to maintain employment at the existing level. The Authority observed that while a temporary increase in tariffs would probably help to increase sales, it might not assist steel workers, for BHP had already stated that it intended to lay off workers irrespective of the outcome of the temporary assistance inquiry. The results of such

tariff increases would depend, said the Authority, on whether BHP was prepared to compete actively in the market.<sup>1</sup>

The report containing these assessments and recommendations was published on July 9, 1982. By that stage the Australian Government was fully committed to the overseas initiative of Prime Minister Malcolm Fraser which aimed at arresting and gradually reversing the growth or protectionist measures and subsidies in international trade.<sup>2</sup> The Government declined to grant any temporary assistance.

### III. ISSUES RAISED

The episode raised a number of questions. Was the Government using the Temporary Assistance Authority as a scapegoat to enable it to avoid meeting the competing demands of BHP, importers, trade unionists and downstream users of steel? By placing responsibility with the Authority and diverting attention from itself, perhaps the Government was able to minimize and defuse domestic political opposition from parties threatened by injury from free trade policies. Or to the contrary, had it been "hoist by its own petard," which is to say, had the Authority's decision which resulted from a process initiated by the government in turn prevented the Government from adopting justified restrictive measures? Although the Authority's inquiry produced a report which did not meet BHP's request, the Government is free to override such a report. Indeed, there may have been good policy reasons for doing so. But it would have been particularly embarrassing internationally, in view of the Prime Minister's initiatives on international trade, to impose quantitative import restrictions against the advice of the Authority.

Anything short of import quotas was seemingly unacceptable to BHP. Does this intransigence indicate that the public inquiry system prevents the Government from yielding to pressure from powerful industry forces in situations where the evidence (when produced) runs against the merits of the industry requests for protection? If so, does the steel story support one assumption underlying the codes on non-tariff measures, as agreed in the Tokyo Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), that by making administrative procedures open to public scrutiny—by making them "transparent"—the bias which normally exists in favor of domes-

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1. TEMPORARY ASSISTANCE AUTHORITY, REPORT ON CERTAIN FLAT STEEL PRODUCTS, PIPES AND TUBES OF IRON AND STEEL (1982).

2. For an outline of the proposals, and of the thinking behind the initiative, see Malcolm Fraser, *The Western Alliance: Perceptions and Reality*, an Address to the Foreign Policy Association, New York (May 18, 1982).

tic sources of supply over foreign sources will be reduced? The following sections of the paper examine three types of public inquiry in Australia with the aim of providing some answers to these questions.

#### IV. AUSTRALIA'S TARIFFS AND NON-TARIFF RESTRICTIONS

Australia, like all governments, is subject to pressures for protection, and accordingly has devised ways with which to handle pressures for protection. All decisions in Australia on public assistance to industry, whether through protection or subsidies, are formally made by the Cabinet. They are discussed first, however, in the Standing Inter-Departmental Committee on Assistance to Industry which, following the latest reorganization of the government, embraces the departments of Industry and Commerce, Trade and Resources, Foreign Affairs, the Treasury and Administrative Services. The Department of Industry and Commerce has inherited the responsibilities of the old Department of Customs and is the key department in the administration of the country's regulatory trade measures. The Department of Trade and Resources on the other hand has the prime responsibility for the conduct of international negotiations and the promotion of exports.

In Australia a wide range of regulatory measures has been adopted at both state and federal levels to provide public assistance to industry both outside of and within the frontier. The Australian approach has been to entrust ministers and administrative authorities with broad discretionary legislative and decision-making powers. The administrative procedures for the exercise of these powers have traditionally been closed. The regulations and decisions are thus immunized against public scrutiny and debate.

The following analysis of three exceptions to this closed system as it operates at the customs frontier requires a brief outline of the Australian tariff structure. Essentially, most-favoured-nation (MFN) treatment is extended to other GATT signatory countries and to those non-GATT countries with which Australia has concluded MFN bilateral trade treaties. General tariff rates apply to the rest of the world. With the concurrence of GATT, however, Australian tariffs also reflect preferential treaty obligations under trade agreements with New Zealand, Papua New Guinea, other South Pacific countries and Canada.<sup>3</sup> Preferences to developing

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3. Australia-New Zealand Free Trade Area Agreement 1966, Australian Treaty Series, 1966, No. 1; Agreement on Commercial Relations between Australia and Papua New Guinea 1976, Australian Treaty Series, 1977, No. 7; South Pacific Regional Trade and Economic Cooperation Agreement 1981, unpublished; Trade

countries are another important exception to the MFN rule.<sup>4</sup>

In conformity with the GATT, Australia's policy has been to rely on the tariff as the principal instrument of protection. Support-value duties which ensure minimum import prices can also be imposed on specified items in the tariff schedule but they are currently inoperative, applying only to certain synthetic rubber products. Import licensing was abolished in 1960 and reintroduced in the 1970's, although only on a small wide range of items including textiles, clothing, footwear and motor vehicles.<sup>5</sup> Tariff quotas have also been imposed on a range of items, but compared with other countries, little use is made of health, technical and safety regulations or customs-valuation procedures to restrict imports.<sup>6</sup> Nor have "voluntary" export restraint agreements been widely used as an informal method of protection.<sup>7</sup> This position can be seen as one explanation for the traditionally high level of Australian tariffs.

By international standards, particularly by comparison with other countries belonging to the Organization for Economic Cooperation and Development (OECD), Australia's nominal rates of duty have been criticised for being relatively high:

Whereas most other developed countries have, as a result of multilateral negotiations, reduced to a low level their import duties, Australia still relies on high import duties to assist industry. While international comparisons of assistance levels must be heavily qualified, Australian tariffs on *manufactured goods* in 1975 were, on average, nearly twice those of the European Community and Canada.<sup>8</sup>

In April 1982, a report of the Industries Assistance Commission in Australia suggested that this situation was still present. The Commission's view is contested by manufacturing interests. These interests claim that in general the effective rate of tariff protection has decreased and is only 20 percent. The truth probably

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Agreement between Australia and Canada, Australian Treaty Series, 1960, No. 5; and related Exchange of Notes, Australian Treaty Series, 1973, No. 23.

4. Developing countries receive non-reciprocal tariff preferences which were introduced in 1967 and are not part of the GATT Generalised System of Preferences introduced two years later.

5. See e.g., INDUSTRIES ASSISTANCE COMMISSION, PASSENGER MOTOR VEHICLES: IMPORT RESTRICTIONS AND QUOTA ALLOCATIONS, Report No. 250 (1980).

6. Cf., the following reports of the Industries Assistance Commission: STARTING, REGULATING AND CONTROL APPARTUS AND OTHER ELECTRICAL EQUIPMENT, Report No. 157 (1977); POTATOES AND PROCESSED POTATO PRODUCTS, Report No. 136, at 21 (1977) and FRUIT GROWING, PART B: APPLES AND PEARS, Report No. 77, at 129 (1976).

7. But see the undertakings on steel, mentioned above, and the understanding between the Australian and New Zealand dairy boards regarding the importation of New Zealand dairy products into Australia.

8. INDUSTRIES ASSISTANCE COMMISSION, ANNUAL REPORT 1977-78 (1978) (emphasis added).

lies somewhere between these conflicting claims. Tariff rates are high, but the average effective rate of protection undoubtedly has been significantly reduced over recent years. On July 19, 1982, however, the Australian Government decided not to proceed with a program of general reductions in tariff protection.

The traditional use of the tariff as a major instrument of protection led to the introduction of concessional rates of duty on certain imports through by-laws under the Customs Act of 1901. Concessional rates are still a feature of the Australian tariff schedule. Currently, there are 6,300 consolidated by-law references and 25,000 *ad hoc* by-laws relating to goods covered by almost every chapter in the tariff schedule. The value of duty concessions provided under this system are estimated at about 600 million Australian dollars annually.<sup>9</sup> In the countries of Western Europe and North America, where the tariff levels are much lower, such by-law schemes are almost unknown.

The legislative basis for concessional rates of duty on imported goods is provided for in Chapter XVI of the Customs Act of 1901, in sections 271 and 273. By far the greatest volume of by-law imports enter under item 19 of Schedule 2. Item 19 provides for the entry of goods as prescribed by the by-law and defines such items as "goods, a suitable equivalent of which that is the produce or manufacture of Australia, is not reasonably available." This inelegant formula generally is known by the acronym SERA. In general, sections 271 and 273 confer discretionary power on the Minister of Industry and Commerce, who then delegates to customs officials in that Ministry the authority to make by-laws or specific determinations in proceedings which may in particular cases contain conditions. By-laws and determinations must specify "goods," "matters," or "things," not individual persons or corporations. In practice, section 271 is no longer used. Instead ministerial determinations are issued under section 273. Concessions are published in the *Government Gazette*, but *ad hoc* ministerial determinations generally are not readily available. Ministerial determinations having general application are published in the *Consolidated By-Law References Publication*.

Other types of by-laws allow the Government to give effect to specific policies such as oil pricing, "local content" plans for industries such as motor vehicles and tobacco, tariff preferences in favour of New Zealand, and the implementation of tariff quotas.

It must be emphasized that Australia relies heavily on broad ministerial discretion in the decision-making process under the Customs Act. This is true also of related legislation such as the

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9. INDUSTRIES ASSISTANCE COMMISSION, DRAFT REPORT ON THE COMMERCIAL BY-LAW SYSTEM (1982).

Customs Tariff (Anti-Dumping) Act of 1975. In the case of by-laws nothing in the legislation lays down (i) who is eligible for by-law concessions, (ii) who may oppose concessions, or (iii) what procedures in the decision-making processes are to be followed. There is no legislative guarantee such that if certain criteria are satisfied a decision will be made in favour of the applicant.

The exercise of discretion by delegates under these broad powers can obviously lead to judgments which in the view of the industries concerned are unfair, inequitable or wrong. Put mildly, complainants find a lack of certainty in this type of administration, which poses considerable doubts about the likely outcome of applications. Equally important, there is concern about the power, apparently unfettered, to revoke ministerial determinations. There is no obligation under the Customs Act to provide reasons for determinations or for their withdrawal, and there is little public information about the policies pursued in interpreting the broad statutory criteria. In short, as far as by-law concessions are concerned, the procedures are far from being transparent.<sup>10</sup>

A distinctive feature of such discretion, as interpreted by the Australian courts, is that the Minister of Industry and Commerce has no obligation to grant a by-law even though the applicant may have objectively satisfied SERA criteria.<sup>11</sup> Further, the Minister's customs officials have broad discretion as to the matters that may

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10. A recent detailed study of commercial by-laws by the Industries Assistance Commission commented as follows:

The by-law provisions . . . are administered on the basis of criteria specified in the Customs Act. In the case of item 19 by-laws . . . these criteria and their interpretation have changed over the years in response to the changing perceptions of the role of the by-law. . . . The provisions of item 19 as revised in 1970, specify that goods eligible for by-laws should be goods "a suitable equivalent of which that is the produce or manufacture of Australia is not reasonably available": (SERA). In practice the Department often has to make fine distinctions between goods and, as a consequence, has been subject to criticism for the apparently arbitrary nature of its decisions. Its inability to maintain consistency in its interpretation of suitable equivalents and, to a lesser extent reasonable availability, is affected by the volume of applications, the vague nature of the criteria and the general context in which decisions are made. . . . Important elements of the Department's approach are based on its perception of the objectives of the by-law system and do not directly reflect the specifications of item 19. As a consequence, the wording of item 19 tends to be an inadequate guide as to the eligibility of particular goods for by-law entry. Thus the decision to grant or refuse by-law [entry] can be based on the use to which the goods may be put, even though a plausible interpretation of item 19, and the interpretation taken by many applicants for by-law [entry], is that item 19 refers only to the availability of suitably equivalent goods and is not concerned with end-use.

*Id.*

11. *Finance Facilities Pty. Ltd. v. Commissioner of Taxation*, 45 Australian Law Journal Reports 615, 617-19 (1971).



be taken into account. While the officials must consider the criteria set out in the statute, they are entitled to consider other factors relating to the general policy of the Act in exercising powers under section 273.<sup>12</sup>

The by-law system is but one of several closed mechanisms for altering the rates of duty in the tariff schedule. A second mechanism is the virtually unlimited ministerial powers contained in the customs legislation which, for example, allow the Minister of Industry and Commerce to prohibit exports and imports. This power is utilized not just for health and security purposes but for protective purposes. Examples include imports of sugar, ships and aircraft.<sup>13</sup> Ministerial powers have enabled the proclamation of orders such as those prescribing developing country preferences and those relating to the way in which different concentrates of fruit juice are to be dutiable. Although these orders are published, the reasons for the orders are usually not provided. Apart from a limited overview by the Administrative Appeals Tribunal (discussed below), the procedures for the day-to-day administration of the tariff by customs officials are excluded from public scrutiny. These matters include how imports should be classified and valued for duty purposes and which rates of duty should apply.

By contrast, an open mechanism is provided in the Industries Assistance Commission Act of 1973 for handling general tariff inquiries and inquiries into industry assistance. Under the legislation dealing with anti-dumping and countervailing duties, another open mechanism of control, with its own peculiarities, has been established. These systems are also discussed below.

Finally, the negotiation of international trade agreements is a mechanism for change in Australian tariffs and non-tariff restrictions. In the Australian system, however, both the negotiating process as well as the final agreement are not susceptible to public scrutiny and criticism. Submission of any aspect of this area of trade relations for public comment and/or specific parliamentary ratification by legislation is at the discretion of the Government. The consequent alterations in tariffs are specifically exempt from review by bodies like the Industries Assistance Commission.<sup>14</sup> This omission represents, it could be argued, a serious weakness in the effective operation of that body.

The three examples of public inquiry systems selected for discussion in this paper illustrate that it would be simplistic, indeed wrong, to divide Australian mechanisms for altering tariff levels and non-tariff restrictions for controlling imports into those

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12. *Murphyores Inc. Pty. Ltd v. Commonwealth*, 136 C.L.R. 1 (1975-76).

13. *Customs Act 1901*, §§ 50 and 51.

14. *Industries Assistance Commission Act of 1973*, § 23(3).

(i) involving general criteria and public participation and (ii) those in which officials apply technical criteria to determine whether a variation should be made to a tariff without public participation. It would be equally wrong to suggest that the interposition of a public inquiry mechanism into some areas of decision-making has been the result of any coherent policy objective. On the contrary, successive Australian governments have provided a limited range of *ad hoc* and pragmatic responses to demands from domestic or international pressure groups for open, as opposed to closed, decision-making. Governments have opted for clear guidelines and explanations, as opposed to vague criteria which can lead to conflicting results.

Moreover, with one exception, it is fair to say that the systems of public inquiry into tariff levels and non-tariff restrictions provide no more than the basis for a report or recommendation which the responsible minister may take into consideration in reaching a decision. Indeed, it is arguable that in a democratic system it is necessary to place the final responsibility for such a decision on the minister concerned; otherwise government by the civil service, the bureaucracy, would become the reality.

At this point it is necessary to introduce another ingredient into the analysis of the mix in public inquiry systems. Australia has long since abandoned "Westminster" notions of ministerial responsibility to Parliament as a check on the abuse of power by ministers and officials. This has meant that the courts have been expected to assume a more important role in controlling abuses of power. In 1977, legislation was enacted to strengthen the role of courts in reviewing all stages of federal administrative decision-making up to and including decisions by ministers. The Administrative Decisions (Judicial Review) Act of 1977 came into force in 1980. Those who see judicial review as a method of ensuring transparency in government can point to a range of judgments, including the overturning of decisions on customs by-laws that have grappled with abuse of power. The weakness of judicial review is that it does not allow review on the *merits* of a case. Under the 1977 legislation, the complainant can obtain the reasons for a decision only. The courts are not interested in whether the decision is "best" for either or both sides of a matter or for the economy; they are only interested in whether it is a right decision in law, which is what one would expect. Judicial review does not allow investigation of the "gut" issues for the protagonists. In addition, judicial review is expensive and time consuming, and it does not allow for a wide range of views to be aired.

The public inquiry system is therefore one of the few mechanisms which enables proposed adjustments of tariff levels and non-tariff restrictions to be examined on their merits and in a way

which allows an affected industry, trade union or consumer group to put forward views as to whether a particular alteration in a tariff or non-tariff restriction should occur. Three types of public inquiry systems have been selected:

- (i) public inquiries established under statute,
- (ii) public inquiries established by administrative policy in compliance with international obligations, and
- (iii) public inquiries established in the form of a statutory appeal on the merits of a case to an independent tribunal.

## V. PUBLIC INQUIRIES ESTABLISHED UNDER STATUTE

The main public inquiry system established by statute is the Industries Assistance Commission, the product of the Industries Assistance Commission Act of 1973. It has a chairman and five members with four (part-time) associate members. The Act also established the Temporary Assistance Authority which has one member and is serviced by the Commission's staff.

### A. Industries Assistance Commission

The Industries Assistance Commission is an independent statutory authority whose main function is to advise the Federal Government on the nature and extent of assistance which should be given to Australian industries. When the Commission was established, the hope was expressed that "it would substitute a deliberate, systematic and comprehensive program of public inquiries for the rather random, haphazard and sometimes informal and superficial process of investigation of the past."<sup>15</sup> The important aspects of the Commission are its independence, its openness, the breadth of its terms of reference and its lack of decision-making power.<sup>16</sup>

The Commission is independent from the political process, deriving its authority from the statute under which it was established. The Commission's recommendations stem from inquiries requested by the appropriate minister, now formally the Minister for Administrative Services, either in compliance with the Act or on his own initiative, with the Government's work being substantially carried out in the Department of Industry and Commerce. The statutory obligation on the Government to obtain the views of an independent body before responding to requests for industry

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15. Speech by the Prime Minister, *Hansard* (House of Representatives), at 1633 (September 27, 1973).

16. For a useful description, see INDUSTRIES ASSISTANCE COMMISSION INQUIRY PROCEDURES AND APPROACH TO ASSISTANCE ISSUES (1980).

assistance reflected the decision to open the decision-making process.

The Commission's reports go to the Standing Inter-departmental Committee on Assistance to Industry via the Minister for Administrative Services. In the performance of its functions the Committee is obliged to have regard to a set of guidelines contained in the Act (section 22). Briefly, these guidelines state that the Commission should be concerned with:

- (a) improving the efficiency with which the economy uses its resources,
- (b) ensuring a consistent industry policy,
- (c) taking account of the interests of consumers and users of products affected by the Commission's proposals,
- (d) providing for public scrutiny of assistance measures, and
- (e) having due regard to the capacity of the economy to sustain changes in the structure of industry and to absorb any members of the work force displaced.

The responsible minister, the Minister for Administrative Services, has power to require the Commission to have regard to other matters and the Commission can commence inquiries in some circumstances on its own initiative.

The Act requires that the Commission's inquiries shall include public hearings. These inquiries are not judicial; there is no legal representation of witnesses. Provision is made for confidential information to be supplied. Submissions are presented prior to the public hearing to allow the Commission to consider them carefully. Witnesses, who include representatives of industries seeking assistance, are expected to speak to and/or read these submissions. They can be cross-examined by the Commission's representatives, but cross-examination by interested parties is not permitted. The conduct of the inquiry is thus in the hands of the Commission. If the examining commissioner does not choose to cross-examine on a particular point or to allow another witness to express a view, that is the end of the matter as far as the public inquiry is concerned. This hearing process seems to be a sensible and adequate way to conduct an inquiry which often has to deal with highly contentious issues involving a great number of witnesses. The Commission has adopted the practice of releasing draft reports to allow further comment from the public before its final report goes forward to the Government.

The Industries Assistance Commission Act also deals with temporary assistance. Requests for urgent protection from imports are referred by the Government to the Temporary Assistance Authority. The Authority considers the Industries Assistance Commission's guidelines, but it is primarily concerned with the

issue of whether the increased imports are likely to cause "serious injury to the local industry," in line with the provisions of GATT Article XIX. Temporary assistance is a short-term measure and if it is likely to be in force for more than two years the question of continued assistance to the industry must be submitted to the Industries Assistance Commission for review. The public inquiry procedure also operates in the case of requests for temporary assistance (section 30F).

The value of the public inquiry aspect of the Industries Assistance Commission's work is open to debate. To a lawyer, one obvious value of the public hearing is that it allows the protagonists to put forward their views and to be subject to objective examination by the Commission. In terms of its impact on regulatory trade measures and achieving greater transparency in government, the value of the public hearing *per se* should be considered in the context of the overall operations of the Commission. It could be argued that the public hearing merely ventilates views without affecting the result and that it would be speedier and neater for the Government to make a decision without any public hearing. But the justification for public hearings is to expose issues to public scrutiny and debate. Decisions involving a wide range of issues (which the Government plainly considers relevant, having mandated their consideration by the Commission) should not be taken without allowing, and indeed expecting, affected interests to express their views. It is also important to remember that the supplicant industry's submission is thereby put in the public domain. Written submissions are the better for being tested in a public forum. The very knowledge that the cry for assistance is going to be tested in this way is salutary in itself. So far as the Commission is concerned, in spite of the exhausting man-hours involved, the public exposure and criticism is a defense against complaints of bias by an offended industry or by other affected interests.

The Commission's reports and the Government's response indicate that, taken as a whole, the public inquiry system, as handled under the Industries Assistance Commission Act, is an important aspect of the process of control over otherwise unfettered government powers of protectionist intervention. Arguably the same result in terms of public exposure and assessment can be gained by *ad hoc* inquiries such as have taken place in Australia.<sup>17</sup> Nevertheless, this argument can be rejected. The statutory obligation on the Government to refer proposed industry-assistance measures to the Commission, together with the statutory hearing procedure and the statutory guidelines, provide for the first time

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17. See, e.g., WHITE PAPER ON MANUFACTURING INDUSTRY (1977).

in Australia a stable basis for making changes in industry assistance.

Still, there are weaknesses in the system set up under the Industries Assistance Commission Act. First, the range of matters which the Commission is required to consider in assessing requests for assistance is too wide. The opening paragraph of section 22 reads like a political tract<sup>18</sup> and certainly requires the Industries Assistance Commission to attempt political judgments which the Government is then free to accept or reject.

Next it can be suggested that the Commission is sometimes placed in the position of legitimizing decisions which the Government has already tacitly taken. This result can be achieved by sending "loaded" references to the Commission. Such a reference may take the form of asking the Commission to advise whether the tariff should be increased by 20 percent or 25 percent as opposed to asking whether the tariff should be increased at all. The Commission may comment on the latter issue, but it will probably find that its comments, however convincing, are ignored by the Government.<sup>19</sup> Certain industries are assisted by complex packages involving a combination of tariff quotas, "local content" requirements and domestic pricing arrangements. These mechanisms build-in administrative arrangements which can change levels of assistance without reference to the Commission.<sup>20</sup>

Finally, after the draft report has been published and commented upon and after the final report is submitted to the Government, there is still room for certain pressures to be brought to bear on the Government. These pressures may come directly from industry, especially where the industry is a powerful one (as is the case with the steel industry in Australia). They may also come indirectly through the recommendations of the standing Inter-departmental Committee on Assistance to Industry, whose views on the report are sent directly to the Cabinet. This political reality leads to suggestions that the public inquiry system of the Industries Assistance Commission does not or simply cannot lead to transparency in decision-making by the government.

Such suggestions ignore counter-arguments put earlier in this

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18. Section 22(1) reads: "In the performance of its functions the Commission shall have regard to the desire of the Commonwealth Government, in pursuing the general objectives of national economic and social policy and urban and regional development, to improve and promote the well being of the people of Australia, with full employment, stability in the general level of prices, viability in external economic relations, conservation of the natural environment and rising and generally enjoyed standards of living."

19. INDUSTRIES ASSISTANCE COMMISSION, PASSENGER MOTOR VEHICLES: IMPORT RESTRICTIONS AND QUOTA ALLOCATIONS, Report No. 250 (1980).

20. DEPARTMENT OF INDUSTRY AND COMMERCE, TEXTILES, CLOTHING AND FOOTWEAR ADVISORY COMMITTEE REPORT (1982).

paper. For example, in the recent case of the steel industry in Australia in which pressures were applied for temporary protective assistance, the Government would have found it difficult to ignore the findings of the Temporary Assistance Authority which, by virtue of the statutory public inquiry procedure, were exposed to media and public attention. Without such a public inquiry system, the Government could simply have announced that it was satisfied that quantitative import restrictions were necessary to protect Australian industry from import penetration. Indeed, it might have found it difficult to do otherwise.

At the very least, as a result of this type of public inquiry system, the Government is obliged to explain why it chooses to take action contrary to recommendations contained in a report of the Temporary Assistance Authority or the Industries Assistance Commission. Equally, the Commission finds that it is obliged in its draft report to explain why it has chosen to accept one line of argument in the public inquiry and to substantiate this choice by objective statistical or other reasons.

## VI. PUBLIC INQUIRIES IN COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Public inquiries are conducted in compliance with the GATT Anti-Dumping Code and the GATT Code on Subsidies and Countervailing Duties. The Australian mechanisms for the imposition of anti-dumping and countervailing duties are contained in the Customs Tariff (Anti-Dumping) Act of 1975 as amended. The legislation was amended in 1981 with the aim of bringing it into line with the agreements reached in the Tokyo Round negotiations. In spite of these amendments, the legislation is awash with ministerial discretionary powers. The responsible minister, the Minister of Industry and Commerce, is generally empowered to take action under the Act if "he is satisfied." In some cases the requisite state of satisfaction can be obtained only if certain criteria are met. Unfortunately several key criteria are not defined in the legislation so that neither domestic industry (a term which is itself not defined) nor exporters and importers can be really sure of the criteria by which officials operate. In an effort to comply with the obligations under the GATT Codes, which are intended to increase transparency, the Department of Industry and Commerce has established by administrative fiat a form of public inquiry in the case of dumping allegations. This mandatory forum is described as a "meeting of parties".

The administrative procedures so-established require that the complainant complete a written questionnaire from which, with the aid of other material obtained independently, the officials deter-

mine the existence of a *prima facie* case. If warranted, further investigations are carried out, frequently in the country of export. Afterwards, the Department invites the interested parties to meet, to present their views, and to offer arguments in rebuttal. Quite frequently, written non-confidential submissions conveying the views of each side are not exchanged until the meeting; in addition, they may not have been even seen by the responsible officials much before then. In such circumstances a great deal of time can be wasted by arguments which could have been avoided had the parties and officials an opportunity to give thoughtful consideration to the submissions.

The meetings are public, but the range of interests presented is in the discretion of the chairman. Consumer interests are notable by their absence or if present by their silence. The meeting is chaired by an official, the proceedings are taped and a transcript is later available. In contrast with the procedures of the Industries Assistance Commission, cross-examination is not carried out by the presiding official, who seems only to intervene to clarify a point, usually a point of fact. Each side speaks to its written submission and is then subject to points of clarification, a form of cross-examination. Interests are often represented by industry consultants or by lawyers; but unlike the Industries Assistance Commission, evidence is not given under oath. The upshot is a process in which the presiding official seems willing to allow each side to make submissions, to challenge by way of cross-examination and to rebut in an environment which resembles the old concept of "trial by battle" rather than a quasi-judicial procedure. The aim of each side is clearly to convince the presiding official that its analysis of the facts is the right one. A key defect is that each side often refuses to disclose material evidence to the other so that parties argue about detailed items making up "normal value" and the "export price" using data which is only fully available to officials.<sup>21</sup>

In brief, the procedure approaches administrative law notions of a hearing of a dispute where, for reasons of confidentiality, the full facts are not made available. While the issues are certainly exposed, it is doubtful whether unsworn exchanges of views regarding disputed facts, coupled with each side's refusal to disclose data which are essential to the argument, will necessarily add very much to the very specific and detailed material already gathered by officials. Under the anti-dumping procedures, for example, interested firms can have confidential discussions with officials before and after the "meeting of parties".

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21. The same point is made in Richard Dale, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER*, 82 (1980).



The final views of the officials are set out in a written report which is submitted to the Minister of Industry and Commerce and then published together with the decision. This report contains a summary of the views put forward at the "meeting of parties" as well as references to other non-confidential material, and concludes with a statement of the Department's findings. It becomes clear on looking through the published reports of dumping inquiries that in the main the Department's recommendations to the Minister regarding the imposition of anti-dumping duties are founded on its own inquiries or confidential material which is not disclosed. Accordingly, it is almost impossible to form any view as to whether the introduction of this system of public inquiry into the decision-making process really leads to a better understanding by the parties, or by the public of the decision-making process. There seems to be little doubt, however, that the officials have *some* disputed questions of fact exposed for their better understanding.

There is provision for an appeal on the issue of the existence of prerequisite facts to support the Department's decision to the Industries Assistance Commission by either the complainant or the importer.<sup>22</sup> This appeal would open up the inquiry to consumers, but the nature of the criteria applied (dumping and subsidy inquiries assume, in spite of potential gains to consumers, that it is unfair for a domestic producer to suffer losses because of competing dumped or subsidized goods), indicate that the Commission does not have authority to consider the welfare of consumers in a dumping reference. These criteria should be compared with the Commission's broad terms of reference in an inquiry into industry assistance under section 22, discussed above. It reveals a disturbing difference in criteria for industry assistance across the board.

## VII. PUBLIC INQUIRIES AS A STATUTORY HEARING ON MERITS

The Administrative Appeals Tribunal is part of the Federal Government's package of administrative law reforms, the rest of which consist of the creation of the Commonwealth Ombudsman and the new grounds and avenues of judicial review of administrative decisions available under the Administrative Decisions (Judicial Review) Act of 1977.

### A. Administrative Appeals Tribunal

The Administrative Appeals Tribunal has jurisdiction to sub-

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22. Customs Tariff (Anti-Dumping) Act of 1975, § 15.

stitute its decision for that of the official whose decision comes before it for review (section 43). Its jurisdiction does not automatically catch all federal administration decisions and so far only a small, but increasing spectrum, of decisions are reviewable.<sup>23</sup> These decisions include a very limited range under the Customs Act of 1901 including demand of duty (section 167), certain rules-of-origin decisions (section 151A), determination of the f.o.b. price and landed cost of goods, and decisions under the Customs Tariff Act of 1966 (section 8 and section 31). Nonetheless, in spite of the small range of jurisdiction in customs matters, the Administrative Appeals Tribunal exhibits some unique features which are relevant to the question of the role of the public inquiry system in advancing open government.<sup>24</sup>

First, the range of persons who can complain is limited, but the formula adopted, "persons whose interests are affected", allows room for very broad interpretation. Wives have standing to complain about any proposed deportation of their husbands. By contrast, in the customs duty context the Tribunal has concluded that, while it is not necessary for the complainant to have a legal interest in the ordinary sense, he must be able to demonstrate that he has some interest which is not too remote from the decision impugned.<sup>25</sup> In a case under review, the President refused standing to a customs agent who argued that an assessment of duty which ran counter to the advice he had given a client reflected on his reputation and livelihood. The President of the Tribunal pointed out that the alleged error in assessment of duty could be challenged by the firm concerned. In fact, the firm subsequently succeeded in having the duty reassessed by the Tribunal. As the President observed, the agent's reputation did not suffer.<sup>26</sup> More importantly, complainants are entitled to be given reasons for a decision before they institute proceedings (section 28). Informal directions have been issued to departments which contemplate that the statement must be intelligible to the applicant and be of sufficient precision to give him or her a clear understanding of why the decision was made. The Tribunal is judge of the adequacy of the statement of reasons by reference to the objective of

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23. The Administrative Appeals Tribunal Act requires the Federal Parliament to enact legislation adding acts or parts of acts to the jurisdiction of the Tribunal; that is, it has no original or broadly-based jurisdiction.

24. *Re Azo Overseas Sales Pty Ltd and Collector of Customs*, No. 2, 3 Administrative Law Decisions: Notes 65 (1981). The issue was whether small cricket bats are classifiable for duty as toys.

25. *Re McHatton and Collector of Customs*, 1 Administrative Law Decisions 67 (1976-78).

26. *Re Termolst (Australia) Pty and BACA*, 16 Administrative Law Decisions: Notes 350 (1976-78).

"enabling persons affected to determine whether to challenge the decision and how to do so."

The hearing can take the form of a preliminary conference chaired by a Tribunal member or a public hearing. The Tribunal has power to affirm, set aside, remit for consideration, or substitute its own decision for that of the original decision maker (section 43). The other aspect of the form of public inquiry is that the Tribunal is required to reexamine both the facts, the legal basis for the decision *and the justification for the Government's policies*. It is this last factor which makes the whole process unique in Australia. The Tribunal must examine any policy justification for the decision and may overturn it and apply a different policy which it considers to reflect more properly the terms of the statutory power. Although the Tribunal has been very discreet in applying its blue pencil to government policy guidelines,<sup>27</sup> the potential breadth of this power has led to suggestions that the Tribunal is really another arm of the executive. There may be some truth in such a suggestion, but as an arm of government it is certainly a very effective mechanism for exposing, analyzing and reshaping government administration in a public forum.

These features, combined with the expert and independent nature of the Administrative Appeals Tribunal, have led to suggestions that it is particularly well-suited to deal with current areas of concern in international trade regulations such as the operation of the by-laws system and the anti-dumping and countervailing duty process. It is potentially the most effective mechanism if the intention is to increase openness of government because it has jurisdiction to decide the matter on its merits after a complete rehearing of the complaint and an assessment of the government policies involved.

At this point, the dilemma for Australian governments becomes apparent. As demonstrated by Australia's signature of the Tokyo Round agreements and current initiatives in the context of the GATT ministerial meeting in November 1982, the Australian Government is in principle in favor of making administrative procedures more open or more transparent. Indeed, it should be mentioned that the present Government is imposing an emasculated Freedom of Information Act on a reluctant Public Service in the interests of open government. But how far down this path will any Australian government and its officials be prepared to go?

GATT participants recognize each country's sovereign right to impose restraints on trade for certain protectionist purposes and some thinking behind Australia's tariff and non-tariff legislation

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27. *Re Drake and Minister for Ethnic Affairs*, No. 2, 2 Administrative Law Decisions 634 (1979).

and administrative practice is clearly protectionist. The result is that even where some form of public inquiry system is introduced, the guidelines load decision-making in favor of the domestic producer. For example, in a dumping inquiry the thrust of the investigation is overtly evenly balanced and the "meeting of parties" allows the importer to challenge allegations that his imports are causing material injury to the domestic industry. But the legislation does not contemplate that the importer can rebut allegations of injury by pointing to the fact that the gains to the importer and to downstream consumers are probably as large, if not larger, than the gains to the domestic producer seeking protection. The obvious answer to that complaint is to point out that such factors fall outside the current international view of dumping criteria and to suggest that the issue should therefore be handled in an international forum. In exploring proof of material injury, however, the importer will not be encouraged to argue that it is instead products from other sources which are causing injury. The authorities emphasize that it is his imports which are under review. Such a stance by officials is likely to result in an automatic finding of material injury once the dumping components of "normal value" and "export price" are established. However analyzed, the importer will conclude that any balancing must be in favor of the domestic industry.

Given such value judgments, the surge in successful dumping complaints may well lead to a backlash, at the governmental level, by those countries such as Singapore and South Korea, whose exports seem to be the prime target of dumping complaints in Australia. South Korea, for example, can point to the fact that the balance of trade is three to one in Australia's favor and suggest to the Australian Government that to single out South Korean exports for protectionist action is hardly the most sensible way for the Australian Government to behave. Alternatively, the importers of South Korean goods may seek judicial review, using the public-inquiry system as the basis for a complaint that the statutory criteria are being abused.<sup>28</sup>

In a closed system of decision-making, the Australian Government would simply be able to accede to the South Korean protest by closing off this avenue of protection for a period so as to avoid the threat of trade retaliation. The current public inquiry system, with the combination of the public "meeting of parties" and the real possibility of challenge before the federal court (which imposes an obligation to give reasons for refusing to impose an anti-dumping duty), makes such a response by the Aus-

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28. Australian Financial Review (Sydney), September 3, 1982.

tralian Government to pressure from the South Korean Government very difficult.

### VIII. CONCLUSION

The regulatory trade measures of the Australian Government are based on what can be described as GATT mercantilism, i.e., an attempt to harness the threat of foreign retaliation as a major constraint on protectionist action. But Australia's politicians are very responsive to protectionist pressure from powerful domestic lobbies. The overall picture is not an easy one to explain internationally. While such conflicting policies might be balanced and practised in a closed system of government administration, it is well nigh impossible to do so in any area where one of the three systems of public inquiry described above operates. These systems have been introduced for quite unrelated reasons, but combined with the new system of judicial review, they leave the Government's policies and decisions exposed to critical domestic and international comment. Electorally, the Australian government cannot afford to act openly against domestic pressure groups too often; it can therefore be forced to adopt extraordinary expedients of which the recent Australian steel story is one example.

The steel scenario gives rise to the argument that transparency in government brings impotence or, alternatively, that Australia's steel crisis demonstrates that when faced with conflicting domestic and international interests the Government is able to abuse the public inquiry process so as to avoid taking any decision. These criticisms are justified. On the positive side, however, it can be argued that Australia, perhaps for the wrong or irrelevant reasons, is moving in the right direction—that of allowing all elements of the domestic economy, as well as the exporters of goods to Australia, to participate in and to know the reasons for decisions on regulatory trade measures.

It is not clear that transparency in government in Australia is leading to the inability of the Government to govern, or that the current public inquiry systems in Australia are but anything more than first moves toward openness in this area. Given the current economic recession, the "margin of appreciation" employed in assessing the use of these systems must be generous; otherwise there will be a risk of seeing the present machinery dismantled.

In conclusion, there exists an underlying concern which perhaps goes beyond the strict subject matter of this paper. Australia has established a complex system of tariff and non-tariff protection. Some of the different procedures for evaluating claims for assistance have been outlined. The analysis of the different procedures for the purposes of this paper has drawn attention to the

different criteria being applied. Different systems, open and closed, applying different criteria, mean that domestic industry is encouraged to shop around for the best protectionist bargain. More importantly, for government and for those Australian interests which support a coherent policy for public assistance to industry, the clear evidence that two elements, the different procedures for evaluating claims combined with the application of conflicting or different criteria under those procedures, serves as a warning that Australia risks losing an opportunity to secure a consistent policy of public assistance to industry. Australia is in danger of reverting to the piecemeal approach which the introduction of the Industries Assistance Commission was intended to overcome.<sup>29</sup>

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29. A COMMISSION TO ADVISE ON ASSISTANCE TO INDUSTRIES (1973).