



**Australian Government**  
**Australian Customs and  
Border Protection Service**

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**INVESTIGATION OF THE ALLEGED DUMPING AND  
SUBSIDISATION OF BIODIESEL**

**EXPORTED TO AUSTRALIA FROM  
THE UNITED STATES OF AMERICA**

**PRELIMINARY AFFIRMATIVE  
DETERMINATION NO.163**

**October 2010**

# PUBLIC RECORD

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## ABBREVIATIONS

ACDN	Australian Customs Dumping Notice
Australian industry	the Australian industry producing biodiesel
BPL	Biodiesel Producers Ltd
CEO	Chief Executive Officer of Customs and Border
CTMS	cost to make and sell
Customs and Border Protection	Australian Customs and Border Protection Service
FOB	free on board
Minister	Minister for Home Affairs
NIP	non-injurious price
PAD	preliminary affirmative determination
Tariff Act	<i>Customs Tariff Act 1995</i>
the Act	<i>Customs Act 1901</i>
the goods	the goods the subject of the application
USP	unsuppressed selling price

## 1. INTRODUCTION

On 31 May 2010, an Australian biodiesel manufacturer, Biodiesel Producers Ltd (BPL) lodged an application with the Australian Customs and Border Protection Service (Customs and Border Protection) under section 269TB of the *Customs Act 1901* (the Act)<sup>1</sup> for the publication of dumping and countervailing duty notices in respect of biodiesel exported to Australia from the United States of America (USA).

Following an examination of the application, the delegate of the Chief Executive Officer of Customs and Border Protection (CEO) decided not to reject the application. Investigations into the alleged dumping and subsidisation commenced on 22 June 2010. A notice was published in *The Australian* on 22 June 2010. Australian Customs Dumping Notice (ACDN) 2010/21 contains further details about the investigation.

The investigation period, used to determine whether dumping and subsidisation has occurred, is from 1 April 2009 to 31 March 2010. Customs and Border Protection is examining the Australian market and the economic condition of the industry from 1 July 2007 for the purposes of assessing injury to the Australian biodiesel industry.

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<sup>1</sup> References to any section or subsection shall be references to sections or subsections of the *Customs Act 1901* unless otherwise specified.

## 2. PRELIMINARY AFFIRMATIVE DETERMINATION

At any time not earlier than 60 days after the date of initiation of an investigation as to whether there are sufficient grounds for the publication of a dumping duty notice, or a countervailing duty notice, in respect of goods the subject of an application, the CEO may, if he or she is satisfied:

- a) that there appears to be sufficient grounds for the publication of such a notice; or
- b) that it appears that there will be sufficient grounds for the publication of such a notice subsequent to the importation into Australia of such goods;

make a preliminary affirmative determination (PAD) under section 269TD to that effect.

In deciding whether to make a preliminary affirmative determination, the CEO must have regard to the application concerned, and to any submissions concerning publication of the notice or notices that are received by Customs and Border Protection within 40 days after the date of initiation of the investigation. The CEO may also have regard to any other matters that the CEO considers relevant. The CEO is not obliged to have regard to any submission received after day 40 if to do so would prevent the timely consideration of whether or not to make a PAD.<sup>2</sup>

### 2.1 Ability to take securities

Customs and Border Protection may, at the time of making a PAD or at any later time during an investigation, require and take securities under section 42 in respect of interim duty that may become payable if the officer of Customs and Border Protection taking the securities is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while an investigation continues.

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<sup>2</sup> Findings, calculations, and conclusions discussed in this report are of a preliminary nature and may change between the time of its publication and the publication of the statement of essential facts.

### **3. THE GOODS**

#### **3.1 The Goods**

The goods under investigation are:

Fuel manufactured by chemically altering non-fossil origin feedstocks (including recycled materials from these sources) through a process of transesterification and/or esterification to form mono-alkyl esters (commonly known as 'biodiesel') whether in pure form (B100) or in a blend with a biodiesel percentage in excess of 20% (B20).

The goods as described above are referred to in this report as biodiesel.

The 'B' factor referred to in the description is an internationally recognised system for indicating the amount of biodiesel in a blend or mixture. The number after the B denotes the percentage of biodiesel in the blend eg. B5 is a mixture of 5 percent biodiesel and 95 percent other product.

#### **3.2 Tariff Classification**

The goods the subject of the application can fall within the following tariff classifications in Schedule 3 of the *Customs Tariff Act 1995*:

2710.11.80 Statistical code 11

2710.19.80 Statistical code 21

3824.90.20 Statistical code 20

3824.90.30 Statistical code 46

2710.91.80 Statistical code 82

2710.99.80 Statistical code 91

All the relevant classifications set out above currently attract a general Customs duty rate of A\$0.38143 per litre.

#### **3.3 Like Goods**

This like goods assessment is made on the basis of visits by Customs and Border Protection to two of the four Australian biodiesel manufacturers; the applicant BPL and Smorgon Fuels Pty Ltd (Smorgon Fuels).

BPL and Smorgon Fuels both manufacture biodiesel meeting the *Fuel Standard (Biodiesel) Determination 2003*. The *Fuel Standard (Biodiesel) Determination 2003* is made under the *Fuel Quality Standards Act 2000* and regulates the standard of biodiesel that can be sold in Australia according to a number of technical specifications. Biodiesel can have differing technical properties according to the types of feedstocks used in its production and production processes employed.

Interested parties generally agreed that two of the most important technical properties of biodiesel are its cold filter plugging point (CFPP) and its cetane number. Cetane is a measure of the combustion quality of the fuel. The CFPP

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is the temperature at which a given volume of fuel fails to pass through a standardised filtration device in a specified time.

The *Fuel Standard (Biodiesel) Determination 2003* requires a minimum cetane number of 51 but does not include a requirement for the CFPP. Different raw material feedstocks and production processes will produce biodiesel with different cetane numbers and CFPPs.

### **Assessment of Like Goods**

Customs and Border Protection has considered the following matters in assessing whether goods produced by the Australian industry are like to the imported goods:

#### i. Physical likeness

- the Australian manufactured biodiesel has similar physical characteristics to the imported biodiesel. In some cases, the CFPPs differed significantly between the locally manufactured and imported biodiesel. Some interested parties had differing views on the implications of this difference for customers and users in Australia. Customs and Border Protection will continue to investigate the significance of differing CFPPs but at this stage of the investigations is of the view that the imported and locally produced biodiesel are physically similar.

#### ii. Commercial likeness

- Australian industry products compete directly with the imported goods in the Australian market. Interested parties have however claimed that soy based biodiesel does not compete against Australian produced biodiesel based on tallow or used cooking oil. These claims will be subject to further investigation by Customs and Border Protection.

#### iii. Functional likeness

- Both the imported and Australian produced biodiesel have comparable or identical end-uses – that is, for use in blends with petroleum based diesel for use as a fuel in diesel engines.

#### iv. Production likeness

- Due to the lack of cooperation from manufacturers in the USA, Customs and Border Protection does not have information on the processes used to produce the imported biodiesel. Without better information, Customs and Border Protection assumes that the Australian industry biodiesel is manufactured in a similar manner to the imported goods.

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### **3.4 Conclusion on like goods**

Customs and Border Protection considers that its findings on i, ii, iii, and iv above all support a conclusion that the Australian products, while not identical, have characteristics closely resembling the imported goods.

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#### **4. THE APPLICANT AND OTHER AUSTRALIAN PRODUCERS**

The application for anti-dumping and countervailing (anti-subsidy) measures was lodged by BPL. The Australian industry, in addition to BPL, is comprised of the following manufacturers:

- Australian Renewable Fuels Ltd (ARF);
- Biodiesel Industries Australia Pty Ltd (BIA); and
- Smorgon Fuels.

Upon the initiation of the investigations, Customs and Border Protection requested information from each of the above manufacturers in relation to their production and sale of like goods. The level of information received from each of the Australian industry members and the verification of such information is discussed in the Preliminary Injury Analysis below (at section 12).

## 5. IMPORTERS

Following the initiation of the investigation, Customs and Border Protection searched its database and identified four importers that appeared to have imported biodiesel exported to Australia from the USA in the investigation period.

Questionnaires were sent to the four importers informing them of the investigations and inviting submissions. Two of the four importers had each imported one small shipment of biodiesel that Customs and Border Protection understands were trial shipments.

The two significant importers of biodiesel from the USA during the investigation period were:

- Freedom Fuels Terminalling Pty Ltd; and
- National Biodiesel Limited.

Customs and Border Protection undertook verification visits to both importers and is in the process of finalising reports on the visits.

The delegate has had regard to the matters discussed in the importer visit reports in making this PAD.

## 6. EXPORTERS

Customs and Border Protection identified from its import database six companies that appeared to have exported biodiesel to Australia from the USA in the investigation period. Exporter questionnaires were sent to the six suppliers identified. Customs and Border Protection also attempted to contact and provide questionnaires to three additional companies nominated by the major importers as the USA-based manufacturers of the biodiesel exported to Australia.

No completed exporter questionnaires have been received.

A Singapore based fuel trader, Trafigura Pte Ltd (Trafigura), that supplied biodiesel to one of the major Australian importers, provided a brief submission with export price and normal value information. Trafigura's submission is discussed under the export price and normal values sections below. Trafigura provided some further information on its shipments of biodiesel to Australia in response to questions from Customs and Border Protection.

## 7. CONSUMER SUBMISSION

### 7.1 Caltex Australia Limited

Caltex Australia Limited (Caltex) made a submission to Customs and Border Protection dated 16 August 2010. A non-confidential version of the submission was placed on the public record.

Caltex claimed that it purchases approximately one-fifth of biodiesel produced in Australia. Caltex submitted that it had not experienced difficulty in securing supply from local biodiesel producers that met Caltex's requirements for volume and product quality. Caltex does not believe that quality, in particular the need for a low CFPP, necessitates the importation of biodiesel. Caltex stated that it believes the local industry has the capacity to meet Caltex's increasing supply requirements.

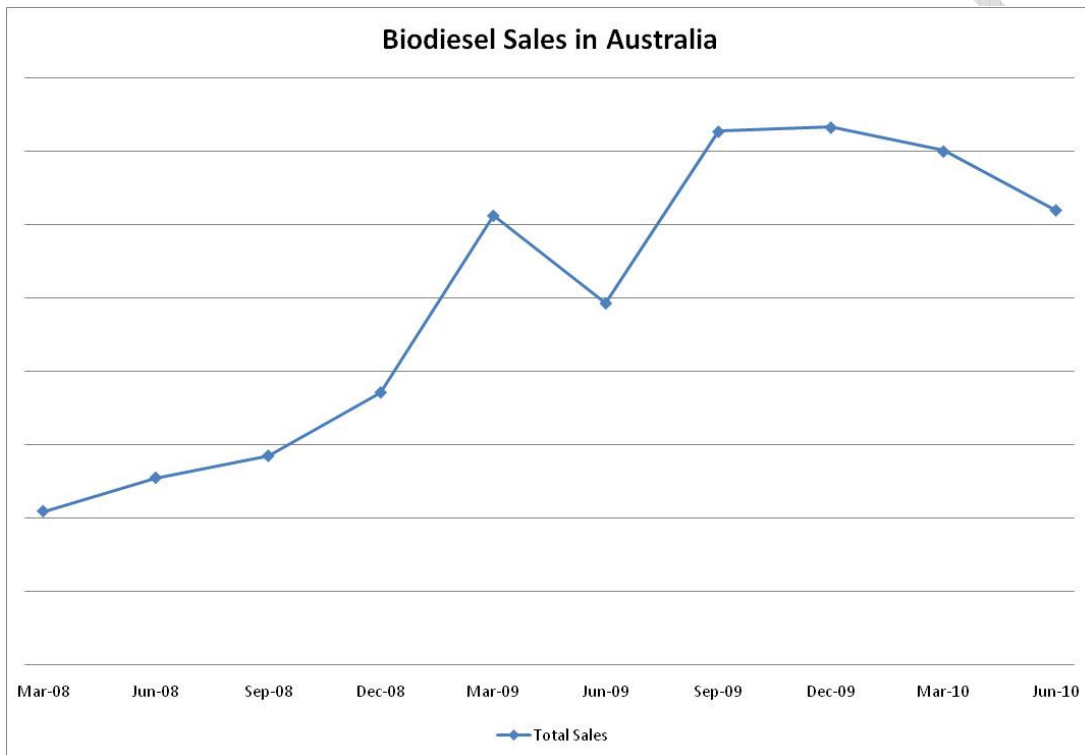
Caltex stated that low-priced imports of biodiesel would not only affect local biodiesel producers. It claimed that blenders and marketers such as itself that purchase local biodiesel would be adversely impacted by being undercut by products incorporating imported biodiesel.

Caltex further stated that if its competitors gained a price advantage using low priced imported biodiesel it would be forced to purchase imported product to remain competitive. Caltex believes that it is most unlikely any local producers of biodiesel could survive against subsidised imports.

## 8. AUSTRALIAN MARKET

Customs and Border Protection has used importer data, data from its commercial database, sales data from BPL and Smorgon Fuels and estimates included in the application to estimate the size and share of the Australian market for biodiesel during the injury analysis period. Summary data is at **confidential appendix 1**.

Information from the same sources described above was used to estimate the total sales of biodiesel from both Australian and imported sources over the injury analysis period.



## 9. PRELIMINARY EXPORT PRICE

For the purpose of determining preliminary dumping margins, export prices have been calculated for biodiesel imported by the two major importers, National Biodiesel Limited and Freedom Fuels.

Customs and Border Protection visited the two major importers and verified information on the prices paid and expenses incurred in relation to the importation of biodiesel exported to Australia from the USA during the investigation period. Both importers purchased from intermediaries and not the manufacturers of the biodiesel in the USA.

For importations by National Biodiesel Limited, Customs and Border Protection has preliminarily determined that:

- the goods were exported to Australia otherwise than by the importer, National Biodiesel;
- were purchased by the importer from an intermediary or the exporter and;
- were purchased at arms length.

Without verified information on the transaction between the USA manufacturer and the intermediary, sufficient information has not been furnished or is not available to enable the export price of the goods to be ascertained under the subsections preceding section 269TAB(3) of the Act.

Customs and Border Protection has preliminarily calculated export prices for imports by National Biodiesel Limited under section 269TAB(3) of the Act using the invoiced price between National Biodiesel Limited and the intermediary that supplied the biodiesel.

For biodiesel imports by Freedom Fuels, Customs and Border Protection has preliminarily determined that:

- the goods were exported to Australia otherwise than by the importer;
- the goods have been purchased by the importer from the exporter; and
- the purchase of the goods by the importer were arms length transactions.

Without verified information on the transaction between the USA manufacturer and the intermediary and verified information on costs arising after exportation, sufficient information has not been furnished or is not available to enable the export price of the goods to be ascertained under the subsections preceding section 269TAB(3) of the Act.

Customs and Border Protection has preliminarily calculated export prices for imports by Freedom Fuels under section 269TAB(3) of the Act using the invoiced price paid by Freedom Fuels to the supplying intermediaries less amounts for expenses incurred after exportation.

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Preliminary export price calculations are at **confidential appendix 2**.

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## 10. PRELIMINARY NORMAL VALUE

As noted above, no completed exporter questionnaire responses were received from entities associated with the manufacture and/or exportation of biodiesel to Australia from the USA.

At this stage, Customs and Border Protection is satisfied that sufficient information has not been furnished or is not available to enable the normal value of biodiesel to be established using the domestic selling prices, the cost to make and sell biodiesel, or by reference to export prices to countries other than Australia. Accordingly, the normal value of the goods is such amount as is determined by the Minister having regard to all relevant information<sup>3</sup>.

### 10.1 Information in BPL's application

In its application, BPL based its estimates of normal value on biodiesel prices reported in a series of Clean Cities Alternative Fuel Price Reports published by the US Department of Energy.

The reports provide a US national average 'at-the-pump' sales price per US gallon for B99/B100 biodiesel in US dollars. The price is described as including Federal and state motor fuel taxes. The national average is derived from price information collected from across the USA and weighted according to the number of price observations in each of seven defined areas of the USA, excluding the states of Hawaii and Alaska. The reports also provide information on the prices and number of price observations in each of the seven defined areas.

### Adjustments

BPL deducted amounts for the following from the 'at-the-pump' sales prices to estimate prices it claims are comparable with export prices of biodiesel from the USA:

- Federal excise tax – at a rate of US\$0.24 per US gallon.
- storage and blending costs prior to delivery – a cost of A\$0.015 per litre based on BPL's own experience with movement and storage costs.
- costs of transporting the product to the retailer – A\$0.08 per litre based on BPL's average delivery costs to Melbourne, Sydney and Brisbane.
- retail margin – A\$0.02 per litre. BPL claimed that as mineral diesel has a significant price advantage over B99/B100 biodiesel, it estimates that the retail margins on the product in the USA would be very low. BPL provided information from the Australian Institute of Petroleum showing retail margins for diesel in Australia in the last two years have averaged A\$0.10 per litre, which BPL estimates would include A\$0.08 in freight costs.

BPL also deducted amounts for the following from the A\$ per litre free-on-board (FOB) export prices to Australia:

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<sup>3</sup> S. 269TAC(6)

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- wharfage for export in the USA – A\$0.002 per litre based on a Australian Competition and Consumer Commission report on setting the pricing of petrol and diesel in Australia.
- costs of transporting to port – A\$0.08 per litre based on BPL's average transport costs moving fuel on the East coast of Australia.

### **10.2 Information submitted by Trafigura**

In its submission, Trafigura claimed that biodiesel in the USA is typically sold at a discount or premium (depending on the type of biodiesel) to the daily settlement of the New York Mercantile Exchange (NYMEX) Heating Oil (HO) contract price.

Trafigura claimed that it had purchased biodiesel in the USA at around the time it contracted to sell biodiesel to Freedom Fuels in Australia. Trafigura provided the average purchase price but no supporting documents or details of the purchase, and no indication of whether the goods were intended for domestic consumption in the USA.

As an alternative normal value, Trafigura provided a biodiesel market assessment by what it claimed to be a reputable energy broker. The submission did not contain information to assist in assessing the reliability of the source or the terms and conditions of the prices quoted.

### **10.3 Information submitted by Freedom Fuels**

Freedom Fuels submitted normal value information based on the same secondary source information as submitted by Trafigura. As with Trafigura's submission, the information provided by Freedom Fuels did not contain information to assist in assessing the reliability of the source or the terms and conditions of the prices quoted.

### **10.4 Assessment of normal value**

At this stage of the investigation, the information provided by Trafigura and Freedom Fuels is not sufficiently explained or supported to be regarded as better available information than the normal value estimates provided by the applicant.

Customs and Border Protection has taken into account that overseas based entities associated with biodiesel exports to Australia in the investigation period have provided either minimal or no cooperation with the investigations and have withheld relevant information.

The secondary pricing information provided by Trafigura and Freedom Fuels is from an unknown source. The level of trade and terms and conditions associated with the pricing is unknown. The alternative purchase price information provided by Trafigura is unverified and not supported by evidence. Because of Trafigura's role as an international fuel trader, it is also not clear if the biodiesel purchased was destined for consumption in the USA and therefore whether it meets this legislative requirement for establishing a normal value.

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Customs and Border Protection will reconsider the information provided by Trafigura and Freedom Fuels if further supporting information is submitted during the remainder of the investigation.

USA biodiesel pricing provided by the applicant, BPL, in its application is, at this stage of the investigation, the best available information on which to establish normal values. The prices are from a reliable source and are reasonably contemporaneous with exports of biodiesel to Australia in the investigation period.

BPL has adjusted the 'at the pump' quoted prices to an equivalent level of trade to exports to Australia by deducting a retail margin based on the estimated difference between wholesale and retail prices in Australia. While Freedom Fuels states that the retail margins proposed by BPL may have no relevance to the retail margins that can be achieved in the USA, it provided no information on alternative margins.

Freedom Fuels also submitted that BPL had not made an adjustment for the volume of biodiesel exported compared to the 'at-the-pump' domestic selling prices. However, it provided no information on the quantum of such an adjustment or evidence to support it being made. In Customs and Border Protection's view, the retail margin proposed by BPL would include an amount to recognise the difference in volume between wholesale and retail sales.

Other adjustments to the domestic selling prices proposed by BPL to make them comparable with export prices are reasonable and supported.

Without reliable information on the place of manufacture of biodiesel exported to Australia, Customs and Border Protection has used the average USA price reported in the January Clean Cities Alternative Fuel Price Report for B99/100 biodiesel as the basis for the normal value (US\$3.59 per US gallon).

The reported USA prices of biodiesel in the Clean Cities Alternative Fuel Price Reports are stated to include both federal and state fuel taxes. BPL did not deduct an amount for state fuel taxes. Customs and Border Protection's analysis assumes any state fuel taxes would not be payable on exports and has deducted what it understands to be the average state excise tax for diesel in the USA from the reported selling prices.

Customs and Border Protections preliminary normal value calculations are at **confidential appendix 3**.

## 11. PRELIMINARY DUMPING MARGIN

The preliminary dumping margin for biodiesel exported to Australia in the investigation period is 40%. Customs and Border Protections preliminary dumping margin calculations are at **confidential appendix 4**

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## 12. PRELIMINARY COUNTERVAILING ASSESSMENT

BPL claimed that countervailable subsidies have been received in respect of biodiesel exported to Australia through a USA federal government excise tax/income tax credit scheme. The scheme, which provides for three categories of credit, was the only countervailable subsidy scheme referred to by BPL in its application.

At the commencement of the investigations, Customs and Border Protection sent a government questionnaire to the Government of the USA seeking information on the alleged subsidies. The Government of the USA provided a response (the government response) by the due date.

### 12.1 Excise tax/income tax credit

BPL claimed that Title 26, Section 40A of the USA Internal Revenue Code provides for a biodiesel fuels tax credit to blenders, retailers and end-users of biodiesel.

The government response, provided by the Office of the United States Trade Representative, provided details on the scheme. The response noted, however, that the scheme expired on 31 December 2009. The response confirmed that, up until 31 December 2009, the scheme existed for the purposes of promoting energy self-sufficiency and reducing greenhouse gas emissions.

The government response explained that the program was an income tax credit, excise tax credit, or refundable direct payment for producers of biodiesel mixtures sold for use or used as fuel, and for retailers and commercial users of unmixed (neat) biodiesel.

The scheme consisted of three components:

- (i) the biodiesel mixture credit;
  - (ii) the biodiesel credit; and
  - (iii) the small agri-biodiesel producer credit.
- (i) The biodiesel mixture credit

For producers of biodiesel mixtures sold for use or used as fuel, the excise tax credit was US\$1.00 for each gallon of unmixed (neat) biodiesel used in the fuel mixture. Thus, the excise tax credit for the blended fuel depends on the proportion of biodiesel it contains. The response provided an illustration where a producer has regular diesel (for which the producer has excise tax liability) and biodiesel. If the producer makes ten gallons of a B20 blend of biodiesel (a blend of 20% biodiesel and 80% petroleum diesel – a 1:4 ratio of neat biodiesel to diesel), the producer would receive a US\$2.00 excise tax credit (US\$1.00 for each gallon of biodiesel used in the ten gallon blend) and (assuming the producer is the person who is liable for the excise tax) would incur a US\$2.44 excise tax liability (a US\$0.244 excise tax liability for each of the ten gallons). Thus the producer's excise tax would be lowered from US\$2.44 to US\$0.44.

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The response also explained that the mixture producer may also claim a refundable income tax credit or direct payment for the incentives only for the amount that the excise tax credit exceeds total excise tax liability. The credit is thus non-cumulative: it remains the same whether the incentive is claimed as an excise tax credit, an income tax credit, a direct payment to the taxpayer, or any combination of the foregoing.

### (ii) The biodiesel credit

The Government of the USA advised that the program is also available to retailers and commercial users of unmixed (neat) biodiesel and retailers selling neat biodiesel as fuel for transportation. This is the only credit allowed with respect to neat biodiesel used directly as a fuel (i.e., not in a mixture). The retailer or commercial user can claim US\$1.00 per gallon for unmixed (neat) biodiesel as a non-refundable general business income tax credit. The credit on the same gallon of neat biodiesel is not available to both the retailer and the commercial user.

The retailer can only claim a credit under this program if the biodiesel remains unmixed with diesel fuel. (The non-refundable general business income tax credit is also available for biodiesel mixtures, but this credit is reduced by any excise tax credit or non-refundable payment received with respect to the mixture.)

### (iii) The small agri-biodiesel producer credit

A small producer (one with an annual production capacity of not more than 60 million gallons of biodiesel) may claim an additional US\$0.10-per-gallon non-refundable general business income tax credit on the first 15 million gallons of biodiesel produced.

The Government of the USA response stated that the Trade Secrets Act (18 U.S.C 1905) prevented it from providing a list of entities that have manufactured and exported, blended and exported, or exported biodiesel to Australia in the investigation period.

The response also stated that, due to a prohibition in providing individual taxpayer information under Internal Revenue Code Title 26 U.S.C. 6103, the Government of the USA was unable to provide information on companies that had applied for, accrued or received benefits under the program and the amount of benefits granted.

## **12.2 Customs and Border Protection's assessment**

In the absence of cooperation from exporters/manufacturers of biodiesel exported to Australia from the USA, and the inability of the Government of the USA to provide detailed information, Customs and Border Protection has assumed that the exports to Australia did benefit from the excise tax/income credit scheme.

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Relevant to this assessment is that overseas based entities associated with biodiesel exports to Australia in the investigation period have provided either minimal or no cooperation with the investigations and have withheld relevant information.

### **Does the nominated scheme involve the payment of subsidies?**

Based on the available information, it appears that each of the three components of the biodiesel fuel credit scheme is a subsidy as defined in Australia's anti-dumping and countervailing legislation in that each is, in relation to goods that are exported to Australia, a:

- financial contribution by a government of the USA that is made in connection with the production, manufacture or export of biodiesel; and that involves;
- a direct transfer of funds from the government to the enterprise by whom the biodiesel is produced, manufactured or exported; and/or
- a direct transfer of funds from the government to that enterprise upon particular circumstances occurring; and/or
- the forgoing, or non-collection, of revenue (other than an allowable exemption or remission) due to the government by that enterprise.

### **Are they countervailable subsidies?**

A subsidy is a countervailable subsidy if:

- (a) it is specific; and
- (b) it is not an excluded subsidy.

A subsidy is specific if, among other things, access to the subsidy is explicitly limited to particular enterprises. The subsidy is not specific where:

- (a) eligibility is established by objective criteria or conditions set out in primary or subordinate legislation or other official documents that are capable of verification;
- (b) those criteria or conditions do not favour particular enterprises over others and are economic in nature; and
- (c) those criteria or conditions are strictly adhered to in the administration of the subsidy.

The available evidence indicates that each of the three components of the biodiesel fuel credit scheme is limited to entities involved in the biodiesel industry and is not available to other industries outside of their sector. Each of the three components of the biodiesel fuel credit scheme appears to be specific.

A subsidy is an excluded subsidy if the Minister is satisfied that:

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- (a) it is specific but described in paragraph (a), (b) or (c) of Article 8.2 of the Agreement of Subsidies and Countervailing Measures; or
- (b) it is a domestic support measure that meets the criteria or conditions set out in Annex 2 to the Agreement on Agriculture.

The components of the biodiesel fuel credits scheme are not described in Article 8.2 of the Agreement of Subsidies and Countervailing Measures. The components of the scheme also do not meet the criteria or conditions set out in Annex 2 to the Agreement on Agriculture. Therefore, based on the information available to date, the subsidies under the biodiesel fuel credit scheme are not excluded subsidies.

### **Have subsidies been received in respect of biodiesel exported to Australia?**

It appears that subsidies available under the biodiesel fuel credits scheme, particularly through the biodiesel mixture credit element of the scheme, were widely received by the biodiesel industry in the USA up until the expiry of the scheme on 31 December 2009<sup>4</sup>. In the absence of better information, it would be reasonable to assume that biodiesel exports to Australia in 2009 and early 2010 would have benefited from receipt of the subsidies.

### **May subsidies be received in respect of like goods that may be exported to Australia in the future?**

The biodiesel excise tax/income credit scheme expired on 31 December 2009. A Bill was introduced into the US Congress in early 2010 to extend the scheme to 31 December 2010 and to reinstate the scheme retrospectively to 31 December 2009. The legislation was not passed by the US Congress and the legislation in its initial form was abandoned.

In July 2010, the Chairman of the USA Committee of Ways and Means released a 'discussion draft' of a Bill that includes amendments to the Internal Revenue Code to extend the biodiesel excise tax/income credit scheme to 31 December 2012. Customs and Border Protection currently considers that this subsidy may be enacted in the future and will monitor developments with the proposal.

### **Calculation of benefit conferred to the goods**

The government response states that the biodiesel excise tax/income credit for the biodiesel credit mixture and biodiesel credit components of the scheme was US\$1.00 per US gallon. The small agri-biodiesel producer credit was US\$0.10 per US gallon. Without better information, Customs and Border Protection considers that the benefit conferred to the goods are equal to the addition of these amount per US gallon.

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<sup>4</sup> See European Commission Council Regulation (EC) No 598/2009

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### **12.3 Preliminary conclusion - countervailing**

Customs and Border Protection has preliminarily assessed the biodiesel excise tax/income credit scheme as representing a countervailable subsidy, the total amount of which is not negligible.

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### **13. PRELIMINARY INJURY ANALYSIS**

Customs and Border Protection examined the period from 1 July 2007 to assess injury to the Australian industry producing like goods.

As noted above, the Australian biodiesel industry consists of the following four manufacturers:

- the applicant, BPL;
- ARF;
- BIA; and
- Smorgon Fuels.

For the purposes of this PAD, the analysis of injury to the Australian industry is based on the following information provided by the Australian industry members:

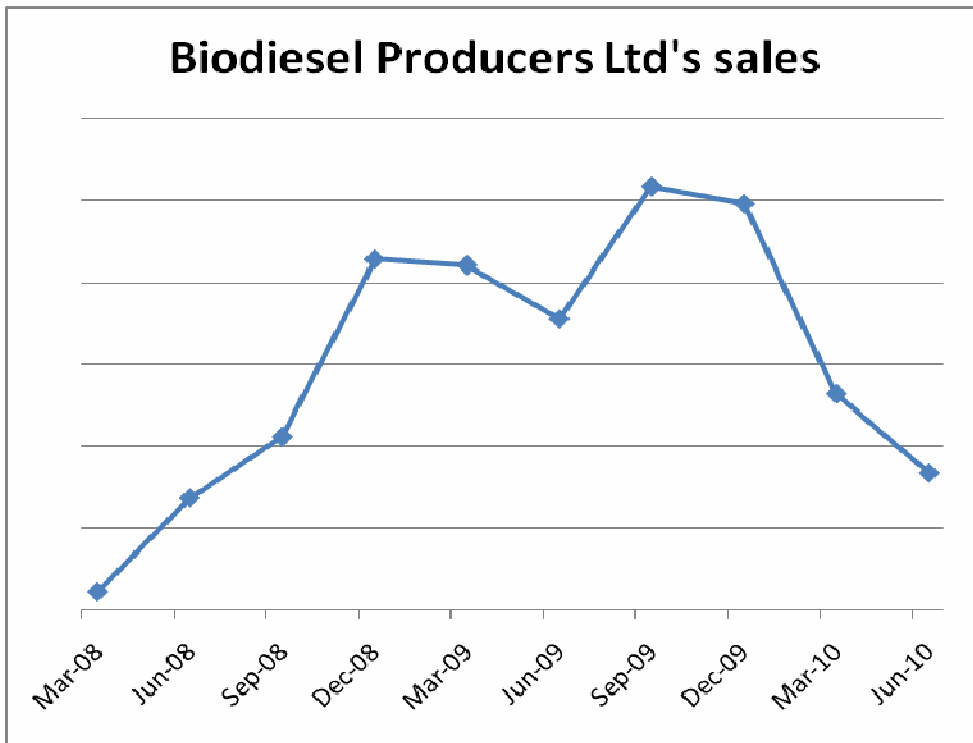
- BPL – complete information received, verification visit conducted;
- ARF – sales and cost information received, verification visit conducted;
- Smorgon Fuels – information received on sales, customer base, Australian market, verification visit conducted, no verification of production costs;
- BIA – limited information received, no verification visit.

#### **13.1 BPL**

BPL's injury claims centre on its major customer, Freedom Fuels, commencing in February 2010 to source the majority of its biodiesel requirements from the USA.

#### **Volume trends**

The following graph illustrates the sales volume of biodiesel in litres by BPL based on verified data.



The graph shows that BPL's sales volume increased from the March 2008 quarter to the December 2008 quarter. However there was a reduction in sales volume from the December 2008 quarter to the June 2009 quarter which is followed by a rise in sales to September 2009. Another reduction in sales was experienced in December 2009 quarter before a sharp fall in sales volumes in the March quarter 2010 and again in June quarter 2010.

Based on the above there appears to be reasonable grounds to support the claim that BPL has suffered injury in the form of lost sales volume.

**Price and cost**

Price effects may be in the form of:

- price depression, which occurs when a company, for some reason, lowers its prices and;
- price suppression, which occurs when price increases for the applicant's product, which otherwise would have occurred, have been prevented.

The following indexed data illustrates BPL's unit cost to make and sell (CTMS) and weighted average unit selling price of biodiesel.

	Sep-08	Dec-08	Mar-09	Jun-09	Sep-09	Dec-09	Mar-10	Jun-10
CTMS	100	108	75	107	83	79	102	106
Selling price	100	98	70	81	79	77	78	78

Note: Figures indexed against September 2008 quarter.

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## Price depression

BPL did not claim to have suffered price depression. BPL's average biodiesel prices appear to have been reasonably stable since the March 2009 quarter.

## Price suppression

The index suggests that, following the period impacted by the start up of the company's operations, BPL experienced price suppression in the June 2009 and March 2010 quarters when increased unit costs were not matched by increases in prices. The increased unit costs were caused by decreased production (and sales) in those quarters. BPL advised that its biodiesel pricing is closely linked to the price of mineral diesel. The ability to increase biodiesel prices independently of mineral diesel prices is very limited.

Based on this analysis it appears that BPL has suffered injury in the form of price suppression.

## **Profits and profitability**

Following initial quarters impacted by the start up of operations, BPL experienced improving profit and profitability results, with the exception of the June 2009 and March and June 2010 quarters when it experienced a significant deterioration in both profits and profitability.

There appear to be reasonable grounds to support the claim that BPL suffered injury in the form of lower profits and profitability.

## **Other economic factors**

Customs and Border Protection examined BPL's data to March 2010 relating to other economic factors that may indicate injury.

## Return on investment

Mar-08	Jun-08	Sep-08	Dec-08	Mar-09	Jun-09	Sep-09	Dec-09	Mar-10
-141	-141	124	196	83	-171	58	100	-125

BPL experienced negative returns on investment in the March and June 2008, June 2009 and March 2010 quarters.

## Capacity utilisation

Mar-08	Jun-08	Sep-08	Dec-08	Mar-09	Jun-09	Sep-09	Dec-09	Mar-10
35	35	46	78	86	71	100	114	54

Capacity utilisation has increased in each quarter except June 2009 and March 2010.

## Employees

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Mar-08	Jun-08	Sep-08	Dec-08	Mar-09	Jun-09	Sep-09	Dec-09	Mar-10
86	86	91	91	91	100	100	109	95

The number of persons employed has increased since the March 2008 quarter with the only decrease occurring in the March 2010 quarter.

### Hours worked

Mar-08	Jun-08	Sep-08	Dec-08	Mar-09	Jun-09	Sep-09	Dec-09	Mar-10
103	103	98	104	104	100	96	98	91

The applicant has experienced a decline in the number of hours worked since the March 2009 quarter.

Other economic factors do not support or detract from the injury claims.

### **13.2 Smorgon Fuels**

Smorgon Fuels provided Customs and Border Protection with detailed information on its sales of biodiesel and biodiesel blends for the financial year ending 30 June 2010. Customs and Border Protection verified this information during a visit to the company. Smorgon Fuels provided information on its financial performance for the 2009-10 financial year but declined to allow Customs and Border Protection to verify its cost information.

Smorgon Fuels claimed that a significant customer had reduced its purchases in the latter half of 2010. Smorgon Fuels suspects that the customer has commenced purchasing lower priced biodiesel imported from the USA. Customs and Border Protection will investigate this claim as the investigation continues but has placed no weight on this claim for the purposes of this PAD.

Smorgon Fuels has not experienced a loss in sales volumes in the period examined. Smorgon Fuels also made no claims of price related injury. Smorgon Fuels has not reduced its prices in response to competition from biodiesel imported from the USA. Its ability to increase prices is largely dictated by mineral diesel prices.

Although unverified, Smorgon Fuels' profit and loss information indicates a difficult trading environment over the 12 months to June 2010 and this is consistent with verified information available to Customs and Border Protection from other sources.

While at this stage no weight has been placed on Smorgon Fuels' claim of injury caused by the loss of a significant customer to imported product, it appears that Smorgon Fuels, while increasing its sales and production volumes, has experienced a challenging trading and profitability environment in 2009-10. Its performance does not appear to be sufficiently positive to offset injury suffered by the applicant BPL.

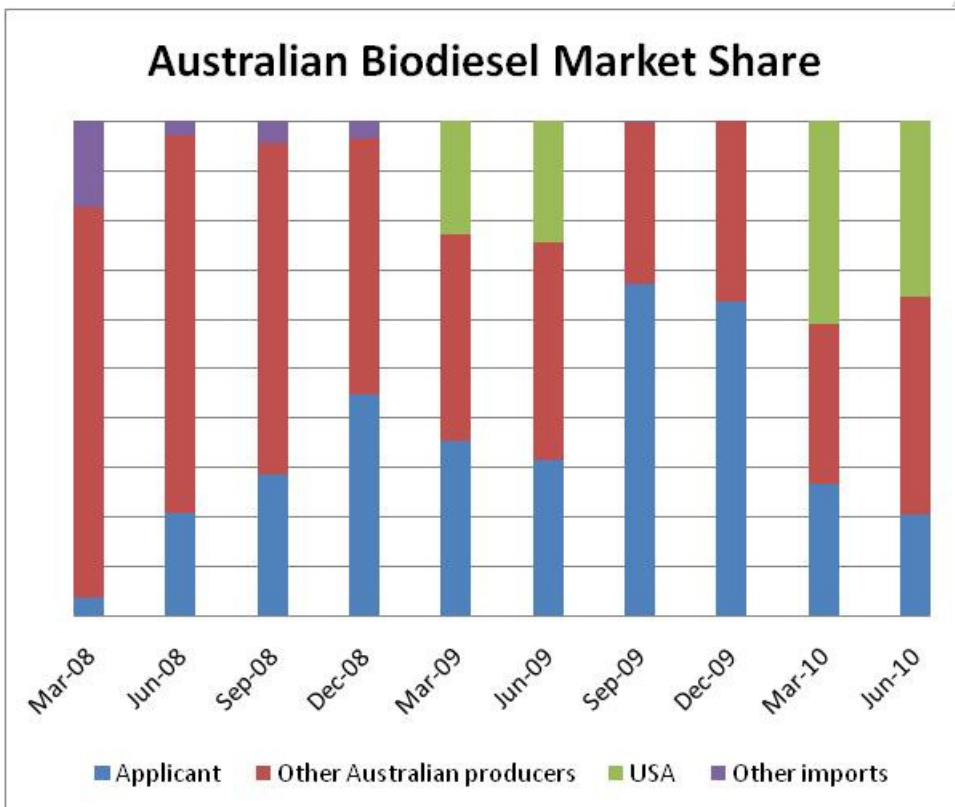
**13.3 ARF**

ARF provided its audited financial statements for 2008/09 and 2009/10. The statements show that ARF made losses in 2008-09 and 2009-10.

Customs and Border Protection at this point has not attributed these losses to dumped and subsidised biodiesel imported from the USA. However, it appears that ARF's recent performance would not offset injury suffered by the applicant BPL.

**13.4 Market share of the Australian industry**

The following chart depicts Customs and Border Protection's preliminary assessment of market share changes since the beginning of 2008.



The graph shows that the Australian industry has lost a significant share of the market to imports from the USA in the March and June 2010 quarters.

**13.5 Undercutting analysis**

Customs and Border Protection compared the into-store cost to importers of biodiesel exported from the USA in the investigation period with the weighted average selling prices of BPL and Smorgon Fuels. The into-store cost of the imports undercut BPL and Smorgon Fuels delivered selling prices by a large margin.

The undercutting analysis is at **confidential appendix 5**.

**13.6 Preliminary conclusion on material injury to Australian industry**

Based on the verified information BPL has suffered injury in the form of:

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- lost sales volume;
- loss of market share;
- price suppression;
- reduced profits and profitability;
- reduced return on investment;
- reduced capacity utilisation; and
- reduced hours worked.

BPL has been the largest Australian biodiesel producer since it commenced production and sales in early 2008. The information available indicates that the performance of the other Australian manufacturers would not offset injury suffered by BPL.

Customs and Border Protection's preliminary conclusion is that the Australian industry has suffered injury.

## **14. PRELIMINARY CAUSATION ASSESSMENT**

The available evidence supports the claim that biodiesel exported to Australia from the USA has caused material injury to the Australian industry.

BPL has been the largest Australian biodiesel producer since it commenced production in early 2008. In February 2010, BPL's main customer, Freedom Fuels, commenced importing the majority of its biodiesel requirements from the USA. The landed price of the biodiesel imported from the USA undercut the prices of Australian manufactured biodiesel by a large margin.

The loss of most of the volumes sold to Freedom Fuels had a severe impact on BPL's overall sales volumes. In the March and June quarters 2010, its fixed costs were spread over a much smaller sales volume, thereby increasing unit costs significantly. BPL's profit and profitability position declined markedly in 2010 due to the loss of sales volume to Freedom Fuels and the increased unit costs resulting from lower overall sales volumes.

Freedom Fuels submitted that several factors other than price had been relevant to its decision to import the majority of its biodiesel requirements from the USA rather than purchase biodiesel manufactured in Australia. It submitted that it was concerned about the ongoing viability of the Australian biodiesel industry, and BPL in particular, and wanted to ensure security of supply for its customers. It also claimed that the Australian industry supplies biodiesel with a CFPP that does not meet the requirements of Freedom Fuels' customers across all locations in Australia.

Customs and Border Protection will continue to examine these claims but at this stage of the investigation is not persuaded by the available evidence that the Australian biodiesel industry has been unable to supply biodiesel that, in most if not all cases, meets the requirements of customers in Australia. Also, Freedom Fuels stated that besides security of supply and quality, price was a key factor in selecting a biodiesel supplier.

Customs and Border Protection is satisfied at this stage of the investigation that the injury suffered by BPL in 2010 appears to have been caused by Freedom Fuels deciding to purchase dumped and subsidised biodiesel from the USA.

Customs and Border Protection will continue to examine the injury claims of the other Australian industry members. At this stage, it appears that the performance of the other Australian manufacturers would not offset injury to BPL that appears to have been caused by the dumping and subsidisation and which appears to be material to the Australian industry as a whole.

### **14.1 Injury caused by other factors**

Several interested parties referred to difficulties experienced by the Australian manufacturers, suggesting that the industry's injury was due to underlying problems with rising feedstock prices, poor management decisions and diminishing government support. Parties pointed to the history of biodiesel

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production facilities closing or being mothballed in recent years as evidence that biodiesel production in Australia is unfeasible.

Customs and Border Protection agrees that the Australian biodiesel industry has faced a difficult trading environment in recent times, particularly in 2009. Biodiesel pricing is closely tied to the price of mineral diesel. Mineral diesel prices are transparent in the market and daily prices are published on the internet sites of the major oil companies.

In 2009, rapidly rising feedstock prices and suppressed mineral diesel prices caused by the Global Financial Crisis created a squeeze on biodiesel sales margins. Customs and Border Protection has not attributed price suppression and declining profits and profitability caused by this factor to dumped and subsidised imports from the USA.

The issues of security of supply and CFPP are discussed above. Interested parties agreed that Australian produced biodiesel was of a quality that met customer requirements in Australia.

Customs and Border Protection will continue to consider these and other issues during the course of the investigation and will not assign injury caused by other factors to dumping or subsidy.

### **14.2 Preliminary conclusion – causation**

The delegate is satisfied that there appear to be sufficient grounds for the publication of a dumping duty notice and a countervailing duty notice because dumped and subsidised biodiesel imported from the USA has caused material injury to the Australian biodiesel industry.

## 15. PRELIMINARY NON-INJURIOUS PRICE ASSESSMENT

Duties may be applied where it is established that dumped or subsidised imports have caused or threatened to cause injury to the Australian industry producing like goods. The level of dumping duty imposed by the Minister cannot exceed the margin of dumping, but a lesser duty may be applied if it is determined that it is sufficient to remove the injury.

The non-injurious price (NIP) provides the mechanism whereby this lesser duty provision is given effect. It is the price that would be sufficient to remove the injury caused to the Australian industry by the dumping. Anti-dumping duties are based on free-on-board (FOB) prices in the country of export. Therefore a NIP is calculated in FOB terms for the country of export.

The NIP is generally derived by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping. This price is referred to as the unsuppressed selling price (USP). Customs and Border Protection's preferred approach to establishing a USP observes the following hierarchy:

1. industry selling prices at a time unaffected by dumping;
2. constructed industry selling prices – industry cost to make and sell (CTMS) plus profit; or
3. selling prices of un-dumped imports.

Having calculated the USP, a NIP is calculated by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia. The deductions normally include overseas freight, insurance, into store costs and amounts for importer expenses and profit.

Both BPL and Smorgon Fuels stated that their biodiesel prices had not been affected by the allegedly dumped and subsidised imports from the USA. Both companies advised Customs and Border Protection that they were not in a position to reduce prices to compete with the low-priced imports.

Therefore, the most appropriate basis for the USP, for the purpose of this PAD, is to use the weighted average of BPL and Smorgon Fuels' selling prices in the investigation period. The majority of prices are delivered to customers and are therefore at a point where they would compete with imports delivered to customers. The level of trade of the USP in terms of imports is the delivered into-store cost to the importers that would otherwise purchase biodiesel from the Australian manufacturers. The NIP has been calculated by deducting from the USP, amounts for:

- importer into-store costs;
- overseas freight and marine insurance;
- port and clearance charges in Australia.

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Customs and Border Protection calculated the difference between NIPs and export prices and found the NIPs exceeded the export prices by less than the calculated dumping margin. This means that the lesser duty rule will be applied for the purpose of setting provisional measures.

Customs and Border Protection's preliminary NIP calculations are at **confidential appendix 6**.

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## 16. REASONS FOR MAKING A PAD

Customs and Border Protection has not received any completed exporter questionnaire responses. It is evident that biodiesel imports from the USA had a competitive advantage over Australian manufactured biodiesel in terms of price as a result of dumping and subsidisation.

Customs and Border Protection has calculated NIPs and found them to be above the USA export prices. This supports a preliminary finding that exported biodiesel from the USA has caused injury.

The delegate is of the preliminary view that:

- the goods the subject of the application have been exported from the USA at less than the amount of their normal value, and benefited from subsidies;
- there is an Australian industry producing like goods that is experiencing material injury;
- the dumped and subsidised goods are causing material injury to the industry;
- it is necessary to require and take securities to prevent material injury to the Australian industry occurring while the investigation continues; and
- there appear to be sufficient grounds for the publication of a dumping duty notice and a countervailing duty notice in respect of the goods the subject of the application exported from the USA.

The delegate is satisfied that there appear to be sufficient grounds for the publication of a dumping duty notice in respect of goods the subject of the application. The delegate has made a preliminary affirmative determination under section 269TD to that effect.

## 17. PROVISIONAL MEASURES

Section 269TD(4)(b) states that if the CEO makes a PAD, Customs and Border Protection may, at the time of making that determination or at any later time during the investigation, require and take securities under section 42 in respect of interim duty that may become payable if the officer of Customs and Border Protection taking the securities is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues.

In order to prevent material injury occurring while the investigation continues, Customs and Border Protection requires that securities be taken under s. 42 of the Act in respect of interim dumping duty that may become payable in relation to biodiesel exported to Australia from the USA that is entered for home consumption on or after 18 October 2010.

Customs and Border Protection does not require provisional countervailing duty securities at this stage. It will continue to monitor developments with the reinstatement of the subsidy program.

Details of the provisional measures are at **confidential appendix 7**.