Australian Government
Department of Industry, Innovation and Science

Regulation Impact Statement

Standard Form – Reference #22523

Addressing concerns about low volume exporters undermining the remedial effect of anti-dumping measures through reviews of measures

Department of Industry, Innovation and Science

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Background

Australia's anti-dumping and countervailing system

What is dumping?

Dumping occurs when goods exported to Australia are priced lower than their 'normal value', which is usually the comparable price in the ordinary course of trade in the exporter's domestic market. Where the price in the ordinary course of trade is unsuitable, 'normal value' may also be determined using comparable prices of exports to a third country or the cost of production plus selling, general and administrative expenses and profit.

Dumping is not a prohibited practice under the World Trade Organization (WTO) agreements. Rather, the WTO Agreements permit anti-dumping duties to be imposed when dumping causes, or threatens to cause, material injury to an Australian industry.

What is a subsidy?

A subsidy is any financial assistance (or income or price support) by a government that benefits, either directly or indirectly, an exporter of the goods to Australia. If the subsidy causes, or threatens to cause, material injury to an Australian industry, remedial action may be taken.

What is anti-dumping action?

Anti-dumping action is the imposition of a measure by the Australian Government, in the form of an additional duty on imports and/or a minimum export price, to remedy material injury to Australian manufacturers caused by dumping. Countervailing action is the imposition of a measure to remedy material injury caused by a subsidy.

What is material injury?

Remedial action may be taken where dumping and/or subsidisation causes (or threatens to cause) material injury to an Australian industry.

Injury to an Australian industry is demonstrated through all relevant indices and factors that reflect the state of that industry. Material injury is typically demonstrated through prices, volume and/or profit indicators and is usually reflected by the Australian industry suffering a material reduction in selling prices, profit or market share. Material injury is considered to be above the normal ebb and flow of business.

The Australian industry concerned must demonstrate that there is dumping or subsidisation, and that the industry has suffered material injury as a result. Injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation.

What happens if dumped or subsidised goods are found to have caused material injury?

Where it is established that dumped or subsidised goods have caused material injury to an Australian industry producing like goods, anti-dumping or countervailing measures may be imposed. These measures are imposed through the publication of a dumping duty notice or countervailing duty notice by the relevant Minister.

Administration of Australia's anti-dumping system

The Anti-Dumping Commission

The Anti-Dumping Commission (the Commission) administers Australia's anti-dumping and countervailing system. Upon application by the Australian industry setting out prima facie evidence of the dumping or subsidy and the injury, the Commission commences an investigation and reports to

the relevant Minister whether anti-dumping or countervailing duties should be imposed on goods from the countries named in the application.

On 27 March 2014, the Commission transferred from the Australian Customs and Border Protection Service (the ACBPS) to the Department of Industry, Innovation and Science (the department) to give effect to Machinery of Government changes announced following the Federal election in September 2013.

The Commission is headed by a statutorily appointed Anti-Dumping Commissioner (the Commissioner).

World Trade Organization and legislative framework

Australia's anti-dumping legislation is based upon the World Trade Organization (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and the WTO Agreement on Subsidies and Countervailing Measures.

The Commission administers Australia's anti-dumping and countervailing system under the following legislation:

- *Customs Act 1901* (Customs Act), particularly Parts XVB and XVC;
- *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act);
- *Customs (International Obligations) Regulation 2015*; and
- *Customs Tariff (Anti-Dumping) Regulation 2013*.

How is an anti-dumping investigation conducted?

The anti-dumping and countervailing investigation process generally starts with an application from an Australian industry producing 'like goods' to those which the applicant alleges are being dumped and/or subsidised. The Australian industry concerned must demonstrate not only that dumping or subsidisation is occurring but also that it has suffered material injury as a result.

Once an application is lodged, the Commission has up to 20 days to determine whether there is an Australian industry producing like goods to the allegedly dumped (or subsidised) goods, and whether there are reasonable grounds for the publication of a dumping or countervailing duty notice. If there are reasonable grounds, the Commission will commence an investigation.

The Commission has up to 155 days after initiation to complete its investigation and report to the Minister, unless the Minister approves an extended deadline.

The Commission will advise importers and exporters of the initiation of an investigation and will request information, including on relevant import and export transactions. This information is required within 37 days of the commencement of the investigation. As part of the investigation process, the Commission may visit the premises of the importers and exporters to undertake further investigations and verify the information provided.

Submissions from importers, exporters and any other interested parties are required within 37 days from the commencement of the investigation. Interested parties are any people or entities such as businesses, industry groups or academics who have an interest in the investigation and who may wish to make a comment or argument about the investigation.

From day 60 of the investigation, provisional measures may be imposed, in the form of securities on imports of the goods. This will only occur once the Commissioner makes a Preliminary Affirmative Determination.

On or before day 110 of the investigation, the Commissioner must issue a Statement of Essential Facts (SEF) on which he proposes to base his final recommendations and report to the Minister. Interested parties will then have 20 days to respond and lodge submissions in response to the SEF.

After consideration of the submissions received, the Commissioner will report his conclusions and recommendations to the Minister. The Minister then decides, within 30 days, whether to impose anti-dumping and countervailing measures. Measures are imposed via the publication of a notice.

Under certain circumstances, the Commissioner must terminate all or part of an investigation. These include where there are findings of negligible dumping margins, negligible countervailable subsidisation, negligible import volumes or negligible injury caused by dumping or subsidisation.

How dumping duties are determined?

During an anti-dumping investigation, there are two variable factors to determining a dumping margin (i.e. the level of dumping):

1. normal value of the goods under consideration (the price the foreign exporter sells for in their home market),
2. export price (to Australia) of the goods under consideration.

Dumping occurs when the export price is less than the normal value. The dumping margin is the difference between the two. When the dumping margin is worked out as a percentage, the denominator is the export price:

$$\text{Dumping Margin (\%)} = \frac{\text{Normal Value} - \text{Export Price}}{\text{Export Price}}$$

A dumping duty can then be established to the equivalent of the dumping margin. The duty can be lower than the dumping margin, but cannot exceed the margin.

The Anti-Dumping Commission has a variety of methods it can rely on to establish normal value and export prices, noting that the foreign exporter's transactional data (such as actual sales data) may not always be suitable or available for various reasons.

Dumping duties can take various forms:

1. ad valorem – a fixed % of the export price, e.g. 10%
2. floor price – a set price. If export prices fall below the floor, an amount of duty is applied to raise the price to the set floor
3. fixed duty – a fixed amount of duty paid on the quantity of exports, e.g. $10 per tonne or unit
4. combination – typically a set floor price with an ad valorem on top.

Each method has varying degrees of effectiveness at remedying dumping. Factors that would influence when to use which form of duty include anticipated changes in markets/prices and practicalities driven by information available. For example, a floor price equal to the normal value would prevent goods being imported below that price. This prevents further dumping (exports priced below the normal value) by applying an amount of duty to raise the price to the floor level if it is lower. However, a floor price becomes ineffective where prices in a market rise or excessive where prices fall.

Reviews of measures

After anti-dumping measures (anti-dumping and/or countervailing duties) have been imposed, reviews of measures (referred to simply as reviews in this document) can be undertaken to update the variable factors (normal value, export price). Reviews also consider the other variable factors (non-injurious price and the amount of any subsidy); however these are not relevant to this document and are not discussed further.

A review can be applied for by an affected party where they consider the variable factors may have changed. Affected parties including exporters of the goods, importers of the goods, Australian industry producing the goods and the foreign governments of countries exporting the goods. The review can examine an individual exporter or exporters, or examine all exporters of the goods from the country in question.

Reviews can also consider whether the duties should be revoked (called revocation reviews). However consideration of revocation is not relevant to this document and is not discussed further.

There are time limits restricting review applications. Affected parties cannot apply for a review within 12 months of the last relevant dumping duty notice being published (i.e. within 12 months of the conclusion of the original investigation or the most recent review). The only circumstance in which a review can be initiated within the 12 month period is if the Minister requests a review.

When a review is undertaken, the information used to establish variable factors will be from the 'review period'. This period is not legislatively defined and is set by the Commission in each case, but is typically the 12 month period prior to the initiation of the reviews.

After conducting a review, a report by the Commissioner to the Minister must recommend:

- that the measures remain unaltered; or
- that the measures have effect using different variable factors (i.e. the measures be varied) either for a particular exporter or exporters generally; or
- that the measures be revoked either for a particular exporter or generally (if the review was a revocation review).

A review will typically take around 6 months to conclude.

What is the policy problem you are trying to solve?

Potential for exporter behaviour to undermine remedial measures

Several Australian manufacturers have raised concerns about the potential for the anti-dumping system to be exploited by exporters behaving strategically and for the system to not operate effectively under specific circumstances, undermining the ability of the anti-dumping system to deliver on the government's policy intent.

Under the existing framework foreign exporters can cease exporting for a period of time ('the review period') or export small volumes at a higher price, before applying for the anti-dumping measure to be reviewed, after which a lower rate or no rate is imposed. This can facilitate them then taking advantage of movements in the market to resume injurious dumping for a period of up to 18 months, without any effective measure in place.

How might exporters exploit the current system?

By changing their behaviour by either suspending exports, or exporting sub-commercial quantities, exporters make it difficult to construct a non-zero duty rate. This rate would then apply on their return to the market at higher volumes.

In the case of not exporting during the review period, an exporter's price could not be determined by:

- the price paid or payable by the importer; or
- the price in Australia less prescribed deductions; or
- the price having regard to all the circumstances of the exportation.

To determine an export price, regard would be given to all relevant information. In the cases in which these circumstances has occurred, the regular practice has been to determine export prices to be equal to the (newly determined) normal values for each exporter.

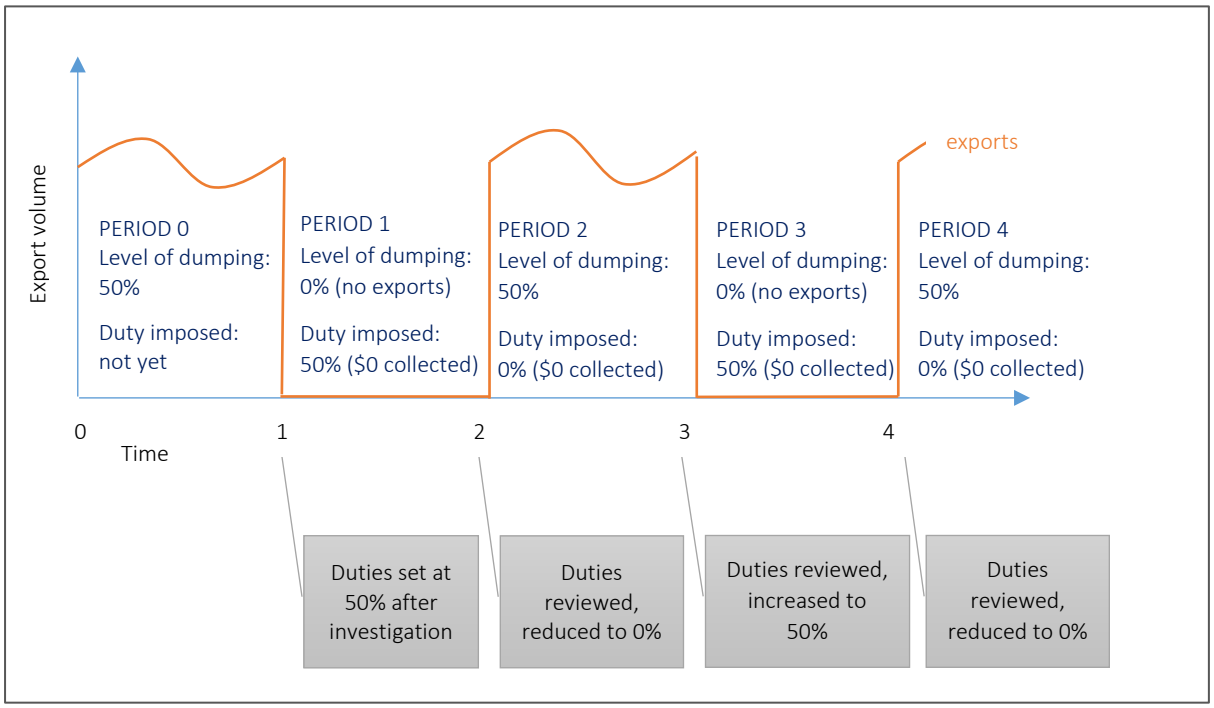
Setting an exporter's export price equal to their normal value has the effect of creating a zero percent dumping margin. As a result, the anti-dumping measure would be imposed in the form of a floor price with an ad valorem element of zero percent. The floor prices would be set equal to the export price, equivalent to the normal value, that is the price each exporter sold the good for in their respective home markets.

A similar issue arises in the case of exporters who have exported very small quantities of the goods at high prices. Such behaviour would require the dumping margin for the exporter to be negative or zero, allowing them to receive a floor price set equal to their normal value (and a zero percent ad valorem element on top).

If the floor is set at a low point in the market, exporters could resume dumping when the market is strong with zero percent ad valorem duty and a floor price. This situation could persist for 18 months. The Australian industries who applied for the original anti-dumping measures are restricted from applying for another review for 12 months. Should they apply for a review at that stage, it would typically be another six months before new variable factors, new dumping margins and new anti-dumping measures are established.

The following graph is a hypothetical illustration of the concept of an exporter lowering export volumes periodically to affect the dumping margins. The graph charts export volumes from a 'low volume' exporter, who is found in an original investigation to have dumped product at a margin of

50%. The exporter ceases exporting during period 1, after dumping duties are imposed. After seeking a review, the dumping margin is found to be zero percent due to the lack of exports. The exporter resumes dumping in period 2. The behaviour repeats for period 3 and 4.



Is there evidence this is occurring?

The Australian industry stakeholders who have expressed concerns allege that the way the system treats exporters who have not exported in a review period or have exported small quantities (as described above) is encouraging exporters to adopt this behaviour to allow them to resume dumping in the period following the review. The department agrees that the anti-dumping system allows for the outcomes described in this section to occur, which could undermine the intended remedial effect of the system.

There is evidence in recent reviews to support these concerns. An examination of anti-dumping cases shows there have been 60 reviews of export prices since 2007 (inclusive) that have concluded, or have published their draft report. This is an average of 5.7 reviews per year. Of the 60 reviews, 21 low volume exporters were reviewed. However of these 21, two were subject to an alternative method to determine the export price rather than setting it equal to the normal value, and two related to countervailing measures. This leaves 17 reviews that determined the updated export price to be equal to the normal value. This represents this occurring, on average, in 28% of reviews. On average it could thus be expected that there are roughly 1.6 low volume exporters per year who have their export price determined to be equal to their normal value.

Of the reviews that have considered a low volume exporter and determined an export price equal to the normal value, four have had subsequent reviews or continuation inquiries that determined new variable factors. The following table compares the differences in the margins calculated prior to the review of the low volume exporter, after the review, and then after the subsequent review or continuation enquiry.

Case	Initial margin (pre-review)	Post-review of low volume exporter	Subsequent review/continuation	Months low volume rate was in existence
1	29.3%	0.0%	60.2%	21
2	57.1%	0.0%	1.9%	24
3	56.0%	0.0%	9.2%	38
4	75.0%	0.0%	22.0%	38
AVG	**54.4%**	**0.0%**	**23.3%**	**30**

As can be seen in the above table, following the period in which they were subject to a zero percent margin, all the exporters were found to have a positive margin in the subsequent process. This indicates that dumping from those exporters resumed. On average, the dumping was determined to be at a rate of 23.3%. In 2016, the Productivity Commission noted the average anti-dumping duty was 17%. The gap between the zero margin and the new margin being determined is also significant, averaging 30 months, or roughly 2.5 years.

There were no circumstances found in which a low volume exporter who received a zero percent margin was later found to have still had a zero percent margin when they had resumed exporting. The other reviews of low volume exporters not included in the table above, were either too recent to have had a subsequent review or continuation inquiry, or were subject to a revocation of measures. The two revocations were on the basis that the Australian industry ceased production and the source of exports had shifted to another country and even if exports were to resume they would be unlikely to be injuriously dumped.

What happens if this is not addressed?

The Australian industries that applied for the anti-dumping measures on the goods are concerned that the measures set following this review will not prevent the exporters (who received the floor price and) from resuming dumping. As evidenced by the cases above, it is highly likely dumping resumes. Resumed dumping will be particularly likely if the review period coincided with a period of depressed prices for the goods and if, since the review period, prices in the market have risen. Such a rise would reduce the effectiveness of the floor price to prevent resumed dumping, however an alternative form of measure (ad valorem or fixed duty) could not have sensibly been imposed as the dumping margin was zero percent due to the lack of exports. The rising market creates scope for the exporters to resume lowering their export prices below their present, higher normal value, and resume injurious dumping.

The possible eighteen month delay in the subsequent imposition of effective measures will be particularly damaging for producers of commodity products. Commodity products are differentiated on little other than price and will be more susceptible to downstream customers switching to dumped goods. The type of damage that is expected includes reduced revenue, production capacity, employment and investment (including foreign investment) for the Australian industry. The damage can be particularly exacerbated in industries with high barriers to entry and exit. Production that ceases in these industries is more difficult, and therefore less likely, to be resumed if the injurious dumping is addressed at a later stage.

Additionally, any change must be made to address the behaviour of both non-exporters and exporters of non-commercial quantities. If changes for both types of low-volume exporters are not made, the possibility exists for non-exporters to switch to exporting a non-commercial quantity of product at a high price in order to still receive a negative dumping margin and associated zero percent ad valorem duty rate. This situation would allow non-commercial quantity exporters to resume dumping, potentially causing injury to Australian industry, in the same manner as non-exporters (as described above).

Why is government action needed?

This proposal does not seek to change the policy intent of the anti-dumping system in any way.

One of the Government's reasons for maintaining an anti-dumping system that works effectively is part of promoting greater trade liberalisation. The Productivity Commission noted in its 2009 Inquiry that having an anti-dumping system facilitated support for the removal of broader trade barriers. Failure of the anti-dumping system to work effectively risks the growth of protectionist approaches. An effective anti-dumping system also facilitates greater inward investment flows in trade-exposed industries, as it provides reassurance that industries receiving foreign investment will have an effective remedy available against injurious dumping or subsidisation. This was also reaffirmed recently by the G20. In July 2017, the G20 issued a communique recognising the legitimate role of trade defences, such as anti-dumping measures, in fighting unfair trade and promoting free trade. Australia's anti-dumping system is based on the rules of the World Trade Organization.

Australia's anti-dumping and countervailing system is intended to provide a market-based remedy to injurious dumping and subsidisation. The remedy provided should be effective at preventing further injury.

As described in the previous section, it has been identified that the current operation of the system is producing systemic outcomes that do not fulfil the intent of the system. In every instance that the low volume export behaviour was identified, and following the zero percent margin there was another process such as a later review or continuation inquiry, the exporters behaviour had led to the subsequent process resulting in a positive dumping margin. These outcomes are evidence that the remedial duties are being undermined.

Government action is required to ensure the system delivers relief from injurious dumping and subsidisation, without creating significant additional burden for businesses and protect the credibility of the system. The following two sections outline an option that requires no government action, however this would create significant additional burden.

Government action to address the issue should align where possible with broader strategic goals such as:

- facilitating growth and productivity of globally competitive industries
- remaining consistent with international obligations
- commitment to an open economy, and
- transparency, natural justice and due process.

Government intervention is also justified on the basis that the issue is a government regulatory failure (i.e. a non-market failure), which is appropriate to address with new government policy.

Failure for the Government to act will have substantial impacts on the cases in which the problematic circumstances occur. Anti-dumping investigations establish that the Australian industry is suffering material injury caused by the dumped or subsidised imports. Not remedying the problem risks the resumption of the dumping and the subsequent injury. A failure of the anti-dumping system to remedy injury will increase calls for greater protectionist or distorting measures, such as tariffs or trade restrictions, to be implemented to resolve the systemic issue.

What policy options are you considering?

Option 1 – No change to system, greater use made of current discretionary powers

If the status quo was maintained, the problem as described above would continue to arise occasionally in reviews.

In order to address the problem, the Minister would be required to initiate new reviews when the circumstances described in the problem arise. The Minister is not restricted from requesting a review where variable factors may have changed within the 12 month restriction that applies to applications from affected parties. This option would address the issue as it arises on a case-by-case basis under the existing anti-dumping system framework.

Monitoring of select, high-risk products and markets could also be required by the Anti-Dumping Commission (the Commission), in order for the Anti-Dumping Commissioner (the Commissioner) to be able to advise the Minister when it is suitable to request a new review. The monitoring would be resource intensive and limited by data availability.

This option was proposed by an Australian industry stakeholder.

Option 2 – Fixed the application period and collect duties retrospectively

This option would require that applications by affected parties for reviews are restricted to certain periods and that duties are collected retrospectively.

Applications would be restricted to the yearly anniversary of the month the measures were imposed following the original investigation. The purpose of this would be to remove the ability of an exporter to deliberately align the period in which they cease exporting with anticipated market changes. Whilst this outcome could still occur it could not be deliberately lined up.

Australia operates a prospective duty system. Duty on imports is collected upon entry. An alternative to this is a retrospective duty system, which assesses duty liability at a later stage after importation. Under such a system, when a good is imported, the duty is not paid, but a security (e.g. a cash deposit) equal to the estimated duty rate is taken. The final duty liability is then calculated at a later stage, and if the final duty is different to the initial duty rate, the excess duty is collected or excess security is refunded.

Changing Australia's duty collection system to be retrospective would require significant changes to Australia's anti-dumping and customs frameworks. This would include expanding the scope of reviews to include the assessment of duties paid during the previous 12 months. Providing an assessment of dumping for exports in the previous 12 months would allow additional duties to be collected if there had been more dumping than the initial duty rate, and a refund of securities if there had been less dumping.

Reviews would still be application based, but they would necessitate that there had been export transactions as duty cannot be assessed unless there had been exports. Low volume exporters would not be able to seek a review.

Major legislative changes and operational changes would be required to implement this proposal.

This option was proposed by several Australian industry stakeholder.

Option 3 – Provide legal certainty for expanded methods of establishing export prices

Option 3 is to facilitate the use of appropriate proxies to determine an export price for exporters who had not exported a commercial quantity (sometimes referred to in this paper as low volume exporters for simplicity). The proxies used would rely upon relevant information as much as possible to construct an export price. Exporters who shipped a commercial quantity of the product would not be affected.

Currently the Minister has the power to determine export prices on the basis of all relevant information. However as noted in the discussion in the sections above, this has led to a problematic outcome in certain review cases. This proposal addresses the systemic concerns regarding low volume exporters achieving a duty that does not reflect market realities because they had no export transactions upon which an export price could be established.

Where there is a low volume exporter or exporters, the methods used to determine an export price would be expanded to include:

- using the average export prices in contemporary reviews of individual exporters that exported commercial quantities and whose individual export prices were determined under s.269TAB(1)(a) of the Customs Act
    - contemporary reviews refers to reviews that have either recently concluded or are running concurrently – the review periods do not have to coincide and indexing may be required to account for this, but the window in which a review is contemporary will be defined
    - adjustments would be used as appropriate to create a fair comparison
    - this methodology has been used previously
    - the change is intended to allow this method to be used in more circumstances than it is currently applied, such as where there is a range of models
    - this method would not be used where it was not possible to maintain confidentiality of another exporter's ascertained export price
- using historical, verified, information (e.g. the exports from the original investigation or the most recent review), appropriately indexed to account for market variations
    - there is some practical experience of updating previously used information
    - would allow the Commission to use and update information they had previously gathered to determine an export price
    - indexing would be flexible so that it could be adjusted to case circumstances.
    - however, principles for establishing an appropriate index would be created through guidance in operational manuals and/or subordinate legislation (e.g. regulations, Ministerial direction)
    - likely to be applicable in a large proportion of circumstances involving low volume exporters
    - where the exporter received a residual rate in the original investigation/most recent review, the average export prices from that process would be indexed
- export prices (by the low volume exporter) to a third country with appropriate adjustments to enable a comparison with exports to Australia
    - based on the exporter's export sales, albeit to a third country
    - would require an analysis of the third country markets to determine suitable comparability with Australia
    - would require additional information from the exporter and potentially additional verification in the third country by the Commission.

After these methods are exhausted, the Minister could have resort to any other method having regard to relevant information (as currently provided for under the legislation).

For exporters of a non-commercial quantity, regard would still be had to the export price information they submitted in the first instance. If it was deemed to be insufficient for the calculation of an export price, the other methods and relevant information would be relied upon for the calculation of the export price. As exporters of no volume will not have information relating to export prices, there will be no information to disregard as insufficient.

The methods above are not hierarchical. The Minister would have regard to the method that most appropriately applied to the circumstances of the case. There will still be cases where none of these methods are suitable (such as due to a lack of relevant information) and applying a floor price with a zero percent ad valorem element will still be the most appropriate outcome.

Commercial quantity would be defined but still have an amount of discretion so that it could be determined on the facts of the particular case. This is to provide for what is commercial being different for different products. For example, large capital goods or tendered goods may only ship a few times per year but this may be considered commercial for that product and market.

Legislative amendments would be required to implement this proposal. Legislating these options will increase the legal certainty that these methods are reasonable and the information they are based on is considered relevant under the law.

Minister requested reviews would still be required to remedy the cases in which the unexpected outcome has already manifested. It is expected any necessary reviews would be requested after legislation is passed.

This option was developed by the Department of Industry, Innovation and Science.

What is the likely net benefit of each option?

This section represents the Department of Industry, Innovation and Science's qualitative analysis of the options based on consistency with fundamental objectives of the anti-dumping system and reviews of measures. This includes:

- anti-dumping measures should provide effective relief for injured industries
- parties should be able to have variable factors updated
- transparency, due process, and natural justice
- minimising detrimental impacts on Australian importers and downstream users and consumers of goods subject to investigation/measures.

The context of how often any policy change may be given effect should also be considered. As discussed above in a previous section, there is an average of 1.6 reviews per year that examine a low volume exporter. Given this infrequency, any policy response should be proportionate and targeted so as to only affect the small number of matters concerned.

Option 1 – No change to system, greater use made of current discretionary powers

This option provides the most simple and readily available solution to address the problem. It uses the powers and flexibility available under the current framework to address the problem of the ineffective duty by recalculating a new margin based on more recent variable factors. This would be effective, as changes in the market would be taken into account in the updated variable factors and margin, reducing the inappropriateness of the previous rate calculated during an unusual market low.

There are however some significant drawbacks to this option. Although it does offer a mechanism to address the problem, the solution is reactive and any new dumping margin would be delayed by up to six to nine months. The delay will increase the scope for the exporter to resume injurious dumping during this period, continuing the material injury to Australian industry.

The other major issue with this approach is the additional reviews that would be required. Based on there being 1.6 low volume exporters per year, there would be two additional reviews per year, however these would likely be extended to include all exporters in cases where it was considered the variable factors had changed for all exporters, not just the low volume exporter. The additional reviews will create an additional compliance burden for businesses, particularly the Australian industry, Australian importers and foreign exporters. A review is a burdensome process. It is an active investigation that takes six to nine months and will require business engagement throughout. A flow on effect of additional, potentially unnecessary, reviews is that investigative resources will be tied up instead of being put to ensuring the efficiency of other processes such as investigations.

There are also other complications with giving effect to this option. Consideration would need to be given as to whether 'regular' use of a Ministerial discretion when there are systemic options available is good governance. The Minister may also be requested to initiate reviews when markets have fallen and the duty level, particularly if there is a floor price, is becoming excessive. This would again lead to additional reviews. The Commission may need to implement some form of monitoring to gather sufficient evidence to advise the Minister as to when it would be appropriate to initiate.

This option affects relatively few stakeholders as it limited to those impacted by the additional reviews. This could however be broader than just the low volume exporters, as the Minister initiated reviews could extend to all exporters of that product from that country. The anticipated impact on various groups of stakeholders are summarised below:

Australian industry: Would eventually have effective relief, although there would always be a delay. Would have to participate in more reviews.

Australian importers: Would have to adjust to more frequent changes in measures and associated switching costs. Would also be involved in more reviews.

Downstream users/consumers: Would potentially face higher costs, depending on importers' capacity to absorb switching costs and the costs of participating in additional reviews.

Foreign exporters: Still incentivised to adopt behaviour aimed at undermining the effectiveness of remedial measures. Would have to participate in more reviews.

Using the Regulatory Burden Measurement (RBM) tool, it is estimated this option will have a regulatory cost of $379,000 per year. This largely stems from the requirement to participate in additional reviews, some of which will extend to all exporters of the product from the country under investigation. It affects Australian industry, Australian importers and foreign exporters. The RBM report is attached.

Option 2 – Establish a fixed period in which parties can apply for reviews

This option would address the problem by ensuring that applications for reviews cannot be aligned with changes, or expected changes, in market conditions. It would also systemically prevent applications by low volume exporters, as reviews would require that there are exports from the last 12 months upon which to assess and determine the amount of duty to be collected.

Fixing the period of review applications to an anniversary date is relatively simple, however implementing the associated retrospective duty system is significantly challenging. It is a major change to Australia's anti-dumping and customs framework. It would significantly change the effect of anti-dumping duties in the market, potentially creating significant uncertainty given the final duty liability on imports may not be decided until at least 18 months after the importation. A retrospective system would also significantly increase the number of reviews applied for given the necessity to apply for one to have the final duty liability assessed. The high number of extra reviews would significantly increase the administrative burden for businesses, particularly Australian industry, Australian importers and foreign exporters.

A retrospective system could have an impact on competition in the market. It requires a commercial quantity of exports to have been shipped in order to access a review. This means that in order to access a review, an exporter would need an unrelated importer to purchase their products and pay any applicable duties. Once a commercial quantity had been shipped and the period for review applications was open, a review could be sought and any securities taken above the amount of dumping that occurred would be refunded. This however would likely occur 18 to 24 months after the importation period. This is a substantial period of time in which the importer would have to absorb the duties on the speculative basis that they would receive a refund. The refund could not be guaranteed in advance without the importer knowing what the exporter's normal value is, which is unlikely for an unrelated business.

Despite the certainty created by knowing when applications for reviews could be accepted, the option is likely to create additional uncertainty overall. This is due to the substantial uncertainty created for importers by not knowing what the final duty liability will be. In particular, importers could face more cases of 'duty shock' where they are subject to large amounts of additional duty at a later stage. This can have a severe financial impact. The effects of duty shock can also cause disruption in downstream markets should the importer cease trading.

A retrospective duty system will also require additional government resources for it to be effective. There are also difficulties with compliance and enforcement that should be considered. It has been observed in other jurisdictions that it can be difficult to collect additional duties at a later stage (after importation). Difficulty in ensuring effective compliance could ultimately weaken the remedial effect of anti-dumping measures.

This option is disproportionate to the relatively infrequent problem (1.6 low volume exporters per year) that is seeking to be addressed.

This option affects a large number of stakeholders. It would significantly increase the number of reviews across all products subject to measures. The anticipated impact on various groups of stakeholders are summarised below:

Australian industry: Would significantly increase the number of reviews required to be participated in. Would potentially provide the most significant amount of relief as retrospective duties could be collected (something not currently a feature of the Australian system).

Australian importers: Would have to participate in significantly more reviews. Would not be able to apply for reviews where an exporter's variable factors may have changed but they have not exported. This would either reduce the potential sources of product (i.e. reduce competition) or require an importer to pay duties in the short term, in the hopes of achieving a refund at a later stage (e.g. 18 months later). Retrospective collection of additional duties could increase duty shock for importers, causing financial hardship due to the unforeseen duty.

Downstream users/consumers: Would not necessarily face a general increase or decrease of the level of duties, but could face market disruption caused by retrospective collection leading to exporters' ceasing trading.

Foreign exporters: Would have to participate in significantly more reviews. May be locked out of a market as they would not be able to seek a review unless they started exporting, for which an importer would need to pay duties until a commercial quantity had been shipped and a review could be sought.

Using the Regulatory Burden Measurement (RBM) tool, it is estimated this option will have a regulatory cost of $2.13m per year. This largely stems from the requirement to participate in additional review and affects Australian industry, Australian importers and foreign exporters. The RBM report is attached.

Option 3 – Provide legal certainty for expanded methods of establishing export prices

This option is an effective solution to the problem. It directly addresses the root cause of the problem, which is that an appropriate export price cannot be determined without regard to additional relevant information. It is proportionate, in that it would only affect the relatively few instances in which it occurs, and is a small change to how reviews are undertaken.

Using alternate methods where there is a lack of sufficient data is a fairly common practice in the anti-dumping system. For example, where there is a lack of sufficient information to calculate a normal value, regard is had to constructing a normal value. The methods proposed under this option, or variations of them, have been utilised previously. This reduces the complexity of the change, uncertainty as to how they would be operationalised and the risk of unintended outcomes.

The definition of what is less than a commercial quantity of exports will create some additional uncertainty as it will need to be flexible so as to accommodate for differences between the various products subject to anti-dumping measures. However practical guidance will be published to ensure the principle is applied consistently.

One of the most significant benefits of this option compared to the above two, is that it does not require any additional reviews as it amends the methodology used in a review. This means the effect of this option is not delayed and there is no significant increase in administrative burden for businesses.

Consistent with the intention of anti-dumping policy, all parties will still be able to apply for reviews and have their circumstances considered as to whether the variable factors have changed.

The option will potentially result in a higher dumping margin (than zero percent) for exporters who have exported low volumes. Higher duties can dampen competition in the market and increase prices for downstream users. However the impact will be equivalent to restoring the market back to a state where measures are not undermined. The scope of impact of this option should also be considered in this regard. There are on average 1.6 low volume exporters per year across review of all anti-dumping measures of which there are thousands of exporters from many markets (both subject and not-subject to the duties).

This option affects relatively few stakeholders as it strictly limited to reviews of low volume exporters. The anticipated impact on various groups of stakeholders are summarised below:

Australian industry: No change in the number of reviews participated in.

Australian importers: No change in the number of reviews participated in, however they would in some cases likely face increased duties as an appropriate margin is calculated.

Downstream users/consumers: In some cases, would increase the level of duties, and likely increase downstream prices.

Foreign exporters: No change in the number of reviews participated in. Could potentially be required to provide more data depending on the method used to calculate the export price.

Using the Regulatory Burden Measurement (RBM) tool, it is estimated this option will have a regulatory cost of $2,000 per year. This largely stems from the requirement to provide additional data if the third country export methodology is used. This cost impacts foreign exporters. There are no anticipated additional compliance costs for Australian businesses. The RBM report is attached.

International obligations

Australia's anti-dumping and countervailing system is based on the rules of the World Trade Organization. Changes to the system can pose a risk of inconsistency with WTO commitments. Particular consideration in designing the options has been given to whether they engage this risk by restricting access to reviews or requiring, as a general rule or presumption, the rejection of contemporaneous exporter-specific data or the privileging of other data unrelated to the exporter in question. The options mitigate these risks by not restricting applications and not presuming data other than that provided by the exporter, should be used in the first instance.

Who will you consult and how will you consult them?

Previous consultation

Several stakeholders who have been applicants for anti-dumping measures have raised concerns about the potential for review outcome for low volume exporters to undermine the intended remedial effect of anti-dumping measures as outlined in this submission. The concerns identified that the outcomes in the reviews affect several industries in Australia. Several Australian industry stakeholders proposed Option 1 (greater use made of current discretionary powers) and Option 2 (introducing retrospective duties) as ways to address the problem.

The department has since consulted a select group of stakeholders familiar with the technical detail of the system about Option 1 and Option 3 (using alternate methods to determine an export price). The stakeholders included two businesses who have been applicants for measures and one industry organisation that represents importer and downstream user interests. The department did not consult on Option 2. It is not considered a viable response to the identified problem.

The stakeholders who have been applicants for measures were generally supportive of Government action to address the problem, but prefer fixing the application period for reviews and moving to a retrospective duty system (Options 2).

The stakeholder representing downstream interests does not support any action as they consider that the problem does not exist and action to address it would restrict competition. The department does not agree that using other methods to determine an export price (aside from setting the export price equal to the normal value) is designed to restrict competition. Restricting competition would be a more likely outcome of Option 2, as it could have the effect of permanently pricing an exporter out of the market. Using the proposed methods to calculate an export price would not have this effect.

The department has considered the key feedback from stakeholders has been that measures should not be undermined, but action to address the problem should not restrict competition.

International Trade Remedies Forum (ITRF)

The ITRF is a dedicated anti-dumping stakeholder body established in legislation (Part XVC of the Customs Act). The forum meets regularly twice a year, and often features sub-committees that discuss topics of specific interest to some members. The ITRF features a broad and balanced membership of Australian manufacturers, importers, downstream users, expert groups and unions.

The ITRF is a long running body that first met in August 2011. As a result, the positions of stakeholders are well known by government. Although individual sectors affected by dumping change from time to time, and novel issues such as circumvention of duties may arise – the present issue relates to a long standing process of the anti-dumping system (namely reviews of measures). Due to reviews being a fairly discrete aspect of the anti-dumping legal framework, and the large case experience of reviews conducted by the Commission, stakeholder experience and positions are known to government with a high degree of confidence. Awareness of stakeholder views is considered when developing any options to change the anti-dumping system. This includes the options developed for this submission.

Concern about potential for review outcomes for low volume exporters to undermine the intended remedial effect of dumping measures was raised at the most recent meeting on 26 May 2017. No significant views were raised by other members.

Further consultation

Given the urgent work being undertaken to find a solution to the problem raised, there is not intended to be any significant consultation undertaken with stakeholders for the purpose of this submission.

Consultation will continue during implementation, particularly on the drafting of any legislation and supporting documents and guidance.

What is the best option from those you have considered?

Option 3 is the preferred option. It directly addresses the systemic problem that is leading to inappropriate dumping margin findings under current methodologies. Using a wider range of information to determine the export price will allow the Commission to reach a conclusion consistent with both the intent to provide an effective remedy and calculate updated variable factors. The option has particular benefits compared to the other options available:

- it does not require additional reviews
- it does not significantly increase the administrative burden on businesses
- it does not prohibit on access to reviews
- it does not change the function of the customs or anti-dumping systems.

The department considers that stakeholder feedback support Option 3 as the most appropriate solution to the problem, largely on the basis that it is more effective and efficient than Option 1, and is not as restrictive on competition as Option 2.

How will you implement and evaluate your chosen option?

Legislative amendment

Amendments to the Customs Act will be required to implement Option 3. It is anticipated these amendments would be made to sections of the Act regarding determining export prices.

Currently, the export price is determined under s.269TAB of the Customs Act.

The methods available would be expanded to include:

- using the average export prices, in contemporary reviews of measures, of individual exporters that exported commercial quantities of the goods specified in the notice and whose individual export prices were based on export sales
- using historical, verified, export sales (e.g. from the original investigation or a previous review of measures), appropriately indexed to account for market variations, and
- export prices from the exporter to a third country (comparable with Australia) with appropriate adjustments to enable a comparison of the export price and normal value.

The Minister would have regard to each of these methods when it is assessed that insufficient or unreliable information has been supplied, and thus a decision cannot be made under s.269TAB(1)(a) and (b). Regard to the methods would not be hierarchical. The Minister would have regard to the method that most appropriately applied to the circumstances of the case.

The concept of a 'commercial quantity' of exported goods would be new, and require definition in the Customs Act. Most anti-dumping definitions in the Customs Act are located in s.269T. The definition will have some Ministerial discretion so that it can be applied on a case-by-case basis.

Consequential amendments may be necessary, but are not expected to be significant.

The legislative amendment is intended to commence as soon as possible and will apply to reviews that are ongoing to ensure the integrity of measures. If legislation did not apply to reviews under way following commencement, the Minister may need to initiate new reviews so that measures in effect were recalculated under the new methodologies.

Additional guidance

Guidance will be developed regarding when each of the methods should be utilised and what information is relevant for utilising each method. In the event that these methods cannot be used, the Minister would have regard to any other method he deems appropriate based on relevant information. Guidance on when a quantity would be considered not commercial will be developed. Additional guidance regarding principles for establishing appropriate indexes would be created.

Evaluation

The impact of the proposal will be reviewed within five years. The operation of this regulation will manifest periodically in reviews as low volume exporters are reviewed. As noted, they occur relatively infrequently. The outcome of these cases will be reviewed as they occur in order to assess if the policy is having the intended effect and to monitor any unintended consequences. Unintended consequences will also be identified by the Commission as they give effect to the policy. Australian industry stakeholders, having initially raised these concerns, will also provide an immediate feedback loop for policy makers and administrators on the effectiveness of the new changes.

Attachment: Regulation Burden Measurement Report

Compliance cost report		
Proposal name	Addressing concerns about low volume exporters	
Reference number	22523	
Problem	Low volume exporters undermining remedial anti-dumping measures through reviews of measures	
Objective	Ensure anti-dumping measures are effective	
Explanatory information		
Not applicable		
Segments affected		
Business		
Option 1		
Option name	Option 1 - Make no change to the anti-dumping system, but greater use made of current discretionary powers	
Business affected	125	
Community affected	0	
Organisation units affected	0	
Average Annual Regulatory Costs (from Business as usual) – Change in costs ($millions)		
	Business	**Total change in Cost**
Total by sector	$0.379M	$0.379M
Option 2		
Option name	Option 2 - Introduce a retrospective dumping duty system	
Business affected	690	
Community affected	0	
Organisation units affected	0	
Average Annual Regulatory Costs (from Business as usual) – Change in costs ($millions)		
	Business	**Total change in Cost**
Total by sector	$2.113M	$2.113M
Option 3		
Option name	Option 3 - Legal certainty for methods to construct an export price	
Business affected	2	
Community affected	0	
Organisation units affected	0	
Average Annual Regulatory Costs (from Business as usual) – Change in costs ($millions)		
	Business	**Total change in Cost**
Total by sector	$0.002M	$0.002M
Notes		

1. An assessment of compliance costs in itself do not provide an answer to the most effective and efficient regulatory proposal. Rather, it provides information that needs to be considered alongside other factors when deciding between policy options.
2. Negative dollar figures present a cost saving.
3. If 'See PV' appears in a cell you can refer to the present value report for more information.