



**Australian Government**  
**Australian Customs Service**

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# **Australia's Anti-Dumping and Countervailing Administration**

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# **FOREWORD**

In this booklet the Trade Measures Branch of the Australian Customs Service (Customs) seeks to explain Australia's procedures and practices in relation to anti-dumping and countervailing action.

The term "dumping" is often used to refer to subsidy as well as dumping. For ease of reference, this booklet often uses this convention but has specific sections relating to subsidies and countervailing duties where these vary from the procedures covering dumping.

## **Role of Customs**

Customs has sole responsibility for investigating and reporting to the Minister on dumping matters. These investigations cover applications for new anti-dumping and countervailing measures; reviews or revocations of existing measures; dumping duty assessments; and applications for continuation of existing measures past the five-year sunset period.

In addition, Customs provides an advisory service - through the Dumping Liaison Unit - to assist all interested parties involved in dumping matters.

## **PART 1 – INTRODUCTION**

When an exporter sells a product to Australia at a lower price than the price charged in its home market, that exporter engages in a form of price differentiation known as "dumping". Anti-dumping remedies are available where the dumping causes or threatens to cause material injury to an Australian industry.

International trading conventions, in particular the World Trade Organization (WTO) Agreements, do not prohibit dumping but recognise that remedial action may be taken when dumping causes or threatens material injury to an industry within the country of import. Equally, Australia's legislation does not require that the commercial or other reasons for price differentiation be established. Rather, the objective is simply to identify if the goods are dumped; if any material injury has been caused (or threatened) to the Australian industry by that dumping; and, to provide a mechanism to remove the injurious effect of subsequent dumped imports.

Price differentiation in the form of dumping is a common international commercial practice that can be beneficial to both exporting and importing countries. An exporter will often experience greater price pressure on the export market as compared to its domestic market. It may also be striving to maintain or develop an export market. In these circumstances it is not uncommon for there to be lower prices in the export market than in the domestic or home market. Price differentiation on different markets is an everyday part of commercial practice. Dumping will often occur where competition on international markets is intense, and lower prices benefit consumers.

Similarly, the practice of governments providing assistance to domestic industry by way of subsidies or other financial assistance is not uncommon. Such subsidies can provide a benefit to a producer or exporter of the goods. Remedial action is available if subsidised exports cause or threaten to cause material injury to an Australian industry. Again, the question is not one of fairness, but of providing a remedy for injury caused by the subsidy.

The point is that there is nothing inherently illegal or immoral about the practices of dumping or subsidised assistance. However, where these cause or threaten material injury to a domestic industry, there are statutory remedies. In the case of injurious dumping, the remedy may be the imposition of a dumping duty. Countervailing duty is the duty imposed to redress the effects of injurious subsidisation.

## A short history

Legislative measures to counter dumping have operated since early this century. The first country to introduce anti-dumping legislation was Canada in 1904. Australia's legislation dates from the *Industries Preservation Act 1906*.

Internationally, no accepted rules operated to deal with dumping until the formation of the *General Agreement on Tariffs and Trade (GATT)* in the late 1940's. However, the initial GATT Agreement itself did not specify any procedures for imposing anti-dumping duties and this led to differences in the policies adopted by GATT members.

The start of the modern era in anti-dumping administration came with the Kennedy Round of trade negotiations (1964 - 1967). This produced a negotiated "Anti-Dumping Code" that set out the rules for the application of anti-dumping duties. An essential feature of the Kennedy Round on dumping was the obligation that national legislation be aligned with the requirements of the Code. Australia became a signatory to that Code in 1975.

The Tokyo Round of negotiations (1973-1979) revised the Anti-Dumping Code and also saw the introduction of a "Subsidies and Countervailing Duties Code". Australia became a signatory to the revised Anti-Dumping Code and the new Subsidies Code in 1979 and legislation was amended to reflect the provisions of those Codes.

During this time, Customs alone administered the anti-dumping legislation in Australia. Upon request, the Tariff Board (and later the Industries Assistance Commission) would review Customs' findings. In 1988, following a review of anti-dumping procedures, the Government established the Anti-Dumping Authority (ADA).

The GATT 'Uruguay Round' negotiations culminated in the creation of the WTO to replace the GATT in April 1994. On 1 January 1995 the Uruguay Round WTO changes to anti-dumping and countervailing procedures were incorporated into Australian law and administration.

Between 1988 and 1996 there were a number of Government reviews that led to significant changes to the legislation. The main changes included the introduction of statutory time-frames for investigations; a sunset clause limiting the duration of the measures; a new system for the collection of anti-dumping and countervailing duties; a reduction in the investigation period; and simplification of the two stage investigation system with the abolition of the ADA in 1998.

From 24 July 1998, Customs resumed sole responsibility for investigating and reporting on dumping matters.

## WTO agreements and Australian law

As a signatory to the WTO, and in accordance with our rights and obligations, Australia has enacted legislation based upon the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (generally referred to as the *Anti-Dumping Agreement*) and the *Agreement on Subsidies and Countervailing Measures* (the *Subsidies Agreement*).

Australia's *Customs Act 1901* sets out the general inquiry process and the *Customs Tariff (Anti-Dumping) Act 1975* provides for the imposition of anti-dumping and countervailing duties.

The legislation vests certain powers in the Minister and in the Chief Executive Officer of Customs. Where necessary, the powers of the Chief Executive Officer may be delegated. Customs makes decisions under the legislation listed above and in accordance with Australian domestic policies and procedures. Where disputes arise, an aggrieved party has certain administrative and judicial rights of review. For greater detail on the subject of appeals see Part 6 of this booklet - Reviews and Appeals.

In addition to the national coverage for reviews, where a member country of the WTO considers that actions taken by another member country are not in accordance with the terms of these Agreements, specific Dispute Settlement procedures have been set up within the WTO framework.

## **New Zealand goods**

Under the *Australia New Zealand Closer Economic Relations Trade Agreement* both countries have precluded anti-dumping action against goods which are the produce or manufacture of the other. However, countervailing action can be applied.

Although anti-dumping actions may not be taken against such goods from New Zealand, scope may exist for action under the *Trade Practices Act* in relation to Trans-Tasman misuse of power provisions. The Australian Competition and Consumer Commission should be contacted if further advice is required on this matter.

## PART 2 - THE FUNDAMENTAL CONCEPTS

### Dumping margin

The calculation of a dumping margin may be expressed as a simple mathematical equation. In a simple example it is the amount by which the normal value of the goods exceeds the export price i.e. dumping margin equals the normal value minus the export price.

The terms 'normal value' and 'export price' are explained further below.

In mathematical terms:

$$DM = NV - EP$$

or if expressed as a percentage:

$$DM = (NV - EP)/EP$$

The dumping margin is established on the basis of a comparison of either:

- a weighted average of export prices with a weighted average of corresponding normal values over the investigation period, or
- the export prices with the corresponding normal values on a transaction-to-transaction basis, or
- in some circumstances, a mixture of the above treatments.

### Export price

#### The Price Paid or Payable

The export price is usually the amount that the importer has paid or is to pay to the exporter for the goods, excluding any post exportation charges such as ocean freight and overseas insurance. To establish export prices, Customs investigates the transaction price and contractual arrangements between Australian importers and overseas exporters.

#### Alternative Methods of Calculation

Sometimes, examination of an importer's records indicates a loss is being made on the resale of the allegedly dumped goods in Australia. This is known as 'sales dumping'. In this case, or if the transactions are found to be non arms length (see below), a 'deductive export price' may be determined and used instead of the export price established for the 'transaction price'.

An example of the calculation of a deductive export price is as follows:

Australian selling price of imported goods	=	190
<i>less</i>		
All costs incurred after export, (eg. customs duty, goods and services tax, selling and administration expenses including a reasonable profit)	=	<u>90</u>
<i>equals</i>		
Deductive export price	=	100

It may also be that insufficient information is available to enable a determination on the above basis. In these cases, the export price of the goods is determined by the Minister having regard to the circumstances of the exportation and/or whatever relevant information is available.

Note : A sale is not at arms length if:

- there is any consideration payable for the goods other than their price; or
- the price is influenced by a commercial or other relationship between the buyer and the seller; or
- the buyer receives reimbursement, compensation or benefit for, or in respect of, the whole or any part of the price in certain circumstances. (However, the Minister may ignore rebates that are of long standing).

## **Normal value**

### **Domestic Sales**

Usually the normal value is based on the price paid (or payable) for like goods sold in the domestic market of the country of export - either by the exporter or by other sellers of the goods. For a domestic selling price in the country of export to be accepted as the normal value, the sale needs to be at arms length and in the ordinary course of trade.

Sales will be taken to have not been made in the ordinary course of trade if:

- the selling price for a substantial quantity (taken as 20%) of the goods has, for an extended period of time (usually twelve months), been less than the cost to make and sell the goods; and
- it is considered that the cost will not be recovered within a reasonable period of time.

### **Alternatives to Domestic Sales**

If suitable domestic sales are not available, or it is not practical to obtain information on such prices, then alternatives exist to assess normal value. Also, if there are suitable domestic sales but these are not considered relevant because of other reasons, such as the volume being too low to permit a fair comparison, then alternatives may be used. In these circumstances determination of the normal value may be based upon:

- a representative price for like goods sold in the ordinary course of trade, in arms length transactions, for exportation from the country of export to an appropriate third country; or
- the cost to make and sell the exported goods i.e. the production costs of the goods, delivery charges and other costs necessarily incurred. A profit margin may be incorporated in this constructed cost. However, if the reason for using the cost to make and sell option is the result of sales not being in the ordinary course of trade, then no profit margin is added.

Circumstances may also arise, usually because of insufficient or unsuitable information, where the above methods cannot be used to assess a normal value. When this occurs, the normal value is determined having regard to all relevant information and may at times be based upon the information supplied by the Australian industry in its application for anti-dumping measures.

### **Non-Market Economies**

The WTO recognises that special difficulties may exist in assessing the normal value of goods in a country that has a non-market (or centrally planned) economy. The Australian legislation incorporates this provision by providing alternative methods for assessing normal values for countries in which Government involvement in the economy satisfies both the following criteria:

- the Government has a monopoly, or substantial monopoly, of the trade of the country; and
- the Government determines or substantially influences the domestic price of goods in that country.

These criteria refer to trade in goods in general, not only the goods subject to a dumping application.

Where these criteria are met, the normal value is ascertained in accordance with whichever of the following is considered most appropriate:

- a value of like goods sold in another (or surrogate) country in the ordinary course of trade and at arms length;
- a value of like goods sold by the surrogate country to another country in the ordinary course of trade and at arms length;
- a value equal to the cost to make and sell like goods in the surrogate country, including any determined profit rate; or
- a value of like goods produced and sold in Australia in the ordinary course of trade and at arms length.

## Economies in Transition

Where a country is in the process of transition from a non-market to a market economy, the Australian legislation permits an alternative approach to determining normal values.

In an economy in transition, there may be moves to a market economy in some sectors but the government may still have considerable control over the domestic price of certain goods in other sectors. This would make it inappropriate to determine normal values for those goods as if the country were a true market economy. An assessment of the influence or control a government has over domestic selling prices and the method used for determining normal values is made on a case-by-case basis.

Customs may use alternative methods for calculating normal values in an economy in transition when the country no longer has a centrally planned economy, and either of the following two circumstances exist:

- it is established that the domestic selling price of like goods is subject to a price control situation; or
- a raw material input to the manufacture of the exported goods, that accounts for more than 10% of the costs of production, is supplied by a state wholly owned enterprise.

Where the goods are subject to price control, the normal value may be determined having regard to all relevant information including the normal value options used for a non-market economy.

For those cases where the raw material is supplied by a state wholly owned enterprise, a substitute raw material cost may be used in the calculation of the normal value. The method of determining the substitute raw material cost will depend on the circumstances of each case.

The legislation provides for the substitute raw material cost to be based on one of the following options:

- the raw material price in the domestic market of a surrogate country;
- the raw material export price from a surrogate country to an appropriate third country;

- the cost to make and sell the raw material in a surrogate country; or
- the selling price of the raw material in Australia.

The normal value for goods that are found to incorporate raw materials from a state wholly owned enterprise may be determined having regard to all relevant information. This can include the sum of:

- the cost of the substitute raw material;
- the actual costs of production of the exported goods (excluding the actual costs for the affected raw material); and
- the administrative, selling and general costs and profit associated with the export sale.

## Adjustments

Whatever method is used to determine the normal value and export price, there are often differences between the normal value and the export price that can affect a fair comparison of these two components.

An adjustment may be made where there is sufficient evidence that the normal value and the export price:

- relate to sales occurring at different times; or
- are not in respect of identical goods; or
- are modified in different ways by taxes or the terms or circumstances of the sales to which they relate.

Commonly, differences in circumstances of sales occur where the supplier of the goods incurs certain costs on the domestic market which differ from the costs incurred on the export market. These could relate to matters such as credit terms, distribution, technical specifications, advertising or warranty costs. In such cases, it is the responsibility of the exporter to provide sufficient evidence to identify the difference and to quantify the amount involved.

Where differences are identified and sufficient evidence is available, adjustments are included in the assessment of the normal value to ensure that a fair comparison is made with the assessed export price. These adjustments, also known as "due allowance", may lower or raise the normal value.

## Effect of exchange rates

Sometimes export prices are in a currency other than that of the exporting country. To ensure comparability it is necessary to convert the prices to a single currency using rates of exchange appropriate to the transactions under consideration. Official exchange rates on the date of sale, or the forward exchange rate negotiated for the sale, are often used for this purpose. However, there are provisions to enable short term price fluctuations to be disregarded, and to enable exporters a 60 day period to adjust prices in the light of sustained exchange rate movements.

## Subsidies

Where the payment of certain subsidies by a foreign government for the production of goods causes material injury to an Australian industry when those goods are exported to Australia, offsetting import duties - known as countervailing duties – may be imposed. These countervailing duties are designed to provide a remedy for the Australian industry producing like goods to compete with those goods exported at prices that reflect the benefit of foreign government assistance.

## Countervailable Subsidy

In general terms, to be subject to countervailing duties, a subsidy must comply with the legislative definition; be “specific”; and not be an “excluded” subsidy.

The identification of countervailable subsidies is particularly complex, and much of the necessary analysis may not be finalised prior to initiation of an investigation.

## Definition of a Subsidy

In order for a subsidy to be countervailable, it must be a financial contribution by the foreign Government or an agency entrusted to carry out a government function. It must also convey a benefit directly or indirectly to the manufacturer of the goods either through the transfer of funds; revenue forgone; the provision of Government goods or services; or purchases of the goods by the Government. The final outcome of the subsidy must be to provide a quantified benefit to the recipient.

## Specific Subsidies

A "specific" subsidy is one that is:

- only available to particular enterprises; or
- only available to particular enterprises within a designated geographical region; or
- related to export performance; or
- related to the use of domestically produced or manufactured goods in preference to imported goods.

## Excluded Subsidies

Specific subsidies that are excluded from countervailing action include those providing assistance for research activities; assistance for disadvantaged geographic regions; assistance to update facilities to meet new environmental requirements; or a measure that meets certain specified criteria of the *WTO Agreement on Agriculture*.

## Material injury

The Australian Government will only take action against dumped or subsidised goods that cause, or threaten to cause, material injury to an Australian industry producing like goods. There must be a direct and identifiable relationship between the impact of the dumped goods on the Australian market and any alleged material injury suffered by, or threatened to, the Australian industry.

Customs assesses the economic factors that are affecting the performance of the Australian industry in order to identify the injury caused by dumping. Circumstances may arise where an industry is suffering injury that may not be caused by exports at dumped prices. Injury from other factors must not be attributed to dumped imports. The prime concern, when contemplating anti-dumping action, is whether the indicators of injury are present because of dumped goods.

The injury is assessed across the total Australian industry and not on a company specific basis.

Action may also be taken where dumped or subsidised goods hinder the establishment of an Australian industry. This booklet does not address this situation and it is suggested that contact be made with the Dumping Liaison Unit if further information is required on this aspect.

## Indicators of Injury

Injury is demonstrated in several ways but is generally categorised into loss of sales volume, loss of market share and/or reduction in profits.

Evidence of volume injury can be shown either by a loss of sales volume or through a loss of market share.

A material reduction of profits and profitability of an Australian industry is identifiable through company accounts. The reduced profits may result from downward pressure on prices, reductions in sales volumes or the inability to pass on increased costs.

## Volume Effects

In assessing the volume effects it is normal to consider the case in both absolute and relative terms. The situation may arise where sales across the total market remain static, however, the sales by the domestic industry fall and correspondingly the market share held by the Australian industry falls.

Injury, in volume terms, may also be sustained where the total sales volume by the Australian industry remains constant, but due to an expansion of the overall market the relative market share of the Australian industry decreases.

In both instances the domestic industry may have suffered injury, but that of itself will not determine if the injury is caused by dumping.

## Price Effects

In examining pressure on prices it is usual to examine if the price of imported goods is less than the selling price of Australian goods. Frequently the Australian industry reduces its prices in response to price reductions of the imported goods. Alternatively, a price reduction by the Australian industry may precede the decline in import prices. In such cases additional evidence would be needed to show that dumped imports were the cause of the price reduction, i.e. that dumped prices were anticipated and a consideration in the price reduction.

Pressure on prices can arise from a number of causes including the actions of Australian competitors and these factors also need to be examined.

## Other Indicators

In conjunction with the key indicators outlined above, investigations may consider a range of other injury indicators including:

- employment and wages;
- production levels;
- capacity utilisation;
- forward orders;
- return on investment;
- cash flow;
- ability to raise capital;
- investment; and
- increased inventory holdings (stock levels) caused by decreased sales volumes and pricing pressures.

This list is indicative and other special factors peculiar to a particular industry could also arise.

## Overall Assessment

When considering material injury, other factors which may be affecting the Australian Industry are also considered, for instance:

- the volume and prices of imports not sold at dumped prices;
- contraction in demand or changes in the patterns of consumption;
- trade restrictive practices of and competition between the foreign and domestic producers;
- developments in technology; and
- the export performance and productivity of the Australian industry.

A criticism levelled at dumping investigations has been the difficulty in quantifying material injury. The word "material" in any context requires that a judgement be made based on a weighing of the facts. Materiality does not require that a specific threshold be reached.

A Ministerial Direction given on this point in 1990 describes "material" as injury greater than that likely to occur in the normal ebb and flow of business. The Minister also indicated that material injury to an Australian industry would usually involve (or threaten) either a "material" loss of profits or of market share caused by dumped exports.

The Minister also wrote to Customs in December 1991 suggesting that particular issues be considered when assessing material injury. The advice focused on the following aspects of injury:

- the greater impact of injury during periods of economic downturn;
- regional dumping;
- reduced rates of growth as an element of injury; and
- threat of injury.

## Threat

Consideration of a threat of material injury is not required in those cases where material injury is being suffered by the Australian industry. It is only where the injury is considered to be prospective that the concept of a threat of material injury needs to be addressed.

A determination of threat of material injury is subject to stringent tests and a totality of factors must lead to the conclusion that because of the exportation of dumped goods:

- a change (or changes) in circumstances make any threat of injury foreseeable and imminent, and
- any injury threatened is material.

When examining evidence on the threat of material injury, consideration may be given to a range of factors including:

- a significant rate of increase of dumped imports into the Australian market indicating the likelihood of substantially increased importation;
- sufficient freely disposable, or an imminent and substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the Australian market, taking into account the availability of other export markets to absorb any additional exports;
- whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- inventories of the product being investigated.

# **PART 3 - APPLICATION AND INQUIRY PROCEDURE**

## **Details needed in an application**

Where an Australian industry is of the view that dumping is causing (or threatening) material injury, an application may be made to Customs for the imposition of measures to redress the situation.

Any person may lodge an application for the imposition of measures, provided that an application is made on behalf of the industry producing like goods to those allegedly being dumped or subsidised. Where there are a number of manufacturers, each may lodge an application. Any application for the imposition of duties requires support from specified threshold levels of the total local industry. Part 5 of this booklet gives details on industry support.

An application must also provide information and sufficient supporting evidence to:

- identify the dumped goods;
- identify "like goods" (see Part 5);
- identify the country of export;
- identify the relevant Australian industry;
- estimate normal value and export price and hence show that the goods have been dumped;
- indicate the material injury that the industry has suffered, or is likely to suffer; and
- demonstrate how the dumped goods have caused, or are likely to cause, that material injury.

There are minor differences in the information requirements in an application for countervailing duties. Because normal value is only relevant to dumping, an application solely alleging subsidisation may not need to show a normal value for the goods. Instead, the application needs to indicate how the subsidy operates and a calculation of the subsidy in terms of the net benefit to the recipient.

Where the applicant claims that goods are both dumped and subsidised, the application must provide evidence of both.

Applications must be lodged in both confidential and non-confidential formats.

Application forms are available from the Dumping Liaison Unit of Customs in Canberra (for contact details see Attachment 1) and on the Customs website at [www.customs.gov.au/webdata/resources/files/b108.pdf](http://www.customs.gov.au/webdata/resources/files/b108.pdf)

## **Consideration of an application**

Upon receipt of an application, Customs will undertake an initial examination to determine if a *prima facie* case exists for the initiation of an investigation. The legislation specifies that Customs complete this examination within 20 days. During this time the merits of the application and any other information considered relevant to the particular case are assessed.

Customs rejects applications that do not meet the necessary criteria for initiation. Those applications are returned to applicants together with reasons for the rejection.

The procedure for a countervailing investigation differs from a dumping case in that 15 days prior to the date of possible initiation the Government of the exporting country is advised of the nature of the complaint. The Government is also offered the opportunity for consultations with the aim of arriving at a mutually agreed solution to the matter. If consultations do not resolve the issues surrounding the allegation of subsidy, the investigation proceeds along similar lines to those established for an anti-dumping application.

Until the formal notification of an initiation of an investigation is published, Customs can

neither confirm nor deny the existence of an application. This ensures that the confidential commercial interests of local manufacturers, exporters and importers are safeguarded.

## **Initiation and investigation**

When Customs initiates an investigation, public notification is made in the Commonwealth of Australia Gazette and a national newspaper, usually the Australian Financial Review. Customs also issues an Australian Customs Dumping Notice (ACDN) to explain procedures and time frames for the investigation.

The public notification of an investigation by Customs invites submissions from all interested parties. In addition, Customs directly contacts known interested parties inviting submissions. These submissions must be lodged with Customs within 40 days of the publication of the initiation notice. Any submission not received within the 40 day period may be disregarded.

Legislation requires that all interested parties (including the applicant) provide submissions in two versions. The first is a confidential version which Customs uses in its investigation. The second is a non-confidential version which is accessible to all interested parties through a Public File held at Customs House, Canberra.

Following receipt of the submissions, Customs investigates and verifies the information. Visits may be made to importers, exporters and manufacturers to examine company records relevant to the investigation.

Provisional measures (in the form of securities) can apply from 60 days after an investigation has commenced. However, securities will only be imposed where there is sufficient verified information that material injury is being caused by dumping and that such action is necessary to prevent further injury being caused during the investigation. The imposition of securities will be accompanied by a Preliminary Affirmative Determination that states the reasons for the action.

Under the legislation, Customs has up to 110 days from the date of initiation to complete its investigation and publish a detailed Statement of Essential Facts. There is provision for the time period to be extended by the Minister should that be considered warranted by the circumstances. Any extension of the investigation period would be publicly notified.

The Statement of Essential Facts summarises the outcome of the investigation and forms the basis of the final finding report to the Minister. It will address whether:

- the goods are dumped;
- the Australian industry has suffered, or is likely to suffer, material injury; and,
- the dumping causes or threatens that material injury.

Exporters, foreign manufacturers, importers and the local industry have 20 days from the publication of the Statement to lodge a response on matters of concern. Any submission received after 20 days may be disregarded.

## **Final finding report**

After consideration of the submissions received, Customs must complete a final finding report to the Minister within 155 days of commencing the investigation. The report will contain conclusions and recommendations based on the investigation.

On the basis of Customs' report, the Minister will make a decision as to whether anti-dumping action should be taken. If dumping duties are to be imposed, Customs is responsible for the arrangements.

# PART 4 - ANTI-DUMPING AND COUNTERVAILING MEASURES

## Provisional measures

Although Customs may impose provisional measures in the form of securities against dumped goods from day 60 of an investigation, this will only occur where there is sufficient verified information to support such action. The provisional measures take the form of a security that importers are required to lodge with Customs when the goods are entered for home consumption in Australia.

For dumping cases, the security taken is the difference between the normal value and export price of the goods as determined by Customs during its investigation. For example, if the normal value of a product is \$12 and the export price established during the inquiry is \$9, the security is \$3. That security of \$3 will be collected on each unit entered for home consumption for the period during which the provisional measures apply. Should the export price drop below \$9, then additional securities would be imposed to cover such a reduction.

For countervailing cases, the amount of the security is based on the subsidy benefit provided to the manufacturer of the goods in the exporting country.

## Final measures

In its final finding report to the Minister, Customs may recommend that the Minister publish a notice declaring that goods have been dumped and, because of that, injury has been caused to the Australian industry. Customs will then also recommend what final measures should apply.

These measures can take the form of an interim anti-dumping or countervailing duty. As an alternative, either during the course of an investigation or at its completion, Customs may recommend that the Minister accept an undertaking by the exporter (see below).

An interim anti-dumping duty can comprise two parts. The first represents the dumping margin found by the inquiry. The second is applied in circumstances where the actual export price of a particular later consignment is less than the export price found by the inquiry (referred to as the ascertained or threshold export price). In this situation, the dumping margin is taken to have increased and the duty payable will include an amount representing the difference between the ascertained and actual export prices.

The practical application of the interim anti-dumping duty may be expressed as follows:

Interim duty payable equals

the amount representing the dumping margin, i.e. the difference between the normal value and export price at the time of inquiry:

ascertained NV	=	\$100/tonne
ascertained EP	=	<u>\$ 80/tonne</u>
difference	=	\$ 20/tonne

and the amount representing the difference between the ascertained export price and the actual export price:

ascertained EP	=	\$80/tonne
actual EP	=	<u>\$70/tonne</u>
difference	=	\$10/tonne

Thus the interim anti-dumping duty payable for this shipment would be \$30/tonne.

The duty is imposed at the determined level on each consignment entered for home consumption after the publication date of the Minister's decision.

Any amounts secured by Customs as provisional measures may be converted to interim duty subsequent to the publication of the Minister's decision to impose interim duties. This is subject to the following limitations:

- if the interim duty imposed is greater than the amount secured, the shortfall will not be called up; and
- if the amount secured is more than the interim duty, the excess amount will be returned to the importer when Customs finalises the security.

In the case of a negative final finding, any securities are refunded or lapse.

## **Non-injurious price (NIP)**

Provision exists for final duty rates or undertaking levels to be less than the dumping margin, or amount of subsidy, if that amount is sufficient to remove the injury to the Australian industry.

Recommendations in regard to NIPs are part of the final finding report by Customs. NIPs are considered by the Minister when deciding what level of duty to impose. However, it is not a mandatory requirement that a lower level than the full margin of dumping, or amount of subsidy, be imposed. Imposition of a lower level remains at the discretion of the Minister. This is not a consideration at the time of collecting provisional measures pending the final decision by the Minister.

To assess a NIP, it is first necessary to determine an unsuppressed selling price (USP). This is the price at which the Australian industry might reasonably expect to sell its goods in the Australian market, if prices in that market were not affected by the dumped imports.

One way of determining a USP is to look at prices achieved in the Australian market before injurious dumping commenced. The NIP would then be obtained by subtracting from the USP:

- expenses incurred in Australia;
- Customs duty and goods and services tax;
- expenses incurred in importing the goods into Australia;
- selling expenses; and
- an amount for profit in Australia.

Alternative methods for assessing a USP may be to consider the Australian industry's costs to make and sell plus a margin of profit, or the price of undumped goods from other countries. The effect of using a NIP for duty collection can be seen by using the figures from the previous example:

NV	=	\$ 100/tonne
NIP	=	\$ 85/tonne
EP	=	\$ 80/tonne
NV - EP	=	\$ 20/tonne
NIP - EP	=	\$ 5/tonne

In this case, instead of collecting the full margin of \$20/tonne, the Minister may impose an interim anti-dumping duty of only \$5/tonne.

## Assessment of final duty liability

In order to ensure that the final anti-dumping duty collected by Customs does not exceed the actual dumping margin for shipments, provision also exists for the assessment of a final duty liability. This system allows for the amount in excess of the net dumping duty liability to be reimbursed.

Reimbursement is not automatic and the interim duty imposed at the time of entry for home consumption will be the total duty payable unless an importer applies for an assessment of the final duty liability. Any application by an importer for final dumping duty assessment needs to be supported by sufficient evidence of contemporary export prices and normal values for the period concerned. Applications that omit this information will not be accepted by Customs for final duty liability assessment.

## Application for final duty liability assessment

On imposition of final measures, and for successive six monthly periods ('importation periods') commencing on the date of publication of the Minister's notice, importers can apply for the assessment of a final level of anti-dumping duties payable i.e. a claim that the level of interim anti-dumping duty was incorrect.

The time frames for such assessments are fixed by legislation and may best be explained by the following table:

Provisional measures imposed	Final measures imposed (published)	Period of assessment	Latest date for application
23 July 1997	15 October 1997	23 July - 14 October 1997	14 April 1998
		15 October 1997- 14 April 1998	14 October 1998
		15 April -14 October 1998	14 April 1999

Applications for final dumping duty assessment must include:

- information on each consignment of the particular goods made by an importer over the importation period;
- details of the amount of interim duty paid on each consignment;
- the amounts the importer contends are the export price and normal value applicable to each consignment, and the information used by the importer to establish those amounts; and
- a statement of the amount by which the total interim duty paid exceeds the total duty payable on all consignments during the subject investigation period.

Applications will only be considered where it is claimed that the total amount of duty payable on all consignments entered in an investigation period is less than the total amount of interim duty paid. This means that if there are five consignments entered in a particular period, and the total amount of interim duty is \$5000, it is necessary for an applicant to have a supportable claim that the total actual duty payable on those five consignments is less than \$5000.

Customs has 155 days to consider applications. Where satisfied that the total interim duty paid exceeds the total duty assessed, Customs will recommend to the Minister that the excess duty be reimbursed. Where Customs considers a lesser amount is to be reimbursed than that claimed by the importer, the importer is advised of the Customs decision. The importer has up to 30 days to seek a review of the decision by the TMRO (refer to Part 6 for further details).

If an application is lodged for final assessment and it is decided by the Minister that the total duty payable exceeds the total interim duty paid, then the additional duty payable will not be collected.

If no application for assessment of final duty is received from an importer by the expiry of the relevant period, the amount of interim duty paid will be taken to be the proper amount of duty payable.

## **Review of interim duty**

Recognising that factors affecting the dumping margin may change over time, an interested party may apply to Customs for a review of the normal value, export price and/or the non-injurious price.

Unless specifically requested by the Minister, reviews will not normally be considered until an interim duty rate has been in place for a minimum period of twelve months. Subsequent requests for review will (again subject to Ministerial request) be considered at twelve monthly intervals from notification of the decision on any previous review.

Where, following a recommendation by Customs, the Minister decides that a change should be made, the new prospective interim duty rate will take effect from the date on which notification of the change is published.

## **Price undertakings**

As an alternative to the imposition of duties the Minister may accept a written undertaking from an exporter to conduct future export trade to Australia in such a manner that injury will not be caused to the Australian industry.

Where such an undertaking is accepted, the exporter may request (or the Minister may direct) that the inquiry nonetheless be completed. The Minister would be obliged to then make a determination of dumping, injury and causal link. If, as a result of this consideration, it is decided that anti-dumping duties would not have been imposed, then the undertaking automatically lapses.

## **Exemptions from anti-dumping duties**

Under certain conditions the Minister may exempt goods from anti-dumping measures. Reasons for such exemption include:

- like goods are not offered for sale to all purchasers under the same terms and conditions of sale. In such circumstances, the Minister must consider the custom and usage of trade before making an exemption;
- that a Tariff Concession Order is in place in respect of those goods; or
- that the goods, being articles of merchandise, are for use as samples for the sale of similar goods.

## **Sunset clause - life of measures**

Duties and undertakings have a life of five years unless revoked earlier. This time limit reflects the intent that anti-dumping measures not become a form of ongoing assistance to industry. It is also a requirement that measures remain in force only as long as is necessary to redress injurious dumping.

Provision does exist whereby consideration will be given to extension of measures for a period beyond five years. In all cases - but not later than nine months before the end of the five year

period - Customs must publish a notice inviting interested parties to apply for an extension of the measures. Interested parties have 60 days to make this application and provide the information requested in the approved form. Where a valid application is lodged, Customs then has a further 155 days to make inquiries and report to the Minister. If the Minister accepts a recommendation that measures should continue, measures may then remain in force for a further period of five years.

## **Revocation of measures**

An importer, exporter or the Australian industry may request that the Minister revoke anti-dumping or countervailing measures if they have grounds to believe the measures are no longer appropriate. Such an application can be made at any time after the Minister's decision has been published. Requests for revocation need to demonstrate that there would not be a recurrence of dumping that would lead to material injury to the Australian industry.

It has only been in exceptional circumstances – such as the demise of the Australian industry or the cessation of a subsidy – that measures have been revoked in the past. Customs anticipates that measures would normally apply for the legislated five year period unless exceptional circumstances arise.

## PART 5 - RELATED PROVISIONS

### Like goods

The Australian legislation makes various references to "the" goods and "like" goods. "The" goods are those exported to Australia and alleged as being the cause of material injury to the Australian industry.

"Like" goods are those produced by the Australian industry. The term also refers to goods which are sold on the domestic market in the exporting country, or those which may be exported to Australia in the future. Section 269T of the *Customs Act 1901* defines like goods as:

"goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration."

An Australian industry can get relief from injury caused by dumping even if the goods it produces are not identical to those being dumped. The industry must however, produce goods that are "like" to the dumped goods.

It is most important that applicants clearly identify the goods that are the subject of their application. For example, there may be different grades, models or technical specifications within a particular product range.

Issues relating to like goods are often complex and frequently open to debate. The following example may illustrate some of the difficulties:

Polyvinyl chloride (PVC) film grade *might* not be like goods to PVC pipe grade as the two products are not interchangeable. In this instance while both products are PVC, it is not possible to use pipe grade product to make film and film grade product is unsuitable for use in pipe forming.

### Australian industry

An application for anti-dumping action must include evidence to support the claim that an Australian industry is being materially injured by dumping or subsidisation.

The Australian industry comprises all producers of like goods wholly or partly manufactured in Australia. The only exception occurs where the like goods are considered to be close processed agricultural products. In which case the Australian industry also includes the producers of the raw agricultural goods.

To proceed to a formal investigation stage an application needs to be supported by a sufficient section of the Australian industry producing like goods to the imported goods. The application needs to be supported by Australian producers whose collective output comprises:

- 25% or more of the total Australian production of the like goods; and
- more than 50% of the total production of like goods by those Australian producers that have expressed either support for (or opposition to) the application.

For Customs to be satisfied that the Australian industry *produces* such goods, evidence is required that at least one substantial process in the manufacture of the goods is carried out in Australia.

## Agricultural products

Only when dumping of like goods causes material injury to the Australian industry can action be taken. Where the Australian produced goods are "close processed agricultural products", the Australian industry will include the producers of the raw agricultural product. However, this can only occur where a number of legislated conditions are met.

For a dumping application concerning, for example, packaged processed sugar, the conditions required to include the sugar cane growers in the Australian industry would be

- that the sugar cane produced in Australia is grown substantially or completely for the processed sugar market; AND
- that the processed sugar is derived substantially or completely from sugar cane; AND
- EITHER there is a close relationship between the price of the sugar cane and the processed sugar;
- OR the cost of the sugar cane comprises a significant part of the production cost of the processed sugar.

If these criteria are met, then the Australian industry is considered to include the producers of the raw product (sugar cane) as well as the producers of the close processed agricultural product (processed sugar). Material injury is assessed in terms of the producers of the raw and the processed products.

## Terminations

An application shall be rejected or an investigation be terminated promptly where the authorities determine that:

- the margin of dumping or level of subsidy is *de minimis*;
- the volumes of dumped or subsidised imports are negligible; or
- the injury is negligible.

The margin of dumping is considered *de minimis* if it is less than two per cent (when expressed as a percentage of the export price).

The volume of dumped imports from a particular country will be regarded as negligible if it accounts for less than 3% of total imports of like goods into Australia. However, if dumped imports from individual countries (each accounting for less than 3% of total imports from all sources) collectively account for more than 7% of the total, they will not be regarded as 'negligible'.

In contrast to the *de minimis* level for dumping margins, the amount of a subsidy shall generally be considered *de minimis* where it is less than 1% of the FOB export price. Certain concessions have been made in this area for developing countries and the relevant *de minimis* thresholds for those countries are:

- developing countries - if the subsidy does not exceed 2%; and
- least developed countries - if the subsidy does not exceed 3%.

The general negligible volume thresholds for subsidy levels reflect those for dumping. However, concessions have also been granted for developing countries. The volume of subsidised imports from a developing country will be regarded as negligible if that volume accounts for less than 4% of total imports of like goods into Australia. However, if subsidised imports from those countries that individually account for less than 4% collectively account for more than 9% of the total imports, they will not be regarded as 'negligible'.

## Cumulation

In assessing the injury that may be caused by dumped imports from multiple countries, the effect may be considered of all the imports as one entity. This practice is referred to as cumulation. The key factor in cumulation is that it is not required that imports from each country need to be found to be individually causing 'material' injury.

Cumulation of imports may occur only when it is determined that it is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

For example, consider an investigation of tyres imported from a range of countries. In such a case, if certain countries only supplied truck tyres and other countries supplied passenger car tyres, then a cumulation of all sources may not be appropriate. It may be more appropriate to cumulate all sources of truck tyres in one group, and all sources of passenger car tyres in another group. Then two separate findings of material injury would be required.

## **PART 6 - REVIEWS AND APPEALS**

A dumping inquiry is a progression of investigative stages, each of which is finalised by a decision. Avenues of appeal exist where interested parties may request a review of any of those decisions.

### **Trade Measures Review Officer**

A specialised independent body, the Trade Measures Review Officer (for contact details see Attachment 1), has responsibility for undertaking reviews of specific decisions in the dumping process. The TMRO has no investigative function and will not gather new information.

The various stages at which a request for review may be made are set out below.

### **Rejected application**

If Customs rejects an application and thus does not initiate an investigation, the applicant has 30 days in which to lodge an appeal with the TMRO for a review of Customs' decision. The TMRO is limited to the information that was available to Customs at the time of its investigation and must reach a decision within 60 days of receipt of the application.

Should the TMRO overturn Customs' decision, the application is referred back to Customs to formally initiate an investigation.

### **Final finding**

Interested parties have up to 30 days to lodge an appeal with the TMRO against the Minister's decision following consideration of Customs' final finding report. An appeal will only be accepted where the appellant can establish grounds upon which reconsideration of the final decision would be warranted. Where accepted, a public notice of the appeal will be published.

Parties have 30 days to lodge submissions in response to the notice of appeal. Submissions may only comment on matters raised in the notice of appeal. New information will not be considered. The review assesses the claims made in the notice of appeal on the basis of the information obtained during Customs' investigation.

The appeal body has no power to overturn a final finding decision and may only recommend action to the Minister. Where the TMRO recommends that an aspect be further considered, the Minister may refer the matter to Customs for investigation and report within a specified period.

The review must be completed within 60 days of public notification of the appeal.

After consideration of Customs' report, the decision of the Minister must be advised by public notice.

### **Terminations**

If Customs terminates an investigation prior to reaching a preliminary finding, on the basis of *de minimis* margins or negligible volumes, the decision may be appealed within 30 days to the TMRO. The TMRO has 60 days in which to consider the appeal and make a decision.

The TMRO is limited to information that was available to Customs at the time of its investigation. If the Customs' termination decision is revoked, Customs must resume the investigation and publish a Statement of Essential Facts as soon as practicable.

## **Duty liability assessment**

Applicants for an assessment of duty liability are formally notified by Customs of the amount to be recommended to the Minister for consideration. In cases where the recommended amount to be repaid is less than that contended by the applicant, the notification also contains an explanation of the reasons for the difference. The applicant has a right to seek a review of this matter by the TMRO.

An applicant has 30 days, from the day of notification of the Customs assessment decision, to seek such a review. The TMRO then has 60 days to complete the review. In this review the TMRO is limited to information that was available to Customs at the time of its decision.

Where a dumping duty assessment decision of Customs is revoked, the TMRO must recommend within 7 days that the Minister give effect to that decision.

## **Federal Court action**

As well as the above avenues of appeal, legal challenge may be made against many of aspects of the process including:

- the decision by Customs to accept and initiate an application;
- the final finding by Customs;
- terminations by Customs; and
- the TMRO's finding on dumping duty liability.

Challenges are made by way of application to the Federal Court of Australia, principally under the *Administrative Decisions (Judicial Review) Act*.

Parties who challenge decisions by Customs can only challenge on points of law. It is not possible to dispute matters of fact.

# **ATTACHMENTS**

## **Attachment 1: Contact points**

### AUSTRALIAN CUSTOMS SERVICE

Director Dumping Liaison Unit  
Australian Customs Service  
Customs House  
5 Constitution Avenue  
CANBERRA CITY ACT 2601  
Telephone (02) 6275 6066  
Facsimile (02) 6275 6888  
Internet: [dumping@customs.gov.au](mailto:dumping@customs.gov.au)

### TRADE MEASURES REVIEW OFFICER

Trade Measures Review Officer  
Trade Measures Review Secretariat  
Robert Garran Offices  
National Circuit  
BARTON ACT 2601  
Telephone (02) 6250 6220  
Facsimile (02) 6250 5914

## Attachment 2 Diagram of a dumping investigation

### Process for Considering an Application for the Imposition of Anti-Dumping Measures

