Australian Government
Department of Industry
Innovation, Science, Research
and Tertiary Education

innovation.gov.au

Australia's Trade Remedies System

Mechanisms to address the negative impacts of unfair trading activities by overseas companies on Australian industries.

Regulation Impact Statement

1 Background

1.1 Introduction

Australia's anti-dumping and countervailing system (Australia's anti-dumping system) allows the Australian Customs and Border Protection Service (Customs and Border Protection) and its Minister (currently the Minister for Home Affairs, the Hon Jason Clare MP) to provide trade remedies for Australian producers who suffer material injury from dumped or subsidised imports. An effective and efficient system is an important component in ensuring that Australian businesses face full and fair competition and continue to support efforts to further liberalise trade.

Dumping occurs where the export price for goods entering Australia is lower than the normal value (usually based on the selling price of like goods in the exporter's domestic market). Anti-dumping duties may be imposed up to the difference between the normal value and the export price.

Subsidisation is the provision of benefits by the government of a country to its producers. Countervailing duties may be imposed to offset the full direct or indirect subsidisation of a product.

Where desirable, anti-dumping or countervailing duties may be set at lower levels if doing so would be sufficient to remove injury (this is known as the "lesser duty rule").

Duties are generally imposed for an initial five year period, but can be continued (usually for another five years) where injury would continue or resume if the duties were to be removed. After duties have been imposed for 12 months, the level of those duties can be reviewed and increased or decreased as necessary.

Duties can be imposed only after an investigation has been conducted, usually in response to an application by Australian industry. In Australia, the standard period for an investigation is 155 days, although extensions are permitted.

Australia's anti-dumping system 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 five years to June 2011[1].

In June 2011, the Government announced a broad suite of reforms to Australia's anti-dumping system. In tabling the final tranche of improvements to implement the legislative aspects of the reforms, the Minister for Home Affairs, the Hon Jason Clare MP, indicated that he was considering further changes to the system. The proposals that are the subject of this Statement form part of a smaller suite of reforms for the Government's consideration.

1.2 Administration of the system

A number of agencies share policy oversight for Australia's anti-dumping system, including the Department of Industry, Innovation, Science, Research and Tertiary Education, the Department of Agriculture, Fisheries and Forestry and the Department of Foreign Affairs and Trade.

---

[1] *Australia's anti-dumping and countervailing system Regulation Impact Statement*, Australian Customs and Border Protection Service, 26 July 2011

Customs and Border Protection is responsible for the administration of the system. In doing so, 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[2]. Consumers, consumer organisations and most end-users do not participate in anti-dumping or countervailing investigations, inquiries or assessments.

At the conclusion of investigations and inquiries, Customs and Border Protection makes recommendations to the Minister for Home Affairs (the Minister) and then implements the Minister's decisions. Customs and Border Protection also provides advice to interested parties involved in potential and actual inquiries, and ensures compliance with measures imposed.

Most of the decisions resulting from investigations and inquiries are subject to external merit and/or judicial review.

1.3 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 Subsidies and Countervailing 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 in the *Customs Tariff (Anti-dumping) Act 1975*.

The system has been reviewed a number of times, including through the 1986 Gruen Review[3], the 1996 Willett Review[4] and a 2006 administrative review[5]. The most recent substantive review of the anti-dumping system was the 2009 Productivity Commission (PC) inquiry[6]. In June 2011, through its *Streamlining Australia's Anti-dumping System* (*Streamlining*) Policy Statement, the Government responded to the PC report, as well as to submissions received after the release of the PC report, and a Senate inquiry into two pieces of anti-dumping legislation[7].

---

[2] *Australia's anti-dumping and countervailing system Regulation Impact Statement*, Australian Customs and Border Protection Service, 26 July 2011

[3] 1986, Commonwealth of Australia, *Review of the Customs Tariff (Anti-dumping) Act 1975*, Professor F H Gruen

[4] 1996, Commonwealth of Australia, *Review of Australia's Anti-Dumping and Countervailing Administration*, Mr Lawrie Willett AO

[5] 2006, Commonwealth of Australia, *Joint Study of the Administration of Australia's Anti-Dumping System, Report to the Minister for Justice and Customs and the Minister for Industry, Tourism and Resources*, Australian Custom Service and the Department of Industry, Toursim and Resources.

[6] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission

[7] 2011, Commonwealth of Australia, *Customs Amendment (Anti-dumping) Bill 2011* and *Customs Amendment (Anti-dumping Measures) Bill 2011*, Senate Economics Legislation Committee Reports

The *Streamlining* statement set out a number of reforms to the system aimed at improving its effectiveness, reducing costs for Australian business seeking remedies against dumping and improving timeliness and transparency for all parties to anti-dumping investigations, while re-affirming Australia's commitment to world trading rules.

Those reforms included the establishment of the International Trade Remedies Forum (ITRF) [a stakeholder body comprising representatives from industry[8], unions[9] and government agencies[10], which provides strategic advice and feedback to the Government on the operation of the system], and the International Trade Remedies Adviser (ITRA) [appointed by the Australian industry Group with Government funding to provide advice and assistance to small and medium enterprises (SMEs) seeking to access trade remedies or to otherwise participate in the system].

The *Streamlining* reforms have largely been implemented or are in the process of being implemented. In introducing the final tranche of legislative amendments to give effect to the *Streamlining* reforms on 27 June 2012, the Minister for Home Affairs, the Hon Jason Clare MP, acknowledged that more could be done to improve Australia's anti-dumping system, and that the Minister was considering a number of further reforms[11]. On 4 July 2012, Minister Clare also announced that the Government had commissioned former Victorian Premier John Brumby to advise on the best structure for administering Australia's anti-dumping system, including investigating the benefits and costs of a stand-alone anti-dumping agency (the Brumby Review)[12]. Mr Brumby is expected to report to the Government by 30 November 2012. All the submissions, including those referenced, can be found at http://antidumpingreview.gov.au/submissions/.

Aspects of Australia's anti-dumping system have also been raised in broader reviews, such as the Prime Minister's Manufacturing Taskforce[13] and the Senate Select Inquiry into Australia's Food Processing Sector[14], both of which were released in August 2012. Refer to Attachment B for a list of stakeholders consulted through the various inquiry and review processes on and from the 2009 PC inquiry.

2 Problem

The Government is committed to continually improving Australia's anti-dumping and countervailing system, within world trading rules, to ensure that industry faces full and fair competition. As noted above, the Government has introduced a number of reforms in the past year, and has tasked Mr John Brumby with examining the feasibility of an independent Commonwealth agency for administering the system.

---

[8] Representatives of industry seeking measures: Capral, CSR, Dried Fruits Australia, Kimberly-Clark, OneSteel; Representatives of downstream producers: Australian Steel Association, JEL-WEN; Representatives of a cross-section of industry (submissions to date tending to favour industry seeking measures): Australian Industry Group, Plastics and Chemicals Industry Association

[9] Australian Manufacturing Workers Union, Australian Workers Union, Australian Council of Trade Unions, and Construction, Forestry, Mining and Energy Union

[10] Customs and Border Protection (chair), the Attorney-General's Department, the Department of Industry, Innovation, Science, Research and Tertiary Education, the Department of Agriculture, Fisheries and Forestry, the Department of Foreign Affairs and Trade, and Treasury

[11] 2012, Commonwealth Government, House of Representatives Hansard, Wednesday 27 June 2012, Proof page 6

[12] 2012, Media Release, 4 July 2012, The Hon Jason Clare MP, Minister for Home Affairs, Minister for Justice, Minister for Defence Materiel

[13] 2012, Commonwealth of Australia, *Prime Minister's Manufacturing Taskforce Report of Non-Government Members*, page 62 and Appendix One.

[14] 2012, Commonwealth of Australia, *Inquiry into Australia's food processing sector report,* Senate Select Committee on Australia's Food Processing Sector

Over the same period, unions and industry stakeholders have taken the opportunity to contribute to various other inquiry and review processes touching on Australia's anti-dumping system – such as the ITRF, the Prime Minister's Manufacturing Taskforce[15], and the Brumby Review. The majority of stakeholders making submissions to these processes represent manufacturers and their employees adversely impacted by dumped or subsidised imports[16]. Proposals for further improvement commonly put forward by these stakeholders, include:

- increased duties (including through the removal of the lesser duty rule and more effective 'particular market situation' provisions) to deter dumped and subsidised imports (including due to diversion from markets where higher dumping or countervailing duties have been imposed);
- more effective and timely compliance and/or anti-circumvention action;
- improved retroactive duty provisions;
- limited access to timeframe extensions; and
- increased assistance to SMEs, including through greater support for the ITRA.

The improvements suggested by these stakeholders were not addressed in the Government's response to the PC inquiry, or were not addressed to their satisfaction.

A smaller group of stakeholders contributing to the more recent inquiry and review processes represent Australian agents of overseas exporters and/or Australian businesses that have benefitted from the lower prices offered by dumped or subsidised imports. These stakeholders have variously sought improvements to Australia's anti-dumping system[17] that could be considered to be diametrically opposed to those put forward by the majority of stakeholders, including:

- less focus on whether and to what extent imports are dumped or subsidised;
- greater scrutiny as to whether injury is material, and has been caused by dumped or subsidised imports; and
- an emphasis on the consideration of the wider impacts of imposing measures.

The two improvements that all stakeholders agree on are:

- increased resourcing for administration of the system in terms of funding and expertise; and
- continued increase in transparency.

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 can flow to the broader economy as business closures or downsizing reduces competition in the Australian market and lead to job losses, damage to regions and reduced choice for downstream industries and consumers.

---

[15] 2012, Commonwealth of Australia, *Prime Minister's Manufacturing Taskforce Report of Non-Government Members*, page 62 and Appendix One.

[16] See Attachment A – Stakeholders seeking remedies

[17] 2012, Brumby Review, submissions by Australian Steel Association, Sanwa Holdings Pty Ltd and the Group of 43 Concerned Parties, Rio Tinto

The WTO recognises the serious detriment that injurious dumping goods into overseas markets can cause. As noted by Senator Pratt recently in Parliament[18], Section 1 of Article VI of the General Agreement on Tariffs and Trade 1947 (GATT – which forms part of the WTO Agreement) states:

> *"… dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry"*

Section 2 of Article VI of the GATT specifically endorses the levying of an anti-dumping duty as a remedy for this unfair trading practice.

In line with the WTO Agreement, the primary objective of Australia's anti-dumping system is to address the negative impacts of unfair trading activities by overseas companies on Australian industries. To remedy the injury caused by low-priced, dumped or subsidised imports on Australian industry, duties are imposed on those imports. The imposition of duties under the system necessarily increases the prices of those imports.

Where anti-dumping or countervailing action increases the prices of dumped or subsidised imports, businesses that had previously chosen to take advantage of the artificially low prices associated with those imports have two choices:

- continue to import the dumped or subsidised goods and pay the duties imposed; or
- choose to source goods from Australia or from countries that have not engaged in dumping or subsidisation.

In either case, it is likely that the input costs of those previously relying on dumped or subsidised imports would be increased. The increased input costs would be likely to reduce margins or to flow through the supply chain to consumers in the form of higher prices (albeit at increasingly diluted levels as the relative proportion of the goods subject to duties would reduce at each stage of production). There is a possibility that, at the higher levels of the supply chain for some commodities, where the price impact would be most pronounced, production might need to be curtailed as demand falls in response to price rises, or if there is a switch in dumping and subsidisation behaviour in the exporting country from upstream to downstream products. Increasing prices could also reduce the viability of alternate supply options should local production fail, potentially leading to interrupted production downstream as illustrated in statements by downstream stakeholders:

> "*… a dumping application … favours a select number of (often monopoly) raw material suppliers at the expense of supply certainty and competitively priced inputs to Australia's downstream manufacturing sector*"[19]

> "*For downstream industry costs are experienced as either restricted availability of inputs and/or higher inputs costs that directly affects their manufacturing competitiveness. For consumers the cost is experienced as higher prices. The lack of a public interest assessment is a disadvantage of the anti-dumping system in its present form*." [20]

---

[18] 2012, Commonwealth of Australia, Senate Hansard, Wednesday 10 October 2012, Proof page 21, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2011, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2012, Customs Tariff Amendment (Anti-dumping) Bill (No. 1) 2012, Customs Amendment (Anti-dumping Improvements) Bill (No. 3) 2012, second reading debate, Senator Pratt.

[19] 2012, Brumby Review, submission by Sanwa Holdings Pty Ltd

[20] 2012, Brumby Review, submission by Australian Steel Association

"*due to their anti-competitive effect, anti-dumping measures may, in some cases undermine or act as a disincentive to the development of alternate supply channels which rely upon imports for all or part of the supply chain. This can heighten security supply risk and business interruption risk for Australian businesses. Rio Tinto experienced this in 2008 and again in 2011 when the domestic production and supply of ammonium nitrate was interrupted and there were no effective alternate supply options from local or international suppliers. In Rio Tinto's view, the lack of alternate supply was contributed by the anti-competitive effect of anti-dumping measures on ammonium nitrate. This has resulted in financial loss and/or business interruption to Rio Tinto's operations."*[21]

In its 2009 inquiry report, the PC noted the propensity for the system to increase prices to downstream users and the wider economy. However, it found that the aggregate and net economy-wide impacts of the system were very small (too small to model). Given the low cost of the system, the potential broader benefits from providing access to anti-dumping (including as a means to ensure continued support for further trade liberalisation) and the lack of any alternative mechanism to address the underlying problem, the PC decided that the system should be retained, albeit with the addition of a public interest test[22].

In its June 2011 *Streamlining* response to the PC inquiry, the Government acknowledged that the imposition of duties under the system would impact negatively on downstream industries. However, it did not accept the need for a public interest test on the grounds that such a test would undermine the purpose of the system, add cost and complexity to the system, and increase business uncertainty. The Government also noted the fact that the Minister already had unfettered discretion not to impose measures[23].

The Government did accept a number of other PC recommendations in its decision to institute a broad range of changes to the system, which were aimed at improving access, transparency, timeliness, decision-making, compliance and consistency with other countries. One of the improvements arising from the *Streamlining* announcement was the establishment of the ITRA. The main role of the ITRA is to assist SMEs participate in anti-dumping investigations. This assistance is not limited to SMEs seeking the imposition of duties. It also includes assisting downstream SMEs respond to anti-dumping applications, and monitoring the impacts on those SMEs of the imposition of duties[24].

The primary cause of the concerns raised by the majority of stakeholders contributing to inquiries in the past year is that, under Australia's anti-dumping system, duties are often imposed at much lower levels (and sometimes not at all), compared with those imposed on similar goods in other jurisdictions. By imposing substantially lower duties on dumped and subsidised goods than its trading partners, there is a risk that exports will be diverted from those trading partners to Australia. This observation was made in relation to a number of dumping cases in a submission to the Brumby review.[25]

"In contrast to the treatment of Tai Ao in Australia (dumping and subsidies not found or negligible), it is noteworthy that both the United States and Canada have recently found against Tai Ao and applied a 32.79% and 101% dumping margin respectively following

[21] 2012, Brumby Review, submission by Rio Tinto Limited

[22] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission, page xv

[23] 2011, Commonwealth of Australia, *Streamlining Australia's Anti-dumping System, - An effective anti-dumping and countervailing system for Australia*, 27 June 2011, Government Policy Statement, Reform 6.1, page 26

[24] 2011, Commonwealth of Australia, *Streamlining Australia's Anti-dumping System, - An effective anti-dumping and countervailing system for Australia*, 27 June 2011, Government Policy Statement, Reform 1.1.1, page 7

[25] 2012, Brumby Review, submission by the AMWU, AWU and CFMEU

investigations in their jurisdictions… This has two consequences for Australian producers and exporters such as Capral:

1)Local producers are relatively less competitive than equivalent manufacturers in the US and Canada benefiting from the more favourable decision of their local anti-dumping authorities;

2)Product otherwise destined by Tai Ao for the US or Canadian market is potentially diverted to the "less onerous" Australian market undercutting - accounting for the US and Canadian decisions - the competiveness in absolute terms of domestic producers both locally and internationally.

Evidence from anti-dumping cases including Viridian, Capral, Kimberley Clarke/SCA, Carter Holt Harvey/Big River Timbers/Boral among a range of others confirms the extent to which our current regime is letting down home grown competitors to dumped and subsidised products from offshore."

Factors identified by some stakeholders as hindering Australia's system from achieving outcomes similar to those in other jurisdictions include:

(a) the costs of establishing that dumped and subsidised imports are causing or threatening material injury to Australian industry fall too heavily on the injured Australian industry (and can be prohibitive for SMEs);

(b) the time, cost and complexities associated with identifying subsidies and other government interventions in countries that do not abide by their WTO transparency obligations;

(c) the *Customs Act 1901* provisions that give effect to WTO particular market situation provisions, which add significant time, complexity and cost to investigations;

(d) routine application of the lesser duty rule; and

(e) insufficient resourcing of Customs and Border Protection in terms of funding and expertise.

More detail on the nature of the above factors is set out below.

(a) the costs of establishing that dumped and subsidised imports are causing or threatening material injury to Australian industry fall too heavily on the injured Australian industry (and can be prohibitive for SMEs)

To initiate an investigation, Customs and Border Protection must be satisfied that an applicant has provided sufficient evidence to establish a *prima facie* case that dumped or subsidised like goods are causing or threatening to cause material injury to the applicant industry.

The costs associated with applying for the imposition of anti-dumping or countervailing duties are high. The PC found that the average cost of making an application was around $400,000[26]. Senator Xenophon recently advised the Parliament that the price quoted to a constituent was $1,000,000[27]. This can be prohibitive for SMEs (which is why the Government

[26] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission, page xvi

[27] 2012, Commonwealth of Australia, Senate Hansard, Wednesday 10 October 2012, Proof page 24, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2011, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2012, Customs Tariff Amendment (Anti-dumping) Bill (No. 1) 2012, Customs Amendment (Anti-dumping Improvements) Bill (No. 3) 2012, second reading debate, Senator Xenophon.

established the ITRA – see 1.3 above), but is still a substantial cost to other Australian producers, particularly where they have been materially injured by dumped or subsidised imports:

> *"The business case to justify an anti-dumping action is extremely difficult in terms of the dollars outlayed, internal resources committed, and time taken, especially if the organisation is an SME. There is no 'windfall gain' at the completion of the process and it can be questioned whether a return to pre-dumping and material injury is ever really achieved."*[28]

> *"More needs to be done to reduce the complexity of the system, be more proactive, offer more assistance (including financial), increase audits, and improve feedback, in order to allow the full range of enterprises to utilise the anti-dumping system."*[29]

> *"barriers still exist that prevent BlueScope's customers – many of whom are small and medium enterprises (SMEs) – from fully accessing the anti-dumping system. These barriers include the significant time and cost normally associated with preparing an anti-dumping application, including the need to engage external consultants with expertise in anti-dumping…we think more should be done by government to ensure SMEs have access to relief from injurious dumping."*[30]

As found by the PC in its 2009 inquiry, much of the complexity of Australia's anti-dumping system is due to the inherent complexity of the WTO Agreement[31]. The primary costs associated with applying for measures relates to the collection of the necessary information. In Australia, this is made more difficult due to the suppression of detailed trade data by the Australian Bureau of Statistics aimed at maintaining confidentiality and data integrity. In other countries, such as the US and Canada, this data is more readily accessible[32].

Industries comprised of a number of SMEs face additional costs due to the need to collaborate and to find ways to collate and present to Customs and Border Protection their production, sales and marketing information as evidence of injury, without weakening their relative competitive positions with each other.

Many firms will continue to seek measures despite the high cost of doing so. Their primary goal is to normalise the domestic market by nullifying the impact of dumped or subsidised imports that have caused them material injury. This can be achieved through the anti-dumping system by the imposition of duties aimed at:

- deterring further dumping and subsidisation;
- increasing the price of imports that continue to be dumped or subsidised; and
- encouraging importers/downstream producers to switch to non-dumped sources.

---

[28] 2012, Brumby Review, submission by the Australian Food and Grocery Council

[29] 2012, Brumby Review, submission by the Australian Forest Products Association

[30] 2012, Brumby Review, submission by Bluescope Steel Pty Ltd

[31] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission, page xv

[32] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission, page 157-160, Appendix C, page 182

A number of businesses have expressed strong concerns that they incur significant damage while attempting to gather sufficient evidence to lodge and defend an anti-dumping or countervailing application. Several have claimed that the inability to access or to secure sufficient remedy under the system has been a factor in their closure or downsizing. This includes cases where greater complexities [e.g. (b) and (c)] and resource constraints (e) have increased investigation timeframes beyond the standard 155 days to a significant degree, and have involved requests for review by the Trade Measures Review Officer and/or the Federal Court.

For example, Senator Xenophon has noted that dumping was factor in closing down two of Kimberly-Clark's four tissue machines and the sell-off of its pulp mill in regional Australia, costing 230 jobs, with a flow-on affect on the community[33], as did Patrick Secker MP[34]. Kimberly-Clark describes the current arrangements as:

> *"highly complex, time consuming and costly for domestic industry to access…In a concentrated retail environment like Australia, the elapsed time from dumping commencing through to analysing, collecting data (12 - 18 months) and submitting / conducting an investigation can leave substantial and potentially irreversible damage to industry even if dumping is found"*[35]

BlueScope Steel, which in August 2011 announced the closure of a blast furnace and a metal coating line and ceased exporting predominantly due to the high Australian dollar, costing 1000 jobs. In their May 2012 applications for anti-dumping and countervailing duties against a range of countries involving hot rolled coil steel[36], galvanised steel and aluminium zinc coated steel[37] BlueScope claimed that dumping and subsidisation had led to further job losses. Again these job losses occurred predominately outside major capital cities.

BlueScope noted in their submission to the Brumby Review that the current system is not effective enough to prevent or adequately address injury:

> *"The current system only applies dumping measures on a prospective basis (i.e. interim duties are only applied after a lengthy investigation of dumping, material injury and causal link) rather than being applied from the time when the dumping began. It is BlueScope's view that that the Anti-Dumping System does not adequately address the level of financial damage to the domestic industry by dumping, nor does it provide a sufficient deterrent to those contemplating importing or purchasing dumped or subsidised goods."*[38]

---

[33] 2012, Commonwealth of Australia, Senate Hansard, Wednesday 10 October 2012, Proof page 24, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2011, Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2012, Customs Tariff Amendment (Anti-dumping) Bill (No. 1) 2012, Customs Amendment (Anti-dumping Improvements) Bill (No. 3) 2012, second reading debate, Senator Xenophon2012, Brumby Review, submission by Senator Nick Xenophon.

[34] 2012, Commonwealth of Australia, House of Representatives Hansard 28 February 2012, p2100

[35] 2012, Brumby Review, submission by Kimberly-Clark Australia Pty Ltd

[36] Customs and Border Protection, Electronic Public Record 188, May 2012 application, page 27, http://www.customs.gov.au/webdata/resources/files/003-Application-HotRolledCoilfromJapanKoreaMalaysiaandTaiwan.PDF

[37] Customs and Border Protection, Electronic Public Record 190, August 2012 applications, page 28 (galvanised steel), http://customs.gov.au/webdata/resources/files/002-Application-Australianindustry-BlueScopeSteel-GalvanisedSteel.pdf, and page 28 (aluminium zinc coated), http://customs.gov.au/webdata/resources/files/003-Application-Australianindustry-BlueScopeSteel-AluminiumZincCoated.pdf

[38] 2012, Brumby Review, submission by BlueScope Steel Ltd

OneSteel, another stakeholder seeking the imposition of remedies, has also been reported as having shed nearly 1000 jobs in the past year[39] due to a range of factors. In correspondence to Customs and Border Protection regarding the certain hollow structural steel dumping and countervailing investigation, OneSteel specifically notes that dumping was a key factor in its decision to close its Kembla Grange production facilities. This resulted in the loss of 56 jobs.[40]

Table 1 summarises the employment losses in the production of goods involved in recent anti-dumping and countervailing applications, reported by OneSteel and BlueScope:

Table 1: Employment impacts reported in anti-dumping and countervailing applications

Firm	Goods	Index of employees in the production of the goods under consideration							
		2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	Decline
BlueScope	Galvanised steel	-	-	-	100	93.9	96.5	80.7	19.3%
	Aluminium zinc coated steel	-	-	-	100	95.3	94.1	57.6	42.4%
	Hot Rolled Coil steel	-	-	-	100	91.9	87.6	64.2	35.8%
OneSteel	Certain hollow structural steel	100	88.5	79.2	52	42.4	41.1	-	58.9%

The Australian Steel Institute, of which OneSteel and BlueScope are members, notes that remedies are not necessarily timely or adequate:

> *"Despite the recent changes, there is a perception that the Anti-Dumping System is slow to access remedies and that applicants are required to wholly substantiate the case before any measures are imposed. The system is further viewed as delivering below adequate outcomes – any measures imposed are generally less than is necessary to remove the injurious effects of dumping."*[41]

On 15 August 2012, Shayne Neumann MP stated in the House of Representatives stated:

> *"A company in my electorate which has made a big impact in relation to this and has been at the forefront of the fight about dumping is Capral…It is a 76-year-old Australian company employing about 900 people across the country. Its largest aluminium extrusion plant is located at Bremer Park, in Ipswich, and employs about 300 workers.*
>
> *The Bremer Park plant is a state-of-the-art plant, but it runs at about 50 per cent capacity. Why does it run at about 50 per cent capacity? It does so because of dumping. It does so because it is facing unfair competition from Chinese dumping in our economy. This plant is one of the most highly automated, efficient, internationally competitive plants in the world."*

[39] 2012, Garvey, P, *Whyalla key to Arrium play*, 2 October 2012, The Australian, http://www.theaustralian.com.au/business/companies/whyalla-key-to-arrium-play/story-fn91v9q3-1226486156397

[40] Customs and Border Protection, Electronic Public Record 177, 14 May 2012 submission on behalf of OneSteel, page 2, Attachment 2, http://www.customs.gov.au/webdata/resources/files/384-ATM-reSEF.pdf

[41] 2012, Brumby Review, submission by Australian Steel Institute

It is not possible to prove or disprove claims that firm closures (or downsizing) and associated employment losses are the result of dumped or subsidised imports. However, strong anecdotal evidence suggests that such practices are at least a contributing factor.

There is also a perception that many importers do not shoulder their fair share of the burden in establishing whether imports are dumped or subsidised. Some may be aware of possibility that their imports are dumped or subsidised, but are not compelled to reveal the extent of their awareness or to make further inquiries. As pointed out by Senator Xenophon in the 4 May 2011 Senate Economics Legislation Committee hearing in relation to his Customs Amendment (Anti-dumping) Bill 2011:

> *"… article … 3.5 says: It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. It talks about 'the demonstration of a causal relationship'. But isn't it a chicken-and-egg situation at the moment in that there is a real difficulty in gathering the evidence because some of the parties are withholding importer or overseas manufacturer information? At the moment there is a huge disadvantage."*[42]

Under the current system, Customs and Border Protection cannot force importers to participate in investigations. An examination of the public record[43] shows that importers of allegedly dumped or subsidised goods that participate in an investigation often do so passively or reactively – effectively completing written questionnaires and/or responding to questions asked by Customs and Border Protection during verification visits. Other importers do not participate in investigations at all, either because they choose not to do so, or because they may be intermittent or new importers that have not been identified or contacted by Customs and Border Protection. These latter importers may not be aware that they could be procuring dumped or subsidised imports, or of the impact such procurements could be having on Australian industry producing like goods, and are not compelled to find out. Australian industry impacted by dumping or subsidisation would like to see this issue addressed:

> *"Additional reforms are required to dissuade importers from purchasing dumped goods."*[44]

Few importers make proactive submissions during investigations and those who do so tend to avoid providing information on whether or not they may be procuring dumped or subsidised imports. Instead, they are inclined to restrict their comments to claims about the impact of the imposition of duties on their businesses, the comparative quality of local and imported product, the lack of reliability of the applicant's pricing information, and identifying other factors that may be injuring the applicant. Some argue that importers are not in a position to assess whether the prices they are paying reflect dumping or subsidisation.

The propensity for importers to avoid becoming actively involved in an anti-dumping and countervailing investigation tends to push the costs of those investigations back onto applicants (who have even less access to information that may be relevant to the question of dumping or subsidisation), Customs and Border Protection, exporters (who may not cooperate) and downstream producers (who would have less access to dumping and subsidy information than importers).

---

[42] 2011, Commonwealth of Australia, Senate Hansard, Wednesday 4 May 2011, Proof page 11, Customs Amendment (Anti-Dumping) Bill 2011, Senate Economics Legislation Committee, Senator Xenophon

[43] Australian Customs and Border Protection Service, *Electronic Public Record*, http://www.customs.gov.au/anti-dumping/cases.asp

[44] 2012, Brumby Review, submission by Amcor Packaging (Australia) Pty Ltd

Downstream producers that attempt to mount a comprehensive case against the imposition of duties can incur similar costs to applicants for duties – as noted by JELD-WEN in the 4 May 2011 Senate Economics Legislation Committee hearing into Senator Xenophon's Customs Amendment (Anti-dumping) Bill 2011:

> *"… I have to say that the JELD-WEN organisation has incurred expenditure of $1 million to date in opposing the antidumping application by CSR and Viridian in respect to clear float glass. Hopefully, that puts some perspective on the observations about the costs to applicants."*[45]

By failing to actively participate in investigations, many importers are also unprepared for the imposition of provisional or final dumping or countervailing measures. This is especially the case if they have not undertaken their own inquiries as to whether or not their imports are dumped or subsidised, or they have not followed the progress of an investigation. Such a lack of preparation can have serious implications for business cash-flow where provisional measures (usually in the form of unsecured undertakings) are converted into duties.

The tendency for importers to avoid the costs associated with an anti-dumping and countervailing investigation has also led to other stakeholders (unions, politicians and some manufacturers) to call for a 'reversal of the onus of proof'. Under the scenario proposed by Senator Xenophon, an applicant seeking the imposition of anti-dumping or countervailing duties in effect need only establish that imports have increased and that it has been injured or is threatened with injury. Once those facts have been established, there is a 'rebuttable presumption' that the imports are dumped or subsidised, and that such dumping and subsidisation has caused or threatened the injury, unless importers can prove otherwise[46].

This proposition is problematic from a number of perspectives. It would be desirable for importers to be more aware of the possibility that their imports may be dumped or subsidised and to participate more actively in the early stages of investigations. This would put them in a position to take on a fairer share of the burden of establishing whether their imports are dumped or subsidised. However, reversing the onus of proof may go too far in this respect, and Department of Foreign Affairs and Trade has advised that it is likely to be contrary to WTO rules[47].

The costs and complexities associated with Australia's anti-dumping system are a deterrent to access, particularly by industries comprising a number of SMEs. In this respect, the system's regulatory framework has failed these stakeholders. The ITRA established under the *Streamlining* reforms addresses this failure to some extent, but modification of a number of aspects of the system still need to be explored to ensure it is accessible to those who need it.

---

[45] 2011, Commonwealth of Australia, Senate Hansard, Wednesday 4 May 2011, Proof page 11, Customs Amendment (Anti-Dumping) Bill 2011, Senate Economics Legislation Committee, Dr Ron Silberberg

[46] 2011, Commonwealth of Australia, Senate Hansard, Wednesday 4 May 2011, Proof page 41, Customs Amendment (Anti-Dumping) Bill 2011, Senate Economics Legislation Committee, Senator Xenophon

[47] 2011, Senate Economics Legislation Committee, Customs Amendment (Anti-Dumping) Bill 2011, submission by the Department of Foreign Affairs and Trade

The ability of importers to withhold information is seen by some stakeholders as a weakness of Australia's regulatory regime, as other countries provide more open access to data on imports. For example, in its 2009 inquiry, the Productivity Commission found that, in the US and Canada, detailed information on import transactions is more readily available than in Australia. In Australia, much of this information is suppressed due to Australian Bureau of Statistics data collection policy (and legislation), which is aimed at ensuring data integrity. Some countries also have automatic import licensing systems that require additional information to be provided on certain commodities prior to importation. An example of this is the US Steel Import Monitoring and Analysis System[48].

The inability of other importers to properly inform themselves of the potential impact of dumped or subsidised goods or of the imposition of duties is also seen as a form of regulatory failure that needs to be addressed

(b)	the time, cost and complexities associated with identifying subsidies and other government interventions in countries that do not abide by their WTO transparency obligations

A number of matters increase the time, cost and complexity of anti-dumping investigations. One of those is the lack of transparency of subsidies and other government interventions in some of our trading partners. The WTO Subsidies and Countervailing Agreement defines subsidies that fall within the scope of the agreement. These subsidises are essentially classed as either prohibited or actionable. Benefits provided by governments that fall outside these definitions are not within the scope of the Agreement. The types of benefits provided by governments that would be outside the scope of the WTO Subsidies and Countervailing Agreement are too numerous to quantify, but would include duty drawback regimes and generic or economy-wide tax rebates and concessions that apply to all industry sectors.

The Agreement also provides its members with certain rights – such as the ability to impose countervailing duties to offset the full direct or indirect subsidisation of a product that causes material injury to its industry producing like goods – and imposes a range of disciplines – from not imposing prohibited subsidies (generally those aimed at promoting exports or replacing imports) to the notification of subsidies that they do provide.

The requirement to notify subsidies is aimed at ensuring transparency, and allows members to identify subsidies that might be negatively impacting on their industries or economies more generally. Where such impacts are identified, a range of remedies may be sought. One of those remedies is the imposition of countervailing duties.

However, countervailing duties can usually be instituted only in response to a written application by or on behalf of the industry affected. The application must be able to evidence the existence of a subsidy causing or threatening material injury to the industry.

Where a country does not abide by its subsidy notification obligations, it becomes very difficult to identify the subsidies that the country is providing, and to establish that the subsidy is causing or threatening material injury to an Australian industry – especially where that country's regime lacks transparency more broadly. In such cases, the difficulties associated with identifying subsidies and their impacts increase the costs for applicants, delay applications and prolong injury. They can also increase costs and investigation timeframes for Customs and Border Protection.

[48] http://ia.ita.doc.gov/steel/license/

Ultimately, this lack of transparency can lead to lower countervailing duties (or in some cases dumping duties) and much longer investigations where all subsidies and other government interventions, and their impacts have not been identified. As noted in a recent Brumby Review submission:

> *"in the 2009-2011 Aluminium Extrusions case, … countervailable subsidies involving the People's Republic of China… were found for the first time in Australian history. This case involved an unprecedented submission of evidence, especially detailing countervailable subsidies, complex interposed intermediary entity structures used by Chinese-owned manufacturers and traders to minimise tax and optimise duties, as well as introducing complex VAT and accounting issues that remain unresolved."*[49]

The aluminium extrusions case, initiated in June 2009, took over 290 days to investigate, nearly 190 days to be decided by the Minister, involved a number of reviews by the Trade Measures Review Officer and is currently under review by the Federal Court after appeal by Chinese exporters.

The high resource requirement for addressing subsidies was also raised by the unions in their submission to the Brumby Review:

> *It is fair to say Customs has been less proactive in the prosecution of countervailing cases compared to dumping cases. It also reflects a lack of internal resources devoted to the task which has placed an undue burden on local producers to "make the case".* [50]

Countries known to have failed to lodge subsidy notifications within the last three years include South Africa (which has never filed a notification), Philippines (1997) and Indonesia (1998). China's last notification in October 2011 showed only subsidies offered at national level up to 2008. Canada and China have never filed notifications for subsidies provided below national level[51].

Australia submits subsidy notifications to the WTO every two years. The notification includes subsidies provided at Commonwealth, State and Territory level. Australia also attends regular meetings of the relevant WTO Committees, at which it continues to encourage all members to abide by their obligations.

The inability for applicants to identify subsidies offered by other countries constitutes information asymmetry. Through its *Streamlining* reforms, the Government has gone some way to address this issue by publishing subsidies known to Customs and Border Protection on the agency's website since August 2011.

However, where countries do not adequately comply with their subsidy notification obligations, Customs and Border Protection faces the same difficulties as applicants. This has meant that investigations involving countries that have not adequately complied with their subsidy notifications continue to be excessively long and costly. Investigations which resulted in the imposition of countervailing duties in the last year took from 240 to 290 days to resolve, instead of 155 days – and they are still the subject of review action. This suggests that there may have been some improvement through the *Streamlining* reforms, but that the system's regulatory framework is still failing to address the negative impacts of this information deficiency.

---

[49] 2012, Brumby Review, submission by Heslop Consulting Pty Ltd

[50] 2012, Brumby Review, submission by the AMWU, AWU and CFMEU

[51] WTO search, web page http://www.wto.org/english/tratop_e/scm_e/scm_e.htm

To ensure the system is effective at achieving its objectives of remedying injury, deterring further dumping and subsidisation and garnering support for further international trade liberalisation, options must be explored to address the extended injury caused by long and costly investigations affected by "hidden" subsidies. The preferred mechanism should prevent future injury **and** enable the applicant industry to recover from the injury incurred during lengthy investigations. It should also provide greater incentive for other countries to abide by their subsidy notification obligations.

(c)	the *Customs Act 1901* provisions that give effect to WTO particular market situation provisions, which add significant time, complexity and cost to investigations

The WTO's particular market situation provisions (reflected in 'situation in the market' provisions in the *Customs Act 1901*) potentially cover a variety of situations. Essentially the provisions recognise that sales within an exporter's domestic market may not permit a proper comparison for the purposes of calculating a dumping margin due to a particular market situation. Where such a situation exists, the normal price used to determine a dumping margin must be established by considering comparable sales to third countries (provided they are representative), or the cost of production in the originating country plus a reasonable amount for administrative, selling and general costs and for profit.

Constructing normal values under the particular market provisions adds significant complexity, cost and time to an investigation, particularly where the situation that renders the domestic sales inappropriate for comparison purposes also impacts on the costs of production. When investigations take significantly longer to resolve, the applicant industry continues to incur material injury, from which it becomes increasingly difficult to recover. This is especially the case where complexities associated with the investigation can lead to significant delays in the imposition of provisional measures, or provisional measures may expire before the investigation is completed.

A recent investigation in which the *Customs Act 1901* market situation provisions were considered involved hollow structural steel. This investigation was initiated in September 2011 and took over 280 days to investigate instead of the legislated 155 days. The decision to impose duties is currently the subject of a review by the Trade Measures Review Officer at the request of a number of Australian importers and overseas exporters, one of which has also sought Federal Court review.

As Australia's particular market situation provisions are inherently complex, investigations will be very long and costly. It is often not possible under the current system to prevent the applicant industry from incurring extended injury during the investigation in these circumstances. This suggests a failure in the system's regulatory framework.

Changes to the system need to be considered to ensure it is more effective at achieving its objectives of remedying injury, deterring further dumping and subsidisation and garnering support for further international trade liberalisation. The preferred changes would ensure measures prevent future injury **and** enable the applicant industry to recover from the injury incurred during the lengthy investigation.

(d) routine application of the lesser duty rule

Where dumped or subsidised imports are found to cause or threaten material injury to industry producing like goods, WTO rules permit duties to be imposed up to the full dumping margin (the difference between the normal value and the export price) or to cover the full value of a subsidy. However, Australia follows the WTO principle known as the lesser duty rule. Under the lesser duty rule, consideration is given to the desirability of imposing duties at less than the full margin if that would be adequate to remove injury. Other jurisdictions that routinely apply the lesser duty rule include the European Union, New Zealand and India. Some jurisdictions only apply the lesser duty rule in certain circumstances (for example, Canada), and others routinely impose duties to the maximum allowed (for example, the United States).

Different approaches to the lesser duty rule can result in different levels of measures on similar goods by different countries. As noted in Section 2, page 8 this may lead to the diversion of dumped or subsidised goods to countries with lower or no dumping or countervailing duties, resulting in greater injury to the industries in those countries. This concern is highlighted by BlueScope Steel in their submission to the Brumby Review:

> *"the company remains concerned about dumped (and subsidised) steel imports in the Australian market. This concern is heightened by recent successful steel industry anti-dumping cases in jurisdictions including Canada, the EU and the USA. These successes overseas threaten to further increase the volume of steel being redirected to Australia by major exporters such as China, which currently has significant excess steel production capacity."*[52]

Imposing duties to the maximum permitted can sometimes provide injured industries with protections above and beyond those necessary to remove injury. This can provide a better environment for the recovery of the damaged industry, but it can also increase prices more substantially than might be desirable. These increased prices can lead to unnecessarily high input costs for downstream industry, hindering their capacity to compete with imports. For this reason, Australia has traditionally supported routine application of the lesser duty rule. Under WTO rules, routine application of the lesser duty rule also permits provisional measures (necessary to prevent injury during an investigation) to be imposed for a longer period (six rather than four months).

Downstream producers who have historically taken advantage of low-priced dumped or subsidised imports have strongly supported the Government's approach to date, and continue to advocate for measures that do no more than remove the injury caused by dumping or subsidisation[53] (or, in the national interest, for no measures to be applied at all[54]). As noted in Australian Steel Association's second submission to the 2009 PC inquiry:

> *"From a policy perspective, it is also important not to conflate issues of whether to mandate an analysis with evidentiary burdens. Lesser duty should be considered in all cases as this gives effect to the structural basis of antidumping support. Nevertheless, it is permissible for benefit of the doubt to be given to local industry where the conflicting arguments are relatively balanced."*[55]

[52] 2012, Brumby Review, submission by BlueScope Steel Ltd

[53] 2012, Brumby Review, submissions by Sanwa Holdings Pty Ltd, and the Group of 43 Concerned Parties (including AD Coote and Co Pty Ltd, Agrichem Manufacturing Industries Pty Ltd, Brisbane Steel Supplies, etc)

[54] 2012, Brumby Review, submissions by Australian Steel Association, Sanwa Holdings Pty Ltd

[55] 2012, Brumby Review, submission by Australian Steel Association

Stakeholders representing Australian industry seeking the imposition of measures have expressed different views about the lesser duty rule. On the whole, submissions from these parties during the 2009 PC inquiry supported retention of the lesser duty rule as a defence against the introduction of the public interest test. However, many were unhappy with the way the non-injurious price was calculated under the lesser duty rule, and sought alternative approaches to calculation.

In its *Streamlining* announcement, the Government stated at 4.3[56]:

> "***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 *Streamlining* announcement also noted at 4.3 that there had been a perception by applicants for measures that Custom and Border Protections current approach has resulted in non-injurious price levels that were underestimated and therefore the effectiveness of the remedy was diluted. It was accepted that the introduction of a more flexible approach to calculating non-injurious prices would permit consideration of a wider range of relevant factors – and would in turn 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.

Improvement to the calculation of a non-injurious price was referred to the ITRF for consideration. Notwithstanding considerations of a number of discussion papers, submissions and proposals, implementation of this improvement appears unlikely to be completed in the near future. The fact that there has been no satisfactory outcome on the implementation of 4.3, is likely to have contributed to the change of heart by the majority of stakeholders contributing to the Brumby Review, who have now strongly advocated for the abolition of the lesser duty rule[57].

It should also be noted that routinely applying the lesser duty rule adds a level of complexity to investigations due to the need to calculate a price for the dumped goods that would no longer be injurious to Australian industry, and reduces the time and resources available to consider in as much depth as possible other matters in these cases. In most cases this can be perceived as wasteful – as duties are usually applied at the maximum permitted level because the non-injurious price is usually higher than the maximum normal value that would otherwise apply[58]. Also, imposing duties to the maximum level possible can act as a deterrent to unfair trading practices[59].

All of these factors, and the difficult trading environment experienced in recent years following the global financial crisis (the full effects of which had not been realised during the PC inquiry) calls into question whether the application of the lesser duty rule is desirable in all cases.

---

[56] 2011, Commonwealth of Australia, *Streamlining Australia's Anti-dumping System, - An effective anti-dumping and countervailing system for Australia*, 27 June 2011, Government Policy Statement, Reform 4.3, page 21

[57] 2012, Brumby Review, submissions by Amcor Packaging (Australia) Pty Ltd, Australian Steel Institute, BlueScope Steel Ltd, Cement Industry Federation Ltd, CHH Woodproducts Australia Pty Ltd, Geofabrics Australasia Pty Ltd, Manufacturing Australia, Orica Australia Pty Ltd, Penrice Soda Products Pty Ltd, Qenos Pty Ltd

[58] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48, 18 December 2009, Australia's Anti-dumping and Countervailing System*, Productivity Commission

[59] 2012, Brumby Review, submissions by Amcor Packaging (Australia) Pty Ltd, Australian Steel Institute, BlueScope Steel Ltd, Cement Industry Federation Ltd, CHH Woodproducts Australia Pty Ltd, Geofabrics Australasia Pty Ltd, Manufacturing Australia, Orica Australia Pty Ltd, Penrice Soda Products Pty Ltd, Qenos Pty Ltd

Examples of where it might be desirable to no longer consider imposing a lower duty would be situations in which a lower duty contributes to the negative impacts of regulatory failures caused by other complexities system, such as those set out in 2(b) and 2(c) [where a lower duty might ensure no future injury, but would not remedy injury already incurred due to the costs and delays caused by significant complexity], as well as investigations involving a number of SMEs [where contemplating a lower duty would add complexity due to the nature of these industries, their products and their markets] . These matters are dealt with more comprehensively in 4.1 below.

(e)	insufficient resourcing of Customs and Border Protection in terms of funding and expertise

Nearly all of the submissions to inquiry and review processes on Australia's anti-dumping system, including most recently through the Brumby Review, have expressed concerns about the funding and expertise of the administration of the system. Some stakeholders would prefer a greater emphasis on assessing material injury and public benefit, and others on establishing appropriate normal values, dumping margins and ensuring compliance with measures imposed.

Stakeholders representing Australian industry seeking the imposition of measures claimed:

> *"Where normal values are determined under s.269TAC(2)(c)…Customs and Border Protection be required to allow for a sufficient margin of profit that is in line with required commercial rates of return in the Australian industry and would provide that industry with a sufficient return such that it would be able to reinvest in the industry"*[60]

> *"Policies should ensure: ... > Appropriate resourcing for ongoing operations and strike forces against dumping within Customs. … In overcoming the negative effect of dumping, manufacturers are identifying the need for further reform in the following areas: … > Agencies are adequately resourced and mandated to cooperate with one another in anti-dumping investigations. … The success of Operation Bluenet in identifying compliance issues in the anti-dumping system is important. …any Commonwealth Anti-Dumping agency should be highly resourced with Commonwealth funding and expertise … Penalties for deliberate and negligent circumvention of trade controls detected need to be increased to complement increased compliance monitoring as an effective deterrent.*[61]*"*

On the other hand, stakeholders representing downstream industries suggested the system should focus on the link between dumping and injury and other factors.

> *"we request the authorities to ensure, in making decisions to impose duties, that material injury has been caused by dumping, and that any injury is not blamed on dumping when in truth it is largely due to other factors."*[62]

> *"A weakness of Australia's present anti-dumping arrangements and the retention of anti-dumping investigations solely within Customs is an emphasis on dumping margin analysis at the expense of public benefit (the national interest) and material injury considerations. The Australian Steel Association's view is that this priority should be*

[60] 2012, Brumby Review, submission by BlueScope Steel Ltd

[61] 2012, Commonwealth of Australia, Prime Minister's Manufacturing Taskforce, Report of the Non-Government Members, Appendix one.

[62] 2012, Brumby Review, submissions by Group of 43 Concerned Parties (including AD Coote and Co Pty Ltd, Agrichem Manufacturing Industries Pty Ltd, Brisbane Steel Supplies, etc)

reversed supported by an independent administrative structure that enables a more balanced, objective appraisal of material injury and public benefit considerations prior to technical or numerical analysis of alleged dumping."[63]

The lack of sufficient resources can reduce Customs and Border Protection's ability to effectively deal with the various matters raised by a wide range of stakeholders.

3 Objectives

The objective of Australia's anti-dumping system is to allow Australia to accrue the benefits accorded by free trade while countering the negative impacts of unfair trading activities by other countries and their exporters on Australian industries. Consistent with WTO rules, this is achieved through the imposition of additional customs duties on dumped or subsidised imports that cause or threaten material injury to Australian industry producing like goods. By remedying the material injury threatened or caused by dumped or subsidies imports, an effective anti-dumping system nullifies the negative impacts of those imports and deters further acts of dumping and subsidisation. It also helps overcome the distortions that subsidisation and dumping cause to the efficient allocation of resources on a global scale, and elicits continued support for further international trade liberalisation.

Therefore, Australia's anti-dumping system aims to increase the prices of dumped or subsidised imports through the imposition of duties in order to:

- remedy the material injury such imports cause;
- deter further acts of dumping and subsidisation;
- garner support for further multi-lateral trade liberalisation.

4 Proposals

The Ministers for Industry and Innovation and for Home Affairs intend to put to Government for its consideration a suite of proposals aimed at addressing the factors identified as hindering Australia's system from achieving outcomes similar to those in other jurisdictions, identified by the majority of stakeholders contributing to recent inquiry and review processes, as outlined in 2(a) to (e) above. Those proposals include:

1. Removal of the lesser duty rule;
2. Clarification of the retroactive duty provisions and changes to import declaration requirements;
3. Expedited partial review or adjustment reviews;
4. Improvements to the Infringement Notice Scheme;
5. Continued funding for the ITRA; and
6. Additional funding for the administration of the system.

The elements of the above proposals identified as requiring a Regulation Impact Statement are the removal of the lesser duty rule (see 4.1) and changes to import declaration requirements (see 4.2).

[63] 2012, Brumby Review, submission by Australian Steel Association

The first element of proposal **2** above is to clarify Australia's retroactive duty provisions in line with WTO provisions. This proposal would make the circumstances under which retroactive duties can be imposed clearer for all stakeholders in the system. The WTO provisions allow retroactive duties to be imposed for the period up to 90 days before the imposition of provisional measures in limited circumstances. Those circumstances are where authorities determine that:

- either there has been a history of dumping, or importers were aware or ought to have been aware that imports were dumped; and
- there has been a massive volume of imports in a relatively short period of time such that the remedial effect of the proposed measure would be seriously undermined.

The provisions do not allow measures to be applied before the investigation is initiated, and importers must have the opportunity to comment before retroactive duties are imposed. The current provisions in the *Customs Act 1901* are consistent with the WTO rules, but are poorly constructed, making them difficult to understand and to apply.

The proposal to clarify retroactive duty provisions is aimed at assisting Customs and Border Protection respond to concerns about the costs of the system and the effectiveness of its administration (Sections **2(a)** and **2(e)** above). It is designed to work in conjunction with increased resourcing for the system (Proposal **6** above) and with the changes to import declarations (the second element of Proposal **2** above, which would assist in identifying importers that knew or ought to have known that their goods were dumped).

Proposal **3** (expedited partial or adjustment reviews) would provide an opportunity for an interested party (for example, an importer, exporter or manufacturer of the goods under measure) to request a more timely review of a measure aimed at determining whether any behaviour is causing the measures to be ineffective. It is proposed that the standard period for an expedited partial or adjustment review would be 110 rather than 155 days (as is currently the case), and that it would focus on specific factors relevant to the grounds for review, rather than on all factors.

The review proposal is aimed at assisting Customs and Border Protection respond to concerns raised by stakeholders about the effectiveness of the system, particularly its ability to respond quickly to review requests that relate to claims that sales at a loss are circumventing measures (Section **2(e)** above). It is designed to work in conjunction with increased resourcing for the system (Proposal **6** above).

Proposal **4** (improvements to the Infringement Notice Scheme) would provide an alternative to prosecution that would still be an effective deterrent to the making of false or misleading statements that lead to the loss of anti-dumping, countervailing and other duties. Higher penalties than those which currently apply to false or misleading statements (20 per cent of the duty avoided) are proposed for these offences, to be determined in consultation with other agencies, including the Attorney-General's Department.

The proposal to improve the Infringement Notice Scheme is aimed at assisting Customs and Border Protection respond to concerns raised by stakeholders about the effectiveness of the system, particularly its ability to deter dumping and subsidisation through an effective compliance regime (Section **2(e)** above). It is designed to work in conjunction with increased resourcing for the system (Proposal **6** above).

The ITRA assists SMEs apply for measures and otherwise participate in anti-dumping or countervailing investigations. Proposal **5** (continue funding for the ITRA) would extend support for these activities until the end of December 2015. It is aimed at addressing the complexity and reducing the costs for SMEs associated with anti-dumping and countervailing applications and investigations (see Section **2(a)** above) beyond December 2013.

Proposal **6** (additional funding for the administration of the anti-dumping system) would assist Customs and Border Protection address the concerns raised by stakeholders set out in Section **2**, particularly Section **2(e)**. This proposal would operate in conjunction with all other proposals.

4.1 Remove the requirement for the Minister to consider in all cases the imposition of a duty lower than that reflecting the full margin of dumping or the full value of a subsidy (that is, the 'lesser duty rule')

4.1.1 Background

As noted in 2(d) above, Australia routinely applies the lesser duty rule. The following example demonstrates the effect of routine application of the lesser duty rule.

Duty imposed when the lesser duty rule is applied in an anti-dumping case

Duty is applied at the **LOWER** of:

The difference between the **Normal Value** (the price at which the goods are sold in the country of export) and the **Export Price** of those goods when exported to Australia

AND

The difference between the **Non-Injurious Price** (the price at which goods could be sold in Australia without causing injury to Australian industry producing like goods) and the **Export Price** of those goods when exported to Australia

Example A:

Export Price = $10/unit

Normal Value = $15/unit

Non-Injurious Price = $12/unit

Difference between Normal Value and Export Price (Dumping Margin) =$5/unit

Difference between Non-Injurious Price and Export Price = $3/unit

Duty would be imposed at $3/unit

Example B:

Export Price = $10/unit

Normal Value = $15/unit

Non-Injurious Price = $18/unit

Difference between Normal Value and Export Price (Dumping Margin) =$5/unit

Difference between Non-Injurious Price and Export Price = $8/unit

Duty would be imposed at $5/unit

Duty imposed when the lesser duty rule is not applied in an anti-dumping case

Always the difference between the **Normal Value** and **Export Price** (no need for non-injurious price to be calculated) **Example A** AND **Example B** above, duty would be imposed at $5/unit

As noted in 2(d) above downstream producers continue to advocate for measures that do no more than remove the injury caused by dumping or subsidisation (or, in the national interest, for no measures to be applied at all)[64].

The majority of stakeholders contributing to recent inquiry and review processes do not concur with this view. They have expressed strong concerns that Australia's anti-dumping system does not deliver the same outcomes as other jurisdictions, and have called for the abolition of the lesser duty rule as a more effective deterrent of dumping and subsidisation[65].

4.1.2 Options

A number of reform options were considered to address the issues set out in 4.1.1 above, from retention of the lesser duty rule to reducing or eliminating its application:

Option 1: Maintain routine application of the lesser duty rule

Option 2: Eliminate the lesser duty rule

Option 3: Remove routine application of the lesser duty rule, and consider it only in specified circumstances

Option 4: Maintain routine application of the lesser duty rule except in highly complex cases, as determined by the Minister

Option 1 would require the Minister to continue to consider in all cases the imposition of lower duties where they would be sufficient to remove injury caused by dumped or subsidised imports.

Option 2 would mean the Minister would not be permitted to impose lower duties where they would be sufficient to remove injury caused by dumped or subsidised imports.

Option 3 would involve changing the default position so that the lesser duty rule would no longer apply unless specified criteria were met. This would require the nomination of all of the circumstances in which the application of the rule would apply, and could make it a de facto public interest test. As an alternative, *Option 3* could replicate *Option 4* in the negative.

Option 4 would retain the current default position in that the lesser duty rule would continue to apply unless specified criteria were met. *Option 4* is based on the premise that there is a case for not applying the lesser duty rule in matters that are already highly complex, including where:

[64] 2012, Brumby Review, submissions by Australian Steel Association, Sanwa Holdings Pty Ltd

[65] 2012, Brumby Review, submissions by Amcor Packaging (Australia) Pty Ltd, Australian Steel Institute, BlueScope Steel Ltd, Cement Industry Federation Ltd, CHH Woodproducts Australia Pty Ltd, Geofabrics Australasia Pty Ltd, Manufacturing Australia, Orica Australia Pty Ltd, Penrice Soda Products Pty Ltd, Qenos Pty Ltd.

- a particular market situation is identified in an application;

  As noted in Section 2(c), the WTO's particular market situation provisions (reflected in 'situation in the market' provisions in the Customs Act 1901) potentially cover a variety of situations in which sales within an exporter's domestic market may not permit a proper comparison for the purposes of calculating a dumping margin. Where such a situation exists, the construction of a normal value through the cost of production in the originating country plus a reasonable amount for administrative, selling and general costs and for profit presents a number of complexities that significantly increase the length and costs of the investigation, particularly where the situation that renders the domestic sales inappropriate for comparison purposes also impacts on the costs of production and other relevant costs.

- the application involves a country that has not adequately complied its WTO subsidy notification obligations;

  As noted in Section 2(b), the subsidy notification process of some exporting countries is not sufficiently transparent to enable all of the subsidies provided by that country to be identified. This makes it extremely difficult for Australian industry and Customs and Border Protection to establish the full extent to which any product exported from those countries is subsidised, and the extent to which that subsidisation injures Australian industry producing like goods. Investigations in these cases tend to be excessively long and costly.

- the application involves an Australian industry comprising a number of SMEs.

  As noted in Section 2(a) Australia's anti-dumping system can be difficult and costly for SMEs to access. This is due to a capability gap and the fact that they are likely to operate in industries where there are a number of similar-sized domestic competitors – requiring a degree of information sharing, collaboration and trust not normally found in these competitive industries. Very few SME dominated industries have accessed Australia's anti-dumping system in the last decade or more. This situation is expected to change, with the ITRA indicating at the last ITRF that he is working with SMEs on the development of several applications. Routine application of the lesser duty rule would be likely to add an undesirable level of complexity to these cases, as they would be more likely than most to involve a degree of product and market differentiation, which are complicating factors when attempting to calculate a non-injurious price.

Option 4 therefore targets a number of concerns raised by the majority of stakeholders in recent inquiry and review processes, as set out in Section 2. The characteristics of matters considered to be highly complex and in which it would not be desirable for a lower duty to be considered would be determined by the Minister, consistent with Australia's international trade obligations. In all other circumstances, consideration of a lower duty sufficient to remove injury would continue to apply so that downstream industries impacted by the imposition of duties in less complex matters would continue to benefit from the lowest possible increase in prices needed to remedy the injury caused by dumped or subsidised imports.

Any Customs and Border Protection resources freed up from no longer considering the application of the lesser duty rule in every case would be applied to increasing the rigorous analysis of other aspects of an investigation. Similarly, other parties to the investigation would no longer need to be concerned about the impact of the lesser duty rule, freeing their resources to concentrate on addressing the other complexities associated with these investigations.

4.1.3 Impacts

The impact on the economy of the lesser duty rule, or of changing the lesser duty rule, is expected to be negligible given the PC in its 2009 inquiry noted the economy-wide impact of Australia's entire system was very low[66].

The quantifiable impacts of *Options 1, 2* and *4* on measures imposed were assessed using the data on measures in place in April 2009[67] and the three examples of complexity listed under *Option 4* in 4.1.2 above. The quantifiable impacts of *Option 3* on measures imposed were not separately assessed on the grounds that if it simply replicated *Option 4* in the negative its impacts would be identical. If *Option 3* were to operate on any other basis, it would not be possible to quantify its impact without nominating alternative specific circumstances in which the imposition of a lower duty sufficient to remove injury would be considered desirable.

As can be seen from **Table 2**, based on the measures in place in April 2009, the lesser duty rule would continue to be applied on a routine basis under *Option 1*, but would never be applied under *Option 2*. Under *Option 4*, the lesser duty rule would continue to be applied to around 40 per cent of measures, 50 per cent of exporting countries and 41 per cent of commodities. Of these less complex cases, the proportion of measures, countries and commodities in which the duties would be lowered by the application of the lesser duty rule would remain relatively stable.

Table 2: Analysis of impact of options

	Option 1	**Option 2**	**Option 4**	**Option 4 % of Option 1**
Total: No.				
Measures	26	26	26	
Countries	13	13	13	
Commodities	18	18	18	
LDR applied: No. (% of Total)				
Measures	25 (96%)	0	10 (38%)	40%
Countries	12 (92%)	0	6 (50%)	50%
Commodities	17 (84%)	0	7 (39%)	41%
Measures resulting in lower duties: No. (% of LDR applied)				
Measures	12 (48%)	0	5 (50%)	42%
Countries	11 (92%)	0	6 (100%)	55%
Commodities	8 (44%)	0	2 (29%)	25%

This result is not surprising, given that many anti-dumping measures involve a significant degree of complexity, as noted by the PC in its 2009 inquiry[68]. Under *Option 4*, the factor with the greatest impact was the failure of a number of countries involved in anti-dumping actions to provide adequate transparency on their subsidy regimes through their subsidy notification obligations. It is likely that the influence of this factor will change over time as non-compliant countries bring their notifications into line with their obligations. This would mean a greater proportion of measures would become subject to the lesser duty rule over time.

---

[66] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission, pages 45-47

[67] Provided by Customs and Border Protection

[68] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission, page 10

In terms of duty impacts, according to the 2009 PC inquiry, the average reduction in duties due to the application of the lesser duty rule was 15 per cent[69] (that is, where a lower duty was applied due to the application of the lesser duty rule, the average difference between the non-injurious price and the normal value was 15 per cent of the normal value). The abolition of the lesser duty rule under *Option 2* would mean a maximum increase in duties of $576,000[70]. It should be noted that increased duties could mean that some importers switch to sourcing non-dumped imports (including from other countries) or Australia, which would reduce the additional duty payable/collected.

Under *Option 4*, the average reduction in duties due to the application of the lesser duty rule would be 11 per cent. The maximum increase in duties due to the limited application of the lesser duty rule under this option would therefore be $400,000[71] (30 per cent less than under *Option 2*). Again, it should be noted that increased duties could mean that some importers switch to sourcing non-dumped imports (including from other countries) or Australia, which would reduce the additional duty payable/collected.

Consequently, based on April 2009 data, *Option 4* would mean that regulatory burden for all parties would be reduced in the majority of cases, and Customs and Border Protection resources would be more concentrated on addressing the factors that increase the complexity of those cases. However, it would also mean that those importing dumped or subsidised goods would face higher duties for around eight commodities from 11 countries under 12 measures. As noted in Section 2, page 7 above, downstream industry is particularly concerned about the negative impacts on their business of the imposition of duties on dumped or subsidised imports, including reduced competitiveness, increased input costs, lower margins and security of supply.

Based on the Status report for the end of September published by Customs and Border Protection in Australian Customs Dumping Notice No.2012/48, there are currently 27 measures in place[72] compared with 26 in April 2009. Sufficient data is not available to undertake a direct analysis of the impact of *Options 1, 2* or *4*. However, given the similarity in the number of measures, and in the commodities[73] and countries[74] involved, results very similar to those set out in **Table 2** would be expected.

4.1.4 Consultation

Stakeholders have been consulted extensively on possible improvements to Australia's anti-dumping and countervailing system over the past three years, as noted in the brief history in Section 1.3 above. The views on removing the routine application of the lesser duty rule are well expressed, most recently in the submissions to the Brumby Review.

---

[69] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission, pages 22, 25, 31

[70] $8m average duty collected in the five years to 2011 x 48% of April 2009 measures that would no longer have lower duties x 15% average duty increase without the lesser duty rule

[71] (Full duty increase under Option 2) less ($8m average duty collected in the five years to 2011 x 20% of April 2009 measures that would still have lower duties x 11% average duty saving under the lesser duty rule)

[72] Noting that, for the purposes of this exercise, combined dumping and countervailing measures for a single country are counted as a single measure, as are measures where there are both undertakings and duties for goods from the same country.

[73] Measures were applied on certain chemicals, plastics, processed and unprocessed horticultural products, steel products, paper (board) products, industrial products, garbage bins and automotive parts in both April 2009 and September 2012

[74] Canada, China, Greece, Indonesia, Japan, Korea, Malaysia, Philippines, Russia, Thailand and the United States of America were involved in measures in place in April 2009 and in September 2012, with the only differences being Hungary and France (April 2009) and Taiwan (September 2012)

Downstream producers who have historically taken advantage of low-priced dumped or subsidised imports have, in the absence of public interest test, strongly supported the Government's approach to date – that is, the routine application of the lesser duty rule.

> *"Lesser duty should be considered in all cases as this gives effect to the structural basis of antidumping support."*[75]

> *"The WTO agreement strongly recommends but does not mandate that a duty less than the full margin should be applied if such lesser duty would be adequate to remove the injury caused by the dumping"*[76]

From contributions to the Brumby Review, it is clear that stakeholders representing downstream producers are advocating for no measures to be imposed at all in the national interest, and where measures are to be imposed, for them to be as low as possible (ie, to do no more than remove the injury caused by dumping or subsidisation). As noted by Australian Steel Association and Sanwa Holdings Pty Ltd in the Brumby Review:

> "*(considering) the public benefit and material injury aspects of an anti-dumping application would provide a more balanced initial appraisal of a dumping allegation … (undertaking) econometric analysis of public benefit impacts could circumvent the extensive costs associated with subsequent dumping margin analysis. Dumping duties should be supported to remove injury where substantiated*"[77]

> *"It would be more prudent to have an anti-dumping structure that has primary consideration of the national interest (public benefit) and material injury … We support the application of dumping duties where dumping causing material injury has occurred."*[78]

These stakeholders acknowledge that the system is expensive for both applicants and downstream producers. However, they would not see any reduction in costs associated with removing the lesser duty rule under *Option 2, 3* or *4* as beneficial to them. *Option 2* would be strongly opposed as it would mean additional costs in the form of increased duties in all of the current measures that have lower duties due to the application of the lesser duty rule. *Option 4* (and *Option 3* if it were to replicate *Option 4* in the negative) would be opposed on the grounds that it would mean additional costs in around half of those measures (see Section 4.1.3, **Table 2**). As noted in Section 2, page 7 above, an increase in duties could undermine the competitiveness of these industries (possibly leading to lower margins, higher consumer prices, restricted production and/or job cuts) or reduce supply options.

Given these views, of the four options under consideration, it is clear that downstream producers relying on dumped or subsidised imports of goods subject to duties determined under the lesser duty rule would strongly support *Option 1*. This option would continue to enable duties to be imposed at less than the maximum level permitted in all circumstances where the lesser duty would remedy injury.

---

[75] 2009, Productivity Commission Inquiry, submission by Australian Steel Association

[76] 2009, Productivity Commission Inquiry, submission by Australian Steel Association

[77] 2012, Brumby Review, submissions by Australian Steel Association, Sanwa Holdings Pty Ltd

[78] 2012, Brumby Review, submissions by Australian Steel Association, Sanwa Holdings Pty Ltd

Downstream producers would strongly oppose *Option 2*. They would see imposing duties to the highest level possible in all cases as unjustifiably increasing their input costs, undermining their competitiveness and threatening security of supply. These stakeholders would also oppose *Option 3* and *Option 4* (notwithstanding that *Option 3* would be a de facto public interest test if appropriate criteria could be established) on the grounds that both options would result in lower duties being imposed in fewer cases than is currently permissible.

In the recent inquiry and review processes (particularly the Brumby Review) many stakeholders (representing Australian producers adversely affected by dumped or subsidised imports) have strongly advocated for the elimination of the lesser duty rule to ensure measures can be applied to the greatest level possible as a deterrent to unfair trading practices[79].

> *"continued procedural reforms to the Anti-Dumping System are necessary to provide a sufficient deterrent to those contemplating importing or purchasing dumped goods. In particular, the following changes are key: (i) Eliminating use of the 'lesser duty rule'"*[80]

> *"Geofabrics strongly urges the Federal Government to abolish the lesser duty rule (i.e. non-injurious price) test and impose measures at the full margin of dumping. The impact of abolishing the lesser duty rule for assessing interim duties will assist in deterring importers from purchasing dumped goods"*[81]

> *"Orica Australia has identified further areas for reform as follows….the abolition of the 'lesser duty rule' i.e. allow for measures to be applied at the full margin of dumping "*[82]

> *"ASI recommends that the Anti-Dumping Review propose…the elimination of the lesser duty rule"*[83]

> *"Penrice would highlight that any additional costs could be funded from additional revenues received from increased compliance on goods the subject of measures, and the removal of the lesser duty rule so that measures reflect the full margin of dumping."*[84]

> *"Areas for further reform include the abolition of the lesser duty rule"*[85]

> *"Additional reforms are required to dissuade importers from purchasing dumped goods. Identified areas for reform include…abandoning the "non-injurious price" principle in favour of collecting measures at the full margin"*[86]

[79] 2012, Brumby Review, submissions by Amcor Packaging (Australia) Pty Ltd, Australian Steel Institute, BlueScope Steel Ltd, Cement Industry Federation Ltd, CHH Woodproducts Australia Pty Ltd, Geofabrics Australasia Pty Ltd, Manufacturing Australia, Orica Australia Pty Ltd, Penrice Soda Products Pty Ltd, Qenos Pty Ltd.

[80] 2012, Brumby Review, submission by Manufacturing Australia

[81] 2012, Brumby Review, submission by Geofabrics Australasia Pty Ltd

[82] 2012, Brumby Review, submission by Orica Ltd

[83] 2012, Brumby Review, submission by Australian Steel Institute

[84] 2012, Brumby Review, submission by Penrice Soda Products Pty Ltd

[85] 2012, Brumby Review, submission by Qenos Pty Ltd

[86] 2012, Brumby Review, submission by Amcor Packaging (Australia) Pty Ltd

"…changes to the Anti-Dumping System are required to improve the effectiveness of the System and deter injurious exports. These include: (i) Elimination of the lesser duty rule which dilutes the effectiveness and undermines the intent of measures to restore the applicant's unsuppressed selling price"[87]

"BlueScope recommends that the Anti-Dumping Review propose…the elimination of the lesser duty rule"[88]

"The CIF would also like to see certain additional reforms to enhance the effectiveness of the Anti-Dumping System, including… the abolition of the lesser duty rule" (p1) "Advantage…the abolition of the lesser duty rule would mean that duties are collected at the full margin (i.e. increase in revenue)"[89]

Others have simply questioned Customs' approach to the lesser duty rule:

"Customs' approach to applying the "lesser duty rule" typifies the lack of understanding of injury to domestic industries caused by imports at dumped and subsidised prices"[90]

Also, routinely applying the lesser duty rule adds a level of complexity to investigations due to the need to calculate a price for the dumped goods that would no longer be injurious to Australian industry. This reduces the time and resources available to consider in as much depth as possible other matters in these investigations. Even when the lesser duty rule is applied, duties are usually imposed at the maximum permitted level because the non-injurious price is usually higher than the maximum normal value, as found by the PC in its 2009[91]. This leads some to perceive the time and resources spent on the lesser duty rule as wasteful.

"The delay in accessing relief from dumping and the subjectivity associated with the assessment of some non-injurious prices, provide sufficient reasoning for the abolition of the lesser duty rule."[92]

Given the above views, Australian industry adversely affected by dumped or subsidised imports would strongly oppose *Option 1* as it would not address the concerns recently raised in inquiry and review processes, as noted in Section 2(d) above. It is likely that if this option were selected, they would continue to be vocal in their call for abolition of the lesser duty rule.

The majority of these stakeholders would strongly support *Option 2* – abolition of the lesser duty rule – as it concurs with their recent demands.

Notwithstanding the possibility that *Option 3* could lead to lower duties being imposed in fewer cases than is currently the case, this option would not be supported by these stakeholders on the grounds that it could become a de facto public interest test, which would increase rather than relieve complexity and cost (as noted by the Government in its Streamlining statement[93]).

---

[87] 2012, Brumby Review, submission by Arrowcrest Group Pty Ltd

[88] 2012, Brumby Review, submission by BlueScope Steel Ltd

[89] 2012, Brumby Review, submission by CHH Woodproducts Australia Pty Ltd

[90] 2012, Brumby Review, submission by Heslop Consulting

[91] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission

[92] 2012, Brumby Review, submission by Cement Industry Federation Ltd

[93] 2011, Commonwealth of Australia, Streamlining Australia's Anti-dumping System, - An effective anti-dumping and countervailing system for Australia, 27 June 2011, Government Policy Statement, Reform 6.1, page 26

Option 4 would be supported if *Option 2* were unavailable, especially if it were seen to provide a meaningful deterrent to dumping and subsidisation and address to some degree the other factors that hinder Australia's anti-dumping system from achieving similar outcomes to those in other jurisdictions, as set out in Section 2(a) to (e).

Industries involving a number of SMEs that would like to apply for trade remedies would welcome any opportunity to reduce the burdens associated with anti-dumping and countervailing investigations, and so would support *Options 2* or *4*. Those administering the system might also welcome relief from considering the imposition of a lower duty in cases involving multiple SMEs, given that a degree of product differentiation and market segmentation is likely to be present in such cases, which could make it difficult to determine a number of relevant factors, including an appropriate non-injurious price.

4.1.5 Implementation and Review

To give effect to any change to the application of the lesser duty rule agreed by the Government, Customs legislation would need to be amended for all options except *Option 1*.

Option 2 would require references relating to the lesser duty rule to be removed. It would also require alternative text to be inserted for goods subject to dumping and countervailing duties to ensure that they would not be aimed at remedying the same situation, which would result in double counting.

Option 3 would require additional legislation detailing the criteria for the application of the lesser duty rule. It would also require alterations to existing legislation, such as the inclusion of provisions referring to the relevant criteria and ensuring there would be no double counting in relation to goods subject to dumping and countervailing duties.

Option 4 would require the insertion of provisions enabling the Minister for Home Affairs to make a determination to the effect that the lesser duty rule would not apply in complex cases meeting certain pre-determined characteristics. It would also require alterations to existing legislation, such as the inclusion of provisions referring to the relevant determination and ensuring there would be no double counting in relation to goods subject to dumping and countervailing duties.

For all options, Customs and Border Protection would also update its 'Dumping and Subsidies Manual', forms and other documentation associated with the system.

The ITRF would be consulted on the implementation of any changes prior to the any changes to the application of the lesser duty rule being introduced. Any legislation would be considered by the Department of Foreign Affairs and Trade and the Attorney-General's Department, in particular, to ensure compliance with international trade rules and constitutional compliance.

The ITRF would continue to monitor and review any changes to the application of the lesser duty rule post-implementation.

4.1.6 Conclusion

Option 1 is not preferred. Continued routine application of the lesser duty rule would address future injury to Australian industry caused or threatened by dumped or subsidised imports, fully recognise the WTO default position that the imposition of lower duties sufficient to remove injury is desirable, and continue to permit provisional measures (necessary to prevent injury during an investigation) to be imposed for six rather than four months.

However, maintaining the status quo would continue to result in material disparities between the measures imposed by Australia and those imposed by other jurisdictions on similar goods. Therefore, Option 1 would be opposed by domestic manufacturers likely to be adversely affected by dumped or subsidised imports due to perceptions that it does not deter further dumping or subsidisation, and risks diversion of dumped and subsidised goods to Australia. Given the strength of the opposition to the lesser duty rule expressed by the majority of stakeholders making submissions to recent inquiry and review processes, retention of the lesser duty rule in its current form might be seen by those stakeholders as impeding the Government's attempts to improve the effectiveness of the system. Ultimately, a lack of trust in the effectiveness of Australia's anti-dumping system could lead to stronger resistance to further international trade liberalisation.

Option 2 is not preferred. The majority of stakeholders making submissions to recent inquiry and review processes have demanded removal of the lesser duty rule to ensure measures are imposed to the greatest level possible to deter further dumping and subsidisation. However, complete removal of the lesser duty rule would mean increased duties in all cases where the non-injurious prices is currently the determining factor in the level of duties imposed. This will without exception increase input costs for all downstream producers in all of those cases and hinder their capacity to compete with imports, ultimately leading to increased prices flowing through to consumers, or to cuts in production, possibly impacting jobs in all affected sectors. It would also ignore the WTO default position that the imposition of lower duties sufficient to remove injury is generally desirable.

Other options that would deter further dumping and subsidisation without increasing costs to this extent would be preferred, particularly if those options would reduce the gap between measures imposed by Australia and those applied on similar goods by other jurisdictions.

Option 3 is not preferred. Removal of the consideration to impose a lower duty other than in specific circumstances ignores the default position encouraged by the WTO Agreement that the application of the lesser duty rule is generally desirable. Also, setting criteria for specific circumstances in which the lesser duty rule would be applied would be difficult, and could effectively result in a de facto public interest test. The Government in its response to the 2009 PC inquiry determined that a public interest test would add unnecessary complexity and cost to the system. A version of *Option 3* that would replicate *Option 4* in the negative would be possible, and could have a similar cost/benefit outcome. However, expressing the concept embodied by *Option 4* in the negative would be complicated and clumsy, making administration a challenge.

Option 4 **is preferred**. Under *Option 4*, the Minister would determine (consistent with Australia's international trade obligations) that the application of the lesser duty rule is not desirable in highly complex matters, including where:

- a particular market situation is identified in an application;
- the application involves a country that has not adequately complied with its WTO subsidy notification obligations; or
- the application involves an Australian industry comprising a number of SMEs.

Unlike *Options 2* and *3*, *Option 4* recognises the WTO default position that the application of the lesser duty rule is generally desirable. Unlike *Option 1*, it also recognises that routine application of the lesser duty rule can add unnecessary complexity to investigations that are already complex – especially given that, in most cases consideration of the lesser duty rule does not result in the application of a lower duty. *Option 4* would also go some way to freeing up Customs and Border Protection resources to concentrate on the issues associated with these complex investigations.

Option 4 addresses to some degree the concerns recently expressed by the majority of stakeholders, including:

- costs of the system, particularly for SMEs seeking trade measures [Section **2(a)** above];
- time, cost and complexity associated with identifying subsidies and other government interventions in countries that do not abide by their WTO transparency obligations [Section **2(b)** above];
- time, cost and complexity associated with applying Australia's particular market situation provisions [Section **2(c)** above]; and
- insufficient resourcing of Customs and Border Protection in terms of funding and expertise [Section **2(e)** above].

By increasing duties in some complex investigations, *Option 4* could increase costs for downstream producers. This could impact on their security of supply and their competitiveness and lead to increased prices flowing through to consumers, or to cuts in production, possibly impacting jobs in those sectors, as noted in Section 2, page 7 above. However, by limiting the impact to cases already involving a significant degree of complexity, *Option 4* would still provide an avenue for lower duties to apply in around half of the current cases, unlike *Option 2*.

Increasing the duties in significantly complex matters would provide industries materially injured by dumped or subsidised imports with greater relief once duties were imposed. Increased duties in these cases would also bring Australia's measures closer to those imposed on similar goods in other countries. This should help to demonstrate that the system is capable of deterring further dumping and subsidisation and might reduce resistance to further international trade liberalisation.

4.2 Require an importer to complete a statement to Customs and Border Protection to the effect that, based on inquiries made and prima facie supportive evidence collected and retained by the importer, its imports of those goods have or have not been dumped or subsidised

4.2.1 Background

Currently, many importers are aware that they may be importing dumped or subsidised goods, especially when those goods have previously been subject to anti-dumping or countervailing measures. However, under the current system, Customs and Border Protection cannot compel those importers to participate in investigations, disclose their knowledge or undertake further inquiries.

As noted in 2(a) above, if these importers actively participate in investigations, they prefer to concentrate their efforts on arguing that they do not import like goods to those under investigation, the applicant industry has not been materially injured, other factors have caused any injury incurred or that measures should not be imposed due to the negative impact on downstream industry and consumers. They rarely engage on the question of whether or not their imports are dumped or subsidised, although some choose to respond to questions put to them by Customs and Border Protection regarding evidence of prices paid. They prefer to leave the question of dumping and subsidisation to other parties to the investigation and to Customs and Border Protection.

Other importers may not be aware that they may be importing dumped or subsidised goods, and may not appreciate the potential damage that may be caused to Australian industry. Where such importers do not actively participate in investigations, this situation might continue until provisional measures are imposed during an investigation, and they are asked to provide security to Customs and Border Protection. There is currently no mechanism by which these

importers could be made aware of the implications of procuring dumped or subsidised goods prior to that time, or are encouraged to make sufficient inquiries to increase their awareness. There are currently no alerts to that effect when declaring imports under the Customs and Border Protection Integrated Cargo System.

Australian producers seeking trade remedies suggest that the lack of importer awareness and cooperation in terms of information sharing means that too much of the burden falls on the applicant industry to establish that goods are dumped or subsidised. Importers are able to escape relatively cost-free, even though they should be in a better position to establish whether their imports are dumped or subsidised. This has led to some stakeholders to call for a reversal of the onus of proof in anti-dumping and countervailing investigations.

4.2.2 Options

The ITRF (see Attachment B for membership) has been looking at a number of options for improving importer awareness of the impact of dumping and subsidisation, and shifting some of the burden of establishing that imports are dumped or subsidised, through changes to the Customs import declaration requirements. The options included the requirement for all or a selection of importers to respond to a number of different questions aimed at ensuring they were aware of the implications of procuring dumped or subsidised goods and/or undertook reasonable inquiries as to whether their imports were dumped or subsidised. The specific options considered were:

Option 1: All importers to indicate in their import declarations whether or not the goods were dumped based on inquiries made and *prima facie* supportive evidence collected and retained by the importer, with Customs and Border Protection undertaking further inquiries, with a view to serving an infringement notice, or initiating prosecution where statements were intentionally false or misleading.

Option 2: Similar to *Option 1*, but only applicable to select importers

Option 3a: *Option 1*, but with the discretion to serve an infringement notice only (no prosecutions)

Option 3b: *Option 2*, but with the discretion to serve an infringement notice only (no prosecutions)

Option 4: Importers to be asked a range of questions in their import declarations designed to raise awareness and assist Customs and Border Protection in conducting investigations – no infringement notice to be served and no prosecutions

Option 5: Importers to acknowledge dumping in their import declarations if they had enquired as to whether the goods were dumped – no infringement notice to be served and no prosecutions

Option 6: Importers to be asked a range of questions outside the import declaration process designed to raise awareness and assist Customs and Border Protection in conducting investigations – no infringement notice to be served and no prosecutions

Option 7: Retain the status quo

Option 1 would require **all** importers to make inquiries and declare to Customs and Border Protection whether or not their goods were dumped or subsidised. It would also provide for the initiation of prosecution action or the imposition of penalties under the Infringement Notice

Scheme for false or misleading statements. The maximum penalty under a successful prosecution is the amount of duty loss, and the maximum penalty under the Infringement Notice Scheme is currently 20 per cent of the duty loss. The penalties would be in addition to payment of the duty avoided due to the false or misleading statement.

There are serious concerns that this option would be contrary to WTO rules. For example, under WTO rules, authorities can initiate an investigation only where applicants (or the authority) can provide sufficient and reasonably available evidence that dumped or subsidised imports are causing or threatening material injury to domestic producers of like goods. A regime that requires all importers to undertake inquiries and make declarations to Customs and Border Protection as to whether or not their goods are dumped or subsidised in the absence of such evidence is likely to be challenged as breaching these rules.

Option 2 is similar to *Option 1* in that the threat of both prosecution and penalties under the Infringement Notice Scheme would be available. In its initial form, *Option 2* provided for a risk assessment tool to be applied to **targeted** high risk importers who were likely to be dumping.

A variation to this option was developed that would avert the need for a risk assessment tool and that would improve WTO compliance. The revised *Option 2* targets importers of goods on which an investigation has been already been initiated. This would ensure the burdens associated with inquiring and declaring to Customs and Border Protection would be limited to importers of goods on which there is *prima facie* evidence that dumping or subsidisation is causing or threatening material injury to Australian industry producing like goods.

Option 3a builds on *Option 1* by retaining recourse to penalties under the Infringement Notice Scheme for false or misleading statements, but removing the threat of prosecution. However, it would still place the same inquiry and declaration burdens on **all** importers, and involve the same WTO concerns.

Option 3b expands on *Option 2* by retaining recourse to penalties under the Infringement Notice Scheme for false or misleading statements, but removing the threat of prosecution. Like the variation described in *Option 2*, *Option 3b* was revised to **target** importers of goods on which an investigation has already been initiated. This averts the need for the development of a risk assessment tool, improves WTO compliance and takes into account feedback from ITRF members. Unlike *Option 2*, *Option 3b* removes the threat of prosecution.

Option 4 would be similar to *Option 3a*, but there would be no recourse to penalties under the Infringement Notice Scheme for false or misleading statements. Option 4 would still place the same inquiry and declaration burdens on **all** importers, and involve the same WTO concerns.

Option 5 would be similar to *Option 4*, but with slightly lower burdens placed on **all** importers.

Option 6 would be very similar to *Option 4*, but would take place outside the import declaration process.

Option 7 would continue to impose no inquiry or declaration requirements on importers.

4.2.3 Impacts

The impact of all options on the overall economy is expected to be negligible given the PC's observation in its 2009 inquiry that the impact of the entire anti-dumping system is very low, as noted in 4.1.3 above.

Under *Options 1* and *3a*, the negative impact on the importing community is likely to be very high to high, as they would impose inquiry and declaration burdens on **all** importers, but with

diminishing levels of penalty for false or misleading statements. All import declarations submitted each year (3.488 million in 2011-12[94]) for all commodities would be impacted, even though very few actually become subject to anti-dumping or countervailing measures. According to the PC, "the industry and product coverage of the anti-dumping system is narrow and diminishing"[95] and would represent only a very small fraction of all imported goods.

There are around 8000 tariff line/statistical code combinations in Australia, many of which would cover hundreds of different commodities. Of these tariff line/statistical code combinations, only 48 (around 0.6%) were under investigation in 2011-12[96].

This means that *Options 1* and *3a* would be particularly burdensome for regular importers of a wide range of goods that:

- are not likely to be dumped or subsidised; or
- for which there is no local production (noting that there were over 13000 Tariff Concession Orders in existence in 2011-12 for goods not produced in Australia, which provided around $1.8b[97] in duty savings.

Regular importers of these sorts of goods would include the automotive industry (which regularly imports thousands of different kinds of car parts) and other Australian producers of advanced equipment, as well as the chemical and plastics industries, which rely on a wide range of imported chemical inputs.

Based on commentary in the ITRF, the costs to each individual importer associated with the additional work involved in making inquiries and collecting and retaining *prima facie* evidence to support a statement as to whether goods are dumped or subsidised are estimated to be around $500 (10 hours at $50 per hour) per commodity (not per declaration). Such costs would include consulting with suppliers or other sources (such as on-line or hard copy sales catalogues, trade data in the exporting country, and data on world prices such as the London Metal Exchange, depending on the commodity) and then assess whether, by comparison, the goods imported might be dumped or subsidised. Most of the costs would be incurred in relation to the first importation of any commodity by an importer, with only marginal costs incurred thereafter – unless there was a material drop in the price of a commodity, in which case it would be prudent for importers to repeat the process and re-incur the costs to avoid prosecution or penalties.

Most SMEs would import a relatively narrow range of goods. However, the additional cost to them of making declarations in respect of all of their imports is likely to be disproportionate to any benefit to the system in terms of improved information or importer awareness.

The WTO compliance concerns associated with *Options 1* and *3a* might also negatively impact on Customs and Border Protection and the Department of Foreign Affairs and Trade should another WTO member dispute the imposition of dumping or subsidy inquiry and declaration requirements on importers of their goods without *prima facie* evidence that dumped or subsidised goods are causing or threatening material injury to Australian industry producing like goods.

The benefits accruing to Australian industry and Customs and Border Protection associated with improved information and importer awareness about whether imports are dumped or

---

[94] 2012, Commonwealth of Australia, *Australian Customs and Border Protection Annual Report 2011-12*, page 30

[95] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission, page 35

[96] 2012, Commonwealth of Australia, *Australian Customs and Border Protection Annual Report 2011-12*, page 78

[97] 2011, Commonwealth of Australia, *Australian Customs and Border Protection Annual Report*, page 114

subsidised are likely to be moderate under *Options 1* and *3a*. However, nearly all of the information collected would never be used, as so few commodities would be subject to anti-dumping or countervailing action.

By targeting importers of goods on which anti-dumping or countervailing investigations has already been initiated, *Options 2* and *3b* would have a very low overall impact on the importing community, given the narrow and diminishing scope of industries and products on which measures are imposed. As noted above, of the 8000 tariff line/statistical code combinations in Australia only 48 were under investigation in 2011-12 (see *Option 1* and *3a* above).

Based on Customs data, where there might be 11 complex investigations in a year for four commodities, involving up to four countries each, taking around 300 days each (due to complexity), around 3.4 thousand import declarations would be impacted out of 3.5 million (around 0.1 per cent). This means that only a very small fraction of the import declarations submitted each year would be impacted by *Options 2* and *3b*.

The inquiry and declaration costs to each individual importer of goods subject to anti-dumping or countervailing investigations would initially be the same as under *Options 1* and *3a* ($500 per commodity), and would involve the same activities. Most of these costs would be incurred between the announcement of the initiation of an investigation and the first importation of goods subject to investigation, with only marginal costs associated with further importations. The costs would be incurred only during the life of the investigation.

Where SMEs are involved, the costs associated with responding to import declaration questions during and anti-dumping or countervailing investigation could be substantially reduced through the services of the ITRA, who would assist them compile the necessary information. This service would not be available under *Options 1* and *3a* as they would not be targeted to goods subject to anti-dumping or countervailing investigations.

Potential adverse impacts of WTO non-compliance on Customs and Border Protection and on the Department of Foreign Affairs and Trade would be minimised under *Options 2* and *3b*, as no inquiry or declaration requirement would be imposed on importers until after the receipt of *prima facie* evidence of dumped or subsidised imports causing or threatening material injury to Australian industry producing like goods.

The benefits accruing to Australian industry and Customs and Border Protection associated with improved information and importer awareness about whether imports are dumped or subsidised are likely to be moderate under *Options 2* and *3b* – all of the information would be useful, as it would relate solely to goods under current anti-dumping and subsidy investigations, and potentially provide access to useful information that would not otherwise be available.

As noted under the detailed description of *Option 1* at 4.1.2 above, the penalties associated with false or misleading statements resulting in loss of duty would be the amount of duty loss under a successful prosecution (*Options 1* and , *3a)* and 20 per cent of the duty loss under the Infringement Notice Scheme (*Options 1, 2, 3a* and *3b*). In all cases, the penalties are ultimately likely to be negligible, given:

- action would be taken only after an investigation established that the goods had been dumped or subsidised AND compliance action would need to be taken AND the statements made would have to be proven to be false or misleading AND either deliberate or made without due care;
- only a very narrow range of commodities is subject to anti-dumping or countervailing measures;

- less than two per cent of import declarations were assessed for compliance in 2010-11[98];
- the net value of revenue collections from all compliance activity in 2010-11 was around 0.8 per cent of total $9 billion in revenue collected[99];
- the average overall revenue collected from the anti-dumping system was only around $9 million per annum between 2006 and 2009[100] and $8m per annum in the five years to June 2011[101]; and
- given these facts, annual penalties associated with false or misleading statements under these options is unlikely to be more than $0.07m.

Prosecutions under *Options 1* and *2* would be rare, but could prove very costly for both importers and Customs and Border Protection.

The negative impact of *Option 4* on importers would be low – more of a nuisance than a burden. While all import declarations would be impacted, the lack of any penalty for false or misleading statements is likely to lead to less diligence on the part of importers. Minimal effort would be expended on collecting and retaining evidence, and there would be a tendency to revert to automated responses with low reliability. The value of any information provided under *Option 4* and its impact on importer awareness would therefore be very low. Like *Options 1* and *3a*, the bulk of any information collected would be wasted due to the narrow range of goods subject to anti-dumping or countervailing action.

The negative impact of *Option 5* on the importing community is also likely to be low. It would impact on **all** importers, but would ultimately prove to be only a mild irritant. The absence of penalties is likely to lead to an automated negative response to any question about whether inquiries had been made about whether goods were dumped or subsidised. The benefits would be negligible, as information provided would invariably be of little or no value, and in almost all cases would never be used.

The impact of *Option 6* would have minimal impact on importers as there would be no means of compelling them to cooperate. It would therefore prove of little or no value in improving importer information or awareness.

By maintaining the status quo, *Option 7* would clearly have no adverse impacts on importers and provide no benefits in terms of improving importer information or awareness.

4.2.4 Consultation

Feedback from the ITRF and other stakeholders was considered on the various options. Based on that feedback, importers of low-priced dumped or subsidised imports, and their downstream customers, will strongly object to any changes being made to import declarations that would impose burdens on them to establish whether or not goods are dumped or subsidised[102]. As noted in Section 2(a), those who do choose to participate fully in anti-dumping or countervailing investigations can incur expenses of the same magnitude as applicants. *Option 7* would clearly be preferred by these stakeholders. The other options in order of most to least objectionable would be *1, 3a, 2, 3b, 4, 5* and *6*.

---

[98] 2011, Commonwealth of Australia, *Australian Customs and Border Protection Annual Report*, pages 114, 115

[99] 2011, Commonwealth of Australia, *Australian Customs and Border Protection Annual Report*, pages 114, 115

[100] 2009, Commonwealth of Australia, *Productivity Commission Inquiry Report No. 48*, 18 December 2009, *Australia's Anti-dumping and Countervailing System*, Productivity Commission, page xvi

[101] *Australia's anti-dumping and countervailing system Regulation Impact Statement*, Australian Customs and Border Protection Service, 26 July 2011

[102] 2012, Feedback from certain ITRF members during and after the meeting of 31 August 2012

In submissions to Customs and Border Protection and the Brumby Review, stakeholders seeking to access the dumping system have expressed support for reducing the burden on applicants:

> *"The foundation of such a system needs to provide a clear framework that is cost effective to access when justified, and responds to threats to domestic industry in a timely and effective manner so as to minimize the upstream impacts that result from dumping. The current arrangements are highly complex, time consuming and costly for domestic industry to access."*[103]

> *"In current applications for anti-dumping duties or countervailing measures, it is the responsibility of the applicant (usually an Australian manufacturer) to prove that dumping is occurring. The burden this causes on businesses is huge."*[104]

> *"Although the Australian Government's anti-dumping and countervailing measures provide some protection against unfair imports, the industry believes that the current system is highly complex, onerous, time consuming and costly for most businesses"*[105]

> *"The AFGC would support amendments to the anti dumping arrangements that improve the efficiency of the application process and remove the complexity and costs that companies need to incur to seek assistance measures."*[106]

> *"A3P suggests that more be done by Customs to reduce the complexity of the system"*[107]

The Government has also acknowledged the feedback from the majority of ITRF and other stakeholders contributing to recent inquiry and review processes. Those stakeholders strongly advocate for a more equitable sharing of the burden of costs associated with establishing whether or not goods are dumped or subsidised:

> *"A small South Australian manufacturer (with just 10 employees) recently told me they had been informed that the cost of compiling a case would be in excess of $1 million. This is clearly unacceptable. Reversing the onus of proof would mean that dumping would be assumed to have occurred unless the importer can prove otherwise, shifting the burden away from Australian manufacturers."*[108]

> *"A more equitable approach to the burden of proof is required"*[109]

> *"OneSteel believes that Customs currently places an undue onus on the applicant"*[110]

As can be seen from the above comments, some of these stakeholders continue to call for a 'reversal of the onus of proof'[111]. As noted in 2(a) above, reversing the onus of proof would

---

[103] 2012, Brumby Review, submission by Kimberly-Clark Australia Pty Ltd

[104] 2012, Brumby Review, submission by Senator Nick Xenophon

[105] 2011, submission to Customs and Border Protection by the Australian Workers Union, the Australian Manufacturing Workers Union and the Construction, Forestry, Manufacturing, and Energy Union

[106] 2011, submission to Customs and Border Protection by the Australian Food and Grocery Council

[107] 2011, submission to Customs and Border Protection by the Australian Plantation Products and Paper Industry Council

[108] 2012, Brumby Review, submission by Senator Nick Xenophon

[109] 2009, PC Review, submission by Orica Ltd

[110] 2009, PC Review, submission by OneSteel Ltd

[111] 2011, Commonwealth of Australia, Customs Amendment (Anti-dumping) Bill 2011, *Senate Economics Legislation Committee Report*, proposed amendments to the Customs Amendment (Anti-dumping Improvements) Bill (No. 2) 2011 tabled by Senator Nick Xenophon, and the 2012, Brumby Review, submissions by Australian Steel Institute, Senator Nick Xenophon

breach WTO rules. Under those rules, applicants must be able to provide sufficient evidence to support the initiation of an investigation. As it is not possible for the Government to introduce legislation reversing the onus of proof, these stakeholders are likely to accept *Option 2* or *3b* as a means of providing some balance to the costs associated with establishing that imports are dumped or subsidised.

Other stakeholders seeking trade remedies have generally expressed extreme caution on options that would impose inquiry and declaration requirements on all importers and/or involve harsh penalties (such as *Options 1*, *2* and the original *3a*). Some favoured *Options 4* to *6* on the grounds that they could raise awareness, but others thought they would be ineffective.

Given the comments made by these stakeholders in relation to import declarations, and their desire for importers to take on a fairer share of the cost of establishing that goods are dumped or subsidised, most would welcome the more targeted *Option 3b*.

4.2.5 Implementation and Review

In the event that any of the *Options 1* to *5* is agreed, changes would need to be made to import declaration forms and online reporting mechanisms. It is estimated that developing, testing and implementing such changes would take six to nine months (assuming high priority status, technical capacity and resources).

For *Options 1-6*, Customs and Border Protection would also update its 'Dumping and Subsidies Manual', import declaration manuals and associated documentation.

The ITRF and other Customs and Border Protection stakeholders would be consulted on the implementation of any change to import declaration requirements prior to introduction. The ITRF would continue to monitor and review any change to import declaration requirements post-implementation.

4.2.6 Conclusion

Option 1 is not preferred. By imposing dumping and subsidy inquiry and declaration requirements on all importers of all commodities, backed by threats of prosecution or penalties for false or misleading statements, the negative impact on importers would be too costly and overly severe. Prosecution might also be costly for Customs and Border Protection, without a commensurate increase in compliance assurance above that achievable through penalties under the Infringement Notice Scheme.

Also *Option 1* would provide only moderate benefits to applicants for trade remedies and Customs and Border Protection in terms of improved information on dumped or subsidised goods and importer awareness of the implications of dumping and subsidisation. Much of the information would collected under *Option 1* would never be used, and there are serious WTO compliance concerns with this option. *Option 1* might address the importer information and awareness problem identified, but at too great a cost.

Option 2 is not preferred. By targeting importers of goods subject to current anti-dumping or countervailing investigations, its negative impact on the importing community would be very low overall, and it would impose only moderate costs on individual importers of goods subject to investigations. Once an investigation has commenced, it would be reasonable to expect importers of the goods under investigation to undertake sufficient research to establish whether, *prima facie*, their imports were dumped or subsidised, and to declare their findings to Customs and Border Protection. All of the information collected under *Option 2* would be useful, and would deliver moderate benefits to applicants for trade remedies and Customs and

Border Protection in terms of improved information on dumped or subsidised goods and importer awareness of the implications of dumping and subsidisation.

The WTO compliance risk with *Option 2* would also be minimised through its targeted nature. However, by maintaining the threat of prosecution for false or misleading statements, *Option 2* would potentially impose very high costs on importers and Customs and Border Protection, without a commensurate increase in compliance assurance above that achievable through penalties under the Infringement Notice Scheme. *Option 2* might address the importer information and awareness problem identified, but at too great a cost.

Option 3a is not preferred. This option builds on *Option 1* but it does not require prosecution action to be taken against importers who have been found to have made intentionally false or misleading statements. However, it still has the same disadvantages as *Option 1* in terms of overly high negative impacts on the importing community and WTO compliance risk, in return for only moderate benefits in terms of improved information on dumped or subsidised goods and importer awareness of the implications of dumping and subsidisation. *Option 3a* might address the problem identified, but at too great a cost.

Options 4, 5, 6 **and** ***7*** are not preferred. Without the deterrent of penalties under the Infringement Notice Scheme, the requirement for all importers to respond to dumping and subsidy questions under *Options 4* and *5* would prove to be an irritant to all importers and remain a WTO compliance risk without providing any useful information or improving importer awareness.

By operating outside the import declaration process *Option 6* is likely to impose little burden on importers, as there would be no means by which to compel them to respond to questions about whether their goods are dumped or subsidised, or to improve their awareness of the implications of dumping or subsidisation. It would therefore be ineffective in addressing the problem identified.

Similarly, by maintaining the status quo *Option 7* would impose no burdens on importers, but would also fail to address the problem identified.

Option 3b **is the preferred option.** This Option would have the same reasonable, low and moderate negative impacts on importers, and the same moderate benefits in terms of improved information on dumped or subsidised goods and importer awareness of the implications of dumping and subsidisation as *Option 2*. By removing the threat of prosecution, yet maintaining penalties under the Infringement Notice Scheme, *Option 3b* would be less costly for importers and Customs and Border Protection, while maintaining an effective deterrent to the making of false or misleading statements – which in turn would ensure the integrity of the information provided.

The adoption of *Option 3b* would therefore be effective in addressing the importer information and awareness problem identified. It would also provide for a rebalancing of the time and cost burden associated with establishing whether imports are dumped or subsidised. In addition it would increase transparency and confidence in Australia's anti-dumping and countervailing duty investigations.

List of stakeholders and interested parties who have been consulted during the 2009 Productivity Commission inquiry, Customs and Border Protection consultations, the Senate Economics Committee inquiries on the Customs Amendment (Anti-Dumping) Bill 2011 and the Customs Amendment (Anti-dumping Measures) Bill 2011, the Brumby Review and the Prime Minister's Manufacturing Taskforce.

Stakeholder	Industry Sector (* union/industry representative body)	Stakeholder position	Consultation Process				
			PC Review	Streamlining development	Senate Committees	Brumby Review	PM's Taskforce
Australian Plantation Products and Paper Industry Council	Paper *	Seeking remedies	X	X	X		
Advance Cables Pty ltd	Cables	Seeking remedies				X	
Australian Industry Group	Manufacturing *	Seeking remedies			X	X	X
Amcor Packaging (Australia) Pty Ltd	Paper	Seeking remedies				X	
Arrowcrest Group Pty Ltd	Wheels	Seeking remedies				X	
Australian Council of Trade Unions	Various *	Seeking remedies			X		X
Australian Dried Fruits Association Inc	Agriculture	Seeking remedies	X	X			
Australian Food and Grocery Council	Food processing *	Seeking remedies		X	X	X	
Australian Forest Products Association	Paper *	Seeking remedies				X	
Australian Manufacturing Workers Union	Various *	Seeking remedies		X	X	X	X
Australian Paper Pty Ltd	Paper	Seeking remedies	X	X	X	X	
Australian Pork Ltd	Agriculture *	Seeking remedies	X	X			
Australian Steel Institute	Steel *	Seeking remedies				X	
Australian Workers Union	Various *	Seeking remedies	X	X	X		X
AUSVEG Ltd	Agriculture *	Seeking remedies				X	
BlueScope Steel Ltd	Steel	Seeking remedies	X	X		X	
Bradken Ltd	Manufacturing	Seeking remedies	X	X			

Stakeholder	Industry Sector (* union/industry representative body)	Stakeholder position	Consultation Process				
			PC Review	Streamlining development	Senate Committees	Brumby Review	PM's Taskforce
CarterHoltHarvey Woodproducts Australia Pty Ltd	Timber	Seeking remedies				**X**	
Cement Industry Federation Ltd	Cement *	Seeking remedies	**X**	**X**		**X**	
Construction, Forestry, Mining, Energy Union	Various *	Seeking remedies	**X**	**X**	**X**		**X**
CSBP Ltd	Chemicals	Seeking remedies	**X**	**X**			
CSR Ltd	Building products	Seeking remedies	**X**	**X**	**X**	**X**	
Dow Chemical (Australia) Ltd	Chemicals	Seeking remedies	**X**				
Geofabrics Australiasia Pty Ltd	Textiles	Seeking remedies	**X**			**X**	
Gunns Ltd	Timber	Seeking remedies	**X**				
Horticultural Market Access Committee	Agriculture	Seeking remedies	**X**				
Huntsman Chemical Company of Australia Pty Ltd	Chemicals	Seeking remedies	**X**				
James Stevenson	Agriculture	Seeking remedies	**X**				
Kimberly-Clark Australia Pty Ltd	Paper	Seeking remedies		**X**		**X**	
Manufacturing Australia	Manufacturing *	Seeking remedies				**X**	
National Biodiesel Ltd	Biodiesel	Seeking remedies				**X**	
National Farmers Federation Ltd	Agriculture *	Seeking remedies	**X**	**X**			
Norman Longworth	Manufacturing	Seeking remedies	**X**				
OneSteel Ltd	Steel	Seeking remedies	**X**	**X**			**X**
Orica Australia Pty Ltd	Chemicals	Seeking remedies	**X**			**X**	
Penrice Soda Products Pty Ltd	Chemicals	Seeking remedies	**X**	**X**		**X**	
Peter Crisp	Agriculture	Seeking remedies	**X**				
Plastics and Chemicals Industries Association	Plastics and Chemicals *	Seeking remedies	**X**				

Stakeholder	Industry Sector (* union/industry representative body)	Stakeholder position	Consultation Process				
			PC Review	Streamlining development	Senate Committees	Brumby Review	PM's Taskforce
Poly Pacific Pty Ltd and Townsend Chemicals Pty Ltd	Plastics and Chemicals	Seeking remedies	**X**	**X**			
Qenos Pty Ltd	Plastics	Seeking remedies	**X**	**X**		**X**	
SCA Hygiene Australasia Pty Ltd	Paper	Seeking remedies	**X**	**X**		**X**	
Simplot Australia Pty ltd	Food processing	Seeking remedies				**X**	
SULO MGB (Australia) Pty Ltd	Plastics	Seeking remedies	**X**				
Trade Remedies Taskforce	Manufacturing *	Seeking remedies	**X**		**X**		
Windsor Farm Pty Ltd	Food processing	Seeking remedies	**X**				
Agilent Technologies Australia Pty Ltd	Measurement devices	Seeking remedies					**X**
Boeing Australia	Aerospace	Seeking remedies					**X**
Kraft Foods Ltd	Food processing	Seeking remedies					**X**
National Union of Workers	Various *	Seeking remedies					**X**
Textile, Clothing and Footwear Union of Australia	Textiles *	Seeking remedies					**X**
Textor Technologies Pty Ltd	Textiles	Seeking remedies					**X**
Thales Australia Ltd	Aerospace and Security	Seeking remedies					**X**
Australia-China Chamber of Commerce of NSW	Various *	Downstream/importer	**X**				
Australian Steel Association	Steel *	Downstream/ importer	**X**	**X**	**X**	**X**	
Food and Beverage Importers Association	Food processing *	Downstream/importer	**X**			**X**	
Ford Motor Company of Australia Ltd	Automotive	Downstream/importer				**X**	
Group of 43 Concerned Parties	Manufacturing *	Downstream/importer				**X**	
Holden Ltd	Automotive	Downstream/importer					**X**
JELD-WEN Australia Pty Ltd	Building products	Downstream/importer		**X**	**X**		

Stakeholder	Industry Sector (* union/industry representative body)	Stakeholder position	Consultation Process				
			PC Review	Streamlining development	Senate Committees	Brumby Review	PM's Taskforce
Palmer Steel Trading Pty Ltd	Steel	Downstream/importer	**X**				
Rio Tinto Ltd	Mining	Downstream/importer				**X**	
Sanwa Holdings Pty Ltd	Plastics and Metals	Downstream/importer				**X**	
W W Wedderburn Pty Ltd	Measurement devices	Downstream/importer	**X**				
Mr Terry Haines	Hobbyist	Downstream/importer		**X**			
Brett Williams	-	Academic		**X**			
Caselle Commercial Services Pty Ltd	-	Consultant	**X**	**X**		**X**	
Greg Cutbush	-	Consultant	**X**				
Gross Beecroft	-	Solicitors				**X**	
Heslop Consulting	-	Consultant	**X**			**X**	
Hudson Trade Consultants	-	Consultant	**X**				
Hunt & Hunt	-	Lawyers				**X**	
Institute for International Trade	-	Academic			**X**		
Law Council of Australia / Law Institute of VIC	-	Solicitors	**X**	**X**	**X**	**X**	
Malcolm Bosworth	-	Consultant	**X**				
Martin Parkinson	-	Academic			**X**		
Moulis Legal	-	Solicitors			**X**		
Senator Nick Xenophon	-	Senator				**X**	
Martin Richardson	-	Academic			**X**		

Attachment B

List of International Trade Remedies Forum membership

- AiGroup
- Australian Steel Association
- Capral
- CSR
- Dried Fruits Australia
- Jeld-Wen
- Kimberly-Clark
- OneSteel
- Plastics and Chemicals Industry Association
- Australian Manufacturing Workers' Union
- Australian Workers' Union
- Australian Council of Trade Unions
- Construction, Forestry, Mining and Energy Union
- Australian Customs and Border Protection Service (Chair)
- Attorney-General's Department
- The Department of Foreign Affairs and Trade
- Department of Industry, Innovation Science, Research and Tertiary Education
- Department of Agriculture, Fisheries and Forestry
- The Treasury