REGULATION IMPACT STATEMENT

1 BACKGROUND

1.1 Australia’s anti-dumping and countervailing system

Australia’s anti-dumping and countervailing system implements trade remedies (in the form of duties and price undertakings) which World Trade Organization (WTO) Members have incorporated to form the basis for the maintenance of the multilateral trading system. Its purpose is to protect Australian manufacturers and producers from dumped or subsidised imports that would affect their viability. It provides a small but effective trade remedy — collecting on average $8m in duties per annum (before refunds) representing an average of 0.004% of the value of goods imported into Australia over the past five years.

Dumping is a form of international price discrimination. It occurs when an overseas supplier exports goods to Australia at a price that is designed to ultimately lower competition. If the dumping causes, or threatens to cause, ‘material injury’ to Australian producers of ‘like goods’, those producers can pursue action that may result in dumping duties being imposed on future exports of the goods. Dumping occurs when an overseas supplier exports goods to Australia at a price that is lower than the price it normally charges in its home market.

Similarly, countervailing duties may be imposed on imports subsidised by foreign governments that cause or threaten material injury to an Australian producer of ‘like goods’.

1.2 Brief history

Australia has had an anti-dumping system, in one form or another, for over 100 years. The anti-dumping system in its current form is governed by two key World Trade Organisation (WTO) agreements:

- *The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (‘the Anti-Dumping Agreement’); and
- *The Agreement on Subsidies and Countervailing Measures* (‘the Countervailing Measures Agreement’).

The WTO agreements do not prohibit dumping or all forms of subsidies. Instead the agreements govern the use of trade remedies where dumped and/or subsidised goods cause or threaten to cause injury to domestic producers.

The primary legislative provisions enacting Australia’s anti-dumping system are detailed in Part XVB of the *Customs Act 1901* and the *Customs Tariff (Anti-dumping) Act 1975*.

The most recent substantive review of the anti-dumping system was the Willett Review in 1996. Amendments in 1998 to implement the Government’s response to this review established the current system with the Australian Customs and Border Protection Service (Customs) responsible for conducting anti-dumping and countervailing investigations and implementing decisions of the Minister. The Trade Measures Review Officer (‘Review Officer’) was established to provide limited, independent review.

A review of the administration of the anti-dumping system was conducted in 2006. *The Joint Study of the Administration of Australia's Anti-dumping System* ('Joint Study') involved government and non-government stakeholders. The Joint Study's terms of reference specifically excluded examination of issues of anti-dumping policy or the legislative basis for the anti dumping system. The Joint Study made 22 recommendations to improve the administration of the anti-dumping system. Key themes included:

- additional assistance to enable potential applicants (particularly small to medium enterprises) to understand the anti-dumping system and to provide guidance on the application process;
- improved guidelines to ensure consistency of application of policy in Customs' processes; and
- measures to improve transparency of processes and decision-making.

1.2.1 Administration of the system

Customs is responsible for the administration of Australia's anti-dumping system. It undertakes investigations of alleged dumping and subsidisation, inquiries on whether measures should be continued, revoked or varied and assessments of the final amount of duty to be paid by importers. These activities involve Australian manufacturers, importers, foreign exporters, foreign governments (for subsidy investigations) and, in some cases, end users. Following these investigations and inquiries, it makes recommendations to the Minister for Home Affairs (Minister) and then implements the Minister's decisions. Customs also provides advice to interested parties involved in potential and actual inquiries.

Most of the decisions resulting from investigations and inquiries are appellable to the Review Officer who is appointed by the Minister. Further information about the operation of the current system is available at **Attachment A**.

2 PROBLEM

The objective of the anti-dumping and countervailing system is to address the negative impacts of unfair trading activities by overseas companies on Australian industries. However, there is a tension between preventing unfair trade on the one hand and encouraging the beneficial effects of competition on the other.

Australian manufacturers and producers operate in a global economy and benefit from international supply chains and access to foreign markets. The benefits of such competition may be felt by consumers and purchasers of inputs who benefit from cheaper prices and greater choice, which can translate into improved profit and productivity.

However Australian industry can also be negatively impacted by international competition. In some cases this will be the result of 'fair' competition from a more efficient producer, but at other times it will come from unfair competition resulting from dumping or subsidisation. Sometimes this unfair competition can have a material impact on the industry's performance and may threaten its long-term viability. Resulting problems include reduced competition in the market and reduced choice for consumers and purchasers.

On a domestic level, this behaviour is addressed through competition regulation, including misuse of market power provisions in the *Competition and Consumer Act 2010*. Such provisions aim to address the misuse of market

power by looking for evidence of abuse of market power with the intent to eliminate damage, prevent or deter competitors.

The formulation applied in the current anti-dumping law looks at damage caused to the complainant. While the test does not explicitly take into account the wider economic impacts of measures, the Minister has the discretion to take these impacts into account. The main challenge for anti-dumping regulation is the distinction between unfair trade and normal competitive activity.

In its recent review of the current system, the Productivity Commission ('the Commission') concluded that Australia should retain an anti-dumping and countervailing system. It noted that "…the potential broader benefits from providing access to anti-dumping protection seemingly come at very small overall cost to the community" (page 51 of the Report). It also considered the retention of the system would facilitate Australia's further trade reform.

However, it considered greater checks and balances needed to be included in the form of a bounded public interest test to ensure that competitive conduct was not captured by the system.

The Commission also suggested a number of administrative changes to balance cost, administrative ease, timing and transparency. For example, it noted that, under current arrangements, reviews have the same timeframes as investigations when they could be completed within a shorter timeframe. They also observed that reviews are undertaken infrequently. The Commission also noted that the current duty collection scheme could be considered to be asymmetric, inefficient and potentially inflexible as duties are collected even if goods are exported above the floor price. Finally the Commission was concerned that duty assessments did not reset the level of measures applying to future imports.

Overall, the Commission recommended 20 changes to the system that it considered would reduce the economy wide impact and improve its efficiency and effectiveness. Further information about the review of the Productivity Commission and its recommendations are available at **Attachment B**.

3 OBJECTIVES

The broad objectives of the anti-dumping and countervailing system are to provide an effective and efficient remedy for unfair international trading practices and to minimise any unintended impacts of the system on the Australian economy and the community.

4 OPTIONS

4.1 Status Quo

The operation of the current system, including existing checks and balances is outlined at **Attachment A**.

4.2 Introduction of a bounded public interest test

The Commission recommended the introduction of a bounded public interest test to ensure that competitive behaviour is not excluded simply because of the negative impact on Australian industry. The test would be administered by Customs and apply to new investigations and to reviews to determine whether existing measures should be continued.

The model proposed by the Commission involves a presumption that measures would be imposed where there has been injury caused by dumped or subsidised imports unless it would be contrary to the public interest. Assessment of the public interest would involve ascertaining in 100% of cases where the imposition or continuation of measures appears likely, whether any of five prescribed criteria were met and, if they were, measures could not be imposed.

The criteria proposed by the Commission are intended to address significant impacts on competition, the imposition of ineffective measures and to ensure measures would not be imposed where the costs to other parties would be clearly disproportionate to the benefits to the applicant industry. The proposed criteria are:

- the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule;
- the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers' costs to make and sell;
- un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods;
- prior to the commencement of injurious dumping or subsidisation, the local industry's share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed; and
- the large majority of the overseas supplier's output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier's fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).

Where, based on the advice from Customs, the Minister was satisfied that one (or more) of these circumstances applied, measures would not be imposed. Where the imposition of measures would not be contrary to the public interest, the current lesser duty provisions would apply.

Customs would have to complete assessments against the test within 30 days, with provisional measures imposed in all cases where there was a finding of injurious dumping or subsidisation, prior to consideration of public interest matters.

4.3 Alternatives to the Commission's bounded public interest test

There are several alternative approaches to considering the impact of measures. These include but are not limited to:

a) Maintaining the status quo.
    - Australia's current legislative framework includes several mechanisms that can limit the impact of measures. This includes consistent consideration of the lesser duty rule, where measures are only imposed at the level necessary to remove the injury caused by dumping and/or subsidisation; provision for importers

affected by the imposition of measures to apply for exemption in certain specified circumstances; and a Ministerial discretion to not impose measures.

b) A discretionary approach where the impacts of measures on other impacted parties may be taken into account in determining whether measures should be revoked. Under this approach the Minister may take into account the extent to which:

    - the imposition or continuation of measures has:
        - impacted on employment, including in regional and rural Australia;
        - improved the viability and/or future prospects of the applicant industry;
        - impacted on domestic producers of inputs used in the production of like goods;
        - caused significant damage to manufacturers or producers in Australia that use the goods as inputs in the production of other goods;
        - caused significant damage to importers of like goods;
        - affected competition, including the extent to which consumers are impacted by competition effects; and
    - the revocation or non-revocation of measures would be seen as supporting practices that would be contrary to Australia's international trade interests.

    The approach would be based on an application process.

c) A discretionary approach where the impacts of measures on the applicant and downstream manufacturers and producers may be taken into account in determining whether to impose or continue measures. Under this approach the Minister may take into account:

    - employment;
    - competitiveness;
    - viability;
    - investment;
    - innovation;

    including in regional and rural Australia;

    - whether the imposition or non-imposition of measures would be seen as supporting practices that would be contrary to Australia's international trade interests; or
    - any other matters.

    The approach would include, at the Minister's discretion, a consultation process.

d) A discretionary approach where the impacts of measures on the applicant, upstream and downstream producers, importers and consumers, must be taken into account in determining whether to

impose or continue measures. Under this approach, the Minister may take into account:

- whether not imposing or continuing measures:
    - would be likely to cause significant damage to domestic manufacturers and producers of inputs used in the production of like goods
    - would be likely to improve the viability and future prospects of the applicant industry
    - would be likely to cause significant damage to manufacturers and producers in Australia that use the goods as inputs in the production of other goods
    - would be likely to cause significant damage to importers of like goods; and
- the effect or likely effect on competition of the imposition or continuation of the measures, including the extent to which consumers are likely to be impacted by these competition effects.

This approach would include an application based process supplemented by a discretion to initiate a public interest inquiry where a prima facie case existed.

4.4 Limiting the duration of measures and adjusting continuation arrangements

Limits could be introduced to the duration of measures and associated adjustments to continuation arrangements. This would include introducing a requirement to examine the variable factors that establish the level of the measures (i.e. export price, normal value and non-injurious price) during a continuation inquiry.

The Commission recommended that the initial five year term for measures be retained but that extensions are limited to one three year term and that any applications for measures following expiry should be subject to the same requirements as an original application. It also recommended that continuation reviews should comprehensively examine and recalculate the variable factors.

Alternatives to this proposal could include either not limiting the extensions of measures or limiting extensions to one five year term. In either case, this could be complemented by a comprehensive examination and recalculation of variable factors during continuation inquiries. In addition the application provisions for the continuation of measures beyond five years could be strengthened. This would place the onus on applicants to establish a prima facie case for an inquiry which may result in the benefits of a further period of trade remedy. It would introduce a test to ensure that, before making a decision to continue the measures, the Minister must be satisfied that it would be more probable than not that the injury would continue or recur if measures were removed.

4.5 Roles and responsibilities of the Minister, Chief Executive Officer and Review Officer (Recommendations 7.1 and 7.2)

The role of the Review Officer could be clarified to provide transparency about the administration of the review process and time limits.

The Commission recommended that:

- If the Review Officer finds in favour of an appeal against a Ministerial decision, the Minister should make a final decision based on the competing findings of the Review Officer and the recommendations of the Chief Executive Officer.
- If the Review Officer did recommend a reinvestigation—the reinvestigation would be based on a directive by the Review Officer on where the initial investigation was flawed and the Chief Executive Officer would be able to take into account new information.
- Decisions by the Minister following reinvestigations should not be appellable.[1]
- The range of decisions that are reviewable by the Review Officer should be extended to include decisions of the Chief Executive Officer on whether or not to commence a continuation inquiry and decisions of the Minister to continue anti-dumping or countervailing measures.

4.6 Proposed changes to the review arrangements and mechanisms for duty collection, duty refunds and feedback from interested parties (Recommendations 6.5, 6.6 and 6.7, which are related)

To improve the efficiency and effectiveness of review arrangements, duty collection and refunds and consultation, the Commission made three related recommendations (6.5, 6.6 and 6.7) which proposed:

- the current review provisions be abolished and replaced by annual reviews—Recommendations 6.5 and 6.6.
- the current duty refund provisions be abolished–Recommendation 6.6;
- the current two part duty collection scheme be abolished and replaced with a 'floor price' system—Recommendation 6.6;
- annual adjustments to the level of measures be made by the Chief Executive Officer (not the Minister) with those decisions not being appellable—Recommendation 6.5; and
- as part of the annual review, Customs should seek feedback from interested parties on the impacts of measures, which could be used, where appropriate, to provide for a more streamlined revocation process—Recommendation 6.7.

The Commission also recommended that the proposed annual review mechanism should employ a risk-managed approach with greater reliance on desk audits; where an annual review led to a zero duty rate, measures would still remain in place for the original term; and, if necessary, Customs be provided additional powers to apply appropriate penalties, if considered necessary.

4.7 Proposed changes to improve access, international consistency, and compliance

The Productivity Commission did not explicitly recommend strengthening or enhancing accessibility of the anti-dumping system, consistency with other international anti-dumping administrations and stronger compliance with measures. Questions regarding accessibility, international consistency and

[1] It is assumed that the Commission meant that such decisions would not reviewable by the Review Officer, not that judicial review would be excluded for aggrieved parties.

compliance arose in the context of industry submissions to the Commission and to Government and in related consultations.

While many of the proposals associated with these themes are well-developed and can proceed to implementation, others require further consideration and development. This explains why some points below include reference to the need for consultation with the International Trade Remedies Forum[2], and consideration of practices in other international anti-dumping administrations, to further develop these proposals.

The following points outline the range of proposals related to improving access, international consistency and compliance:

- measures to improve access to import data and information about subsidies in foreign jurisdictions;

  Potential applicants for anti-dumping or countervailing measures are not required to provide detailed import details in order to make an application for a measure and can instead estimate the volume of imports and deduce export prices. Nevertheless applicants have reported difficulty in developing applications given the obligations of the Australian Bureau of Statistics to maintain confidentiality of individual businesses or persons. The proposal seeks to improve access of applicants to import data so as to allow them to develop more accurate information and determine if an application is worthwhile. Additionally the development of a register of subsidy programs previously investigated by Customs, and the outcomes of those investigations, will also assist potential applicants considering whether to apply for countervailing measures.

- support for small and medium enterprises:

  The Government will fund a position within the Australian Industry Group to assist SMEs with anti-dumping and countervailing matters.

- clarification of the approach to determine the length of investigation and injury periods;

  Applications need to be supported by *prima facie* evidence that dumping or subsidisation has caused material injury to the domestic industry. Clarifying the length of the investigation and injury periods will provide greater guidance for applicants and avoid unnecessary work.

- broadening actionable subsidies to align with those permitted under WTO Agreements;

  The WTO Agreements limit the kinds of subsidies that can be the subject of countervailing measures. The exclusion of certain subsidies expired in 2004, meaning that they became actionable. Australia's countervailing law has not been updated to reflect this, and as a result Australian companies cannot seek measures in relation to certain subsidies that are now actionable under WTO rules. To address this oversight, it is proposed that the Act now be amended to reflect the full range of actionable subsidies under WTO rules, including certain assistance:

[2] The Government will establish the International Trade Remedies Forum comprising parties with an interest in the anti-dumping system and government agencies to oversee the implementation of the reforms and monitor their effectiveness.

    - for research activities conducted by firms or by higher education and research establishments;
    - for disadvantaged regions pursuant to a general framework of regional development;
    - to enable firms to adapt to new environmental requirements; and
    - for a variety of government programs that provide services or benefits to agriculture research programs, pest and disease control, training, marketing and promotion, inspection and advisory services, infrastructure, public purchasing of food stockpiles and purchases for food aid.
- clarifying the approach to take when government and exporters are uncooperative;

The intention of this proposal is to provide transparency and clarity of an existing practice of Customs, namely the circumstances in which it may find that an importer, exporter or government is non-cooperative and the consequences that may result. It is not intended that punitive measures be introduced because the existing system already contains sufficient means to ensure non-cooperation is not rewarded. The Minister already has the ability, where satisfied that sufficient information has not been furnished or is not available to make certain determinations having regard to "all relevant information". However, there is presently a perception that Customs is not firm enough in its approach to interested parties that do not fully cooperate, particularly with respect to exporters and government in the context of assessing dumping and subsidy margins. This perception stems from a comparison of the Australian approach to identifying and handling non-cooperation with the approaches of anti-dumping and countervailing administrations in other countries. The International Trade Remedies Forum will be consulted in the development of this proposal, and the practices of other jurisdictions in this regard will be taken into account.

- improving the effectiveness of the 'particular market situation' provisions

A number of stakeholders have raised issues with the interpretation of what constitutes a 'particular market situation' for the purposes of determining 'normal values'.

The Manual currently outlines some relevant considerations for assessing whether a particular market situation exists, however it could provide improved guidance including:

    - on the relevance and impact of government influence and assistance in respect of key inputs to the product;
    - circumstances where the proportion of government owned enterprises might contribute to a particular market situation determination;
    - other circumstances where government intervention could result in distortion of domestic selling prices; and
    - how Customs will assess a particular market situation where the government of a country, or exporters, do not cooperate.

A working group will be established to make recommendations to Government before the end of 2011 about how to improve the effectiveness

of the particular market situation provisions, consistent with our WTO obligations.

- revising the approach to the calculation of the non-injurious price and the lesser duty rule

The intention of this proposal is to allow the consideration of a broader range of factors in determining non-injurious price (such as effects on volume, price or profits), so as to provide a more effective remedy for injury caused by dumping. There has been a perception by applicants for measures that Customs' present approach has resulted in non-injurious price levels that are underestimated and therefore the effectiveness of the remedy is diluted. The introduction of a more flexible approach to calculating non-injurious prices permits consideration of a wider range of relevant factors. This will enable non-injurious prices to be tailored to provide a more effective remedy for the injury caused by dumping that has been found in a particular case. The International Trade Remedies Forum will be consulted in the development of this proposal which will be reflected in the Manual.

- include industry associations, unions and downstream industry as interested parties in anti-dumping investigations and appeals;

The proposed amendments to the definition of "interested party" in section 269T of the *Customs Act 1901* will permit industry associations, unions and downstream industry (whether or not they are an importer) to formally participate in an investigation by making submissions to Customs to defend their interests. The intention of the proposal is to increase accessibility and awareness of the anti-dumping system to a broader range of stakeholders. The Government will consider further amendments to allow industry associations, unions and downstream industry to participate in administrative reviews as part of the reforms of the administrative appeals process.

- provide greater flexibility in setting the form of duty;

The proposal seeks to provide greater flexibility in the Anti-Dumping System, consistent with the range of options available under the WTO agreements, to the form that a duty may take. This may include, an ad valorem duty, a fixed amount of duty, a combination duty, or a floor price. Legislative amendment will be required to effect this change.

- consider introduction of an anti-circumvention framework; and

The proposal to introduce an anti-circumvention framework is intended to address concerns expressed by industry that the effectiveness of the anti-dumping system is undermined if importers are allowed to avoid paying applicable duties. This can be done, for example, by slight modifications being made to, or disassembly of, goods subject of measures so that the importer can declare that measures do not apply to the modified or disassembled goods. In the present system, a completely new investigation would need to be initiated and undertaken, with a finding that dumping had caused material injury to the Australian industry, before measures could be imposed. The International Trade Remedies Forum will be consulted in the development of this proposal which will be reflected in a (most likely legislative) Framework and be informed by consideration of anti-circumvention regulations of comparable overseas administrations.

- implement an enhanced program for monitoring compliance with anti-dumping measures.

This proposal is based upon existing powers and functions of Customs. The intention is to highlight that Customs will monitor measures shortly after their imposition to ensure early compliance and assist importers to better meet their obligations thereunder. Additionally the intention is to implement a program of periodically monitoring a measure throughout its life.

5 IMPACT ANALYSIS

5.1 Status Quo

While the current system is internationally recognised as timely, fair and transparent, retaining current arrangements may not explicitly address the identified concerns about the lack of consideration of wider economic impacts or continued measures becoming a form of long term protection. However, these considerations remain open to the Minister in exercising the current discretion. This is an appropriate and proportionate response given the small size of the identified problem and the availability of existing checks and balances.

5.2 Introduction of a bounded Public Interest Test

The benefit of a bounded public interest test would be that it would introduce a formal requirement to minimise the exclusion of pro-competitive conduct. While the current system allows the Minister to not impose measures on public interest grounds, exercise of this discretion has hardly ever resulted in non-imposition of measures.

Competition principles dictate that, through the exclusion of anti-competitive behaviour and the maintenance of strong protection of the competitive process, better resource allocation should result in improved productivity in the economy. Following these principles, the overall Australian economy would benefit from the introduction of a bounded public interest test that promotes competition.

Other beneficiaries of the introduction of a bounded public interest test could include importers, downstream manufacturers and producers who use imports as inputs into further production processes. Consumers could also benefit from any flow on effects of cheaper prices. These market participants could benefit from the possibility that fewer measures would be imposed under the Commission's proposed model than is currently the case, and to that extent would benefit from cheaper import prices.

The extent of benefits are difficult to quantify but would be proportional to the benefit to importers and consumers from determinations made under the current system that would be blocked by the application of such a test. In principle it may capture a wider range of economic impacts and may reduce the number of claims for anti-dumping measures. In practice it is not clear whether it would notably reduce the number of anti-dumping determinations made.

The Commission indicated that the impact of this test was not expected to be large, based on consideration of the application of other "public interest" tests in the EU and Canada—approximately 3% or less of cases have been impacted in those jurisdictions. There are several differences between the Canadian and EU tests and the model proposed by the Commission. The Commission's model could be seen to favour competition more, as in Canada and the European Community the public interest tests are based on weighing all relevant factors,

rather than precluding the imposition of measures in specified circumstances. It is noted that application of the Canadian public interest test has only resulted in the imposition of a lesser amount of duty. In Australia the lesser duty rule is consistently considered in the course of every anti-dumping and countervailing investigation and inquiry.

The WTO agreements do not preclude the introduction of a public interest test.

The cost of administering the Commission's model is estimated to be less than $1 million per annum. However, there would be other costs associated with the model. These would include compliance costs for stakeholders, which would apply in every investigation whereas it is expected that the test would only affect the outcome in very few cases. The introduction of the Commission's bounded public interest test would also increase complexity of the system and would increase uncertainty for all stakeholders, including applicants, importers, upstream and downstream manufacturers and producers. It would also extend the timeframes of all investigations and continuation inquiries by at least 30 days. In addition, the bounded public interest test would result in increased administrative and/or judicial challenges to Ministerial decisions. Consultation indicates that stakeholder concerns about these issues are significant.

While the number of times that the bounded public interest test is expected to affect the outcome is expected to be very low the practical application of the test may run the risk of defeating the initial presumption in favour of measures where there was injurious dumping or subsidisation, particularly as the five proposed criteria effectively operate as self-executing tests which would preclude measures from being imposed. It is possible the cost of applying this test would be disproportionate to the likely benefits to be gained in the small number of cases where the outcome is expected to be affected.

The concerns identified with the Commission's proposed bounded public interest test may deter legitimate anti-dumping applications and delay investment in Australian industry. In addition, adopting the bounded public interest test could mean that domestic applicants would have less access to remedies than are currently available to their competitors in other WTO member countries. This is particularly the case for industries that hold a small or a significant share of the market, which would be excluded on the basis of the proposed "competition" or "low market share" criteria.

Sectors of Australian industry that have been users of the anti-dumping system have also submitted that the increased uncertainty resulting from the introduction of a bounded public interest test would negatively affect their investment decisions. The majority of submissions opposed the introduction of a bounded public interest test. The National Farmers' Federation, Trade Remedies Task Force and Australian Food and Grocery Council, which have members that are both importers and exporters, are opposed to any form of public interest test. Australian manufacturers, their representative bodies and unions also strongly oppose its introduction. Most importers, together with the Australian Steel Association and the Law Council of Australia, support its introduction.

5.3 Discretionary approaches to considering the wider impacts of measures.

A number of alternatives exist to the Commission's proposed bounded public interest test. These alternatives include implementing a discretionary approach

to consider the wider impacts of measures which would give the Minister an express power to take wider impacts into account when deciding whether to continue and/or impose measures. Such decisions would be based on evidence that the negative economic impacts of measures on other interested parties had been or were likely to be clearly disproportionate to the positive economic impacts of imposing or continuing the measures. Under some discretionary approaches, decisions would also include a consideration of whether measures would significantly impact on competition in a market in Australia. It is likely that the discretionary approaches would promote competition more than maintaining the current arrangements (to a lesser or greater degree, depending on the option adopted). However, these approaches could impact on the effectiveness of the anti-dumping and countervailing system as a remedy to unfair international trading practices.

Under the discretionary approaches, the relevant factors and the impacts on various stakeholder groups (e.g. applicants, upstream and downstream manufacturers and producers), would be weighed against each other in determining whether measures would be imposed or continued.

The likely impact of each of the discretionary approaches on government and non-government stakeholders and competition would vary depending on matters including: the range of stakeholders considered in each model; the factors that may or must be taken into account in the assessment; the stage of the process when the public interest is considered; and the process for taking wider impacts into account. All discretionary approaches would consider the wider impacts of measures, and would increase uncertainty, complexity, cost and timeframes for stakeholders.

Maintaining the current arrangements would likely result in the least compliance and administration cost to government and non-government stakeholders. However, this approach would have the least impact on promoting competition in line with the nature of the anti-dumping and countervailing system as a remedy for unfair international trading practices.

Discretionary options where the Minister may consider the impact of measures on applicants, upstream and downstream manufacturers and producers, whether during initial investigations, continuation inquires or at some other time, are likely to focus the assessment on stakeholder groups most affected by the imposition or continuation of measures. Such discretionary approaches would result in higher compliance and administration costs to government and non-government stakeholders but would be likely to promote competition more than maintaining the current arrangement.

An approach that required the Minister to consider the impacts of imposing and continuing measures on all stakeholder groups in the community would impose the highest compliance and administration cost on a wide range of government and non-government stakeholders. A significant amount of detailed cost, sales, market and other data would be required from parties including applicants, upstream and downstream manufacturers and producers, importers and consumers. This option would also promote competition more than maintaining the current arrangements.

The relative impacts of imposing or continuing measures on stakeholder groups and the resultant impact on the level of competition in the market will depend on the factors taken into account.

5.4 Recommended action on the bounded public interest test

Introducing the Commission's bounded public interest test would address concerns that wider economic impacts in general and competition in particular are not sufficiently taken into account under the current arrangements but would detract from the anti-dumping and countervailing system as an effective remedy to unfair international trading practices.

Incorporating a discretionary approach to considering the wider impacts of measures into the anti-dumping system would have some benefits relative to the status quo. However, introducing any form of public interest test which could result in the wider impacts of measures being considered in every investigation and/or continuation inquiry would appear disproportionate when it is expected that measures would be precluded in very few cases on public interest grounds.

Adopting the alternative reform package (outlined at Attachment C) which includes maintaining the current arrangements for considering wider impacts, would potentially not yield as great a net benefit in competition terms, but would still represent an improvement over the status quo. It would offer greater flexibility to applicants, impose lower costs on all participants and be administratively cheaper to deliver. Consultation feedback has been supportive of the alternative approach.

Current arrangements include provisions designed to mitigate the wider impact of measures by including mandatory consideration of the lesser duty rule in setting the levels of measures; providing for exemptions from measures in specified circumstances; and a Ministerial discretion to not impose measures.

5.5 Limiting the duration of measures and adjusting continuation arrangements

The Commission's model would provide Australian manufacturers with a five year initial term and allow for a one-off extension of three years. Further re-applications would be subject to the same requirements as the original application.

The benefit of this measure would be that it would address the problem identified with the current system that measures can be imposed and extended for lengthy periods of time with low levels of scrutiny applied at the renewal process. This can blur the boundary between anti-dumping measures and 'long term protection'.

Benefits may accrue from the earlier expiry of measures. Benefits may accrue to downstream producers, importers and consumers of the relevant products, which may have access to cheaper or a greater variety of products. These benefits may improve competition and have a positive impact on productivity.

In addition, re-calculating the variable factors (i.e. export price, normal value and non-injurious price), during continuation inquiries would ensure that, if continued, measures would be at a level necessary to counteract injurious dumping and/or subsidisation rather than punitive or ineffectual.

Guidance for assessments could also be improved by providing illustrative factors in regulations, Ministerial directions or instructions and guidelines to assist in determining whether measures should be continued. The Canadian system provides such guidance for its stakeholders.

These benefits would be offset against the additional compliance costs and administrative delay incurred by applicants who may encounter countervailable subsidies. These subsidies may not disappear when a measure has reached the end of its term. The same is true of non-countervailable input subsidies that may be relevant in some dumping cases (as they affect the cost of production). Such applicants would need to provide fresh evidence after the expiration of measures. As investigations can currently take six months or more to complete, it could be close to two years before measures could be re-imposed. This would leave these sectors of Australian industry susceptible to injury, during this period. Since the cost of applying for anti-dumping and countervailing measures can be high depending on the particular industry, introducing an arbitrary limit to the potential duration of measures may act as a disincentive for genuine applicants to access remedies for injury caused by dumped or subsidised goods.

The Commission's proposal goes further than options considered in the current Doha round of trade negotiations.[3] Implementation of the Commission's proposal is likely to place Australian industry applicants at a disadvantage compared with manufacturers located in other WTO member countries.

5.5.1 Alternative proposals

Alternatives to the recommendation are to:

- Limit extensions of measures to one five year term.
- Not limit extensions of measures.

Either of these options could be supplemented with comprehensive examination and re-calculation of variable factors during continuation inquiries which are undertaken following application by Australian industries. In addition the application provisions for the continuation of measures beyond five years could be strengthened. This would place the onus on applicants to establish a *prima facie* case for an inquiry which may result in the benefits of a further period of trade remedy. It would also ensure that, before making the decision to continue the measures, the Minister must be satisfied that it would be more probable than not that the injury would continue or recur if measures were removed.

5.5.2 Limit extensions of measures to one five year term

In addition to providing two additional years to the extension period, this proposal would require applicants who seek the benefit of continued measures to establish a *prima facie* case that the expiry of measures would be likely to lead to a continuation or recurrence of dumping and injury. If not established no continuation inquiry would be undertaken and the measures would lapse.

Benefits and costs associated with this proposal are similar to those identified for the Commission's model, except applicants would have two years more before they would have to reapply for measures. During this two year period, the costs would be borne by downstream producers, importers and consumers who may otherwise have access to cheaper inputs.

5.5.3 Not limit extensions of measures

Under this approach, the identified problem of anti-dumping measures assuming the role of 'long term protection' is solely addressed by the proposed

[3] A proposal to limit the duration of measures to 10 years (5+5) is not reflected in the current text prepared by the Chair of the Negotiating Group on Rules in the Doha Round.

strengthening of the provisions for applications for the continuation of measures. This would place the onus on applicants to establish a *prima facie* case for an inquiry which may result in the benefits of a further period of trade remedy. It would also ensure that, before making the decision to continue the measures, the Minister must be satisfied that it would be more probable than not that the injury would continue or recur if measures were removed.

It is estimated to result in a low incremental compliance cost to applicants.

5.5.4 Recommended action on limiting the duration of measures

The Commission's model imposes more definite limits on the duration of anti-dumping or countervailing measures and would most comprehensively address the concern that measures could be rolled over and become a form of 'long term protection'. This option most favours competition.

The option of one five year extension and strengthening continuation inquiries would provide applicants with two additional years of protection but would introduce more rigour into the continuation process.

Drawbacks identified with both the Commission's model and the single five year extension model are that they may operate arbitrarily and lead to measures being removed when the applicant may still be materially injured by dumped or subsidised imports. In addition, there are administrative drawbacks that fall on applicants. The concern is that the current burden of proof is high and, if the frequency of reviews is increased, the increase in compliance costs would dissuade genuine applicants from applying for continuations of measures. The option of relying on strengthened continuation provisions is likely to address the identified problem while avoiding unintended arbitrary consequences.

5.6 Roles and responsibilities of the Minister, Chief Executive Officer and Review Officer (Recommendations 7.1 and 7.2)

5.6.1 Commission Recommendation

The modifications proposed would provide clarity with the review process and the role of the Review Officer. These would also set a time constraint on decision-making for the Minister. The option would assist in maintaining the balance between timely decision-making and a rigorous assessment process.

From an administrative perspective, these may be offset against delay and compliance costs. If Customs or the Review Officer were to take further evidence into account in a re-investigation, the requirement for procedural fairness and compliance with the WTO Agreements would involve additional delay for interested parties. The proposed changes may also increase compliance costs.

In addition, the proposed changes do not address the threshold to be applied by the Review Officer when accepting applications for review of a decision of the Minister or Chief Executive Officer.

An alternative to achieve similar outcomes would be to accept the majority of the elements of the Commission's recommendations and clarify the role and threshold to be applied by the Review Officer.

5.6.2 Accept the Commission's recommendation and clarify the role and threshold to be applied by the Review Officer

As an alternative, the Commission's recommended changes to the current review process could be supplemented with measures to clarify the role of the Review Officer and enhance Customs' internal quality assurance function and process.

Under this option, Customs' internal quality assurance function and process would be supplemented by independent expertise and the role of the Review Officer and application threshold to be applied by the Review Officer would be clarified. The appropriate application threshold requires further consideration but will be consistent with the Government's administrative law policy for merits review. The aim is to ensure applications focus on grounds that would materially affect the outcome or decision.

While the Commission recommended that new evidence could be taken into account in the review process, this would result in the characterisation of the appeal as a continuation of the investigation, and would result in regularly exceeding WTO investigation time-limits. This would constitute a violation of Australia's international trade obligations and risk Australia becoming subject to dispute settlement proceedings and possible retaliation against its exports.

Instead, where compelling new evidence becomes known to a party after the investigation has concluded, the Minister will be able to exercise existing powers to initiate a review of existing measures, or in special circumstances, a new investigation. Proposed changes to extensions of time will also allow consideration of new evidence provided late in an investigation.

Under this option the range of decisions that are not presently able to be appealed to the Review Officer will be expanded to include: decisions of the Minister to continue measures or not, and to vary measures following review.

The clarification of the Review Officer's role and the threshold for commencement of a review may reduce the number of reviews undertaken, by restricting interested parties' appeal rights to the issues identified above. Interested parties would retain the right to judicial review of the Minister's and Chief Executive Officer's decisions.

5.6.3 Recommended action on the roles and responsibilities of the Minister, the Chief Executive Officer and the Review Officer and process for the Review Officer function (Recommendations 7.1 and 7.2)

The option identified by the Commission did not suggest a change in the roles of the Minister, CEO and Review Officer but proposed administrative improvements to the process of the Review Officer function.

The alternative would complement the Commission's recommended changes with Customs' internal quality assurance function and process being supplemented by independent expertise; clarification of the role of the Review Officer; and consideration of a higher application threshold. This is the preferred option.

5.7 Proposed changes to the review arrangements and mechanisms for duty collection, duty refunds and feedback from interested parties (Recommendations 6.5, 6.6 and 6.7, which are related)

5.7.1 The Commission's recommendation

The benefits of the Commission's recommendations would be that existing review provisions are replaced with mandatory annual reviews of all measures. This would ensure that measures were based on current market conditions and cost structures. This would have the benefit to the economy in minimising the risk that unnecessary measures are retained.

The costs of the recommendation are mainly administrative and fall on parties to the measure, who would have to provide detailed cost and sales information and evidence to support the calculation of variable factors every 12 months. Some entities providing critical information (e.g. normal value, export price and cost to make and sell) are non-residents. The proposal would also result in an added administrative burden for Customs to conduct annual reviews of all measures. For example, in 2009/10 there would have been a tenfold increase in the number annual reviews - from two to 20. It is estimated that this would have required 28 exporters, 56 importers and 21 industry members to submit returns and to have been subject to varying levels of verification. The costs incurred in preparing annual returns and supporting detailed transactional information (eg. for all sales and associated costs for transactions in the previous 12 months) and participating in verification processes involving 2 to 4 business days of effort from senior financial personnel and management would not be trivial.

An unintended consequence could be that some importers and exporters decide not to participate in the review. In these circumstances Customs would have no choice but to treat these parties as uncooperative and to base calculations on the facts available. The likely result would be higher measures than if the parties had cooperated.

The proposal to abolish provisions that provide importers with an opportunity to apply for refunds of overpaid duties is inconsistent with Australia's international obligations under the WTO Agreements[4], which require the provision of a mechanism to determine an importer's final duty liability, and could not be implemented. There may be circumstances where a floor price may become unreasonably punitive, ineffective or administratively unworkable. For example, wherever the price for the goods is closely linked to volatile prices of key inputs, or, wherever there is a significant number of models falling within the description of the goods, an *ad valorem* rate could be more appropriate as it would maintain interim duty collection as a proportion of the (varying) price of the good or the models of the good.

5.7.2 Alternative

Alternative methods to address identified deficiencies in the review process but minimise administrative costs involve:

- Retaining provisions for duty assessments and accelerated reviews for new exporters consistent with our obligations under the WTO agreements.

[4] E.g. Article 9.3 of the Anti-dumping Agreement

- Providing increased flexibility in setting the form of measures, including floor prices and *ad valorem* duties.[5]
- Interested parties continuing to be primarily responsible for applying for reviews when they considered measures are out of date. Where an applicant sought a partial review, discretion to extend the scope of the review, where reasonable grounds existed, could be maintained.
- Clarifying that the scope of any review may be limited or comprehensive; that any inquiries would confined to the scope specified in the Chief Executive Officer's notice of initiation of a review; streamlining the process for initiating reviews where there were reasonable grounds but no interested party had applied for a review; and providing discretion to initiate, set the scope and key milestones of a review in an initiation notice to replace the current uniform (one size fits all) process, which would permit more flexibility to reflect the scope and complexity of the particular review.
- Aligning application requirements, evidentiary standards for initiating reviews and the grounds for revocation with the requirements in Article 11.2 of the WTO Anti-Dumping Agreement.

The benefits of these measures are to improve the flexibility, timeliness, efficiency and effectiveness of the review processes and increase flexibility to set the form of measures to suit the particular circumstances of a case.

The main costs of the alternative would fall on applicants, some of whom are likely to view any change to the current two-part duty collection scheme as a potential reduction in the protection available under the anti-dumping system. The operation of the "fixed" component of the measure currently ensures that importers are financially impacted, at least in the short-term, on every shipment of goods subject to measures. Industry members have also argued that the fixed component is necessary because the risk of duty circumvention and duty absorption (where importers have a compensatory arrangement with exporters), is higher under a floor price system. Downstream importers, producers and consumers are less likely benefit from measures reflecting current market conditions and cost structures.

5.7.3 Recommended action on review arrangements and mechanisms for duty collection, duty refunds and feedback from interested parties (Recommendations 6.5, 6.6 and 6.7)

In terms of promoting the currency of measures, the Commission's preferred option of mandatory annual reviews would best ensure measures reflected current market conditions. The risk is that resulting benefits may be negated by compliance and administrative costs associated with the annual review. The requirement may also deter applicants.

The alternative proposed would not have a mandatory review function and may achieve less improvement in transparency but would have a lower compliance cost for applicants and lower administrative cost. The preferred option is to:

- improve the current arrangements for review to improve the flexibility, timeliness, efficiency and effectiveness of the review processes;

[5] By amending sections 8(4) and 8(5)(a) of the Customs Tariff (Anti Dumping) Act 1975.

- introduce changes that will allow flexibility in setting the form the measures to ensure they are appropriate to the particular circumstances of the case; and
- retaining provisions that provide importers an opportunity to apply for refunds of duties as required under the WTO Agreements.

5.8 Improving access, international consistency and compliance

The group of proposals to improve access, international consistency and compliance would have variable impacts on affected industry.

Improving access to import data will increase the capacity for local manufacturers to monitor the volumes and prices of the import competition. This increased visibility of export prices and volumes may lead to a greater number of applications for anti-dumping and countervailing actions. Where applications are made, the applicants' estimates of export price, and consequently the estimates of dumping margins, are likely to be more accurate and reliable than would be the case with some of the existing restrictions on accessing import data. Importers and other interested parties will also gain visibility of import data, further informing them as to their competitors' or suppliers' import activities and data. As a result, these other interested parties will also be better informed for the purposes of defending their interests in dumping and subsidy investigations. It is envisaged that there will be alternative ways of presenting the import data without breaching confidentiality requirements. The additional proposal to develop a subsidies register will serve to better inform potential applicants in relation to what are actionable subsidies, and it is likely this initiative will result in more applications for countervailing duties.

Providing support for small and medium enterprises by funding an SME support officer within the Australian Industry Group would assist small and medium enterprises with applications, and would monitor impacts of measures to downstream industry. This proposal would encourage awareness and use of the anti-dumping and countervailing system by industry, and is likely to result in more effective and focussed anti-dumping and countervailing applications.

Clarifying length of investigation and injury periods would provide greater certainty for applicants and other interested parties when accessing the anti-dumping and countervailing system and it would formalise existing administrative arrangements. Related to this is the proposal that Customs work with the ABS and the International Trade Remedies Forum to examine options on a customised cost-recovery basis for the alternative presentation of statistics.

Broadening the range of actionable subsidies to be in line with relevant WTO Agreements will allow applicants to seek measures in relation to certain subsidies than are not presently actionable. This represents an opportunity for Australian industries to seek remedies in relation to a greater range of subsidies that cause material injury, and may therefore result in a greater number of applications for countervailing duty. To the extent this results in duties being imposed, importers and consumers of the products found to be subsidised and causing material injury to the Australian Industry will incur additional duty liability.

Clarifying the approach to determining interested party cooperation would mean that exporters, importers or foreign governments may be treated as 'non-cooperative' by Customs if they

- have not provided complete and meaningful answers to Customs; or
- refuse access to relevant information during on-site verification visits

Clarification of the consequences of non-cooperation will include explanation that, in the case non-cooperating exporters, dumping and subsidy margin calculations are likely to be higher than would have been the case had they cooperated. While already a feature of the existing system, it will be made more explicit in the future, and this important theme of ensuring there is no reward for non-cooperation will be maintained. Greater clarity around what constitutes non-cooperation, and the consequences of that, will lead to greater business certainty for all interested parties in dumping and subsidy investigations. While it is the case that many smaller interested parties tend not to cooperate with investigations, likely due to the cost and relative complexity of providing data, examination of options will take this into account while ensuring non-cooperation is not rewarded. Any changes to identifying and treating non-cooperation will be consistent with the WTO Agreements, and will better align Australia with the practices of other international administrations.

A finding of 'particular market situation' means Customs cannot establish normal values on the basis of domestic sales in the country of export. Improved guidance on the interpretation of what constitutes a 'particular market situation' should provide greater certainty for interested parties. It may also result in better evidenced claims of 'particular market situation' by applicants. This, combined with improved direction for 'particular market situation' inquiries by Customs, may result in more particular market situation findings in investigation outcomes. Where it is determined that a particular market situation exists, dumping margin calculations are likely to be higher than would be the case if a particular market situation did not exist. In some cases higher dumping margins are more likely to be found to have caused material injury. Consequently, there is greater chance of a recommendation that anti-dumping measures are justified.

A more flexible approach to calculating non-injurious prices for the purposes of applying the lesser duty rule should result in a more effective remedy. This is because the non-injurious prices can be tailored to redress the nature of the injury caused by dumping or subsidisation for a particular case. Enhancing Customs ability to determine more effective non-injurious prices will also serve to minimise the impact of measures on the wider economy as the level of the duties is set to prevent only the material injury caused by dumping or subsidisation, not injury caused by other factors.

The inclusion of industry associations, trade unions and downstream industry as a defined interested party will likely encourage their participation in investigations and make clear the opportunities for those groups to defend their interests. While these organisations can already make submissions to investigations, there will be express provision to expand the list of interested parties to include these specific groups. In terms of making an application for anti-dumping or countervailing measures, the current system already provides that "any person" (including these organisations) can apply, and nothing will change in this regard. Also unchanged is the requirement that applications for anti-dumping or countervailing measures contain the requisite information and

support from the Australian industry concerned. In practice, it has generally been only members of the Australian industry producing like goods who have made such applications. The nature and composition of the additional groups of organisations to be added to the definition of interested party is such that members will hold a broad and sometimes polarised perspective of matters relevant to a dumping or subsidy investigation. Accordingly, this proposal does not necessarily favour Australian industry over another type of interested party.

In taking a more flexible approach to the form a duty will take, such as a percentage or a fixed amount per unit, the imposition of duties can be undertaken in an appropriate manner given the circumstances of a particular case. This will increase the effectiveness of measures.

By introducing a dedicated compliance monitoring position, Customs will be able to implement a more proactive program to ensure the correct duties are paid and thereby maintaining the effectiveness of the remedies.

While attempts by exporters and importers to circumvent measures is not a common occurrence, introducing a framework for anti-circumvention will further enhance the compliance initiative, by enabling Customs to identify and act upon non-compliant behaviour. It is envisaged that, in consultation with the Forum, and taking account of other international administrations' practices, that an effective framework can be established. Features of an effective system for dealing with circumvention would need to include the ability to take prompt action and impose suitable remedial measures against circumvention without having to go through an exhaustive investigation process akin to the original investigation. Given that additional measures might be recommended as an outcome of anti-circumvention inquiries, it is envisaged that the Minister would be required to make any decision as to alteration of, or imposition of, a dumping duty or countervailing duty notice.

Collectively, the proposals outlined above would better inform and position Australian industries, including SMEs, to avail themselves of the remedies available for injurious dumping and subsidies. The proposals will also provide clearer guidelines on critical aspects of the approach to dumping and subsidy calculations taken by Customs thereby providing greater certainty for all interested parties. A wider list of interested parties participating in investigations will enhance the Customs ability to take account of all relevant issues and make robust findings. Flexibility in application of the lesser duty rule and the form of the duties will enhance the effectiveness of the remedy, while compliance and anti-circumvention initiatives will ensure that remedy is not undermined.

Compared to the status quo, elements of the package are likely to generate benefits that accrue primarily to applicants for anti-dumping and countervailing measures and their employees. To the extent that they benefit these parties, they are likely to have a negative impact on importers, downstream manufacturers, their employees and also to consumers who may be denied access to cheaper products, or overall economic productivity. However, a number of elements of the package will enhance clarity and transparency of Customs decision-making, and provide greater certainty for business, which will ultimately benefit all stakeholders.

6. CONSULTATION

6.1 Process

There has been extensive consultation during the Commission's inquiry and the development of the Government's response to the Commission's report.

Shortly after receiving its terms of reference in March 2009, the Commission released an issues paper on which it sought information and advice from interested parties. In response to that paper, 34 organisations and individuals made submissions. The Commission also released a draft report in September 2009 that set out its initial findings and preliminary recommendations for changes to the current anti-dumping and countervailing system. Again it sought feedback from interested parties and a further 27 submissions were received. In addition, the Commission held public hearings in which six parties participated.

A further opportunity for stakeholder involvement was provided when the Government released the Commission's final report in Parliament on 27 May 2010. Since some of the recommendations had changed from the draft report, interested parties were invited to review the report and make submissions on the final recommendations by 31 August 2010. The Government also invited stakeholders to make submissions on any matters, outside the focus of the Commission's recommendations, which might improve the system.

Twenty four (24) submissions were received in response to the Government's invitation. As was the case with submissions to the inquiry, the majority of the submissions were received from Australian manufacturers and their representative bodies. Submissions were also received from importers and their representative bodies, the Law Council of Australia & Law Institute of Victoria, and consultants working in the area.

The submissions predominantly reflected views expressed during the Commission's inquiry, but also included several additional suggestions for improvements to the system. Some suggestions, for example those likely to benefit all stakeholder groups by increasing transparency and procedural fairness, have been incorporated into alternative policy proposals to address current deficiencies in the system.

An interdepartmental committee consisting of 10 departments and agencies considered the Commission's recommendations and stakeholder submissions in developing options for the Government response. Committee members included representatives from the Departments of Treasury, Foreign Affairs and Trade, Innovation, Industry, Science and Research, Prime Minister and Cabinet, Agriculture, Fisheries and Forestry, Finance and Deregulation, Attorney-General's, and the Australian Competition and Consumer Commission, Australian Bureau of Statistics and Customs.

The Government also proposes to establish an *International Trade Remedies Forum* to provide a structured process for policy engagement and dialogue between the Government and stakeholders on the future development of key reforms to Australia's anti-dumping and countervailing system. The Forum will initially examine issues raised by stakeholders that were not addressed in the Commission's Report and report to the Minister for Home Affairs by a date to be set by the Minister in consultation with stakeholders.

6.2 Main views of stakeholders

6.2.1 Should Australia retain an anti-dumping and countervailing system?

Support for retaining an anti-dumping and countervailing system was expressed by a wide range interested parties (primarily Australian manufacturing industry), including the Trade Remedies Task Force (TRTF), Australian Dried Fruits Association (ADFA), Australian Food and Grocery Council (AFGC), Cement Industry Federation (CIF), Plastic and Chemicals Industry Association (PACIA), Australia China Chamber of Commerce and Industry of New South Wales (ACCCI), Australian Manufacturing Workers' Union (AMWU), Australian Workers' Union (AWU), Construction, Forestry, Mining and Energy Union (CFMEU), Australian Paper (APL), Australian Paper Products and Paper Industry Council (A3P), BlueScope Steel (BlueScope), CSBP Limited (CSBP), CSR Limited (CSR), Dow Chemicals Limited (DCAL), Geofabrics Australasia Pty Ltd (Geofabrics), Huntsman Chemical Company Australia Pty Limited (HCCA), Kimberly-Clark Australia (KCA), National Farmers Federation (NFF), OneSteel Limited (OneSteel), Orica Australia Pty Ltd (Orica), PolyPacific Pty Ltd and Townsend Chemicals Pty Ltd (Poly Pacific and Townsend), Qenos Pty Ltd (Qenos), SCA Hygiene Australasia Pty Limited (SCAHA), Sulo MGB Australia Pty Ltd (Sulo), Windsor Farm Foods Group Limited (WFF), the Department of Agriculture, Fisheries and Forestry (DAFF), the South Australian Government and individuals including James Stevenson, and P L Crisp, Member for Mildura. The approach taken in other submissions including from Bradken Resources Pty Limited (Bradken), Casselle Commercial Services Pty Ltd (Casselle), Gunns Limited (Gunns), Heslop Consulting, N Longworth, and Penrice Soda Holdings Limited (Penrice) also indicated support for retaining the system.

The Australian Steel Association (ASA), WW Wedderburn Pty Ltd and individuals including Malcolm Bosworth and Greg Cutbush consider the anti-dumping and countervailing system to be anti-competitive and protectionist. Jeld-Wen an importer and downstream manufacturer is particularly concerned that the current system may not address the situation where measures would benefit only one or two domestic producers of like goods but would materially and adversely affect downstream users and consumers of the product in question.

6.2.2 The proposed introduction of a bounded public interest test (Recommendation 5.1)

Australian manufacturing industry and their representative groups (including the TRTF, Pulp and Paper Industry Strategy Group (PPISG), CIF, Australian Paper, PACIA, KCA, A3P, Qenos, AFGC, OneSteel, Australian Pork Limited (APL), BlueScope, the ACTU and relevant trade unions, CSR, Geofabrics, Orica, Sulo, PolyPacific and Townsend, Penrice, WFF, SCAHA, Bradken, CSBP and ADFA, strongly oppose introduction of a bounded public interest test. They believe it is unnecessary and will impose additional costs, time delays and uncertainty and will limit access to the system. OneSteel and the ADFA also contend that the proposed test would disadvantage Australian companies because it would deny applicants access to remedies that are currently available to their competitors in other WTO member countries.

Conversely, parties representing importers' interests (including Rio Tinto, the Australian Steel Association, the Food and Beverage Importers Association (FBIA), and JELD-WEN Australia), the Law Council of Australia and Law Institute of Victoria and Casselle and Dr Brett Williams, support the introduction of a requirement for wider impacts to be taken into account. The Australian Steel Association (ASA), believes the introduction of a bounded public interest test

would rightly limit access to the anti-dumping system which it considers to be an "...anti-competitive mechanism".

6.2.3 Limiting the duration of measures and adjusting continuation arrangements (Recommendation 6.4)

Casselle, PolyPacific and Townsend, the Law Council and Law Institute of Victoria, the ASA, Dow Chemical (Australia) Limited (DCAL), the FBIA and JELD-WEN support limiting the duration of measures to a maximum of eight years. The arguments put forward included that injury should have dissipated within this period and any further imposition of measures should be subject to the same requirements as an original application.

The majority of Australian manufacturing interests including the TRTF, Orica, SULO, Australian Paper, KCA, A3P, Qenos, AFGC, OneSteel, BlueScope, CFMEU, the AMWU, the AWU, CSR, CIF, Penrice, SCAHA, Bradken, CSBP, and ADFA do not support the single extension of three years. Arguments put forward in submissions include that:

a) measures should not be arbitrarily removed without review and evidence that circumstances have changed;
b) threats do not necessarily evaporate in the years following imposition of measures; and
c) the proposal is inconsistent with the WTO Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures, and will disadvantage Australian manufacturers compared with producers in other jurisdictions.

These parties believe that there needs to be an examination, as currently occurs, into the likelihood of dumping and injury continuing or recurring.

Several parties including Casselle, Qenos, OneSteel, BlueScope, CSR, PolyPacific and Townsend, the Law Council and Law Institute of Victoria and JELD-WEN support recalculating variable factors in continuation inquiries.

6.2.4 Roles and responsibilities of the Minister, Chief Executive Officer and Trade Measures Review Officer (Recommendations 7.1 and 7.2)

The TRTF, PACIA, Geofabrics, Orica, SULO, WFF, Casselle, A3P, Qenos, OneSteel, CSR, Penrice and CSBP support the Commission's recommendation to broadly retain the roles of the Minister, Customs and the Review Officer.

PolyPacific and Townsend Chemicals oppose the recommendation.

The Commission's recommendation in relation to the proposed changes to the roles of Customs and the Review Officer (e.g. that Customs could take new information into account and that the Review Officer would make a directive on where the initial investigation was flawed), are supported by Casselle, PolyPacific and Townsend Chemicals, the Law Council of Australia and Law Institute of Victoria.

Dr Brett Williams (a Senior Lecturer at the University of Sydney), noted that initial decisions are made by a Minister who was a junior Minister to the Attorney General and that the appeal was undertaken by an employee of the Attorney-General. Dr Williams submitted that at least decisions on questions concerning competition should be made by the ACCC with appeals to the Australian Competition Tribunal. He also suggested that further consideration

should be given to creating a genuinely independent appeal mechanism for all parts of the decision-making process.

The majority of Australian manufacturing interests are not in favour of changing the current appeals system to require the Minister to make a decision on the basis of the Review Officer's advice and Customs' original recommendations. Stakeholders who hold this view include the TRTF, Orica, SULO, KCA, Qenos, OneSteel, CSR, the CIF, Penrice, Bradken and CSBP. The reasons put forward are that the TMRO needs more understanding of Customs' investigation process and "desk audit" by the Review Officer lacked first-hand experience of the original investigation.

In the context of its response to recommendation 7.5, the ASA expressed concerns about the current resource capabilities of the Review Officer. It suggested that the Review Officer function should be assumed by the AAT if the function was not better resourced.

All parties that commented on the Commission's recommendation that continuation decisions be appellable to the Review Officer supported the recommendation. Stakeholders with this view included Casselle, FBIA,Qenos, OneSteel, the Construction, Forestry, Mining and Energy Union, the Australian Workers' Union, Australian Manufacturing Workers' Union, CSR, PolyPacific and Townsend Chemicals, the Law Council of Australia and Law Institute of Victoria, the CIF, Penrice, and CSBP.

6.2.5 Proposed changes to the review arrangements and mechanisms for duty collection, duty refunds and feedback from interested parties (Recommendations 6.5, 6.6 and 6.7)

Australian manufacturing interests and their representative groups including the TRTF, Qenos, OneSteel, ADFA, Penrice and SULO do not support changes to the duty assessment framework. The ASA, which represents importers, also supports retention of a duty assessment scheme.

Australian manufacturing interests and their representative groups including the TRTF, Qenos, OneSteel, ADFA, Penrice, Poly Pacific and Townsend, Bradken, CSBP and SULO are opposed to changes to the current two-part duty collection framework.

Conversely, parties representing importers' interests (including the ASA and DCAL), and the Law Council of Australia do not support retention of the current duty collection arrangements. DCAL commented that the imposition of interim dumping duties "may be a desired punishment for "predatory" exporters, but when long-term import/suppliers are inadvertently captured in the fall-out from anti-dumping actions against such aggressive actors, the impositions of the IDD system are a deterrent to cost effective provision of goods & services to the Australian economy."

Australian manufacturing interests including A3P, Qenos, OneSteel, ADFA, SULO and PolyPacific and Townsend support annual feedback on measures. They considered it would assist in determining whether measures were working or circumstances had changed, and would underpin a pro-active and efficient system. Casselle, the Law Council of Australia and the Law Institute of Victoria provided qualified support for the annual feedback on measures.

7 CONCLUSION

Australia's anti-dumping and countervailing system provides a trade remedy that protects Australian manufacturers and producers from dumped or subsidised imports. However, there is a risk that pro-competitive activity may be inadvertently captured by the system.

The primary problems identified by in the Commission's report on the anti-dumping and countervailing system are:

- a lack of consideration of the wider impacts of anti-dumping and countervailing measures;
- concerns that the renewal process could lead to some measures becoming akin to long term protection; and
- potential for improvements in decision-making and transparency.

To address the first concern, the Commission recommended the introduction of a bounded public interest test. Discretionary alternatives to consider the wider impacts of measures were also considered.

The Commission's recommendations examined in this RIS with respect to:

- the bounded public interest test;
- duration of measures;
- clarification of roles; and
- administrative arrangements,

address identified concerns with the current system that wider economic impacts are not taken into sufficient account, long-term protection, transparency and administrative efficiency. The benefit of these recommendations have been identified as being counterbalanced against concerns about associated administrative complexity, cost, delay and low levels of identified benefit, taking into consideration the relatively small scale of anti-dumping and countervailing measures imposed and the anticipated number of cases where the outcome might be affected.

The Commission's recommendations to introduce a bounded public interest test and to limit the duration of measures reflects the Competition Principles Agreement.

The alternative approaches, which are outlined at **Attachment C** and includes maintaining the current arrangements for considering wider impacts, would not yield as great a net benefit but would still represent an improvement over the status quo. It would offer greater flexibility to applicants, impose lower costs on all participants and be administratively cheaper to deliver.

Alternative options to improve access, international consistency, and compliance would provide significant improvements to the system and better align our approach with the practices of other countries.

While there are elements of the package that are likely to generate benefits that accrue primarily to applicants for anti-dumping and countervailing measures, other elements of the package will enhance clarity and transparency of Customs decision-making, and provide greater certainty for business, which will ultimately benefit all stakeholders.

8. IMPLEMENTATION

The necessary steps to implement the reforms detailed in the Government's response to the Productivity Commission's report on Australia's anti-dumping and countervailing system include:

- Establishing the *International Trade Remedies Forum* and consulting with stakeholders on the Government's preferred alternatives.
- Legislative amendment, followed by modification to administration and practice including changes to relevant Ministerial directions, practice statements and supporting documents.

Stakeholders are not aware of a number of the proposals in the Government's preferred package. The Government will therefore engage further with stakeholders on implementation of the proposed reform of the provisions for the continuation of measures (recommendation 6.4); the review and setting of measures (recommendations 6.5, 6.6 and 6.7); and the roles and responsibilities of the Minister, Chief Executive Officer and Review Officer and appeal mechanisms (recommendations 7.1 and 7.2).

The Government also proposes engaging with stakeholders on issues raised during and after the Commission's inquiry, which were not addressed in the Commission's recommendations (including recommendation 15 of the Pulp and Paper Industry Strategy Group (PPISG) Report of March 2010).

9. REVIEW

The Government considers that it will be important to independently review and assess the impact of the reform package after it has been in operation for at least five years. Among other things, the review could examine:

- the impacts of the reform package and the need for further changes to the legislation, policy or practice;
- the performance of Customs, the Review Officer and the Minister in administering the anti-dumping system and whether any further changes to their responsibilities are warranted;
- whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities; and
- whether there have been changes to overseas anti-dumping and countervailing regimes that could be relevant to the Australian system.

Key performance indicators could include:

- the average time for Customs to complete investigations;
- the average time for the Minister to make decisions;
- the percentage of investigations completed within the specified timeframe;
- the number of applications for judicial review and outcomes of judicial review; and
- stakeholder feedback.

The Government of the day should determine which organisation is most appropriate to undertake the independent review.

In the interim, the *International Trade Remedies Forum* will provide stakeholders the opportunity to address any issues that may arise in the implementation of the reforms or the administration of the system.

Attachment A – Operation of the Current Anti-Dumping and Countervailing System

1. Operation of Current System

1.1 Anti-dumping and countervailing investigations

A person who believes that dumped or subsided goods have caused, or threaten to cause, material injury to an Australian industry producing "like" goods can apply for the publication of a dumping or countervailing duty notice which can result in the imposition of measures.

Applications need to be supported by a specified proportion of domestic producers of the goods and detailed information supporting the claims of dumping or subsidisation of exports, injury to the domestic manufacturer and that the latter is caused by the former. The information includes four years detailed sales and cost data from the applicant industry as well as details on the market, competitors and sales and cost information for exports.

Customs has 20 days to examine the application and decide whether or not to reject the application. If there is sufficient evidence to initiate an investigation, the scope, process and timeframes for the investigation are publicly notified. On initiating an investigation, interested parties (including importers and exporters) are contacted and given the opportunity to participate in the investigation and make submissions.

No earlier than 60 days after an investigation is initiated, provisional measures (usually in the form of securities) may be imposed to prevent material injury occurring to the Australian industry while the investigation continues.

A Statement of Essential Facts (SEF) must be published within 110 days of the initiation of an investigation unless the Minister grants an extension. The SEF summarises the facts of the investigation and forms the basis of the final recommendations to the Minister. All interested parties have 20 days to make submissions in response to the SEF.

In particular circumstances, for example where there is a finding that goods have not been dumped (or subsidised), the Chief Executive Officer of Customs must terminate the investigation.

A final report and recommendations must be provided to the Minister within 155 days of initiating the investigation unless the Minister has granted an extension. The Minister then decides whether anti-dumping and/or countervailing measures should be imposed or whether to accept price undertakings offered by overseas suppliers. There is no time limit on the Minister to make a decision. However, under the WTO agreements, investigations are to be concluded within 18 months of initiation.

1.2 Reviews of measures

After a measure has been in place for 12 months, any party affected by the measure may seek a review of the level of the measure or the ongoing need for the measure (revocation review). A variable factor review involves a reassessment of the basis for the calculation of the level of measures imposed. Variable factors include the normal value (usually the domestic selling prices in the country of export), the export price of the goods to Australia and the non-injurious price (a price at which the goods could be exported without injuring the Australian industry). A revocation review is a reassessment of the ongoing need for measures.

As with initial investigations, variable factor and revocation reviews are subject to a 155 day timeframe unless the Minister grants an extension. New exporters may apply for an accelerated review of the level of measures applying to their imports. Accelerated reviews must be completed within 100 days from initiation of the review.

1.3 Continuation inquiries

Consistent with the WTO agreements, measures can be imposed for an initial period of five years and extensions of the measures can be granted for further five year periods. There is no limit on the number of extensions that can be sought or granted. At least nine months before the expiry of a measure, a notice inviting Australian industry to apply for a continuation of the measures must be published. If a continuation inquiry is initiated, Customs has 155 days to complete its inquiries and report to the Minister who will decide whether measures should be continued.

This is consistent with the WTO process, which provides that measures "shall remain in force only as long as and to the extent necessary to counteract dumping [and subsidisation] which is causing injury."

The evidence required to support an application for an extension of measures is currently very low. At present, Australia's legislation requires only that applicants provide "*reasonable grounds for asserting that the expiration of the anti-dumping measures … might lead, or might be likely to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent*" [6] (emphasis added) In addition, guidance to assist in determining whether measures should be continued is limited.

1.4 Roles and responsibilities

Customs is responsible for the administration of Australia's anti-dumping system. It undertakes investigations of alleged dumping and subsidisation, inquiries on whether measures should be continued, revoked or varied and assessments of the final amount of duty to be paid by importers. These activities involve Australian manufacturers, importers, foreign exporters, foreign governments (for subsidy investigations) and, in some cases, end users. Following these investigations and inquiries, it makes recommendations to the Minister for Home Affairs (Minister) and then implements the Minister's decisions. Customs also provides advice to interested parties involved in potential and actual inquiries.

Most of the decisions resulting from investigations and inquiries are appellable to the Review Officer who is appointed by the Minister.

Currently, the Minister has powers to make key decisions (such as to impose, vary, revoke or continue measures and initiate investigations or reviews) as well as technical responsibilities (for example ascertaining an individual exporter's export price as a basis for determining whether dumping has occurred). There is scope to rationalise the division of responsibilities.

The Review Officer is a statutory position that performs a limited review function in Australia's anti-dumping system. A review by the Review Officer can be applied for in a variety of circumstances[7]. These circumstances include decisions of the Minister to impose measures and decisions of the Chief

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[6] Section 269ZHD(2)(b).

[7] Detailed in Part XVB Division 9 of the *Customs Act 1901*

Executive Officer of Customs to terminate investigations. Applications for review are free of charge.

The current arrangements were introduced following the Willett Review in 1996 and sought to provide access to a streamlined, low-cost and timely review of decisions. At present the role of the Review Officer is not clearly defined and there is no threshold or test to be applied by him/her when reviewing decisions of the Minister and Chief Executive Officer. Currently, most decisions flowing from anti-dumping and countervailing inquiries are appealed to the Review Officer and the majority are remitted back to Customs for reinvestigation or resumption of the investigation.

While the current arrangements contribute to improving the quality and consistency of the final outcomes in decision-making, they have had little impact on changing substantive decisions (e.g. imposition of measures) by the Minister, and therefore provide little remedial effect for aggrieved parties. The current system involves significant duplication of effort, delay, administration and compliance cost and uncertainty for stakeholders.

Parties involved in an anti-dumping or countervailing investigation also have recourse to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. Judicial review is also provided under section 75 of the Constitution which grants the High Court jurisdiction in any case in which the Commonwealth is a party.

The WTO Agreements [8] require Member countries to provide "*judicial, arbitral or administrative tribunals or procedures for…the prompt review of administrative actions relating to final determinations and reviews of determinations"*. There is some doubt whether the current provisions for review by the Review Office of themselves fulfill this obligation. However, the recourse to judicial review does satisfy this obligation.

1.5 Mechanisms for duty collection, duty refunds and feedback from interested parties

Currently, industry applicants and directly affected importers, exporters and governments can seek a review of the measures if they believe the measures are out of date (variable factors review) or if the measures should be revoked. If a *prima facie* case is established by an applicant, Customs will undertake a review and report to the Minister within 155 days of initiating the review. The Minister may also initiate a review in certain circumstances. A review can be limited to a particular exporter, or can be in respect of the measures more broadly, depending on the circumstances of the case. Irrespective of the scope of the review required, all variable factor and revocation reviews, except those for new exporters, have a uniform prescribed timeframe of 155 days.

New exporters (i.e. those who did not export goods to Australia between the commencement of the investigation period and publication of the statement of essential facts), can also seek an accelerated review of the measures. Reports on these reviews have to be provided to the Minister within 100 days of initiation. There is no requirement for a public file to be maintained or a statement of essential facts to be published for accelerated reviews. In addition, decisions from accelerated reviews are currently not appellable to the Review Officer.

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[8] Article 13 of the Anti-Dumping Agreement[8] and Article 23 of the Agreement on Subsidies and Countervailing Measures

Measures can take the form of price undertakings by exporters or the imposition of duties. In relation to the imposition of duties there are a number of bases upon which duties could be collected including: ad valorem duty (i.e. a percentage of the value of the goods); specific duty (i.e. a dollar amount per unit of good); or hybrid measures (i.e. an ad valorem duty or specific duty with a floor price).

The relevant WTO Agreements do not limit the form of measures that can be imposed but Australia's legislation permits only some of these forms. Currently, interim dumping duties are collected in two parts:

- a fixed component (based on the difference between the export price and the normal value or the non-injurious price calculated during the investigation period) and
- a variable component (based on any difference between the average export price calculated during the investigation period and the export price at the time of importation).

The system also allows importers to apply for final duty assessments and seek refunds if the amount of interim dumping duty paid at the time of importation exceeds the actual dumping margin that would have applied to those goods in that particular period. The duty assessment process may result in zero, partial or full refund of the duty.

1.6 Duty assessments

Importers can seek a retrospective assessment of their duty liability (and a refund of any overpaid duty) every six months.

2 Checks and balances against abuse of Current System

2.1 Application requirements

Before an investigation is initiated, applicants are required to compile and provide comprehensive supporting information including detailed sales and cost data for four years, evidence of material injury and material to support their allegation that dumped or subsidised goods have caused or threaten to cause material injury. The applicants' data is then subjected to detailed verification. The application requirements and verification processes are designed to minimise the incidence of market disruption from the initiation of an investigation based on frivolous claims.

2.2 Termination provisions

Consistent with the WTO agreements, the framework also includes provisions requiring investigations to be terminated by the Chief Executive Officer, where it is established during the investigation process that the volumes or margins of dumping or subsidies are negligible or have not caused material injury to the applicant industry.

2.3 Zeroing and lesser duty rule

Australia has adopted a series of moderate administrative practices which also limit the potential negative impacts of measures.

Unlike some other administrations, Australia has a long-standing practice of not zeroing in calculating dumping margins, which results in lower margins and, if measures are imposed, lower measures.

In addition, Australia consistently considers application of the lesser duty rule (i.e. measures are only imposed at the lesser of the margin calculated or the level at which future exports would not be injurious to the Australian industry). In contrast, application of the Canadian public interest test has only resulted in adoption of a lesser duty (rather than measures not being imposed), and this has occurred in relatively few cases.

2.4 Exemptions from measures

Importers may apply for exemptions from measures in some circumstances including where there is a Tariff Concession Order in force in respect of the goods or where suitably equivalent Australian manufactured goods are not reasonably available. This can also limit the impact of measures on certain goods subject to measures.

2.5 Variation of measures

Subject to the limitations in the legislation, whenever importers or exporters consider the measures no longer reflect current market conditions, they can apply for a review of the level of the measures. This can also mitigate the impact of measures during the term of the measures or any extended term.

2.6 Revocation of measures

Whenever importers or exporters consider that there are grounds to question the ongoing need for measures, they can apply for the measures to be revoked.

2.7 Assessment of duty liability and refund

Every six months, importers may apply for an assessment of their duty liability for the previous six month period based on information relating to whether their goods were dumped or subsidised during that period. If they have overpaid any duty they will be entitled to a refund.

2.8 Transparency of process and opportunity to make submissions

A further check and balance in the system is the operation of the public record where stakeholders can access (non-confidential) submissions made by other parties, and make their own submissions to raise issues of substance with Customs. Summaries of Customs' findings are also available for examination by stakeholders, including through the publication of the Statement of Essential Facts. The operation of such an open and transparent system allows stakeholders to make informed submissions and facilitates decision-making on the basis of all relevant information.

2.9 Minister's discretion

The final check is the Minister's implicit discretion to not impose measures. However, to date, this discretion has not been used.

Attachment B – Productivity Commission Review and Recommendations

1. Australia's current anti-dumping system is internationally recognised as timely, fair, transparent and cost-effective. Australia has a moderate approach to remedying injury caused by dumped or subsidised goods. This moderate approach seeks to balance the need to protect Australian industry from unfair trade practices and maintain a healthy and dynamic economy where consumers have access to a wide range of goods from around the globe.

2. Australia's current anti-dumping system provides checks and balances to address these risks. These include rigorous application and investigation processes; moderate administrative practices in calculating dumping margins and imposing measures; provisions for reviewing and revoking measures, terminating investigations and exempting goods from measures in certain circumstances. It also includes provisions that allow importers to have their duty liability assessed every six months and for refunds of any overpaid duty. Finally it includes an implicit Ministerial discretion to not impose measures.

3. Productivity Commission's review

3.1 In July 2008, COAG agreed to a number of priority areas for competition reform, including anti-dumping, and announced that the Government would request the Productivity Commission (Commission) to undertake a review of the anti-dumping system.

3.2 The Commission undertook its inquiry during 2009 and provided its report to the Government in December 2009. The Pulp and Paper Industry Strategy Group provided a report to the Minister for Innovation, Industry, Science and Research in March 2010, which also contained recommendations relating to the Australia's anti-dumping and countervailing system (recommendation 15). The Government tabled the Commission's final report in Parliament on 27 May 2010.

4. Productivity Commission Recommendations

4.1 Primary concerns identified with the current system were[9]:

- lack of consideration of the wider economic impacts of anti-dumping measures - dumping assessments under the current system focus on demonstrating whether dumping or subsidisation had occurred and if so whether it has caused or threatens material injury to the local industry concerned. Wider impacts are not explicitly considered although the Minister has the ability to take these into consideration when making a Determination. No specific previous instances were identified where the Minister had so exercised discretion to take wider impacts into consideration. This could result in potential under current arrangements for the application of measures that may not be particularly effective in removing injury, but which could still be costly for downstream users.
- measures can too easily become akin to long-term protection, or outdated in the face of changing market circumstances. In particular, over the past decade less than 10 per cent of the average number of measures imposed have been reviewed with 40 per cent of those reviews being at the direction of the Minister. The current mechanisms could be

[9] Report No. 48, page XVII.

made more efficient and effective in ensuring measures are current. For example, there had been instances of measures being in force for almost 20 years. As at January 2011, 2 of 22 or 9 per cent of measures were approaching 20 years in duration (exports of PVC from the USA and Japan); eleven measures have been in place for less than five years and nine measures for more than five years but less than 10 years. The average of all measures in place in early January 2011 was five years and three months.

- decision-making and its outcomes are not sufficiently transparent.[10] To improve transparency in the system, the Commission considered that Customs should provide additional information on the number of applications that have been rejected or withdrawn prior to initiation; apply the non-confidential summary arrangements more rigorously; improve reporting on the outcomes of investigations (including publishing the products and countries that were subject of applications that were not initiated, which is inconsistent with the requirements of the WTO Agreements); and provide more detailed information on the variable factors that are established in investigations.

4.2 Examined in this RIS are the recommendations to:

- introduce a bounded public interest test (recommendation 5.1);
- introduce a limit to the duration of measures (five years plus one three year extension) (recommendation 6.4);
- replace the provisions for review of measures and duty assessments with an annual review process (recommendations 6.5, 6.6 and 6.7); and
- vary the roles and responsibilities of the Chief Executive Officer, Minister and Trade Measures Review Officer and the appeal arrangements (recommendations 7.1 and 7.2).

4.3 Other recommendations, which appear to have widespread in-principle support because they will improve the administration of the system, will not be addressed in this statement. These include:

- a working group to examine the close processed agricultural goods provisions (recommendation 6.1);
- the practice of zeroing (recommendation 6.2);
- imposition of provisional measures (recommendation 6.3);
- updates to list of actionable subsidies (recommendation 6.8);
- extension of investigative timeframes (recommendation 7.3);
- introduction of time-limit on Ministerial decisions (recommendation 7.4);
- resourcing for Customs and the Trade Measures Review Officer (recommendation 7.5); and
- consideration of comparable overseas cases (recommendation 7.6);
- reporting on unsuccessful applications for measures (recommendation 7.7);

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[10] Report No. 48, page X.

- publication of details of individual anti-dumping and countervailing measures (recommendation 7.8);
- consultation with Australian Bureau of Statistics regarding availability of import data (recommendation 7.9); and
- the timeframe for the implementation of reforms (recommendation 7.10);
- the review of the system five years after reforms are implemented (recommendation 7.11).

5 Government consideration of the Commission's final report

The Government provided interested parties an opportunity to review the report and make submissions on the final recommendations by 31 August 2010. The Government also invited submissions on any other matters outside the focus of the Commission's recommendations which stakeholders considered may be required to improve the system.

A list of all submissions in response to the final report is at **Attachment D**. The submissions reflected views put to the Commission's inquiry and included several suggestions for other improvements to the system. These included the issues raised in recommendation 15 of the Pulp and Paper Industry Strategy Group report.

An interdepartmental committee consisting of 10 departments and agencies considered the Commission's recommendations and stakeholder submissions in developing a Government response. Committee members included representatives from the Departments of the Treasury, Foreign Affairs and Trade, Innovation, Industry, Science and Research, the Prime Minister and Cabinet, Agriculture, Fisheries and Forestry, Finance and Deregulation, Attorney-General's, as well as the Australian Competition and Consumer Commission, Australian Bureau of Statistics and Customs.

6. Recommendations of Productivity Commission

- maintain the current system as it relates to the consideration of the wider impacts of imposing measures - i.e. not introduce a bounded public interest test because the costs outweigh potential benefits (recommendation 5.1);
- establish a working group on close processed agricultural goods (recommendation 6.1);
- maintain Australia's current approach to the practice of zeroing (recommendation 6.2);
- impose provisional measures wherever necessary to prevent injury continuing while an investigation is finalised (recommendation 6.3);
- strengthening the test to continue measures beyond five years; develop guidance to assist in determining whether measures should be continued; and recalculate the level of measures during continuation inquiries to ensure they are current (recommendation 6.4);
- implement a package of amendments designed to improve access to reviews, enhance flexibility in the process for setting measures and reduce unnecessary cost, delay and duplication (recommendations 6.5, 6 .6 and 6.7);

- update Australia's actionable subsidies to align with the latest relevant WTO agreements (recommendation 6.8);
- retain the broad administrative and decision-making roles of Customs, the Minister and Review Officer (recommendation 7.1) and make changes to the current appeal arrangements for anti-dumping decisions (recommendation 7.2)
- provide more flexibility to extend investigative timeframes in complex cases (recommendation 7.3);
- introduce a 30 day time-limit for the Minister to make decisions (recommendation 7.4);
- increase resourcing for Customs and the Review Officer and provide greater access to expertise (recommendation 7.5);
- consider comparable overseas cases in investigations (recommendation 7.6);
- report annually on applications not initiated (recommendation 7.7);
- publish details of individual anti-dumping and countervailing measures (recommendation 7.8);
- consult with Australian Bureau of Statistics regarding access to import data (recommendation 7.9);
- implement supported recommendations as soon as practically possible (recommendation 7.10); and
- commit to an independent review the anti-dumping system five years after implementation of reforms (recommendation 7.11).

Streamlining Australia's anti-dumping system – An effective anti-dumping and countervailing system for Australia June 2011

Table of Contents

EXECUTIVE SUMMARY 41

1. BETTER ACCESS TO THE ANTI-DUMPING SYSTEM........ 42

2. IMPROVED TIMELINESS 42

3. IMPROVED DECISION-MAKING 42

4. CONSISTENCY WITH OTHER COUNTRIES 43

5. STRONGER COMPLIANCE 43

1. BETTER ACCESS........ 44

1.1 Supporting access to the anti-dumping system 44
1.1.1 *Small and Medium Enterprises* 44
1.1.2 *Downstream industry* 45
1.2 Access to import and subsidies data 45
1.3 Investigation and injury periods 46
1.4 Review of measures 47
1.5 Close processed agricultural goods 47

2. IMPROVED TIMELINESS 48

2.1 More resources 48
2.2 Process for providing evidence 49
2.3 Earlier consideration of provisional measures 49
2.4 Time limits for Ministerial decisions 50

3. ENHANCED DECISION-MAKING 50

3.1 Greater use of experts 50
3.2 Particular market situation 51
3.3 New appeals process 52
3.3.1 New information........ 53
3.3.2 Appellable decisions........ 53
3.4 Material injury 53
3.5 Extensions of time 55
3.6 Greater transparency 55
3.6.1 *Criteria and methodology used to evaluate applications*........ 56
3.6.2 *Reporting on applications* 56
3.6.3 *Reporting on measures*........ 56

4. CONSISTENCY WITH OTHER COUNTRIES 57

4.1 Amending subsidies provisions 57
4.2 Uncooperative parties 57
4.3 Non-injurious price and the lesser duty rule 58
4.4 Parties to proceedings 59

4.5 Setting the form of duty 60
4.6 Consideration of cases and practices in other jurisdictions 60

5. STRONGER COMPLIANCE 61

5.1 Compliance monitoring 61
5.2 Anti-circumvention framework 62

6. OTHER MATTERS 63

6.1 "Bounded" public interest test 63
6.2 Minister's discretion 63
6.3 Continuation of measures 64
6.4 Zeroing 64
6.5 Onus of proof 65

7. IMPLEMENTATION 65

7.1 International Trade Remedies Forum 65
7.2 New case management system 65
7.3 Timing 65
7.4 Independent review 66

RESPONSE TO PRODUCTIVITY COMMISSION RECOMMENDATIONS 67

GLOSSARY 68

AUSTRALIAN GOVERNMENT REFORMS TO THE ANTI-DUMPING AND COUNTERVAILING SYSTEM

EXECUTIVE SUMMARY

Australia is an export-oriented economy. An open trade environment provides critical access to markets that keep our economy strong. For more than 30 years, Australia has had bipartisan support for some of the lowest barriers to trade in the world.

Australia is a defender of the rules governing multilateral trade. If everyone plays by the rules, business and the community can retain confidence in the benefits a global economy can bring.

An anti-dumping system has become a standard feature of the international trade policy landscape. More than 90 countries have one. As there is no international competition law regime, an anti-dumping system is the only means by which unfair market behaviour can be deterred at the global level.

A well-administered anti-dumping system has several welcome efficiency effects. These include avoiding the depreciation of the skills and capabilities of the labour force and of industry, encouraging capital investment by providing greater certainty in the competitive environment.

The Australian anti-dumping system provides an effective and relatively low cost means for import-competing firms to seek redress for material injury caused by unfair trading practices. A rigorous and well-resourced anti-dumping regime, will better secure our industries and our workforce from unfair trade practices.

These changes build on the changes made after the Gruen Review (1986) and the Willett Review (1996). There have been no substantial changes to the anti-dumping system in more than a decade.

The Government's reforms respond to the Productivity Commission Inquiry Report No. 48, *Australia's Anti-dumping and Countervailing System*, implementing 15 out of 20 recommendations in whole or in part.

The reforms also take into account the views of State and Territory Governments, the reports of the Senate Economics Legislation Committee of 22 June 2011 on the Customs Amendment (Anti-dumping) Bill and the Customs Amendment (Anti-dumping Measures) Bill, and numerous submissions made by stakeholders.

The package of reforms to the anti-dumping system outlined here will provide significant improvements to the way we administer the global rules in Australia, and better align our laws and practices with other countries.

The changes will improve access to the anti-dumping system for businesses, and anti-dumping investigations will be resolved more quickly. There is a focus on improving decision-making by the renamed International Trade Remedies Branch (the Branch) within the Australian

Customs and Border Protection Service, and ensuring greater consistency with anti-dumping administrations in other countries.

The Branch will have greater resources and expertise available to enable it to do its job. Ensuring compliance with anti-dumping measures is also a priority.

1. Better access to the anti-dumping system

1.1 Small and medium enterprise and downstream industry will be provided support to actively participate in anti-dumping investigations.

1.2 The Branch will work with the Australian Bureau of Statistics and a new International Trade Remedies Forum to examine options to access import data. In addition, the data requirements for initiating an investigation will be clarified, and information about countervailable subsidies in other countries will be made available to businesses that are considering applying for measures.

1.3 The circumstances in which shorter than normal investigation and injury periods may apply will be clarified.

1.4 Parties will more easily be able to update measures as a result of changes that will allow a partial review of measures that are in place.

1.5 A working group of the International Trade Remedies Forum will be established to determine the best way to resolve the problems faced by primary producers in accessing the anti-dumping system.

2. Improved timeliness

2.1 Staff in the Branch will be increased by 45 per cent, from 31 to 45 staff, over the next 12 months to ensure cases are not delayed by a lack of resources.

2.2 Guidelines will be developed to improve the timely provision of information and to ensure adequate opportunities for industry to respond to matters raised by other parties. Further consideration will be given to a new, ordered, evidence gathering process.

2.3 Provisional measures will be considered at the earliest opportunity – as soon as the Branch has sufficient information, without necessarily waiting to verify all data.

2.4 A 30 day time limit for Ministerial decision-making will be introduced.

3. Improved decision-making

3.1 The Branch will make greater use of experts including forensic accountants, industry specialists and others, in accordance with protocols to be determined after consultation with the International Trade Remedies Forum.

3.2 A working group of the International Trade Remedies Forum will be established to make recommendations to Government about how to improve the effectiveness of Australia's "particular market situation" provisions, consistent with World Trade Organization obligations.

3.3 A more rigorous appeals process will be introduced, with more resources, and with the Review Officer rather than the Branch making recommendations to the Minister.

3.4 The definition of what constitutes material injury caused by dumping will be amended to allow a more inclusive consideration of the impact of dumping on employment and investment, and to take account of profits foregone and other injury caused in new or expanding markets. The Branch will also clarify how it determines whether injury is caused by dumping or by other factors.

3.5 The Branch will have flexibility in seeking extensions of time to accommodate complex cases, and consider critical new information that could not reasonably have been provided earlier.

3.6 There will be greater transparency through publishing the Branch's approach to evaluation of applications, and by reporting on measures and applications.

4. Consistency with other countries

4.1 The current list of countervailable subsidies will be expanded to make them consistent with the World Trade Organization Agreement on Subsidies and Countervailing Measures and Agreement on Agriculture.

4.2 The approach to determining whether parties are non-cooperative will be strengthened and clarified.

4.3 The method of determining the non-injurious price will be revised recognising that injury to industry can take different forms, and that more flexible consideration of relevant factors will provide a more effective remedy that is tailored to the injury caused in a particular case.

4.4 The parties permitted to participate in investigations, including by making submissions, will be clarified to include relevant industry associations, unions and downstream industry.

4.5 A more flexible approach will be taken to determining the appropriate form of a dumping or countervailing duty, including *ad valorem* duty, fixed duty, combination duty, or a floor price[11].

4.6 The Branch will take into account relevant cases and practices in other jurisdictions.

5. Stronger compliance

5.1 There will be increased monitoring of compliance with anti-dumping measures.

5.2 A framework will be introduced to prevent the unfair circumvention of measures by the modification of products, sending products through third countries or exporters with a lower duty rate, or assembling parts in Australia.

The Government is proposing to retain the current approach to considering the wider impact of measures, the continuation of measures,

[11] A glossary of terms is at page 29

zeroing[11] and basing its findings on an objective examination of positive evidence in accordance with Australia's World Trade Organization obligations.

The Trade Measures Branch of the Australian Customs and Border Protection Service will be renamed the International Trade Remedies Branch. This is standard terminology internationally. The Branch will develop a new case management system to enable faster dissemination of case information to parties, improving the timeliness of anti-dumping decisions.

The Government will also establish the International Trade Remedies Forum comprising parties with an interest in the anti-dumping system and government agencies to oversee the implementation of the reforms and monitor their effectiveness. A full independent review of the changes will be made in five years time.

1. **Better access**

1.1 Supporting access to the anti-dumping system

1.1.1 *Small and Medium Enterprises*

Presently, the Trade Measures Branch of the Australian Customs and Border Protection Service includes a liaison function, which involves providing information about the anti-dumping and countervailing system (ADS) to industry, including small and medium enterprises (SMEs).

The Branch is constrained in the advice it can provide to industry because it will ultimately make a recommendation to the Minister about whether dumping is causing injury to the industry.

During consultations, it became apparent that there is continuing and widespread concern about the ability of SMEs to access the ADS.

The Government will fund a position within a major industry association to assist SMEs with anti-dumping and countervailing investigations. The existing liaison function will continue to provide information about the system, but not detailed advice.

The SME Support Officer (SSO) will work with businesses to enable them to prepare applications and satisfy initial evidentiary requirements and assist other SMEs interested in a particular case to provide submissions to the Branch during an investigation.

The SSO will also be able to facilitate cooperation between businesses to ensure that their application reaches the "25 per cent of domestic producers of like goods" and "more support than opposition" thresholds for applications required by the World Trade Organization (WTO) Anti-Dumping Agreement (ADA) and Agreement on Subsidies and Countervailing Measures (ASCM). The SSO will achieve this through industry networks and other appropriate means.

The Government intends that these proposals will raise greater understanding of the ADS amongst SMEs, and will facilitate appropriate access to remedies for small businesses injured by dumping. The SSO is a pilot project. The position will be trialled for two years, and extended if it is effective in achieving these objectives.

1.1.2 *Downstream industry*

The SSO may also provide assistance to downstream industry.

During an anti-dumping investigation or continuation inquiry the Branch may identify domestic producers that use the goods under investigation and "like goods" as inputs. Presently, the Minister may consider the impact of measures on this downstream industry in determining whether to impose measures, however, once measures are in place, no further action is taken.

The possibility exists for trade measures to be undermined where measures on imports of a particular product result in an influx of downstream goods at a subsequent stage of processing, further damaging the domestic industry in those downstream goods and companies in its supply chain. To ameliorate that risk, the SSO will periodically review available data about downstream industries following the imposition of measures.

Where there are concerns about the possible dumping of the downstream products, the SSO may assist with the preparation of an anti-dumping or countervailing application in respect of those goods. The SSO may also refer the matter to the Minister to determine whether there are grounds for the Minister to initiate an investigation. Consistent with the WTO ADA and ASCM (ADAs), the Minister can only initiate an investigation where there are "special circumstances", and where there is *prima facie* evidence of dumping or subsidisation causing material injury to the domestic industry as a whole.

1.2 Access to import and subsidies data

The availability of import data in Australia is governed by the *Census and Statistics Act 1905*. This requires the Australian Bureau of Statistics (ABS) to preserve the confidentiality of data so that granting full access to import data on a transaction-by-transaction basis, as occurs in some other jurisdictions, is not open to the ABS.

The role of the ABS is to provide high quality statistical information for research and other statistical purposes. In keeping with this, the ABS disseminates a wide range of statistics compiled from both information it collects directly and information initially collected by other organisations, like the Branch.

The ability to collect this information is partially based on retaining the community's trust that the ABS will preserve the confidentiality of information that is likely to enable the identification of an individual business or person. This also ensures that commercially valuable data is not made available to competing firms or industries.

Potential applicants for anti-dumping or countervailing measures have reported difficulty in constructing applications because of the ABS practice of suppressing certain information in import statistics.

The Government recognises the benefits that would flow to potential applicants from increased access to ABS maintained import data. Availability of import statistics for clearly defined categories of goods would improve the accuracy of applications from Australian industry. It

would also give applicants a better idea of whether to commit time and resources to lodging an application for measures.

The Branch will work with the ABS and the International Trade Remedies Forum (the Forum) to examine options for providing, on a customised cost-recovery basis, the alternative presentation of statistics that may be more useful to applicants in anti-dumping cases (see 7.1). This proposal builds on recommendation 7.9 of the Productivity Commission.

Nonetheless, detailed import data is not required to make an application for measures. Applicants need to provide enough data to make a *prima facie* case that dumping or subsidisation is occurring (and has caused injury to the Australian industry). Applicants can use market intelligence to estimate import volumes and provide estimates of export prices by deducing export prices from known selling prices in Australia, less an estimate of the importer's profit, costs in Australia and overseas freight. The SSO (see 1.1) may assist applicants with this process.

This practice will be clarified in the Customs and Border Protection Dumping and Subsidy Manual (the Manual) and in the other information provided to potential applicants for measures.

Further, to assist applicants seeking the imposition of countervailing measures, the Branch will develop and maintain a subsidies register. The register will be published on the Customs and Border Protection website and will provide a summary of subsidy programs previously investigated by the Branch. It will also outline the basis for its determinations as to whether or not each individual subsidy was an actionable subsidy. Where relevant, the register may also refer to subsidies found by other countries (see 4.6).

1.3 Investigation and injury periods

For the Branch to apply measures there must be evidence that the dumping or subsidy has caused material injury to the domestic industry. The Branch has commonly used 12-month investigation periods for dumping assessments, and three full years plus any subsequent and incomplete year, for injury analysis.

The WTO ADAs do not specify how long the investigation period should be, or specify the length of the injury period for an investigation. However, the current Branch approach is consistent with the recommendation of the Anti-Dumping Committee of the WTO that the period for data collection for dumping analysis should normally be 12 months, and in any case, no less than six months (that is the investigation period). This period should end as close to the date of initiation as is practicable. Further, the period of data collection for injury analysis should normally be at least three years, including the investigation period.

Some stakeholders have indicated concerns that these requirements are unduly onerous.

The Branch will advise the Government, after consultation with the Forum, how to clarify the circumstances in which, consistent with our international trade obligations, it may be appropriate for Customs and Border Protection to deviate from its normal practice. The Manual will be revised accordingly.

1.4 Review of measures

Once imposed, measures can be periodically reviewed to ensure they are only in force for as long as and to the extent necessary to counteract the injurious dumping or subsidisation. This may occur no more than once in any 12-month period on the initiation of an affected party, or if initiated by the Minister, at any time.

Presently, the work involved in a review is said to be as significant as for the original investigation, arguably deterring parties from seeking a review.

The Government will enable businesses to apply for a partial review of measures. A partial review need not be comprehensive in terms of the exporters covered, or the variable factors or injury considerations examined.

The scope of the review will be specified in the notice of initiation of the review. This will provide the flexibility to reflect the scope and complexity of the particular review, rather than the current one-size fits all approach, reducing costs for business and the system overall. It will make it easier for parties to seek a review of measures.

The changes to the review provisions, which will enhance the existing market driven approach, are preferable to an automatic annual review, as recommended by the Productivity Commission (recommendation 6.5).

An annual review of measures would significantly increase compliance costs for Australian businesses, as well as the administrative costs to Government. Businesses affected by measures should continue to have the opportunity to apply for a review if they consider the measures are out of date rather than being compelled to participate in a costly exercise every year.

The new review procedures will require legislative amendment and will be consistent with Australia's international trade obligations. The new procedures are compatible with the Government's proposal before Parliament, which relates to the revocation provisions in the *Customs Act 1901*.

1.5 Close processed agricultural goods

Under the Customs Act, section 269T(4B) "like goods" can be "close processed agricultural goods" (CPAG) if the Minister is satisfied that:

(a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods, and

(b) the processed agricultural goods are derived substantially or completely from the raw agricultural goods, and

(c) either:

(i) there is a close relationship between the price of the processed agricultural goods and the price of the raw agricultural goods, or

(ii) a significant part of the production cost of the processed agricultural goods, whether or not there is a market in

> Australia for those goods, is, or would be, constituted by the cost to the producer of those goods of the raw agricultural goods.

These provisions were introduced in 1991 to provide remedies for primary producers, who can be injured by dumping or subsidisation of goods that are like those manufactured by the processors to whom they sell their product.

Concerns have been raised with the present narrow definition of CPAG, particularly because primary producers cannot alone apply for measures against a dumped processed product. It has been argued that processors of a dumped agricultural product have a powerful incentive not to support anti-dumping actions, because the processor benefits from the low dumping price.

The Government is aware of concerns with the operation of the current legislative provisions relating to CPAG and believes that an examination of the provisions is warranted.

The Branch will convene an agricultural products working group comprising industry representatives and agencies to examine the provisions and report to Government. This relates to the Productivity Commission’s recommendation 6.1.

2. Improved timeliness

2.1 More resources

Presently, there are 31 Customs and Border Protection staff involved in administering the ADS. This will be increased to 45 over the next 12 months.

Staff are involved in:

- conducting anti-dumping investigations, including reviews of measures, continuation inquiries and duty assessments (Operations)
- providing support to investigations by providing quality assurance, industry liaison, management of administrative and judicial review, and monitoring compliance (Operations Support)
- providing advice on policy and legislative issues, international liaison and engagement and strategic communication (Policy and Capability), and
- involved in the reforms to the ADS (Strategic Review).

Some stakeholders are of the view that the Branch needs more resources and this was acknowledged by the Productivity Commission (recommendation 7.5).

The Government agrees that maintaining an effective capability within the Branch is fundamental to the delivery of a timely and effective ADS.

The recruitment of an additional 14 staff, will boost the Branch’s capabilities and provide for better decision-making.

The Senate Economics Legislation Committee recommended that the Government re-examine the statutory timeframes because investigations have exceeded existing timeframes. The Government believes that the better approach is to increase resources.

2.2 Process for providing evidence

Presently it is open to all parties to an anti-dumping investigation to make submissions at any time prior to the Branch issuing the Statement of Essential Facts (SEF), and again in the period between issuing the SEF and making the final report to the Minister.

This can result in parties manipulating the process to leave inadequate time for the other parties to respond to issues raised in their submissions. This is particularly the case where parties do not provide or approve non-confidential versions of a document early enough to allow a considered response.

The Branch will work with the Forum to develop guidelines based upon the existing legislative process, and consistent with Australia's international trade obligations, to ensure all interested parties have adequate time to respond to submissions and the Branch reports at the earliest opportunity.

The Government expects that this will result in quicker final reports to the Minister and accordingly quicker resolution of anti-dumping matters (see also 2.4). It will also provide greater certainty for parties to anti-dumping investigations, and avoid perceptions that natural justice has not been afforded when parties make late submissions.

The Branch will also consult with the Forum and make recommendations to Government about further improving the process for providing evidence. Further changes would be likely to require legislative amendment. Any changes will be consistent with Australia's WTO obligations.

2.3 Earlier consideration of provisional measures

During the course of an investigation, the Branch may apply provisional measures on imports if they have made a preliminary affirmative determination (PAD) of dumping or subsidisation and consequent injury, and have judged that the measures are necessary to prevent injury being caused while the investigation continues.

The provisional measures typically take the form of a bond or security equal to the product of the preliminary estimate of the dumping or subsidy margin (per unit) and the quantity of imports. These are documentary securities.

The Customs Amendment (Anti-dumping) Bill proposes to allow the application of provisional measures from day one of investigations. However, the WTO allows provisional measures to be applied 60 days after the initiation of an investigation.

On average, the Branch has applied provisional measures around day 140 of the investigation, with the earliest at day 80. This is because the Branch has usually waited until completion of verification visits to exporters before making a PAD.

Stakeholders have expressed concern that this does not adequately prevent injury to Australian manufacturers and producers during the investigation, particularly given the length of time it can take to bring an application for anti-dumping or countervailing measures.

The Productivity Commission recognised the need for earlier application of provisional measures where warranted (recommendation 6.3) and the Government believes that earlier provisional measures will better prevent injury to Australian manufacturers and producers during the investigation.

The Branch will therefore consider making a PAD when it has adequate information, without necessarily waiting to verify all data. By day 60 (the earliest WTO consistent date a PAD can be considered) the Branch will usually have verified the domestic industry’s data, and will have received data from the exporters.

If the data submitted by the exporters shows evidence of dumping or subsidisation, this may be sufficient evidence on which to base a PAD prior to verification. Exporters will be given adequate opportunity to respond to questionnaires before a PAD is considered.

Before provisional measures are imposed, the Branch will still need to have made a PAD of dumping or subsidisation and consequent injury, and have judged that the measures are necessary to prevent injury being caused while the investigation continues.

If as a result of verification the Branch finds no dumping or a lower dumping margin, the Branch can remove or adjust the level of the provisional measures. If at the conclusion of the investigation duties are imposed at a higher level than the provisional measures, the Branch can not retrospectively collect more duty than the value of the provisional measures.

This proposal can be implemented through changes to the Manual.

2.4 Time limits for Ministerial decisions

Unlike all the other decisions and processes in the ADS there are currently no legislative time constraints governing the Minister’s decision.

There are clear benefits in imposing a time limit on Ministerial decision-making, providing greater certainty for parties, and ultimately reducing the overall timeframe to conclude an investigation.

The Government will adopt the Productivity Commission’s recommendation (recommendation 7.4) and, subject to extenuating circumstances, the Minister will make a decision within 30 days of receiving the report on an investigation, continuation inquiry, review of measures, duty assessment, or report following a review of a decision.

This will require legislative change.

3. **Enhanced decision-making**

3.1 Greater use of experts

The Branch comprises people with a range of skills critical to anti-dumping investigations, including law, economics and accounting.

However, parties who have been involved in investigations have expressed concern that the Branch does not have specific in-house expertise in relation to the wide range of products, industries and countries in which anti-dumping investigations take place.

It is not feasible for any organisation the size of the Branch to have both the depth and breadth of expertise required by the diversity of investigations. Instead the Branch will bring in independent experts to supplement existing staff knowledge in complex cases and to provide advice on key issues. This might include issues such as determinations of like goods, production processes and costs, accounting arrangements, statistical analysis, economic modelling and economic impact studies.

The Branch will access expertise in accordance with a protocol, to be determined by the government in consultation with the Forum and the Branch. The protocol will require experts to declare all potential conflicts of interest, and it will address the need to comply with due process, evidentiary requirements and other relevant WTO obligations.

The use of independent experts should not, subject to extenuating circumstances, impact on the timeframes for making a decision.

It will still be open for parties to an investigation to procure expert opinions in support of their case, which the Branch will assess in making determinations and recommendations to the Minister.

3.2 Particular market situation

The basis for determining whether goods have been dumped is set out in the WTO Anti-Dumping Agreement. Goods are dumped if their export price to Australia is less than their normal value in the country of export.

In determining the normal value for a dumping investigation involving a market economy, the Branch will first look to that country's domestic selling prices. In Australia this approach applies to all WTO members.

Where the domestic selling prices cannot be used because there are no sales in the ordinary course of trade, low sales volumes, or there is a "particular market situation", the normal value may be calculated using one of two alternative approaches.

The most common method used by the Branch is to construct a normal value in the domestic market in the country of export using the exporter's costs. The other is to use export prices to third countries. In certain circumstances, where exporters do not cooperate in an investigation, the Branch may consider "all relevant information".

A number of stakeholders have raised issues with the interpretation of what constitutes a particular market situation.

The Manual currently outlines some relevant considerations for assessing whether a PMS exists, however it could provide improved guidance including:

- the relevance and impact of government influence and assistance in respect of key inputs to the product

- circumstances where the proportion of government owned enterprises might contribute to a particular market situation determination
- other circumstances where government intervention could result in distortion of domestic selling prices, and
- how the Branch will assess particular market situation where the government of a country, or exporters, do not cooperate.

The Manual could also provide improved guidance for determining an appropriate amount for profit when constructing a normal value consequent upon a particular market situation determination.

A working group of the Forum will be established to make recommendations to Government before the end of 2011 about how to improve the effectiveness of the market situation provisions, consistent with our WTO obligations. The working group will include representatives of relevant Government agencies, as well as domestic industry, overseas exporters and domestic importers. In developing these recommendations, the working group may also consider using independent experts. This is consistent with the new approach outlined in 3.1.

3.3 New appeals process

Presently decisions of the Minister may be appealed to the Trade Measures Review Officer, who is an employee of the Attorney-General's Department. The Review Officer must accept an application unless the applicant has failed to provide sufficient particulars of the findings to which the application relates.

Where the Review Officer reviews a decision of the Minister and recommends that a particular finding or findings warrant further consideration, the matter is referred back to the Branch to reinvestigate and make recommendations to the Minister as to whether to overturn or amend the original decision.

A number of concerns have been raised with the current Trade Measures Review Officer arrangements, including:

- the resourcing available
- the frequency of appeals – 80 per cent of Ministerial decisions are appealed to the Trade Measures Review Officer, and
- the perception that the Branch is conflicted in reinvestigating its own decisions.

The Government will establish a new process for administrative appeals to replace the current Trade Measures Review Officer. This new process will be consistent with Australia's international trade obligations and include the following key elements.

The Review Officer will no longer be an officer in the Attorney-General's Department, and in any particular case will be selected from a panel with relevant expertise.

The Minister will appoint the Panel and the Government will make available additional resources, in the form of administrative and research assistance, to support the efficient functioning of the Panel.

Before making a recommendation to the Minister, the Review Officer may request the Branch reinvestigate a particular finding and report to the Review Officer. Where a reinvestigation occurs, it will be limited to the findings the Review Officer has identified as flawed in the initial investigation.

Where the Review Officer finds in favour of an appeal the Review Officer will make a recommendation to the Minister, who will make a final determination.

As part of the new appeals process consideration will be given to amending the threshold for the Review Officer to apply in accepting applications for review. Any new threshold will be consistent with the Government's administrative law policy for merits review.

Other than the changes to the appeals process, the Minister, Review Officer and the Branch will retain their broad administrative and decision-making roles within the anti-dumping system. These reforms are consistent with the approach recommended by the Productivity Commission (recommendations 7.1 and 7.2).

The changes to the appeals process will require legislative amendment.

3.3.1 New information

Where compelling new evidence becomes known to a party after the investigation has concluded, the Minister will be able to exercise existing powers to initiate a review of existing measures or a new investigation, noting that in accordance with the WTO ADAs the latter can only be undertaken in "special circumstances". The proposed changes to extensions of time will also allow consideration of new evidence provided late in the investigation that could not reasonably have been known by the party when the SEF was published by the Branch.

Taking account of new information in an appeal would result in characterising the appeal as a continuation of the investigation. This would result in regularly exceeding WTO investigation time-limits, which would constitute a violation of Australia's international trade obligations and risk Australia becoming subject to dispute settlement litigation and possible retaliation against its exports. Therefore, reviews by the Review Officer and reinvestigations by the Branch will continue to be limited to the information that was part of the original investigation.

3.3.2 Appellable decisions

A number of decisions that are not presently able to be appealed will become appellable. This includes decisions of the Minister to continue measures or not, and to vary measures following review. However, decisions of the Minister on the advice of the Review Officer will only be able to be appealed to the Federal Court.

3.4 Material injury

Australia's domestic legislation (section 269TAE of the Customs Act) reflects the WTO ADA (Article 3.4)[12] which requires:

> "evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Some stakeholders have suggested that certain injury factors are not adequately considered in assessing whether dumping or subsidisation has caused material injury. The impact on jobs and investment in an industry are two such factors. Stakeholders have also expressed the view that profits foregone and loss of market share should also be recognised as injury considerations.

Presently, section 269TAE(3) refers to "the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of goods of that kind, or like goods".

The Government will amend the Customs Act to reflect that the Minister can consider any impact on jobs in the domestic industry producing like goods, not just the effects currently specified. As well as the wage rate and the number of workers employed, the Branch would be able to consider all aspects of the terms and conditions of the contract of employment, including hours worked and the incidence of part-time employment.

Section 269TAE(3) also refers to investment in the industry, the level of return on investment, and the ability to raise capital. The Government will amend the Customs Act so that the Minister can examine any impact on investment in the industry.

The Government will revise the current Ministerial Direction on Material Injury to confirm that profits foregone and loss of market share in an expanding market are relevant injury considerations. This revision recognises there may be circumstances where dumping or subsidisation may still result in injury where it has caused the rate of an industry's growth to slow, without causing it to contract, or where an industry suffers a loss of market share in a growing market, without a decline in profits.

Some stakeholders consider that the Branch is reluctant to find that dumping or subsidisation has caused material injury where other causes of injury are also evident.

The WTO ADAs require the Branch to examine known factors other than the dumped or subsidised imports that are injuring the domestic industry,

[12] A similar provision is contained in the ASCM (Article 15.4)

and the Branch must not attribute the injury from those other factors to the dumping or subsidisation.

The Branch will amend the Manual to make clear that the mere existence of injury caused by other factors does not preclude a finding that the dumping or subsidisation has caused material injury.

The Branch will also amend the Manual to explain further its approaches to determining whether particular injury is caused by dumping or subsidisation, or other factors, ensuring that the requirements of the WTO ADAs to separate and distinguish the injurious effects of dumped or subsidised imports and the injurious effects of other factors are observed.

3.5 Extensions of time

Australia's ADS contains one of the shortest investigation timeframes in the world, at 155 days.

The Branch can seek an extension to this timeframe during the course of an investigation, but only one extension and only prior to the publication of the SEF at day 110. This can mean that extensions tend to be for significant periods, as the Branch needs to anticipate the possible further need for an extension.

Extensions have been sought in an increasing number of cases and for significant periods of time due to the size and complexity of recent investigations. In general, however, investigations are still being completed within shorter timeframes than other jurisdictions

Consistent with the Productivity Commission's recommendation 7.3, the Government will amend the Act to allow the Branch to seek more than one extension to the timeframe at any point during an investigation, review of measures, continuation inquiry or duty assessment.

The Minister will still have to approve all extensions of time. The Government will monitor the implementation of this proposal carefully to ensure it does not result in a blow out of investigation periods, and that the Branch is seeking extensions only in complex cases, not routinely.

This will enable the Branch to undertake robust analysis where investigations involve particularly complex arrangements, or involve large numbers of countries or interested parties. It will also allow consideration of a response to critical new information that could not reasonably have been provided earlier.

The Branch will notify parties of these extensions through the issue of an Australian Customs Dumping Notice.

The Government expects that increasing the resources available to the Branch (see 2.1) and the new process for providing evidence in anti-dumping cases (see 2.2) will reduce the number of cases that are not able to be resolved within 155 days.

The Branch will continue to provide in its annual report a consolidated summary of the timeliness of each of its investigations in the preceding 12 months.

3.6 Greater transparency

3.6.1 *Criteria and methodology used to evaluate applications*

Sections 269TB and 269TC of the Customs Act set out the requirements for making an application for publishing a dumping or countervailing duty notice. The Guidelines for Applicants provide further detail on the information that applicants must provide in an application and the circumstances in which an application will not lead to initiation of an investigation. In addition, the Branch has developed internal guidance for staff to assist in the evaluation of applications.

One of the consistent themes in consultation was the need for greater transparency in the Branch processes and decision-making. The Branch will amend the Manual to incorporate the criteria and methodologies that the Branch uses to evaluate applications. This may be of additional value to industry in determining whether to make an application, and how best to make that application.

3.6.2 *Reporting on applications*

The Branch does not currently report on the applications for measures that it receives.

The Branch will report on the number of applications for measures that do not proceed to investigation. This information will appear in the Customs and Border Protection Annual Report.

This will provide greater transparency about the Branch workload, and incorporates an important aspect of the approach recommended by the Productivity Commission (recommendation 7.7).

However, information about the exporter, country or industry sub-sector involved in an anti-dumping application that did not proceed to investigation will not be included. The WTO ADAs require the Branch not to publicise applications that do not proceed beyond the application stage.

This is to avoid unwarranted market disruption caused by publication of dumping and subsidisation claims and the prospect of the Branch imposing measures in a particular market.

3.6.3 *Reporting on measures*

Presently the Branch reports the magnitude of dumping and subsidy margins found during its investigations. However it has not usually reported the level of measures imposed, as the values which underpin those measures are based on commercially sensitive information.

A range of views have been expressed regarding whether the Government should provide more information about the magnitude of measures and the values that underpin those measures.

On the one hand, the release of such information can damage the commercial interests of the exporter. On the other, not releasing information can undermine confidence in the outcome of an investigation because of the inability to explain or understand the decision.

The Branch will publish the effective rate of duties for the measures imposed, (that is the *ad valorem* equivalent of the measure). Consistent with the confidentiality requirements of the WTO ADAs, further information, such as the normal value of $X per kilogram, may only be

published with the consent of the party concerned. This level of disclosure accords with the approach recommended by the Productivity Commission (recommendation 7.8).

The Branch will also report publicly on the outcomes of duty assessments and accelerated exporter reviews. This will cover information permitted to be publicly reported by the ADAs and will be included in the existing Branch monthly status report, which is published as an Australian Customs Dumping Notice on the Customs and Border Protection website.

The Government has also considered whether to allow lawyers and accountants to access commercial-in-confidence information under an "administrative protection order" or similar confidentiality agreement. However, it has been decided that this would add substantially to the costs for parties to anti-dumping actions, without commensurate benefits.

4. **Consistency with other countries**

4.1 Amending subsidies provisions

Provisions in the WTO ASCM specify the types of government subsidies that can be actioned by another country. The Howard Government failed to establish appropriate sunsetting arrangements in Australian law, for certain previously non-actionable subsidies that are now actionable under WTO rules. As a result, Australian companies cannot currently seek remedies in relation to these subsidies.

The Government will amend the Customs Act to reflect all countervailable subsidies including certain assistance:

- for research activities conducted by firms or by higher education and research establishments
- for disadvantaged regions pursuant to a general framework of regional development
- to enable firms to adapt to new environmental requirements, and
- for a variety of government programs that provide services or benefits to agriculture.

The Government will make further legislative amendments to better reflect other aspects of the ASCM.

This proposal addresses the Productivity Commission's recommendation 6.8.

4.2 Uncooperative parties

The Branch obtains information necessary to make determinations about the existence of injury, and dumping or subsidies through interested party questionnaires.

Consistent with the WTO ADAs, where a party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, determinations may be made on the basis of all relevant information. This may include information provided by the domestic industry and information from surrogate countries.

Presently, there is a perception that comparable jurisdictions take a firmer view than Australia in determining whether an importer, exporter or government is non-cooperative.

The Government will strengthen and clarify the approach to determining interested party cooperation.

The Branch will revise the Manual to clarify the circumstances in which a finding of non-cooperation may apply, and the consequences that may follow. In doing so, the Branch will take into account Australia's international obligations.

This will deter the selective provision of information and provide a fairer basis for assessing whether dumping or subsidisation is occurring. It does not affect the process for determining a dumping margin for a cooperating exporter.

The Branch will also examine the approach that the European Union (EU) applies to determine dumping margins depending on whether cooperating exporters from a particular country account for a high or low proportion of the total export volume to the EU from that country. In general terms, where cooperating exporters represent 80 per cent or more of the volume, information from those exporters will be used when working out a margin for the non-cooperating exporters in that country. Where the cooperating exporters account for less than 80 per cent of the volume of exports, the margin for non-cooperative exporters will be determined using all relevant available information.

The Branch will consult with the Forum and recommend to Government whether a similar approach should apply in Australia.

4.3 Non-injurious price and the lesser duty rule

In applying anti-dumping and countervailing duties, the amount of duty is normally determined after applying the lesser duty rule. Application of the lesser duty rule means that duties are applied at the level adequate to remove the injury caused by dumping or subsidies, which may be a level less than the full dumping or subsidy margin. The Branch determines the lesser duty by calculating a "non-injurious price".

The Manual currently outlines a hierarchy of options, developed in 2004, for determining the non-injurious price. Initially, the Branch will look to the selling prices at a time unaffected by dumping. If there are sound reasons for not taking this approach, the Branch will construct a price based on the domestic industry's cost to make and sell, with an allowance for profit. Finally, if that is not appropriate, the selling price of any imports that have not been dumped in the Australian market will be used.

Concerns have been raised that the Australian approach to determining the non-injurious price, upon which the lesser duty is based, should be improved to ensure injury to Australian industry is adequately addressed. Injury to Australian industry can take different forms. It could have effects on volume, price, profits or a range of other economic factors.

Before finalising the details of an approach to calculating non-injurious prices the Branch will consult with the Forum and advise Government of factors relevant to the determination of non-injurious prices. Revised

guidelines will be developed for assessment of such prices and appropriate amendments will be made to the Manual.

Provided the non-injurious price is properly determined, routine application of the lesser duty rule ensures Australia's anti-dumping and countervailing system is effective in remedying injurious dumping or subsidisation, while minimising the impact of measures on the wider economy. The Government believes that this approach is appropriate and economically responsible, and does not propose to change the application of the lesser duty rule.

To improve transparency, the Branch will also report annually on the number of cases where the lesser duty rule has resulted in the imposition of duties less than the full dumping or subsidy margin.

Once duties have been imposed, importers of goods subject to duties have the right to periodically apply for refunds where duty has been paid in excess of the amount of duty payable.

The Branch currently considers the lesser rate of duty at the refund stage. Other jurisdictions provide a refund only where the duty paid is in excess of the full margin of dumping, even where the original duty was imposed based upon the lesser duty rule. The Branch will examine the practices of other jurisdictions and Australia's international trade obligations, and consult with the Forum in determining whether Australia should adopt a similar approach. Such a change would require legislative amendment.

A revised approach to determining the non-injurious price would permit more flexible consideration of relevant factors, tailored to provide a more effective remedy for the injury caused by dumping that has been found in a particular case. This could include, for example, Australian industry's costs, prices, profits and returns on investment.

4.4 Parties to proceedings

An "interested party" to an investigation is currently defined in section 269T of the Customs Act to comprise, in broad terms, domestic manufacturers and producers, importers, exporters, trade organisations and foreign governments.

Some submissions to Government have made the point that in the present system certain stakeholder groups are not properly engaged in anti-dumping investigations.

The Government will amend the current definition to clarify that industry associations, trade unions and downstream industry (whether or not they are an importer) who have a direct interest in a particular matter should be treated as interested parties and confirm that these parties can formally participate in an investigation.

This change will not affect the present standing requirements. The Branch will only be able to initiate investigations in the same way that it can now. Usually, the application must meet the "25 per cent of domestic producers of like goods" and "more support than opposition" thresholds for applications required by the WTO ADAs. Alternatively, the Minister may initiate an investigation. Consistent with the WTO ADAs, the Minister may

initiate an investigation only if there are "special circumstances", and only where there is *prima facie* evidence of dumping causing material injury to the domestic industry as a whole.

The Government will consider further amendments to allow these parties to participate in reviews as part of the reforms of the appeals process (see 3.3).

4.5 Setting the form of duty

The WTO ADA does not prescribe what form a duty should take. It could be for example an *ad valorem* (percentage) duty, a fixed amount of duty, a combination duty (having fixed and variable components), or a floor price.

Presently, Australia's dumping duty is a combination duty. The effect is to impose an up-front duty that is never less than the fixed component of the duty regardless of the level of the actual export price (the variable component of the duty applies where the actual export price falls below the floor price).

While a combination duty has certain benefits it will not suit all circumstances. This is especially the case where export prices are subject to frequent variation, which may result in the amounts ascertained at the conclusion of an investigation becoming outdated.

Further, where prices are rising, the protective effect of the fixed duty component can be eroded. Where a large number of types and models are subject to an investigation, ascertaining amounts for each type increases administrative costs and complexity.

Other jurisdictions (including Canada, the EU, and the USA) commonly apply *ad valorem* dumping duties. They also retain the right to vary the type of dumping duty, recognising that a particular case may require a different type of duty.

The Productivity Commission recommended a rigid approach based upon a floor price in all cases (recommendation 6.6).

The Government is proposing that the Australian ADS will take a more flexible approach to the form a duty can take, to increase the effectiveness of anti-dumping duties. Depending on the facts of the particular case, the Branch will be able to apply, for example, an *ad valorem* duty, a fixed amount of duty, a combination duty, or a floor price. This will reflect the range of options available under the WTO Agreements.

The Branch will also re-calculate the level of measures when conducting a continuation inquiry. This will remove the need for separate review and continuation inquiries occurring in close proximity.

The above changes will require legislative amendment.

The Government will retain a duty assessment system consistent with our obligations under the WTO Agreements. Abolishing the provisions for importers to apply for a determination of their final duty liability and a refund of any overpaid duties would be inconsistent with mandatory provisions of the WTO ADAs.

4.6 Consideration of cases and practices in other jurisdictions

Some stakeholders have expressed the view that the Branch does not adequately consider the findings of other dumping administrations in conducting its investigations. The Branch is required to conduct its own investigation to determine whether dumping or subsidies are causing material injury to Australian industry. Outcomes of investigations undertaken in other jurisdictions may not align with an investigation conducted under the ADS for a range of reasons, including differences in the legal frameworks, domestic markets, goods being investigated, parties involved in the investigation and periods examined in determining whether goods have been dumped.

However, in particular cases, it is sensible to consider relevant information from other jurisdictions, for example:

- subsidies found to be operative on particular industries in particular countries, and
- the existence of measures in other jurisdictions as a factor that may indicate the likelihood of dumping recurring should measures be removed in Australia.

While this has generally been the practice of the Branch to some degree, it will in future specifically consider details of relevant cases in comparable jurisdictions, and include this information in investigation reports to the Minister. This reflects an approach recommended by the Productivity Commission (recommendation 7.6).

It is also important that the Branch is conducting investigations and reviews of measures consistent with practice in comparable jurisdictions. The Branch will undertake regular reviews of anti-dumping practices in comparable jurisdictions to inform future policy and practice changes, including through technical exchanges with dumping administrations overseas.

5. **Stronger compliance**

5.1 Compliance monitoring

Non-compliance with anti-dumping and countervailing duties undermines the effectiveness of trade remedies. Anti-dumping and countervailing duties are applied in order to offset injurious dumped or subsidised imports. However, such measures are rendered meaningless if importers are allowed to avoid paying applicable duties.

An importer may try to avoid paying duties by deliberately misdescribing goods on import or claiming that the goods have been supplied by an exporter with a lower rate of duty. The Branch has a range of powers under the Customs Act to address this behaviour and ensure that goods have been correctly reported to Customs and Border Protection and the correct amount of duty paid.

Presently, the Branch reacts to market feedback about possible non-compliance and conducts a limited number of proactive compliance monitoring programs.

Stakeholders have indicated that the degree of compliance monitoring conducted by the Branch could be improved.

A dedicated position will be created within the Branch to develop and implement an improved program of monitoring compliance with anti-dumping and countervailing measures.

The program will strengthen the existing compliance function by proactively:

- identifying, assessing and responding to non-compliance (such as not paying duties or the right amount of duty) with anti-dumping and countervailing measures
- monitoring key indicators (such as import data, commercial documentation) for anomalies that could indicate non-compliance, and
- assisting importers and others to comply with border laws regarding anti-dumping and countervailing measures and encouraging compliance across industry groups.

The Government intends that the compliance-monitoring program will include initial monitoring of measures shortly after their imposition to ensure early compliance and assist importers meet their obligations, followed by periodic monitoring throughout the life of the measures.

5.2 Anti-circumvention framework

Presently, where importers change their behaviour following the imposition of measures in an attempt to circumvent those measures, the Branch will use existing powers to address non-compliant behaviour insofar as it may breach the current legal framework as described in the previous section (see 5.1).

However, the present system does not contain a meaningful framework for identifying and taking action in respect of circumvention where an importer or exporter:

- makes a slight modification to a product to make it fall outside of the description of the goods subject to the measures
- imports a consignment of the product subject to measures via a third country
- reorganises export sales through exporters benefiting from a lower individual duty rate, or
- purchases parts and assembles them in Australia or a third country.

Some stakeholders have expressed concern about the current ability of importers to circumvent anti-dumping and countervailing duties in this way.

The Government will introduce a framework to specifically prevent the circumvention of duties, which could include measures to address the circumstances described above.

This framework will be developed by the Government in consultation with the Forum and informed by a consideration of the anti-circumvention regulations of comparable overseas administrations. Implementation will most likely require legislative amendment, and will be consistent with Australia’s international trade obligations.

6. **Other matters**

6.1 “Bounded” public interest test

The Productivity Commission’s proposed “bounded” public interest test (recommendation 5.1) provided that anti-dumping or countervailing measures would automatically not be imposed where one of five criteria was met.

The Government will not adopt this proposal. It is a costly and disproportionate response to the possible consequences that might arise from the small number of anti-dumping and countervailing cases brought in Australia each year.

The purpose of the ADS is to provide redress for manufacturers and producers injured by dumping or subsidisation. A public interest test could unfairly remove the remedy available to those manufacturers and producers.

The Government did consider a number of other options for taking account of the wider impact of measures. However, any such approach would undermine the purpose of the ADS for Australian manufacturers and producers. It would increase the cost and complexity of the ADS, and the Government believes it would increase business uncertainty, affecting investment decisions.

The Minister currently has an unfettered discretion not to impose measures. The Government believes this is adequate for the Minister to take account of the public interest when circumstances warrant broader matters be considered, subject to the changes outlined in 6.2.

6.2 Minister’s discretion

As indicated in 6.1, the Minister has an unfettered discretion not to impose measures. In reporting its findings to the Minister, the Branch will now include an assessment of the expected effect that any measures might have on the Australian market for the goods subject to those measures, and like goods manufactured in Australia, and in particular any potential for significant impacts on this market.

Potential market impacts and relevant factors are likely to differ in each case. However, the additional assessment that Customs and Border Protectionwill provide the Minister may include matters such as an assessment of the expected effect of any measures on market concentration and domestic prices. Customs and Border Protection will also report on any claims regarding impacts on downstream industries.

This is not expected to affect current investigation processes or timeframes, or the information requirements on business.

The Branch already examines the effect on the market in determining the causes of injury to the industry and in determining the non-injurious price, and it is now proposed the Branch will provide the Minister with information specifically on these matters.

The Minister will provide a direction to the CEO of Customs to give effect to this approach which is intended to better inform the Minister, prior to

making a decision whether to impose anti-dumping or countervailing measures.

6.3 Continuation of measures

Where anti-dumping or countervailing measures have been imposed they remain in force for five years unless earlier revoked. After five years there is an opportunity for Australian industry to apply to have the measures continued for a further five years. There is no restriction on the number of times measures can be continued.

The Productivity Commission's recommended that continuation of measures be limited to one three-year term (recommendation 6.4).

The Government considers that current arrangements relating to the continuation of measures are appropriate. They are the same as all of our major trading partners and are consistent with the WTO ADAs. Measures are not intended to be long-term protection for industry. Rather they are to combat unfair trading practices.

Under the WTO ADAs, measures may only remain in force as long, and to the extent necessary to counteract injurious dumping or subsidisation. Measures should not cease where injurious dumping or subsidisation is occurring, or likely to recur, if measures are removed.

The Government does not consider it appropriate to introduce an arbitrary limit on the duration of measures and therefore does not support the Productivity Commission's recommendation. If industry is required to bring a new application, even if dumping or subsidisation is still occurring, then Australian manufacturers would be vulnerable to material injury caused by dumping or subsidisation for a period of up to two years before measures could be imposed again.

Successful applications for the continuation of measures are infrequent. Over the past five years, 46 measures were due to expire. Applications for continuation were made in 20 cases, and only eight of these cases resulted in continuation of the measures.

While the average duration of measures has risen recently, it is not attributable to being lax in granting extensions. It is a result of the falling number of new measures in recent years. If the number of new measures falls continuously, as it has since the 1980s, the sample from which the average duration is measured will come to be dominated by older measures, so that average duration rises without there being any change in the expected duration of measures at their introduction.

6.4 Zeroing

Zeroing refers to a particular method to calculate dumping margins in which a negative (less than zero) dumping margin for a particular model or transaction is discounted and instead allocated a "zero margin". This practice inflates the dumping margin, thereby increasing the likelihood of a finding of dumping.

Australia has a long-standing practice of not zeroing in calculating dumping margins and, consistent with the recommendation of the Productivity Commission (recommendation 6.2), the Government does not propose to change this approach.

6.5 Onus of proof

Some members of the Senate Economics Legislation Committee have supported further consideration of a reversal of the onus of proof in determining whether dumping is occurring, and whether dumping is the cause of injury as proposed in the Customs Amendment (Anti-dumping) Bill.

This proposal cannot be supported by the Government. It is not compliant with our WTO obligations, particularly the WTO requirements for objective examination and positive determinations by the investigating authorities.

However, the Government has recognised the concerns raised by industry about the information provided by parties, and is proposing changes accordingly (see 4.2).

Similarly, the Government understands the desire for clarification of how the Branch determines whether injury is caused by dumping or other factors (see 3.4).

7. **Implementation**

7.1 International Trade Remedies Forum

There is currently no stakeholder body to provide feedback to Government on the operation of the ADS.

The Government will establish the International Trade Remedies Forum to provide strategic advice and feedback to the Government on the implementation and monitoring of the proposed reforms. It will also play an ongoing advisory role, including reporting to Government on options for further improvements.

The Forum will comprise representatives of manufacturers, producers, and importers, as well as industry associations, trade unions and relevant Government agencies.

The Forum and its role will be established in legislation.

7.2 New case management system

The Branch will introduce an integrated case management system and electronic public record to enable faster dissemination of case information to parties, improving the timeliness of anti-dumping decisions.

The new case management system will replace the current Electronic Public Record and Customs and Border Protection's anti-dumping webpage with a single source of information for policies, procedures, and individual cases. It will also improve the consistency of the Branch decision-making by making information about all cases readily accessible.

7.3 Timing

Many of these proposed reforms can be achieved through an alteration of the Branch practice, and corresponding changes to practice guidelines (primarily in the form of the Manual). These proposed reforms should take effect as soon as practically possible, consistent with the views of the Productivity Commission's (recommendation 7.10), allowing for consultation and feedback from interested businesses, industry associations and trade unions.

Other reforms will require legislative amendment. Priority legislative changes will be introduced as soon as possible, while others will be introduced following consultation through the Forum.

The Government will ensure that these reforms are implemented consistent with Australia's international trade obligations.

The Forum (see 7.1) will be consulted on implementation.

7.4 Independent review

There will be a broad and independent public review of the ADS five years after the reform package is fully operative to examine, among other things:

- whether experience reveals any gaps or deficiencies in the tests applied in determining applications for anti-dumping and countervailing measures
- the need for any further changes to the legislative architecture of the ADS
- the administrative efficiency of the Branch, the appeals mechanism and the Minister in administering the ADS, and whether any change to their responsibilities is warranted in the light of experience
- whether resourcing of the assessment and appeals procedure is adequate and appropriate
- what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes
- the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more can be done in this regard
- whether there have been changes to overseas anti-dumping regimes that are relevant to the Australian system, and
- any unintended consequences of the reform package.

The proposed review accords with the approach recommended by the Productivity Commission (recommendation 7.11). It is anticipated that it will be conducted by an independent and highly respected person with extensive experience of the ADS.

Response to Productivity Commission recommendations

Recommendation		Response	Ref
5.1	Introduce a public interest test	Not accept	6.1
6.1	Establish a working group to examine the close processed agricultural goods provisions	Agree	1.5
6.2	Not adopt the practice of zeroing	Agree	6.3
6.3	Earlier consideration of provisional measures	Agree in principle	2.3
6.4	Change arrangements for continuation of measures	Not accept	6.2
6.5	Replace the current review of measures and administrative review provisions with an automatic annual review	Not accept	1.4
6.6	Modify the basis for collecting anti-dumping and countervailing duties	Not accept	4.5
6.7	Replace the current arrangements for revocation of measures with the annual review provisions	Not accept	1.4
6.8	Update Australia's actionable subsidies to align with the latest relevant World Trade Organization agreements	Agree	4.1
7.1	Retain the broad administrative and decision-making roles of Customs, the Minister and the Trade Measures Review Officer	Agree in part	3.3
7.2	Make changes to the current appeal arrangements for anti-dumping decisions	Agree in part	3.3
7.3	Allow Customs to seek extensions of the investigation period at any time during an investigation	Agree	3.5
7.4	Introduce a 30 day time-limit for the Minister to make decisions	Agree	2.4
7.5	Provide adequate resourcing for Customs and Border Protection and the Trade Measures Review Officer	Agree	2.1 3.1
7.6	Advise the Minister in investigation reports of the details of comparable recent cases in other countries	Agree	4.6
7.7	Improve reporting on applications for anti-dumping measures	Agree in part	3.6.2
7.8	Publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures	Agree	3.6.3
7.9	Consult with the Australian Bureau of Statistics regarding better access to import data	Agree	1.2
7.10	Implement reforms of the anti-dumping system as soon as practically possible	Agree	7.3
7.11	Review these reforms five years after implementation	Agree	7.4

GLOSSARY

ABS	Australian Bureau of Statistics
Actionable subsidy	A subsidy as defined in the ASCM in respect of goods exported to Australia
Ad valorem duty	A percentage rate of dumping or countervailing duty, for example X per cent of the export price
ADA	WTO Anti-Dumping Agreement
ADAs	Anti-Dumping Agreements – refers to the WTO ADA and the WTO ASCM
ADS	Anti-dumping system – refers to the anti-dumping and countervailing system
All relevant information	All facts available to Customs and Border Protection upon which it can base a particular finding
Applications	Anti-dumping or countervailing applications
ASCM	WTO Agreement on Subsidies and Countervailing Measures
Branch, the	Trade Measures Branch – to be renamed the International Trade Remedies Branch
Customs	Australian Customs and Border Protection Service
Combination duty	Dumping duty with both fixed and variable components
CPAG	Close Processed Agricultural Goods
Countervailing	The remedy taken in response to actionable subsidies, usually in the form of a duty
Dumping	Where the export price of goods exported to Australia is less than their normal value
Export price	The price at which goods are exported to Australia
Fixed duty	A fixed amount of dumping or countervailing duty, for example $X per kg
Floor price	The minimum price at which exporters can export goods to Australia before incurring a variable component of dumping duty
Forum, the	International Trade Remedies Forum

Investigations	Anti-dumping or countervailing investigations
Lesser duty rule	Applying an amount of dumping or countervailing duty (based on the non-injurious price) less than the full dumping or subsidy margin, where the lesser amount is considered sufficient to remove the material injury caused by the dumping or subsidisation
Like goods	Goods that are identical or closely resemble the allegedly dumped or subsidised goods
Manual, the	Customs and Border Protection Dumping and Subsidy Manual
Measures	Anti-dumping or countervailing measures
Minister	Minister for Home Affairs
Non-injurious price	The minimum export price necessary to prevent the material injury caused by dumping or subsidisation
Normal value	In relation to goods exported to Australia, the normal value is the comparable price for like goods sold in the country of export – can be based on an actual selling price or a constructed price
PAD	Preliminary Affirmative Determination
Particular market situation (PMS)	A particular situation in the market of the country of export that renders actual selling prices unsuitable for normal value
SEF	Statement of Essential Facts
SMEs	Small and medium enterprises
SSO	SME Support Officer
Variable component of duty	The amount by which the actual export price of goods exported to Australia is less than the floor price
WTO	World Trade Organization
Zeroing	The practice of setting a negative dumping margin to zero, the effective result of which is to disregard undumped goods in determining the dumping margin on a weighted average basis

Attachment D – List of submissions in response to the Commission's final report

Entity name
Australia - China Chamber of Commerce and Industry of NSW
Australian Bureau of Statistics
Australian Competition and Consumer Commission
Australian Customs and Border Protection Service
Australian Dried Fruits Association
Australian Food and Grocery Council
Australian Manufacturing Workers' Union
Australian Paper
Australian Plantation Products and Paper Industry Council
Australian Pork Limited
Australian Steel Association Inc
Australian Workers' Union
BlueScope Steel
Bosworth, Malcolm
Bradken Resources Pty Limited
Casselle Commercial Services Pty Ltd
Cement Industry Federation
Chemicals and Plastics Industries Association
Construction, Forestry, Mining and Energy Union
Crisp, P L
CSBP Limited
CSR Limited
Cutbush, Greg
Department of Agriculture, Fisheries and Forestry
Department of Foreign Affairs and Trade
Dow Chemical (Australia) Limited
Food & Beverage Importers Association
Geofabrics Australasia Pty Limited
Government of South Australia
Gunns Ltd

Heslop Consulting

Horticulture Australia Ltd

Hudson Trade Consultants

Huntsman Chemical Company Australia Pty Limited

JELD-WEN Australia

Kimberly-Clark Australia

Law Council of Australia & Law Institute of Victoria

Longworth, N

National Farmers Federation

OneSteel Limited

Orica Australia Pty Ltd

Palmer Steel Trading (Aust) Pty Ltd

Penrice Soda Holdings Limited

PolyPacific Pty Ltd & Townsend Chemicals Pty Ltd

Qenos Pty Ltd

SCA Hygiene Australasia Pty Limited

Stevenson, James

Sulo MGB Australia Pty Ltd

Trade Remedies Task force

Williams, Dr Brett

Windsor Farm Foods Group Limited

WW Wedderburn Pty Ltd