



**INSTRUCTIONS AND GUIDELINES
CUSTOMS VALUATION**

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CUSTOMS VALUATION
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SUMMARY OF MAIN POINTS

This Instruction and Guideline specifies issues surrounding the valuation of imported goods, including:

- An introduction to customs valuation;
- An examination of relevant legislation;
- Customs valuation methodology;
- An encyclopaedia of valuation terminology; and,
- Customs and Border Protection's Valuation Advice service.

INTRODUCTION

This Instruction and Guideline deals only with issues as they relate to the valuation of goods imported into Australia.

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Division 1: An introduction to valuation

Section 1: Brief history of customs valuation

1.1.1 Domestic fair market value

- (1) At Federation, the Department of Trade and Customs adopted the "customs domestic value" (CDV) method of customs valuation. At that time, section 154 of the Customs Act 1901 described the value of imported goods as:

... the fair market value of the goods in the principal markets of the country whence the same goods were exported in the usual and ordinary acceptance of the term and free on board at the port of export in such country, and a further addition of 10% on such market value.
- (2) Put simply: $\text{Customs Value} = \text{Domestic Fair Market Value} + 10\%$. The ten percent uplift was originally meant to cover freight and landing charges. It lingered on in fossil form as "the statutory 10%" long after its purpose was forgotten. At one stage in the 1930s the Minister for Trade and Customs explained that it was well known that exporters undervalued their goods for Customs purposes, and the 10% was to compensate for that.
- (3) The underlying reason for the system - also used by the USA, among other nations - was that, in the early years of the century, the major exporting countries were USA, Germany and UK. These nations had large domestic markets and hence their domestic prices were a fair indication of value.

1.1.2 Selling price or current domestic value (CDV)

- (1) In 1921, the newly established Tariff Board reviewed the system and came up with a revised set of criteria. The customs value was now export selling price or current domestic value, whichever was the higher.
- (2) Several reasons were advanced for adopting this system:
 - protection against understatement of domestic values;
 - reasonable value for goods where there was little domestic market; and
 - galloping inflation in some countries meant unreasonably low domestic values.
- (3) Domestic Fair Market Value gave way to Current Domestic Value, which was defined as:

... the amount for which the seller of the goods to the purchaser in Australia is selling or would be prepared to sell for cash, at the date of exportation of those goods, the same quantity of identically similar goods to any and every purchaser for consumption in the country of exportation.
- (4) This system also introduced the official customs invoice complete with a declaration on the back which remained in use for many years. This system - selling price or CDV - was intended to produce a result in which CDV was the one used most of the time.

- (5) There were loopholes. There was no realistic provision for "consignment" goods, and there was no provision at all for circumstances when the goods being imported were not sold to the importer. Arbitrary methods were used and generally accepted. Most important, there was no provision for dealings between related parties - "transfer pricing" - where the relationship may have significantly influenced the price.
- (6) In 1947, for the first time, customs values were required to be in Australian currency. Up until then, value for duty (VFD) was in Sterling, and duty in Australian currency. This was fine when the Australian pound was the same as the English pound, but caused problems when the Australian pound was depreciated against the Sterling. The 10% uplift of value was dropped at this time as compensation.
- (7) This valuation method, with the minor changes noted, lasted for fifty years.

1.1.3 Brussels definition of value (BDV)

- (1) The Brussels Definition of Value was formulated for international consumption in 1950. One of its purposes was to cope with an international trading environment that had changed dramatically since the innocent days following World War I.
- (2) There was no longer just a handful of major trading nations; everybody was in the international market place. Government export subsidies and government control of trade were commonplace. There were complete government-controlled economies - the Communist nations in particular - in which there was no such thing as an open domestic market producing fair prices. Many countries produced goods which were sold only on export markets. There were multinational corporations selling goods to related parties at prices unrelated to fair market value. Exchange rates fluctuated. In these conditions, CDV was a dubious and often very unreliable measure of customs value.
- (3) It wasn't until 1972 that Customs in Australia began to investigate BDV. And it wasn't until the Sarah Coventry Case in 1974 that BDV became a matter of urgent consideration. Sarah Coventry left the existing valuation legislation with no effective tool for dealing with associated companies and transfer pricing.
- (4) BDV relied on determining an arms-length value, and specifically dealt with associated companies and transfer pricing. The essential core of BDV was set out in Article 1, paragraph 1, of Annex 1 of the Convention, as follows:

For the purposes of levying ad valorem duties of customs, the value of any goods imported for home consumption shall be taken to be the normal value, that is to say, the price which they would fetch at the time when the duty becomes payable on a sale in the open market between a buyer and a seller independent of each other.
- (5) BDV was introduced into Australia in 1976, but it proved to be an interim measure only. Although BDV had been in use around the world since the 1950s, Australia adopted it at the very end of its life. The GATT valuation system replaced it in 1981.

Section 2: The WTO Customs Valuation System

- 1.2.1 The Australian Customs valuation system is contained in Division 2 of Part VIII of the Customs Act 1901. The purpose of this legislation is to give effect to Australia's commitment under the General Agreement on Tariffs and Trade (GATT) to facilitate international trade by the implementation of the GATT Valuation Agreement, now the World Trade Organization Valuation Agreement.

The GATT valuation system became the WTO valuation system in 1994 after the World Trade Organization (WTO) was formed and the WTO Valuation Agreement was signed in Marrakesh.

- 1.2.2 Article VII of the GATT (Valuation for Customs Purposes) contains (among other things) the following summation of the essential core of the WTO Valuation Agreement:

2(a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

(b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions.

To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

(c) When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

- 1.2.3 The detailed provisions of the WTO Valuation Agreement are contained in a document entitled "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade". This document is published in "Compendium on Customs valuation" by the World Customs Organization, Rue de Marche, 30 Brussels, Belgium.

- 1.2.4 The Compendium is amended from time to time, and contains copies of the following documents:

- (1) The Agreement referred to in 1.2.3 above.
- (2) Article VII, referred to in 1.2.2 above.
- (3) Decisions taken by the Committee on Customs valuation.
- (4) Texts issued by the Technical Committee on Customs valuation:
 - (a) Advisory Opinions
 - (b) Commentaries
 - (c) Explanatory Notes
 - (d) Case Studies
 - (e) Studies
 - (f) Index to Rulings and Conclusions (that is, rulings made by various nations using the WTO Valuation Agreement).

- 1.2.5 The Compendium is quite easy to read, and gives an excellent picture of the intended interpretations of the WTO Valuation Agreement.
- 1.2.6 It should be borne in mind, however, that while the purpose of the Australian valuation legislation is to implement the WTO Valuation Agreement in Australia, the WTO Valuation Agreement and other documents in the Compendium are not the Australian law on the issue. Regard must instead be had to the provisions of the Customs Act 1901, as amended, and as interpreted by the Australian legal system.

Division 2: The legislation

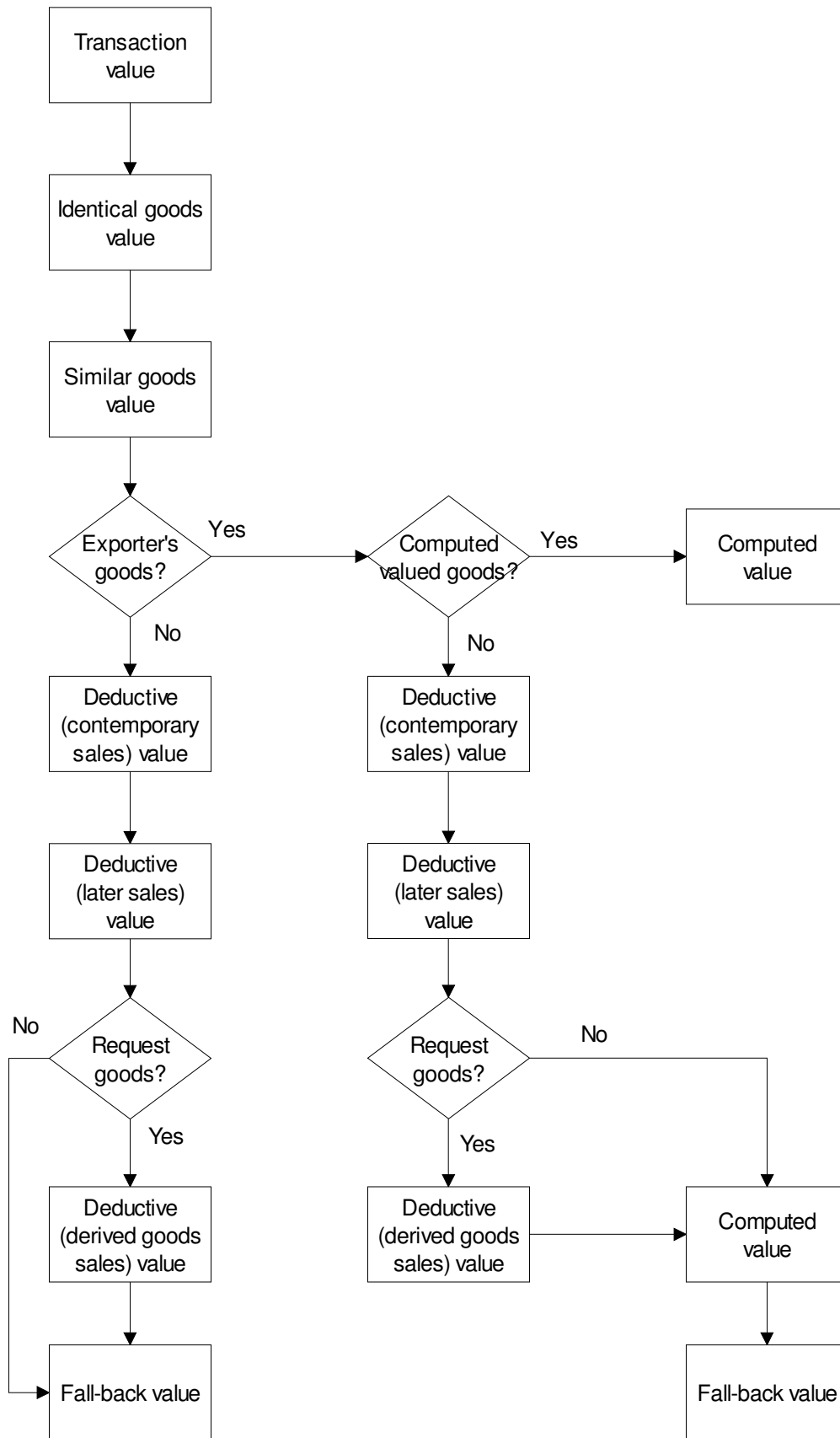
Section 1: Overview of the valuation process

- 2.1.1 Division 2 of Part VIII (sections 154 to 161L) of the Customs Act 1901 contains the legal rules for arriving at the valuation of imported goods.
- 2.1.2 The valuation legislation is complex, and is not easy to grasp simply by reading through it. A road map is needed, and this Division is intended to be such a road map.
- 2.1.3 The Act provides a number of different methods for arriving at the customs value, and those methods must be considered in strict order, as per the WTO Valuation Agreement; that is, if the first method fails to produce a value, then proceed to the second, and so on. This order is laid down in section 159, and is summarised as follows: (see Figure 2:1; p. 13-14)

Method	Section	WTO Article
(1) Transaction Value	161	1
(2) Identical Goods Value	161A	2
(3) Similar Goods Value	161B	3
(4) Deductive (Contemporary Sales) Value	161C	5.1(a)
(5) Deductive (Later Sales) Value	161D	5.1(b)
(6) Deductive (Derived Goods Sale) Value	161E	5.2
(7) Computed Value	161F	6
(8) Fall-back Value	161G	7

- 2.1.4 This strict order allows for two variations.
 - (1) At the request of the importer, method number 7 (Computed Value) can be applied before method number 4, in effect being swapped with the group of three different Deductive methods (normally numbers 4, 5 and 6.). Refer to Division 4 entries, "computed valued goods" and "exporter's goods".
 - (2) Method number 6 (deductive [derived goods sale] value) can be used only if the importer requests that it be used. Refer to Division 4, entry "request goods".

Figure 2:1 Sequence of valuation methods



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This Figure shows the strict sequence of valuation methods as set out in the Customs Act 1901. The sequence is exactly the same under the WTO Valuation Agreement. The definitions in subsection 154(1) of "request goods" and "exporter's goods" are legislative drafting devices, and do not appear in the WTO Valuation Agreement.

- 2.1.5 This gives effect to the same provisions of the WTO Valuation Agreement, which sets out the methods as follows:
- (1) Transaction Value
 - (2) Identical Goods Value
 - (3) Similar Goods Value
 - (4) Deductive Value (3 methods)
 - (5) Computed Value
 - (6) Fall-back Value
- 2.1.6 The WTO Valuation Agreement allows, on request by the importer, the reversal of methods 4 and 5. It also allows, on request of the importer, the use of a variation of method 4, but based on the sale of derived goods. Although the detailed structure of the WTO Valuation Agreement and the Customs legislation is different, the outcome is exactly the same.
- 2.1.7 Although this array of methods seems daunting and complex, it must be remembered that it is very rare for any method except transaction value to be used.
- 2.1.8 The other methods are intended to ensure that, in the absence of an import sales transaction, or other circumstances which prevent the use of transaction value, Customs and Border Protection can still arrive at a customs value without resorting to arbitrary methods or fictitious values. There is a method available to deal with almost any imaginable contingency.
- 2.1.9 Section 2 below explains, very briefly, the nature of the various methods, and also the circumstances under which the strict order can be varied.
- 2.1.10 Each of the valuation methods is dealt with in full in later Divisions of this Instruction and Guideline.

Section 2: Valuation methods in correct order

2.2.1 Method 1: Transaction value method

- (1) This method assumes that the goods have been the subject of a sale which gave rise to the export of the goods from a foreign country and their importation into Australia. This sale is called the import sales transaction.
- (2) The Transaction Value method is explained in detail in Division 3.
- (3) It is used for the valuation of the overwhelming majority of shipments into Australia, and, indeed, worldwide wherever the WTO Valuation Agreement is used.
- (4) The remaining valuation methods are designed to cover those circumstances where the transaction value method cannot be applied (The circumstances preventing the use of transaction value are set down in detail in Sections 160 and 161H of the Act).

2.2.2 Methods 2 and 3: Identical and similar value methods

- (1) If a Collector cannot determine a value using the transaction value method, the next two steps involve using other shipments (of identical or similar goods) to arrive at a value for the shipment under scrutiny.
- (2) First, try the identical goods method. This involves finding a shipment of the identical goods exported to Australia at about the same time (that is, within plus or minus 45 days) as the shipment to be valued, for which a transaction value can or has been established.
- (3) If that fails, try the similar goods method. This involves finding a shipment of similar (rather than identical) goods for which a transaction value can or has been established. Again the shipment of similar goods must be exported to Australia about the same time as the imported goods.
- (4) For a more detailed coverage of these two methods, refer to the relevant entries in the Encyclopaedia, Division 4.

2.2.3 A digression: switching the order

- (1) In normal circumstances, if identical or similar goods value methods have failed, the next step is to try the deductive value methods followed by the computed value method as in paragraph 2.1.3.
- (2) Article 4 of WTO Valuation Agreement allows the order of these two methods to be reversed at the request of the importer. The Customs Act 1901 makes the same provision. For full details of the way this has been implemented in the Act, see the Encyclopaedia article on computed valued goods.

2.2.4 Methods 4, 5 and 6: Deductive values

- (1) The next group of valuation methods are, in order, deductive (contemporary sales) value, then deductive (later sales) value, and finally deductive (derived goods sales) value.
- (2) The first two of these deductive methods arrive at the customs value by working backwards from the price realised by the sale in Australia of "comparable" goods by deducting costs which have been added to those goods after exportation.
- (3) The third deductive method, which applies only to request goods, arrives at a customs value by working backward from the sale of "comparable" goods which have been derived from imported goods by assembling, packing or further processing those imported goods in Australia.
- (4) Request goods are merely goods which an importer has requested be valued by the deductive (derived goods sale) value.

2.2.5 Method 7: Computed value

- (1) Computed value method has a restricted scope. It can be used only if the goods to be valued are exporter's goods. These are goods that are exported directly by the producer, manufacturer, etc, not through some intermediary. The essence of this scheme is to arrive at a value by working through the producer's own records of the costs of production.
- (2) Note that, if an importer asks, and if the goods are exporter's goods, and if the Collector can determine a computed value, this method can be employed before any of the deductive value methods above. See above, Section 2.2.3
- (3) For a more detailed coverage of this method, refer to the alphabetical entries of exporter's goods, and computed valued goods in Division 4.

2.2.6 Method 8: Fall back value

- (1) Fall-back value applies when all of the above methods have failed to arrive at an acceptable customs value.
- (2) This method requires a Collector to start again at the top, and flexibly revisit the preceding valuation methods with a view to finding a value by reasonable means. For this reason, fall-back is sometimes known as the "flexible" valuation method.
- (3) Example 1:

Method 2, identical goods, almost but not quite provided the customs value first time around for a hypothetical shipment of goods. The defect being that the sale took place 47 days, rather than 45 days, away from the date of importation.

Because the sale took place two days outside the specific limits of that valuation method, it could not be used under the identical goods method, even though the values produced by using that sale were fair and reasonable.

That sale could, however, reasonably be accepted to produce a value under the fall-back provision.

Section 3: Inability to determine value

- 2.3.1 Section 160 provides for the circumstances in which a Collector may determine, in writing, that he or she is unable to determine any value because the Collector is not satisfied that there is sufficient reliable information.
- 2.3.2 What might constitute sufficient reliable information will depend on the circumstances of each case. While Customs and Border Protection does not look to make unrealistic demands, it is essential that customs values be determined equitably on the best possible information. It is the responsibility of the importer to correctly value goods and to supply the necessary documentary support for that valuation.
- 2.3.3 For a more detailed discussion of this, refer to 3.9.2 and 3.9.3.

Appendix 2:1 Index to definitions

The Valuation provisions of the Customs Act 1901 contain many definitions. Most of those definitions are in subsection 154(1) of the Act, but quite a number are to be found in other sections. Some are in other Divisions of the Act. This index is to make it easier to locate those definitions.

DEFINITION	DEFINED IN
about the same time	154(2)
acquire	154(1)
adjusted price	161(2)
aircraft	4(1)
Australian arranged material costs	161F(2)
Australian arranged subsidiary costs	161F(2)
Australian arranged tooling costs	161F(2)
Australian arranged work costs	161F(2)
Australian inland freight	154(1)
Australian inland insurance	154(1)
buying commission	154(1); 155
commercial document	4(1)
comparable goods	154(1)
comparable identical goods	161A(2)
comparable similar goods	161B(2)
computed value	154(1); 161F
computed value goods	154(1)
container	4(1)
contemporary sale	161C(2)
control	154(4)
customs value	154(1); 159
day of exportation	161J(4)
deductible administrative costs	154(1)
deductible financing costs	154(1)
deductive (contemporary sales) value	161C
deductive (derived goods sales) value	161E
deductive (later sales) value	161D
deductive value	154(1)
derived goods	161E(2)
derived goods sale	161E(2)
design	157(3)
enactment	161K(5)
exempted container	154(1)
exempted pallet	154(1)
exporters goods	154(1)
fall-back value	161G
foreign inland freight	154(1)
foreign inland insurance	154(1)
identical goods and similar goods	156(1); 156(2)
identical goods value	161A
import sales transaction	154(1)
later sale	161D(2)
officer	4(1), 161L(3)
officer of Customs	4(1)
overseas freight	154(1)
overseas insurance	154(1)
owner	4(1)
pallet	4(1)

1) **INTERNAL AND EXTERNAL USE**

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payment	157(3)
place of export	154(1)
price	154(1)
price related costs	154(1)
produce	154(1)
production assist costs	154(1)
production materials	154(1)
production tooling	154(1)
production work	154(1)
purchaser	154(1)
purchaser's material costs	154(1)
purchaser's subsidiary costs	154(1)
purchaser's tooling costs	154(1)
purchaser's work costs	154(1)
rebate	154(1)
reference sale	161C(2); 161D(2); 161E(2)
related	154(3)
request goods	154(1)
royalties	157(1)
self transported goods	154(1)
ship	4(1)
similar goods	156(3)
similar goods value	161B(1)
scheme	157(3)
subsidiary goods	154(1)
subsidiary services	154(1)
trade mark	154(1)
trader	154(1)
transaction value	154(1); 161
transportation	154(1)
transportation costs for assists	158
unit price	161A(2); 161B(2); 161C(2); 161D(2); 161E(2)
use	157(3)
value unrelated amount	154(1)
vendor	154(1)
work goods	154(1)
work services	154(1)

Division 3: Transaction value

Section 1: Introduction

- 3.1.1 This Division explains the **transaction value** method of valuing imported goods. It is supported by a chart showing the elements involved (see Figure 3:1).
- 3.1.2 Phrases in **bold type** are fully treated in the Encyclopaedia of Valuation Terms in Division 4.
- 3.1.3 More than 95% of goods imported into Australia are valued by the transaction value method.
- 3.1.4 Several conditions need to be met before the customs value of goods can be determined using the transaction value method:
- there must be sufficient reliable information available to the Collector to determine the transaction value of the goods: subsection 160(1);
 - there must be an **import sales transaction** - a contract of sale for the goods - between the two principals, namely the purchaser and the vendor paragraph 161H(1)(a);
 - there are no restrictions on the disposition or use of the goods (but see the exceptions to this rule - paragraph 161H(1)(c);
 - the price has not been influenced by a relationship between the purchaser and the vendor - subsection 161H(2); or
 - the price was not different from the price of identical or of similar goods, and, if it was, that price difference was not designed to reduce or to avoid duty - subsection 161H(4).

Section 2: Transaction value in brief

- 3.2.1 Transaction value is defined at subsection 161(1) as the sum of:
- the adjusted price of the goods in their **import sales transaction**; plus
 - any price related costs that have not been taken into account in determining the price of the goods.
- 3.2.2 The procedural steps in the Transaction Value Method are (see also Figs 3:1 and 3:2):
- (1) Identify the import sales transaction by reference to the contract/s of sale;
 - (2) From the import sales transaction, establish the actual price of the imported goods;
 - (3) Arrive at the adjusted price by deducting any legal deductions from the price;
 - (4) If there are any **price related costs** not already included in the price, add them to the adjusted price to give a complete account of the transaction;
 - (5) Convert the resulting price to Australian currency at the exchange rate applying on the **day of export**. This is the customs value of the goods.

Section 3: Identifying the transaction

- 3.3.1 Turn to the section 154 definition of import sales transaction in order to determine just what contracts of sale and associated contracts, agreements or arrangements will form the basis of the transaction value.
- 3.3.2 A contract of sale does not necessarily have to be a single document or set of documents. It may be formal or informal, written or verbal. It must have the following elements:
- (1) an offer to sell the goods (it may be an "offer at large");
 - (2) acceptance of that offer (evidenced by signing a contract, or simply by placing an order and tendering the price);
 - (3) payment for the goods ("Consideration").
- 3.3.3 In many cases, the offer may be in a standing distribution or sales agreement covering a period and/or a territory, possibly also setting out conditions of sale, and the remaining elements - acceptance, payment and change of ownership - will be evidenced by the placing of an order, shipping of the goods, and payment for same in the terms of the standing agreement. In this case, the individual orders and shipments, taken together with the standing agreement, form each contract of sale.
- 3.3.4 Where there has been more than one contract of sale for the goods, paragraphs (a), (b) and (c) of the definition tell us which contract to choose.
- 3.3.5 Paragraph (d) requires us to include in the import sales transaction any other contract, agreement etc (whether formal or informal) that provides for an increase in the value of the goods, and paragraph (e) directs the addition of any other contract, agreement or arrangement that is so closely connected to the goods and the primary contract that a single transaction is formed.

Section 4: Price

- 3.4.1 Having decided on the appropriate contracts, agreements and arrangements that make up the **import sales transaction**, we now need to look at the various ingredients that make up the transaction. The appropriate place to start is price.
- 3.4.2 Price is defined in section 154. The definition of price is wide, and attempts to capture all consideration passing from the purchaser, directly or indirectly, to the benefit of the vendor in relation to the contract for the goods. This can include not only funds, but also the value of goods and services provided to the vendor or for the vendor's benefit. There are two further considerations:
- (1) rebates that were received at or before the time of valuation may be deducted from the price; and
 - (2) any Australian customs duty and GST that might be included in a free into store (FIS) or delivered duty paid (DDP) contract.
- 3.4.3 Rebate is defined at section 154 as:
- rebate*, in relation to goods the subject of a contract for sale, means any rebate of, or other decrease in, the amount that would constitute the price of the goods other than such a rebate or decrease the benefit of which has been received when that amount is being determined.
- 3.4.4 To complete an assessment of price, we need to determine the amount paid or payable and if any goods or services have been provided as part of the consideration from the buyer to the seller. We need to know the terms of the deal (FOB, CIF, FIS / DDP etc.) and we need to determine the place of export.

Section 5: Adjusted price

- 3.5.1. Having worked out the price of the goods and what the price includes, the next step is to proceed to adjusted price.
- 3.5.2. Adjusted price is defined in subsection 161(2) and allows us to deduct from the price of the goods any of the following charges that are included:
- (1) **deductible financing costs;**
 - (2) **post importation expenses** such as erection, testing assembly, and other technical assistance;
 - (3) Australian inland freight and Australian inland insurance;
 - (4) administrative costs such as quarantine, clearance and brokers fees;
 - (5) **overseas freight** and **overseas insurance** charges.

Section 6: Price related costs

- 3.6.1. The next step required by the definition of transaction value is to add to the adjusted price any price related costs that have not already been taken into account in determining the price of the goods. These are defined in section 154 as being:
- (1) any **production assist costs**;
 - (2) **packing**, fumigation and similar costs incurred to pack the goods for export or to get the goods into the condition in which they are imported;
 - (3) **foreign inland freight** and **insurance charges** to get the goods to their **place of export**;
 - (4) **commissions** and brokerage, other than **buying commission**;
 - (5) **royalties** and **licence fees** (apart from royalties for the right to reproduce the imported goods);
 - (6) payments of any **proceeds of subsequent resale**, use or disposal of the goods paid or payable in future.
- 3.6.2. Price related costs can be paid to any party, not just to the vendor, and still be regarded as part of the customs value.
- 3.6.3. Note that by the inclusion of "proceeds of subsequent sale" in "price related costs", the legislation specifically acknowledges that the ultimate customs value under the transaction value method need not necessarily be known at the time the goods are entered for home consumption. Nevertheless, the transaction value method is still applicable in these circumstances.

Section 7: Terms of trade

- 3.7.1. Note that the above provisions are aimed at assessing the total amount paid for the goods, packed and in export condition, at their place of export.
- 3.7.2. FOB ("free on board") contracts often require little adjustment.
- 3.7.3. CIF ("cost, insurance, freight") contracts will require adjustments in respect of:
 - (1) overseas inland freight and insurance after the place of export;
 - (2) overseas freight and shipping charges; and
 - (3) other charges imposed after the place of export.
- 3.7.4. DDP ("delivered duty paid") contracts will require additional deductions of Australian Customs Duty and GST, clearance charges and transport to the purchaser's store.

Section 8: Day of exportation

- 3.8.1. While examining the export arrangements for the goods we also need to determine the day of exportation as this will fix the date used for converting the currency of the contract into Australian dollars.
- 3.8.2. Conversion of the customs value to Australian currency at the correct exchange rate is the final step in the valuation process.

Figure 3:1 The transaction value method

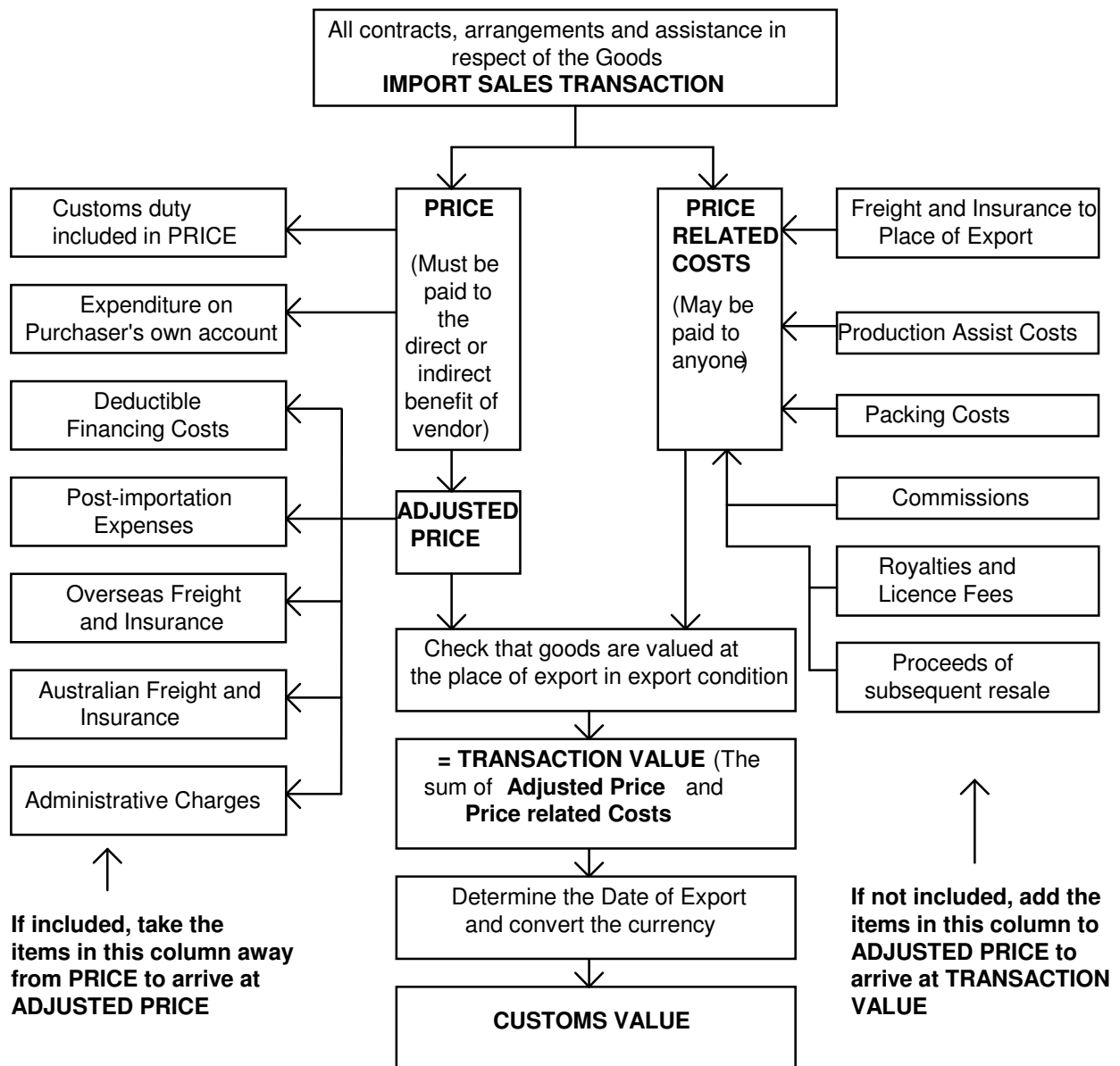


Figure 3:2 Transaction value method simplified

STEP 1:	Identify the import sales transaction
STEP 2:	Establish price paid (allow deduction of eligible rebates)
STEP 3:	Adjust price - legal deductions
STEP 4:	Add legal additions – price related costs
STEP 5:	Convert to Australia \$. Transaction Value now = Customs Value

<p>TRANSACTION VALUE equals:</p> <ul style="list-style-type: none"> • Price in an import sales transaction, but
<p>DEDUCTION OF ELIGIBLE REBATES</p> <ul style="list-style-type: none"> • Rebates/discounts that have been received when the price is being determined
<p>ADJUSTED BY DEDUCTING</p> <ul style="list-style-type: none"> • deductible financing costs • certain costs for assembly, maintenance, technical assistance, etc, incurred in Australia • Australian inland freight and Australian inland insurance • deductible administrative costs • overseas freight and overseas insurance
<p>THEN ADDING PRICE RELATED COSTS TO THE PRICE</p> <ul style="list-style-type: none"> • Production assist costs (assists) • Packing costs • Foreign inland freight and foreign inland insurance • Commission and brokerage (but not buying commission) • Royalties and licence fees • Proceeds of subsequent use, resale or disposal of the goods.

Section 9: When transaction value method is inappropriate

3.9.1 Summary

- (1) Transaction Value Method is inappropriate in the following circumstances (see simplified chart at Fig 3:3).

For a detailed analysis of the rejection of transaction value, refer to Appendix 3:1, Redetermination of Green Line / Red Line entries.

- (a) the price cannot be determined (paragraph 160(2)(a));
- (b) where any amount that would ordinarily form part of their customs value cannot be determined (paragraph 160(2)(a));
- (c) the amount of any deduction from price cannot be ascertained (paragraph 160(2)(b)(ii));
- (d) there is insufficient reliable information about any matter which must be taken into account (section 160);
- (e) there is no import sales transaction (paragraph 161H(1)(a));
- (f) the disposition or use of the goods by the purchaser is subject to certain restrictions (paragraph 161H(1)(c));
- (g) the vendor and purchaser are related parties and that relationship has influenced the price (paragraph 161H(2));
- (h) the Collector determines that the price of the imported goods differs from the transaction value of identical or similar goods (paragraph 161H(4)).

NOTE: Section 160 has general applicability to ANY valuation method under the Division including Transaction Value, while section 161H has application only to Transaction Value Method.

- (2) Some of the above circumstances are treated in more detail in the next section.

Figure 3:3: When transaction value is inappropriate

<p>CUSTOMS VALUE CANNOT BE DETERMINED WHEN: (Section 160 refers)</p>
<p>There is INSUFFICIENT RELIABLE information (3.9.2 and 3.9.3)</p>

<p>TRANSACTION VALUE CANNOT BE USED WHEN: (Section 161H refers)</p>
<p>There is NO IMPORT SALES TRANSACTION (3.9.4)</p>
<p>The disposition or use of the goods is subject to RESTRICTIONS (3.9.5)</p>
<p>The price is influenced by the fact that the PARTIES ARE RELATED (3.9.6)</p>
<p>The price is abnormal - e.g., PRICE AVERAGING or PACKAGE DEALS (3.9.7)</p>

3.9.2 Insufficient reliable information

- (1) Section 160 provides for the circumstances in which a Collector may determine, in writing, that he or she is unable to apply a particular valuation method (including transaction value method) because the Collector is not satisfied that there is sufficient reliable information.
- (2) What might constitute sufficient reliable information will depend on the circumstances of each case. While Customs does not look to make unrealistic demands, it is essential that customs values be determined equitably on the best possible information. It is the responsibility of the importer to correctly value goods and to supply the necessary documentation to support that valuation.

3.9.3. Inability to determine value

- (1) There are two aspects to section 160, and in some respects subsection 160(2) comes before subsection 160(1), because subsection 160(1) refers to subsection 160(2) for conditions that have to be met before subsection 160(1) applies.
- (2) Subsection 160(2) deals with two different circumstances where a Collector is not satisfied that there is sufficiently reliable information about the quantity and correctness of an amount which the Collector has to take into account when determining a value in accordance with a valuation method.

Example 1:

An amount of assists is known to be involved in an importation, but the Collector is unable to be satisfied as to the quantity and correctness of the amount due to insufficient reliable information.

- (3) Such an amount is ordinarily included in customs value. The Collector SHALL determine in writing that he or she is unable to use that valuation method due to insufficient reliable information (paragraph 160(2)(a) refers).

Example 2:

An importation is on a CIF basis, but the Collector is unable to be satisfied as to the quantity or correctness of the amount of overseas freight.

- (4) Such an amount is ordinarily deducted from price to arrive at the customs value. The Collector has two options:

As in example 1, the Collector MAY determine that he or she is unable to use that valuation method due to insufficient reliable information (sub-paragraph 160(2)(b)(i) refers); OR

The Collector may determine in writing that he or she is not satisfied, BUT still desires to use that method; the Collector MAY then use the method, but NOT DEDUCT the amount (sub-paragraph 160(2)(b)(ii) refers).

- (5) Subsection 160(1) states that where a Collector is not satisfied that there is sufficient reliable information to enable him or her to determine a value under a provision of the Division, the Collector may determine so in writing. If the Collector does so, then the Collector shall be taken not to be able to determine a value under that provision.

3.9.4 Determination in writing

- (1) It is a specific requirement that these determinations be IN WRITING.
- (2) There is no specific format for such determinations, but in general:
- (a) The section under which the determination is made should be cited; and,
 - (b) The specific information about which the Collector is not satisfied should be stated.

3.9.5 Notification to owner

- (1) The importer/owner must be notified of, and provided with a copy of, the determination, either by personal visit or by mail.
- (2) The notification must give the importer adequate time to respond, at least 28 days, or some greater time.

3.9.6 No import sales transaction

- (1) Paragraph 161H(1)(a) refers.
- (2) An import sales transaction must have as a basis a contract for the sale of the goods. If goods are not sold, it follows there can be no import sales transaction. Some examples (this is not a comprehensive list) of situations in which there is no sale include:
 - (a) goods are sent on consignment;
 - (b) goods imported by intermediaries, without purchase, for sale on behalf of the supplier;
 - (c) where the purchaser and vendor are not separate legal identities, i.e. branch office transfers;
 - (d) goods imported under a hire or leasing contract;
 - (e) barter, countertrade / "contra" deals, or compensation arrangements;
 - (f) other situations in which the goods remain the property of the supplier; and
 - (g) free consignments such as gifts and, possibly, samples and promotional items.

An import sales transaction will involve a price for the imported goods. If that price cannot be ascertained, then legally the transaction value cannot be determined. It may be that part of the consideration passing from the purchaser to the vendor is not expressed in money, and a money value cannot be established.

3.9.7 Goods subject to restrictions (paragraph 161H(1)(c))

- (1) The disposition or use of the goods by the purchaser may be subject to restrictions. If such a restriction exists in the contract of sale and the commercial value of goods is affected by that restriction, the transaction value will be rejected.
- (2) However, the transaction will not be rejected if the restriction is:
 - imposed under a law of Australia;
 - only limits the area in which the goods may be sold; or
 - does not substantially affect the commercial value of the goods.

3.9.8 Price influenced by relationship (subsection 161H(2))

- (1) Where the Collector is satisfied that the purchaser and the vendor were related persons and considers that that relationship may have influenced the price of the goods, the Collector shall then advise the purchaser, in writing, of this fact.
- (2) The purchaser then has the opportunity to satisfy the Collector that the relationship did not influence the price of the goods. Failing this, the Collector shall determine that the transaction value of the goods cannot be determined, (see Appendix 3.1)

3.9.9 Goods and services sold at prices that differ from transaction value of identical or similar goods (subsections 161H(4) to (7))

- (1) If the Collector is of the opinion that the price of the imported goods differs from the transaction value of identical or similar goods, the Collector may require the purchaser to demonstrate that the price difference was not designed to achieve a reduction of, or to avoid, duty.
- (2) In these circumstances, the purchaser has an opportunity to satisfy the Collector that the difference in price was not designed to obtain a reduction of, or to avoid, duty.
- (3) Where the purchaser fails to satisfy the Collector within the notified period (not less than 28 days), the Collector shall determine that the transaction value cannot be determined.
- (4) Subsections 161H(6) and 161H(7) apply to the supply of services in relation to the imported goods in a like manner as subsections 161H(4) and (5) apply to the price paid for goods. Once again, the purchaser is provided with an opportunity to satisfy the Collector. Failing this, the Collector shall determine that the transaction value cannot be determined.
- (5) Examples of the above are "package deals" and "price averaging". Arrangements between the vendor and purchaser may involve a consideration for which a value cannot be ascertained, and thus invalidate what purports to be the price. Such arrangements include:
 - (a) the contract of sale is for goods which attract a high rate of duty and for other goods which attract a low rate. Having established the total price, the price for the former is reduced and, the price for the latter is increased; or
 - (b) the contract of sale is for goods of the same class or kind but which must be separated into categories for tariff purposes (e.g. footwear). Again, having established the total price, an average unit price is established in order to attract the lowest possible rate of duty.
- (6) In either case, the unstated aim is for the purchaser to agree to purchase a particular quantity of each commodity, or an agreed mix of goods so that the total price is unaltered. Such a consideration may not be ascertainable in money terms, and as each category must be valued in order to apply the tariff, the various prices cannot be determined. This explanation does not of course, consider the question of evasion of duty.

Appendix 3:1 Green Red and Amber line examinations

Green Line – Examination of value after clearance

1. *Determination of value*

Section 161K of the *Customs Act 1901* states that when the value of imported goods is determined by the Collector in accordance with the Division it shall be recorded on the entry, or the owner will be “otherwise advised”.

A determination can be by acceptance (automatically by the Customs and Border Protection computer system) or by decision (by a Customs and Border Protection officer).

Under self-assessment, the importer determines the value of the imported goods and records that value on the Customs entry.

When the entry goes down the ‘green line’ and is automatically accepted and processed by the Customs and Border Protection computer system, the value has been determined by acceptance. This is set out in subsection 161K(2).

Subsection 161K(2) requires notification of determinations in a manner prescribed. Regulation 108 prescribes by reference to subsection 71B(4) which, in effect, provides that automatic computer response through the Customs and Border Protection Integrated Cargo System suffices as notification (and hence, as a determination).

2. *Examination of the declared value*

In the process of a Customs and Border Protection audit (or other post-clearance examination of the entry), the declared customs value will be closely examined for acceptability.

Legislation on the auditing of commercial documents is contained in Part XII of the Customs Act. Section 240AA refers to the power of Customs officers to inspect commercial documents in certain circumstances.

NB: If an audit requires **any** decision to be made in relation to the valuation of previously entered goods, that decision **must** be made by the CEO, or by a delegate of the CEO, under section 161L.

The practical consequence is that an audit officer will need to:

- have the necessary delegation for section 161L; or
- refer the valuation decision, arising in an audit, to an officer who has the necessary delegation.

3. *Is there sufficient reliable information?*

After analysis of the information supplied by the importer during the audit, Customs and Border Protection may decide that it cannot determine the customs value of the goods using the valuation method selected by the importer.

Under section 160, a Collector may determine, in writing, that he or she is unable to apply a particular valuation method (including the transaction value method) because he or she is not satisfied that there is sufficient reliable information. What might constitute sufficient reliable information will depend on the circumstances of each case.

- 160(1) Where a Collector is not satisfied that there is sufficient reliable information available to the Collector, being information of a kind referred to in subsection (2), to enable him or her to determine a value of imported goods in accordance with a provision of this Division for determining their customs value, the Collector may determine, in writing, that he or she is not so satisfied and the Collector shall thereupon be taken to be unable to determine that first-mentioned value.
- (2) Where a Collector is not satisfied that there is sufficient reliable information available to the Collector to enable him or her to determine the quantity and correctness of any amount that is required to be taken into account in determining a value of those goods in accordance with a provision of this Division for determining the customs value of imported goods, then:
- (a) where that amount would ordinarily form part of their customs value under the particular valuation method set out in that provision - the Collector shall determine, in writing, that he or she is not so satisfied and the Collector shall thereupon be taken to be unable to use that method;
 - (b) where that amount would ordinarily be deducted from the amount that would otherwise be their customs value under the particular valuation method set out in that provision:
 - (i) if the Collector determines, in writing, that he or she is not so satisfied and that he or she does not desire to use the method - the Collector shall thereupon be taken to be unable to use that method; and
 - (ii) if the Collector determines, in writing, that he or she is not so satisfied but that he or she desires to use the method - the Collector may use the method but no deduction shall be allowed on account of that amount.

Subsection 160(1) refers to subsection 160(2) for conditions that have to be met before subsection 160(1) applies.

Subsection 160(2) deals with two circumstances where a Collector is not satisfied that there is sufficient reliable information about the quantity and correctness of an amount which the Collector has to take into account when determining the customs value in accordance with a valuation method.

The first circumstance is where the amount is ordinarily included in the customs value. The Collector shall determine, in writing, that he or she is unable to use that valuation method due to insufficient reliable information (paragraph 160(2)(a) refers).

The second circumstance is where the amount is ordinarily deducted from the price to arrive at the customs value. The Collector may determine, in writing, that he or she is:

- (a) unable to use that valuation method due to insufficient reliable information (paragraph 160(2)(b)(i) refers); or
- (b) not satisfied, but still desires to use that method; the Collector may then use the method, but not deduct the amount (paragraph 160(2)(b)(ii) refers).

It is a specific requirement that these determinations be in writing. An example of a determination, prepared by the Customs Legal Unit, is provided at Appendix 3:2 of this Instruction and Guideline.

The completed determination should be placed on the relevant file. It should not be given to the importer.

One determination can be used where there is insufficient reliable information to use one or more valuation methods.

NB: When the customs value is being examined after clearance (green line cargo) under section 161L, the Customs and Border Protection officer undertaking the review must have a delegation under section 161L. If, as part of the review, section 160 needs to be invoked, the officer invoking that section must have a delegation under section 161L. Put simply, when a valuation determination (or other decision) is being reviewed under section 161L, any decision/action that needs to be taken as part of the review process should be undertaken by a delegate under section 161L even if the original valuation determination (or other decision) is affirmed.

If there is insufficient reliable information to use a particular valuation method, Customs and Border Protection must then proceed sequentially through the succeeding methods of valuation under section 159 until a method is reached whereby the customs value can be determined.

4. *Can the transaction value method be used?*

By far the most common method of valuation is the transaction value method. When there is sufficient reliable information to determine the transaction value, the Collector must then consider whether, under section 161H, there are other grounds to reject the use of this valuation method. The following flow diagram should be consulted.

NB: When the customs value is being examined after clearance (green line cargo) under section 161L, the Customs and Border Protection officer undertaking the review must have a delegation under section 161L. If, as part of the review, section 161H needs to be invoked, the officer invoking that section must have a delegation under section 161L. Put simply, when a valuation determination (or other decision) is being reviewed under section 161L, any decision/action that needs to be taken as part of the review process (eg writing a letter under section 161H) should be undertaken by a delegate under section 161L even if the original valuation determination (or other decision) is affirmed.

Section 161H prescribes a number of circumstances where the transaction value method cannot be utilised. The effect of any one of the conditions applying is that Customs and Border Protection is unable to use the transaction value method and will then consider the identical goods value method and so on.

Paragraph 161H(1)(a) refers to situations where there is no import sales transaction.

Subparagraphs 161H(1)(c)(i)-(iii) set out circumstances where there is a restriction on the use or disposition of the goods.

Subsections 161H(2) & (3) refer to related persons.

Subsections 161H(4) & (6) refer to goods or services imported at a lower price than identical or similar goods or services.

In relation to subsections 161H(2) & (3) and subsections 161H(4), (5), (6) & (7), Customs and Border Protection must notify the importer *in writing*, and must give the importer the opportunity to respond (within 28 days). Examples of determinations, prepared by the Customs Legal Unit, are provided at Appendix 3:2 of this Instruction and Guideline.

A copy of any determination that is given to an importer should be placed on the relevant file.

4.1 *No import sales transaction*

Paragraph 161H(1)(a) states:

- 161H(1) Without limiting section 160, a Collector cannot determine the transaction value of imported goods for the purposes of this Division, including, but without limiting the generality of the foregoing, section 161A or 161B, if the Collector:
- (a) after reasonable inquiry, is not aware of any import sales transaction in relation to the goods;

An import sales transaction must have, as a basis, a contract for the sale of goods. If goods are not sold, it follows there can be no import sales transaction. Some examples (which are not exhaustive) of situations in which there is no sale are:

- (a) goods are sent on consignment;
- (b) goods imported by intermediaries, without purchase, for sale on behalf of the supplier;
- (c) where the purchaser and vendor are not separate legal identities;
- (d) goods imported under a hire or leasing contract;
- (e) barter, counter trade, or compensation arrangements;
- (f) other situations in which the goods remain the property of the supplier; and
- (g) free consignments such as gifts, samples and promotional items.

Action required:

- if required, request further information to confirm or to clarify the existence of an import sales transaction;
- if no import sales transaction is found, reject the transaction value method, and issue a revocation notice, for the entered customs value, under section 161L. Note: A delegate of the CEO must prepare the revocation notice.

4.2 *Restrictions on disposition or use of the goods*

Paragraph 161H(1)(c) states:

- 161H(1) Without limiting section 160, a Collector cannot determine the transaction value of imported goods for the purposes of this Division, including, but without limiting the generality of the foregoing, section 161A or 161B, if the Collector:
- (a) ...;
 - (b) ...;
 - (c) is satisfied that the disposition or use of the goods by the purchaser is subject to restrictions, not being restrictions of the following kinds:
 - (i) restrictions imposed or required by, or by any public officer or authority acting in accordance with, any law in force in Australia;
 - (ii) restrictions that limit the geographical area in which the goods may be sold;
 - (iii) restrictions that do not substantially affect the commercial value of the goods.

The disposition or use of the goods by the purchaser may be subject to restrictions. If such a restriction exists in the contract of sale and the commercial value of goods is substantially affected by that restriction, the transaction value cannot be determined.

However, the transaction value will *not* be rejected if the restriction is:

- (a) imposed under a law of Australia;
- (b) only limits the *area* in which the goods may be sold; or
- (c) does not substantially affect the commercial value of the goods.

Restrictions that result in the rejection of the transaction value will be rare.

Action required:

- if required, request further information to confirm or to clarify the existence of restrictions on the disposal or use of the goods; and
- if restrictions are found, reject the transaction value method, and issue a revocation notice under section 161L. Note: A delegate of the CEO must prepare the revocation notice.

4.3 *Price influenced by relationship*

Subsections 161H(2) & (3) state:

- 161H(2) Where, in relation to the goods required to be valued, a Collector:
- (a) is satisfied that the purchaser and the vendor of imported goods were, at the time of the goods' import sales transaction, related persons; and
 - (b) considers that the relationship may have influenced the price of the goods;
- the Collector shall, by notice in writing served, personally or by post, on the purchaser of the goods:
- (c) advise the purchaser of:
 - (i) the view that the Collector has formed of the possible effect on the price of the goods of the relationship between the purchaser and the vendor;
 - (ii) the reasons for forming that view; and
 - (iii) the fact that, because of that view, the Collector may be required to decide under subsection (3) that the transaction value of the goods cannot be determined; and
 - (d) invite the purchaser to put before the Collector, within a period specified in the notice (not being a period of less than 28 days), such further information as the purchaser considers might serve to satisfy the Collector as to any of the matters set out in subsection (3).
- (3) On the expiration of the period specified in a notice under subsection (2), the Collector shall, unless the purchaser of the imported goods has satisfied the Collector that:
- (a) a relationship between the purchaser and the vendor of the goods did not influence the price of the goods; or
 - (b) the amount of the transaction value that would be determined in respect of the goods if the purchaser and the vendor had not been related at the time of the import sales transaction for the goods divided by the number of the units of the goods closely approximates, having regard to all relevant factors:
 - (i) the unit price within the meaning of section 161A of identical goods that were exported to Australia about the same time as the imported goods;

- (ii) the unit price within the meaning of section 161B of similar goods that were exported to Australia about the same time as the imported goods;
- (iii) the unit price of identical goods or similar goods sold in a contemporary sale within the meaning of section 161C as determined in accordance with that section; or
- (iv) the computed unit price of identical goods or similar goods that were imported into Australia about the same time as the imported goods being the computed value of those identical goods or similar goods determined in accordance with section 161F divided by the number of units of those identical or similar goods;

be taken to be unable to determine the transaction value of the goods.

Customs and Border Protection must have grounds for believing that the parties in the import sales transaction are related for these subsections to be applicable. 'Related' is defined in subsection 154(3) of the Act.

Subsection 161H(2) provides that where the Collector is satisfied that the purchaser and the vendor were related persons, and considers that the relationship may have influenced the price of the goods, the Collector shall then advise the purchaser, *in writing*, of this fact.

Subsection 161H(2) also provides that the purchaser has the opportunity to satisfy the Collector that the relationship did not influence the price of the goods. Failing this, the Collector will be unable to determine the transaction value for the goods.

NB: Commerce between related parties accounts for a major proportion of international trade. The fact that the buyer and seller are related does not mean that the customs value cannot be determined under the transaction value method. Subparagraph 2(a) of Article 1 of the WTO Valuation Agreement is clear on this point. The existence of a relationship does, though, serve to alert Customs and Border Protection to the fact that there may be a need to enquire as to the circumstances surrounding the sale.

Action required:

- Send notice to the importer in accordance with the provisions of paragraphs 161H(2)(c) & (d). The notice must include:
 - the view the Collector has formed that the relationship has affected the price;
 - because of the view, the Collector may be unable to determine the transaction value;
 - invite the purchaser to satisfy the Collector that the relationship has not affected the price. Allow no less than 28 days for a response.
- After expiration of the response time, if no response has been received, the transaction value method may be rejected.
- If a response is received to the notice, analyse the information provided and:
 - if the Collector is satisfied that the information provided has established that the relationship has not affected the price then the transaction value is applicable;
 - if the Collector is not satisfied then the transaction value method is inapplicable, an alternate valuation method should be used, and a revocation notice under section 161L should be issued.
Note: A delegate of the CEO must prepare the revocation notice.

4.4 Goods sold at prices that differ from the transaction value of identical or similar goods

Subsection 161H(4) to (7) state:

- (4) Where, in relation to goods required to be valued, a Collector is of the opinion that the price at which the goods were sold in their import sales transaction is different from the price at which goods that are identical goods or similar goods to the first-mentioned goods would normally be sold in an import sales transaction similar to the first-mentioned import sales transaction, the Collector shall, by notice in writing served, personally or by post, on the purchaser:
 - (a) advise the purchaser of the Collector's opinion; and
 - (b) require the purchaser to satisfy the Collector, within the period specified in the notice, not being a period of less than 28 days, that the price difference was not designed to obtain a reduction of, or to avoid duty.
- (5) On the expiration of the period specified in a notice under subsection (4) in relation to imported goods, the Collector shall, unless the purchaser of the goods to whom the notice was given has satisfied the Collector as required by the notice, be taken to be unable to determine the transaction value of the goods.
- (6) Where, in relation to services provided in respect of goods required to be valued, a Collector is of the opinion that the services were provided in relation to the goods under the terms of their import sales transaction at a price different from the price normally paid for the provision of identical or similar services in relation to goods that are identical goods or similar goods to the first-mentioned goods, sold in an import sales transaction similar to the first-mentioned import sales transaction, the Collector shall, by notice in writing served, personally or by post, on the purchaser:
 - (a) advise the purchaser of the Collector's opinion; and
 - (b) require the purchaser to satisfy the Collector, within the period specified in the notice, not being a period of less than 28 days, that the price difference was not designed to obtain a reduction of, or to avoid duty.
- (7) On the expiration of the period specified in a notice under subsection (6) in relation to imported goods, the Collector shall, unless the purchaser of the goods to whom the notice was given has satisfied the Collector as required by the notice, be taken to be unable to determine the transaction value of the goods.

Subsection 161H(4) provides that where the Collector is of the opinion that the price of the imported goods differs from the transaction value of identical or similar goods, the Collector may require the purchaser to demonstrate that the price difference was not designed to achieve a reduction of, or to avoid, duty.

In these circumstances, the purchaser has an opportunity to satisfy the Collector that the difference in price was not designed to obtain a reduction of, or to avoid, duty.

Where the purchaser fails to satisfy the Collector within the notified period (*not less than 28 days*), the Collector shall determine that the transaction value cannot be determined.

Subsections 161H(6) and 161H(7) apply to the supply of *services* in relation to the imported goods in a like manner as subsections 161H(4) and (5) apply to the price paid for goods.

Once again, the purchaser is provided with an opportunity to satisfy the Collector. Failing this, the Collector shall determine that the transaction value cannot be determined.

Action required if Customs and Border Protection is of the opinion that this subsection should be used:

- Send notice to importer in accordance with subsection 161H(4). The notice must include:
 - the view the Collector has formed that the price difference has affected the price;
 - because of the view the Collector may be unable to determine the transaction value;
 - invite the purchaser to satisfy the Collector that the price difference was not designed to obtain a reduction of, or to avoid, duty. Allow no less than 28 days for a response.
- After expiration of the response time, if no response has been received, the transaction value method may be rejected.
- If a response is received to the notice, analyse the information provided and:
 - if the Collector is satisfied that the information provided has established that the price difference was not designed to obtain a reduction of, or to avoid duty, then the transaction value is applicable.
 - if the Collector is not satisfied then the transaction value method is inapplicable and an alternate valuation method should be used, and a revocation notice under section 161L should be issued. Note: A delegate of the CEO must prepare the revocation notice.

5. *Determination of a new customs value*

The Customs and Border Protection audit determined that the customs value as entered was to be rejected.

Customs and Border Protection will need to determine a new customs value for the goods. This alternative method must be determined in the hierarchical order required by section 159.

When the CEO or Collector determines a new customs value, section 161K states that it shall be recorded on the entry, or the owner will be "otherwise advised".

Determinations can be by either acceptance (automatically by the Customs and Border Protection computer system) or by decision (by a Customs and Border Protection officer).

The determination, in this case, is by decision. The customs value for the goods was determined at the time of entry by acceptance (automatically by the Customs and Border Protection computer system).

The owner/broker should be advised of the new determination by letter in accordance with section 161K. That letter should provide a reason for the valuation method used (if it is not the transaction value method) and an explanation as to why other (preceding) methods are inapplicable.

Subsection 161K(3) provides importers with the right to a statement of reasons for any determination, provided it is requested within 28 days of the making of the determination. The subsection also sets out minimum information to be supplied in response to a request for a statement of reasons. *The ACS must respond within 28 days.*

6. *Affirmation, variation or rejection of the entered customs value*

At the conclusion of an audit, the delegate of the CEO may:

- affirm the determination, i.e. confirm without any changes;
- vary the determination, i.e. make changes or alterations to it; or
- revoke the determination by cancelling it so that it ceases to exist, and the Act requires Customs and Border Protection to make a new determination or decision to replace the cancelled one.

Irrespective of whether the customs value is affirmed, varied or revoked, the delegate must prepare a notice under subsection 161L(1).

Where the customs value is varied or revoked because of an error by Customs and Border Protection, Customs and Border Protection may make a demand under section 165 for the payment of any duty short levied. The demand must be made within 4 years of the date of the short levy.

Where the customs value is varied or revoked because of fraud or misdescription by the importer, Customs and Border Protection may make a demand for any duty short paid under section 165. Unlike a demand under section 165, a demand under section 165 does not need to be made within 4 years (of the date of the short payment).

Amber & Red Line – Examination of value before clearance

1. *Determination of value*

As the entry has gone down the 'amber line' or 'red line' it has not yet been examined by Customs and Border Protection and as such nothing has been accepted. Therefore a valuation determination under section 161K has not yet been made.

2. *Examination of the declared value*

In the processing of the 'amber line' or 'red line' entry, the declared customs value will be closely examined for acceptability.

3. *Request for further information*

If, during this examination, there is reason to question the declared value, Customs and Border Protection can issue a notice under section 71DA requesting further information.

71DA An officer may seek additional information

- (1) Without limiting the information that may be required to be included in an import declaration, if an import declaration has been made in respect of goods, authority to deal with the goods may be refused until an officer doing duty in relation to import declarations:
 - (a) has verified particulars of the goods shown in the import declaration; or
 - (b) is satisfied of any other matter that may be relevant to the granting of an authority to deal.
- (2) If an officer doing duty in relation to import declarations believes, on reasonable grounds, that the owner of goods to which an import declaration relates has custody or control of commercial documents, or has, or can obtain, information, relating to the goods that will assist the officer to

determine whether this Act has been or is being complied with in respect of the goods, the officer may require the owner:

- (a) to deliver to the officer the commercial documents in respect of the goods that are in the owner's custody or control (including any such documents that had previously been delivered to an officer and had been returned to the owner); or
 - (b) to deliver to the officer such information, in writing, relating to the goods (being information of a kind specified in the notice) as is within the knowledge of the owner or as the owner is reasonably able to obtain.
- (3) A documentary requirement for the delivery of documents or information in respect of an import declaration must:
 - (a) be communicated to the person by whom, or on whose behalf, the declaration was communicated; and
 - (b) be in an approved form and contain such particulars as the form requires.
 - (4) An electronic requirement for the delivery of documents or information in respect of an import declaration must:
 - (a) be communicated electronically to the person who made the declaration; and
 - (b) contain such particulars as are set out in an approved statement.
 - (5) An officer doing duty in relation to import declarations may ask:
 - (a) the owner of goods in respect of which an import declaration has been made; and
 - (b) if another person made the declaration on behalf of the owner—that other person; any questions relating to the goods.
 - (6) If an officer doing duty in relation to import declarations believes, on reasonable grounds, that the owner of goods to which an import declaration relates has custody or control of documents, or has, or can obtain, information, relating to the goods that will assist the officer to verify the particulars shown in the import declaration, the officer may require the owner to produce the documents or supply the information to the officer.
 - (7) If:
 - (a) the owner of goods has been required to deliver documents or information in relation to the goods under subsection (2); or
 - (b) the owner of, or the person making an import declaration in respect of, goods has been asked a question in respect of the goods under subsection (5); or
 - (c) the owner of goods has been required to verify a matter in respect of the goods under subsection (6); authority to deal with the relevant goods in accordance with the declaration must not be granted unless:
 - (d) the requirement referred to in paragraph (a) has been complied with or withdrawn; or
 - (e) the question referred to in paragraph (b) has been answered or withdrawn; or
 - (f) the requirement referred to in paragraph (c) has been complied with or withdrawn, or a security has been taken for compliance with the requirement; as the case requires.
 - (8) Subject to section 215, if a person delivers a commercial document to an officer doing duty in relation to import declarations under this section, the officer must deal with the document and then return it to the person.

4. *Is there sufficient reliable information?*

After analysis of the information supplied by the importer in response to the notice issued under section 71DA, Customs and Border Protection may decide that it cannot determine the value of the goods using the method used by the importer.

Under section 160, a Collector may determine, *in writing*, that he or she is unable to apply a particular valuation method (including the transaction value method) because he or she is not satisfied that there is sufficient reliable information. What might constitute sufficient reliable information will depend on the circumstances of each case.

- 160(1) Where a Collector is not satisfied that there is sufficient reliable information available to the Collector, being information of a kind referred to in subsection (2), to enable him or her to determine a value of imported goods in accordance with a provision of this Division

- for determining their customs value, the Collector may determine, in writing, that he or she is not so satisfied and the Collector shall thereupon be taken to be unable to determine that first-mentioned value.
- (2) Where a Collector is not satisfied that there is sufficient reliable information available to the Collector to enable him or her to determine the quantity and correctness of any amount that is required to be taken into account in determining a value of those goods in accordance with a provision of this Division for determining the customs value of imported goods, then:
- (a) where that amount would ordinarily form part of their customs value under the particular valuation method set out in that provision - the Collector shall determine, in writing, that he or she is not so satisfied and the Collector shall thereupon be taken to be unable to use that method;
 - (b) where that amount would ordinarily be deducted from the amount that would otherwise be their customs value under the particular valuation method set out in that provision:
 - (i) if the Collector determines, in writing, that he or she is not so satisfied and that he or she does not desire to use the method - the Collector shall thereupon be taken to be unable to use that method; and
 - (ii) if the Collector determines, in writing, that he or she is not so satisfied but that he or she desires to use the method - the Collector may use the method but no deduction shall be allowed on account of that amount.

Subsection 160(1) refers to subsection 160(2) for conditions that have to be met before subsection 160(1) applies.

Subsection 160(2) deals with two circumstances where a Collector is *not satisfied* that there is *sufficient reliable information* about the *quantity and correctness of an amount* which the Collector has to take into account when determining the customs value in accordance with a valuation method.

The first circumstance is where the amount is ordinarily included in the customs value. The Collector shall determine *in writing* that he or she is unable to use that valuation method due to insufficient reliable information (paragraph 160(2)(a) refers).

The second circumstance is where the amount is ordinarily deducted from the price to arrive at the customs value. The Collector may determine, *in writing*, that he or she is:

- (a) unable to use that valuation method due to insufficient reliable information (paragraph 160(2)(b)(i) refers); or
- (b) not satisfied, but still desires to use that method; the Collector may then use the method, but not deduct the amount (paragraph 160(2)(b)(ii) refers).

It is a specific requirement that these determinations be *in writing*. An example of a determination, prepared by the Customs Legal Unit, is provided at Appendix 3:2 of this Instruction and Guideline.

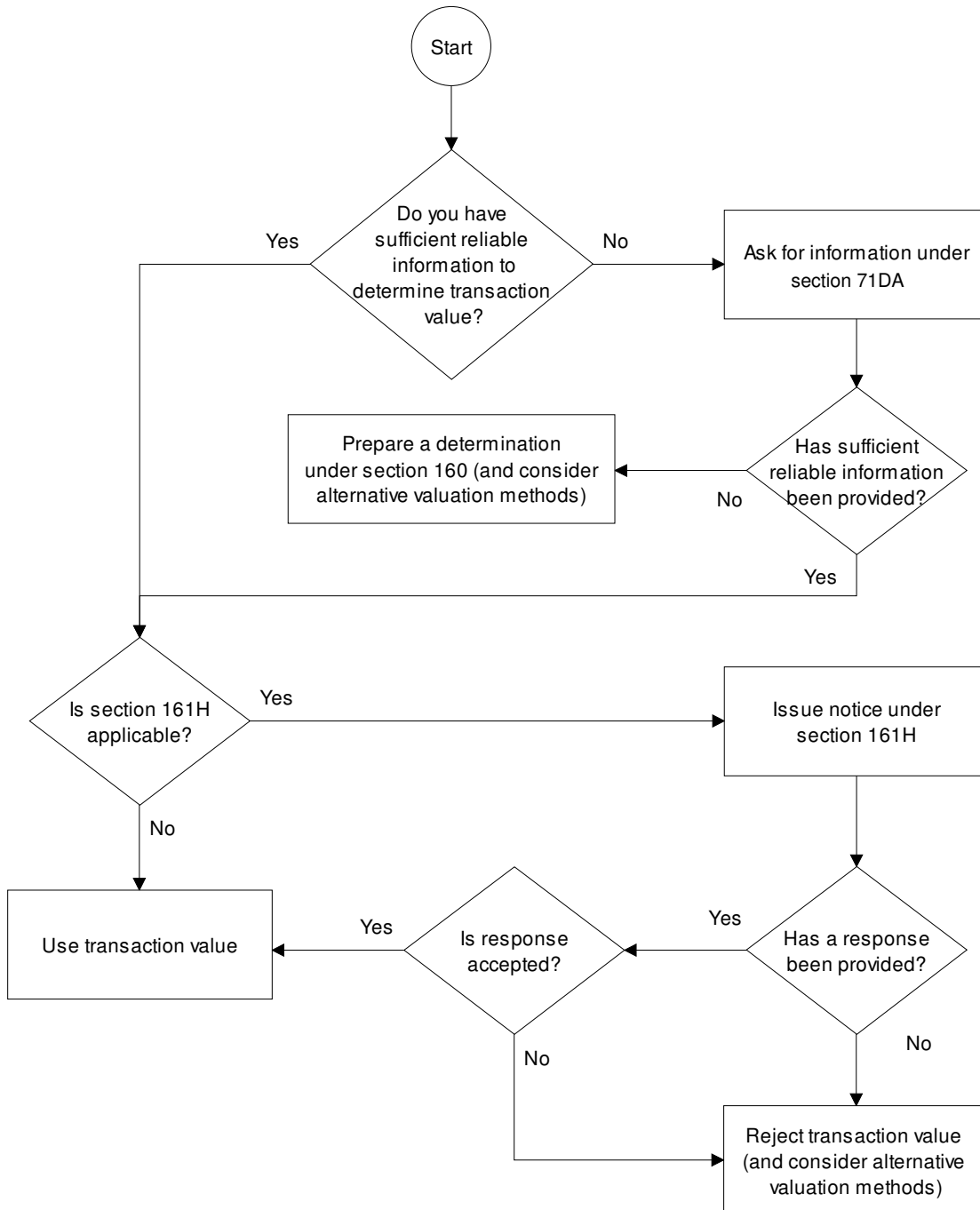
The completed determination should be placed on the relevant file. It should not be given to the importer.

One determination can be used where there is insufficient reliable information to use one or more valuation methods.

If there is insufficient reliable information to use a particular valuation method, Customs and Border Protection must then proceed sequentially through the succeeding methods of valuation under section 159 until a method is reached whereby the customs value can be determined.

5. *Can the transaction value method be used?*

By far the most common method of valuation is the transaction value method. When there is sufficient reliable information to determine the transaction value, the Collector must then consider whether, under section 161H, there are other grounds to reject the use of this valuation method. The following flow diagram should be consulted.



Section 161H prescribes a number of circumstances where the transaction value method cannot be utilised. The effect of any one of the conditions applying is that Customs and Border Protection is unable to use the transaction value method and will then consider the identical goods value method and so on.

Paragraph 161H(1)(a) refers to situations where there is no import sales transaction.

Subparagraphs 161H(1)(c)(i)-(iii) set out circumstances where there is a restriction on the use or disposition of the goods.

Subsections 161H(2) & (3) refer to related persons.

Subsections 161H(4) & (6) refer to goods or services imported at a lower price than identical or similar goods or services.

In relation to subsections 161H(2) & (3) and subsections 161H(4), (5), (6) & (7), Customs and Border Protection must notify the importer *in writing*, and must give the importer the opportunity to respond (within 28 days). Examples of the determinations, prepared by the Customs Legal Unit, are provided at Appendix 3:2 of this Instruction and Guideline.

A copy of any determination that is given to an importer should be placed on the relevant file.

5.1 *No import sales transaction*

Paragraph 161H(1)(a) states:

- 161H(1) Without limiting section 160, a Collector cannot determine the transaction value of imported goods for the purposes of this Division, including, but without limiting the generality of the foregoing, section 161A or 161B, if the Collector:
- (a) after reasonable inquiry, is not aware of any import sales transaction in relation to the goods;

An import sales transaction must have as a basis a contract for the sale of goods. If goods are not sold, it follows there can be no import sales transaction. Some examples (which are not exhaustive) of situations in which there is no sale are:

- (a) goods are sent on consignment;
- (b) goods imported by intermediaries, without purchase, for sale on behalf of the supplier;
- (c) where the purchaser and vendor are not *separate legal identities*;
- (d) goods imported under a hire or leasing contract;
- (e) barter, counter trade, or compensation arrangements;
- (f) other situations in which the goods remain the property of the supplier; and
- (g) free consignments such as gifts, samples and promotional items.

Action required:

- if required, request further information to confirm or to clarify the existence of an import sales transaction;
- reject the transaction value method if no import sales transaction found.

5.2 *Restrictions on disposition or use of the goods*

1) INTERNAL AND EXTERNAL USE
2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines
3) File Number: 2008/038154-01

Paragraph 161H(1)(c) states:

- 161H(1) Without limiting section 160, a Collector cannot determine the transaction value of imported goods for the purposes of this Division, including, but without limiting the generality of the foregoing, section 161A or 161B, if the Collector:
- (a) ...;
 - (b) ...;
 - (c) is satisfied that the disposition or use of the goods by the purchaser is subject to restrictions, not being restrictions of the following kinds:
 - (i) restrictions imposed or required by, or by any public officer or authority acting in accordance with, any law in force in Australia;
 - (ii) restrictions that limit the geographical area in which the goods may be sold;
 - (iii) restrictions that do not substantially affect the commercial value of the goods.

The disposition or use of the goods by the purchaser may be subject to restrictions. If such a restriction exists in the contract of sale and the commercial value of goods is substantially affected by that restriction, the transaction value will be rejected.

However, the transaction will *not* be rejected if the restriction is:

- (a) imposed under a law of Australia;
- (b) only limits the *area* in which the goods may be sold; or
- (c) does not substantially affect the commercial value of the goods.

Restrictions that result in the rejection of the transaction value will be rare.

Action required:

- if required, request further information to confirm or to clarify the existence of restrictions on the disposal or use of the goods
- reject the transaction value method if restrictions are found.

5.3 *Price influenced by relationship*

Subsections 161H(2) & (3) state:

- 161H(2) Where, in relation to the goods required to be valued, a Collector:
- (a) is satisfied that the purchaser and the vendor of imported goods were, at the time of the goods' import sales transaction, related persons; and
 - (b) considers that the relationship may have influenced the price of the goods;
- the Collector shall, by notice in writing served, personally or by post, on the purchaser of the goods:
- (c) advise the purchaser of:
 - (i) the view that the Collector has formed of the possible effect on the price of the goods of the relationship between the purchaser and the vendor;
 - (ii) the reasons for forming that view; and

- (iii) the fact that, because of that view, the Collector may be required to decide under subsection (3) that the transaction value of the goods cannot be determined; and
- (d) invite the purchaser to put before the Collector, within a period specified in the notice (not being a period of less than 28 days), such further information as the purchaser considers might serve to satisfy the Collector as to any of the matters set out in subsection (3).
- (3) On the expiration of the period specified in a notice under subsection (2), the Collector shall, unless the purchaser of the imported goods has satisfied the Collector that:
- (a) a relationship between the purchaser and the vendor of the goods did not influence the price of the goods; or
- (b) the amount of the transaction value that would be determined in respect of the goods if the purchaser and the vendor had not been related at the time of the import sales transaction for the goods divided by the number of the units of the goods closely approximates, having regard to all relevant factors:
- (i) the unit price within the meaning of section 161A of identical goods that were exported to Australia about the same time as the imported goods;
- (ii) the unit price within the meaning of section 161B of similar goods that were exported to Australia about the same time as the imported goods;
- (iii) the unit price of identical goods or similar goods sold in a contemporary sale within the meaning of section 161C as determined in accordance with that section; or
- (iv) the computed unit price of identical goods or similar goods that were imported into Australia about the same time as the imported goods being the computed value of those identical goods or similar goods determined in accordance with section 161F divided by the number of units of those identical or similar goods;

be taken to be unable to determine the transaction value of the goods.

Customs and Border Protection must have reason to believe that the parties in the import sales transaction are related for these subsections to be applicable. 'Related' is defined in subsection 154(3) of the Act.

Subsection 161H(2) provides that where the Collector is satisfied that the purchaser and the vendor were related persons, and considers that the relationship may have influenced the price of the goods, the Collector shall then advise the purchaser, *in writing*, of this fact.

Subsection 161H(2) also provides that the purchaser has the opportunity to satisfy the Collector that the relationship did not influence the price of the goods. Failing this, the Collector will be unable to determine the transaction value for the goods.

NB: Commerce between related parties accounts for a major proportion of international trade. The fact that the buyer and seller are related does not mean that the customs value cannot be determined under the transaction value. Subparagraph 2(a) of Article 1 of the WTO Valuation Agreement is clear on this point. The existence of a relationship does, though, serve to alert Customs and Border Protection to the fact that there may be a need to enquire as to the circumstances surrounding the sale.

Action required:

- Send notice to the importer in accordance with the provisions of paragraphs 161H(2)(c) & (d). The notice must include:

1) INTERNAL AND EXTERNAL USE
2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines
3) File Number: 2008/038154-01

- the view the Collector has formed that the relationship has affected the price;
- because of the view, the Collector may be unable to determine the transaction value;
- invite the purchaser to satisfy the Collector that the relationship has not affected the price. Allow no less than 28 days for a response.
- After expiration of the response time, if no response has been received, the transaction value method may be rejected.
- If a response is received to the notice, analyse the information provided and:
 - if the Collector is satisfied that the information provided has established that the relationship has not affected the price then the transaction value is applicable
 - if the Collector is not satisfied then the transaction value method is inapplicable and an alternate method should be used.

5.4 Goods sold at prices that differ from the transaction value of identical or similar goods

Subsection 161H(4) to (7) state:

- (4) Where, in relation to goods required to be valued, a Collector is of the opinion that the price at which the goods were sold in their import sales transaction is different from the price at which goods that are identical goods or similar goods to the first-mentioned goods would normally be sold in an import sales transaction similar to the first-mentioned import sales transaction, the Collector shall, by notice in writing served, personally or by post, on the purchaser:
 - (a) advise the purchaser of the Collector's opinion; and
 - (b) require the purchaser to satisfy the Collector, within the period specified in the notice, not being a period of less than 28 days, that the price difference was not designed to obtain a reduction of, or to avoid duty.
- (5) On the expiration of the period specified in a notice under subsection (4) in relation to imported goods, the Collector shall, unless the purchaser of the goods to whom the notice was given has satisfied the Collector as required by the notice, be taken to be unable to determine the transaction value of the goods.
- (6) Where, in relation to services provided in respect of goods required to be valued, a Collector is of the opinion that the services were provided in relation to the goods under the terms of their import sales transaction at a price different from the price normally paid for the provision of identical or similar services in relation to goods that are identical goods or similar goods to the first-mentioned goods, sold in an import sales transaction similar to the first-mentioned import sales transaction, the Collector shall, by notice in writing served, personally or by post, on the purchaser:
 - (a) advise the purchaser of the Collector's opinion; and
 - (b) require the purchaser to satisfy the Collector, within the period specified in the notice, not being a period of less than 28 days, that the price difference was not designed to obtain a reduction of, or to avoid duty.
- (7) On the expiration of the period specified in a notice under subsection (6) in relation to imported goods, the Collector shall, unless the purchaser of the goods to whom the notice was given has satisfied the

Collector as required by the notice, be taken to be unable to determine the transaction value of the goods.

Subsection 161H(4) provides that where the Collector is of the opinion that the price of the imported goods differs from the transaction value of identical or similar goods, the Collector may require the purchaser to demonstrate that the price difference was not designed to achieve a reduction of, or to avoid, duty.

In these circumstances, the purchaser has an opportunity to satisfy the Collector that the difference in price was not designed to obtain a reduction of, or to avoid, duty.

Where the purchaser fails to satisfy the Collector within the notified period (*not less than 28 days*), the Collector shall be unable to determine the transaction value for the goods.

Subsections 161H(6) and 161H(7) apply to the supply of *services* in relation to the imported goods in a like manner as subsections 161H(4) and (5) apply to the price paid for goods.

Once again, the purchaser is provided with an opportunity to satisfy the Collector. Failing this, the Collector shall be unable to determine the transaction value for the goods.

Action required if Customs and Border Protection is of the opinion that this subsection should be used:

- Send a notice to importer under subsection 161H(4). The notice must include:
 - the view the Collector has formed that that the price difference has affected the price;
 - because of the view, the Collector may be unable to determine the transaction value;
 - invite the purchaser to satisfy the Collector that the price difference was not designed to obtain a reduction of, or to avoid duty. Allow no less than 28 days for a response.
- After expiration of the response time, if no response has been received, the transaction value method may be rejected.
- If a response is received to the notice, analyse the information provided and:
 - if the Collector is satisfied that the information provided has established that the price difference was not designed to obtain a reduction of, or to avoid duty, then the transaction value is applicable.
 - if the Collector is not satisfied then advise the broker/importer of the reasons for forming that view and advise that the transaction value method is inapplicable and that an alternate method should be used.

6. *Determination of value*

When the CEO or Collector determines the customs value, section 161K states that it shall be recorded on the entry, or the owner will be "otherwise advised".

Determinations can be by either acceptance (automatically by the Customs and Border Protection computer system) or by decision (by a Customs and Border Protection officer).

The determination, in this case, is by decision.

The owner/broker should be advised of the determination by letter in accordance with section 161K. That letter should provide a reason for the valuation method used (if it is not transaction value method) and an explanation as to why other methods are inapplicable.

Subsection 161K(3) provides importers with the right to a statement of reasons for any determination, provided it is requested within 28 days of the making of the determination. The subsection also sets out minimum information to be supplied in response to a request for a statement of reasons. *The ACS must respond within 28 days.*

If release of the cargo is requested, do you uplift values or request a security?

For urgent cargo, the owner may request release of the cargo for 'amber line' or 'red line' entries before Customs and Border Protection has completed its entry examination.

To release the cargo, Customs and Border Protection may require a security based on an 'interim' customs value. This value should be defensible. It cannot be arbitrary or fictitious. The owner is to be advised of this value via subsection 161K(1).

After completing its inquiries, Customs and Border Protection appraises the actual customs value. This appraisal process constitutes a redetermination of the customs value under section 161L. Accordingly, the delegate of the CEO who conducted the appraisal must prepare a notice under subsection 161L(1).

If the redetermined customs value is higher than the 'interim' customs value because of an error by Customs and Border Protection, Customs and Border Protection may make a demand for any duty short levied under section 165. The demand must be made within 4 years of the date of the short levy, except when the demand arose as a result of fraud or evasion as specified in subsection 165(5). If the redetermined customs value is higher than the 'interim' customs value because of fraud or misdescription by the importer, Customs and Border Protection may make a demand for any duty short paid.

Appendix 3:2 Legal Notices

Proforma notification under s160(1), s160(2), s161H(2), s161H(4), s161H(6), and s161L

***CUSTOMS ACT 1901
Determination under subsection 160(1)***

I, (officer’s name), a Collector of Customs, am not satisfied that there is sufficient reliable information available to me to enable me to determine the customs value of (quantity and description of the goods) supplied by (name of supplier), the subject of entry number (list entry number) in accordance with (list method(s) and corresponding section(s) which cannot be used, e.g. “the transaction value method under section 161; and the identical goods value method under section 161A; and the similar goods value under section 161B”) of Division 2 of Part VIII of the *Customs Act 1901*.

Accordingly, I am unable to determine the customs value of these goods in accordance with (list method(s) and corresponding section(s) which cannot be used, e.g. “the transaction value method under section 161; and the identical goods value method under section 161A; and the similar goods value under section 161B”).

Signed:
Title: (officer’s title)
(officer’s work area)
Date:

NOTE: If a valuation method cannot be used due to insufficient reliable information, then an alternative method must be used to determine the customs value in accordance with the order prescribed by section 159.

(Appendix 3.2 continued)

CUSTOMS ACT 1901

Determination under subsection 160(2)

I, (officer’s name), a Collector of Customs, am not satisfied that there is sufficient reliable information available to me to enable me to determine the quantity and correctness of (an amount or amounts, describe e.g. “amounts for overseas freight and overseas insurance”) in relation to (quantity and description of the goods) supplied by (name of supplier), the subject of entry number (list entry number) that is required to be taken into account in accordance with (a provision or provisions) of Division 2 of Part VIII of the *Customs Act 1901* for determining their customs value.

[160(2)(a) option] (That amount or Those amounts) would ordinarily form part of the customs value of the goods under (list method(s) and corresponding section(s) which cannot be used, e.g. “the transaction value method under section 161; and the identical goods value method under section 161A; and the similar goods value under section 161B”).

Accordingly, I am unable to determine the customs value of these goods in accordance with (that method or those methods), due to paragraph 160(2)(a) of the Customs Act.

[160(2)(b)(i) option] (That amount or Those amounts) would ordinarily be deducted from the amount that would otherwise be the customs value of the goods under (list method(s) and corresponding section(s) which cannot be used, e.g. “the transaction value method under section 161; and the identical goods value method under section 161A; and the similar goods value under section 161B”). I have decided under paragraph 160(2)(b)(i) of the Customs Act that I do not desire to use (that method or those methods).

[160(2)(b)(ii) option] (That amount or Those amounts) would ordinarily be deducted from the amount that would otherwise be the customs value of the goods under (list method and corresponding section which will be used, e.g. “the transaction value method under section 161”). I have decided under paragraph 160(2)(b)(ii) that I will use the (method to be used), however no deduction will be made for (describe amount(s), e.g. “overseas freight and overseas insurance”).

Signed:

Title: (officer’s title)
(officer’s work area)

Date:

(Appendix 3.2 continued)

CUSTOMS ACT 1901

Notice under subsection 161H(2)

To: (Owner name)
(address)

TAKE NOTICE THAT

1. I, (officer’s name and title), a Collector of Customs, am satisfied that (purchaser’s name and address) the purchaser of (briefly describe imported goods) the subject of entry lodgement number/s (list number/s) and (vendor’s name and address), the vendor of those goods were, at the time of the sale of those goods, related persons in terms of subsection 154(3) of the Customs Act 1901, and I consider that that relationship may have influenced the price of those goods.

2. NOW TAKE NOTICE THAT I have formed the view that the relationship between the above named purchaser and vendor has possibly affected the price of the abovementioned goods in that (specify form or nature of possible influence on price).

3. I have formed the view on the basis of (specify actual source of documentary evidence, e.g. the vendor’s invoices or international price lists, etc).

4. Because of that view, I may be required to determine under subsection 161H(3) of the Customs Act 1901 that the transaction value of such goods cannot be determined.

I NOW INVITE YOU to put before me within 28 days of this notice such further information as you consider may serve to satisfy me as to any of the matters set out in subsection 161H(3) of the Customs Act 1901. (A copy of subsection 161H(3) of the Customs Act 1901 is attached to this notice).

Signed:
Title: (officer’s title)
(officer’s work area)
Date:

Address for reply to this notice:

Australian Customs and Border Protection Service
(local Customs address)
Attention: (name and title of officer issuing notice)

(Appendix 3.2 continued)**Attachment to Notice under subsection 161H(2)**

- (3) On the expiration of the period specified in a notice under subsection (2), the Collector shall, unless the purchaser of the imported goods has satisfied the Collector that:
- (a) a relationship between the purchaser and the vendor of the goods did not influence the price of the goods; or
 - (b) the amount of the transaction value that would be determined in respect of the goods if the purchaser and the vendor had not been related at the time of the import sales transaction for the goods divided by the number of the units of the goods closely approximates, having regard to all relevant factors:
 - (i) the unit price within the meaning of section 161A of identical goods that were exported to Australia about the same time as the imported goods;
 - (ii) the unit price within the meaning of section 161B of similar goods that were exported to Australia about the same time as the imported goods;
 - (iii) the unit price of identical goods or similar goods sold in a contemporary sale within the meaning of section 161C as determined in accordance with that section; or
 - (iv) the computed unit price of identical goods or similar goods that were imported into Australia about the same time as the imported goods being the computed value of those identical or similar goods determined in accordance with section 161F divided by the number of units of those identical or similar goods;
- be taken to be unable to determine the transaction value of the goods.

(Appendix 3.2 continued)

CUSTOMS ACT 1901

Notice under subsection 161H(4)

To: (Owner name)
(address)

TAKE NOTICE THAT

1. I, (officer’s name), a Collector of Customs, am of the opinion that the price at which (quantity and description of the goods) supplied by (name of supplier), the subject of entry number (list entry number) were sold in their import sales transaction is different from the price at which goods that are identical goods or similar goods to these would normally be sold in a similar import sales transaction.

2. Because of that opinion, and in accordance with subsection 161(H)(5), I may be unable to determine the transaction value of the goods. In that case, the value of the goods would be determined using an alternative method of valuation, as provided in section 159 of the Customs Act.

I NOW REQUIRE YOU to satisfy me within 28 days that the price difference was not designed to obtain a reduction of, or to avoid, duty. You may provide me with any material, information or submissions you consider relevant in that regard.

Signed:
Title: (officer’s title)
(officer’s work area)
Date:

Address for reply to this notice:

Australian Customs and Border Protection Service
(local Customs address)
Attention: (name and title of officer issuing notice)

(Appendix 3.2 continued)

**CUSTOMS ACT 1901
Notice under subsection 161H(6)**

To: (Owner name)
(address)

TAKE NOTICE THAT

1. I, (officer’s name), a Collector of Customs, am of the opinion that (description of the services) provided in relation to the (description of goods) the subject of entry number (list entry number) were provided in the import sales transaction at a price different from the price normally paid for the provision of identical or similar services in a similar transaction.
2. Because of that opinion, and in accordance with subsection 161(H)(7), I may be unable to determine the transaction value of the goods. In that case, the value of the goods would be determined using an alternative method of valuation, as provided in section 159 of the Customs Act.

I NOW REQUIRE YOU to satisfy me within 28 days that the price difference was not designed to obtain a reduction of, or to avoid, duty. You may provide me with any material, information or submissions you consider relevant in that regard.

Signed:
Title: (officer’s title)
(officer’s work area)
Date:

Address for reply to this notice:
Australian Customs and Border Protection Service
(local Customs and Border Protection address)
Attention: (name and title of officer issuing notice)

(Appendix 3.2 continued)

CUSTOMS ACT 1901

**Affirmation under section 161L of the Customs Act 1901 of
*determination/decision under Part VIII, Division 2 of that Act**

I, (officer’s name), delegate of the Chief Executive Officer of Customs for the purposes of section 161L of the Customs Act 1901, having reviewed the *determination/decision made under Division 2 of Part VIII of the Customs Act in relation to the customs value of the goods entered for home consumption at line 1 of the Entry for Home Consumption No. xxxxxxxx, hereby affirm that *determination/decision.

*Strike out which ever is inapplicable

**Revocation and re-making under section 161L of the Customs Act 1901 of
*determination/decision under Part VIII, Division 2 of that Act**

I, (officer’s name), delegate of the Chief Executive Officer of Customs for the purposes of section 161L of the Customs Act 1901, having reviewed the *determination/decision made under Division 2 of Part VIII of the Customs Act in relation to the customs value of the goods entered for home consumption at line 1 of the Entry for Home Consumption No. xxxxxxxx hereby revoke that *determination/decision and determine the customs value of the goods to be \$ xx,xxx.xx.

*Strike out which ever is inapplicable

**Variation under section 161L of the Customs Act 1901 of
*determination/decision under Part VIII, Division 2 of that Act**

I, (officer’s name), delegate of the Chief Executive Officer of Customs for the purposes of section 161L of the Customs Act 1901, having reviewed the *determination/decision made under Division 2 of Part VIII of the Customs Act in relation to the customs value of the goods entered for home consumption at line 1 of the Entry for Home Consumption No. xxxxxxxx hereby vary that *determination/decision by substituting the amount of \$ xx,xxx.xx as the customs value of the goods.

*Strike out which ever is inapplicable

Division 4: Encyclopaedia of valuation terms

Section 1: Purpose

- 4.1.1 This Dictionary deals comprehensively with a selection of valuation terms and concepts that are critical to the interpretation and implementation of the legislation. The purpose of the Dictionary is to amplify and to elucidate issues too complex to deal with in context of the broad treatment of valuation principles and procedures in **Division 3** and to treat the less frequently used alternative valuation methods other than the Transaction Value Method.

Section 2: Structure and layout

- 4.2.1 The entries are in alphabetical order. Each entry includes cross references within the valuation provisions, citations of the WTO Valuation Agreement, and citations of any related or relevant documents, judicial decisions, and the like.
- 4.2.2 Items in **bold type** are in the Dictionary as entries in their own right. In addition, references to other parts of this Instruction and Guideline are also in bold type; e.g., **Division 2 Section 7**.

Section 3: References

- 4.3.1 In this Division, several references and texts are cited for the assistance of readers. This does not mean that Customs and Border Protection officially endorses them. Customs and Border Protection does, however, believe they may be of help in understanding a complex subject. They are:

- (1) Publications on the WTO Valuation Agreement

WTO Compendium, Customs Valuation WTO Agreement; Published by World Customs Organization (WCO), Rue de Marche, 30 Brussels, Belgium

This is the official publication of the WCO on the WTO valuation system, and includes a wide range of official WCO documents and materials. It is in loose-leaf form, and purchase of the volume includes periodic updates.

(The content of the Compendium is also reproduced in CCH (see below).)

Sherman and Glashoff

Saul L Sherman and Hinrich Glashoff: Customs valuation: Commentary on the GATT Customs valuation Code. Kluwer Law and Taxation Publishers, Netherlands, 1988.

The definitive commentary on the GATT Valuation Code.

- (2) Publications on the Australian customs valuation legislation

CCH

Australian Customs Law and Practice. Published by CCH Australia Limited, Box 230, North Ryde NSW 2113

Contains, among other things, a Division on valuation law, another on the WTO Valuation Agreement, and the complete WCO Compendium. It also publishes comments and reports on AAT and court decisions on valuation matters. It is a loose-leaf publication and the purchase price includes regular updates and revisions.

CELA No 2

CELA No 2 1987: Replacement Explanatory Memorandum 1989 AGPS: 10756/89; Cat No. 89 4299 6

The bulk of the current valuation legislation was introduced in the *Customs and Excise Legislation Amendment Act (No 2) 1987*. The replacement Explanatory Memorandum was circulated in 1989.

ACNs

Australian Customs Notices. These are published throughout the year, and from time to time cover valuation matters.

Appendix 4:1 Encyclopaedia of valuation terms

“About the same time”

1. References:

Subsections 154(1) and 154(2)

WTO: Valuation Agreement, Article 2 and Explanatory Note to Article 2.

CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989, pp 21-2

2. Defined in:

Subsection 154(2).

3. Used in:

Section 161A: **Identical Goods Value**

Section 161B: **Similar Goods Value**

Section 161C: **Deductive (Contemporary Sales) Value.**

4. Purpose and Rationale:

1. Article 2 of WTO Rules on Customs valuation uses the phrase “at or about the same time”, but does not define the term. The Explanatory Notes state that the words “or about” should be regarded as intended simply to make the term “at the same time” somewhat less rigid.
2. In order to establish value, the three valuation provisions that employ this phrase are dependent on other events such as:
 - the exportation to Australia of identical goods; or
 - the exportation to Australia of similar goods; or
 - the sale of the imported goods.

The function of the phrase is to ensure that the events are reasonably current, rather than ancient history. The closer in time those events are to the exportation of the goods in question, the more confidence can be placed upon them. In all cases, the ideal would be “same day” but this is obviously impracticable as a universal rule.

3. The Australian legislation is quite specific. In subsection 154(2), about the same time means plus or minus 45 days.

“Assists” (production assist costs)

1. References:

WTO: Valuation Agreement, Article 8(1)(b) and Note to Article 8
 Sherman and Glashoff: Customs valuation, Kluwer, 1988; pp 112-120
 CCH: Australian Customs Law and Practice ¶ 5-590, ¶ 5-595, ¶ 5-600, ¶ 5-605, ¶ 5-610, ¶ 5-615
 CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989: pp 15-20
 Valuation Code: A3

2. Defined in:

Subsection 154(1) of the Act. (In this Instruction and Guideline, they are generally referred to by the more convenient term of “assists”.)

3. Used in:

They are relevant in establishing **customs value** under the following provisions:

Transaction Value Method: Subsection 161(1) (**price related costs**)

Identical Goods Value: Subsection 161A(2) (unit value)

Similar Goods Value: Subsection 161B(2) (unit value)

Computed Value: Subsections 161F(1)(a)-(d); 161F(2)

Deductive Valuation Methods: Subsections 161C(2)(c)(ii), 161D(2)(c)(ii) and 161E(2)(c)(ii)

Transportation Costs: Section 158.

4. Purpose and Rationale:

1. “Assists” are not explicitly mentioned in the WTO Valuation Agreement; they are, however, referred to in Article 8(1)(b), which covers certain

“... goods and services ... supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connexion with the production and sale of the imported goods...”
2. “Assists” are goods, materials and services which a purchaser provides directly or indirectly to the vendor free of charge or at a reduced cost in order to assist in the production of the imported goods. The purchaser, by providing these goods or services, thereby places the vendor in a position to offer the completed goods to the purchaser at a contract price which does not reflect the true value of the goods.
3. WTO regards “assists” as part of the value of the goods because one of the stated objectives to the WTO system (contained in Article VII of the General Agreement on Tariffs and Trade) is that: *“...the value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed...”*.
4. The value of assists is part of the actual value of the goods, and must be part of the value for customs purposes. (The same principle was implicit, if not specifically stated, in the former Brussels Definition of Value).

5. Policy and Procedure:

1. "Assists" do not have to be either owned, made or provided by the purchaser; the purchaser can obtain assists from third parties, either in Australia or overseas. The key issue is, were they supplied to the manufacturer free of charge or at a reduced cost?
2. "Assists" fall into four categories, all of which are to be included in the customs value:

Purchaser's material costs

These are the costs to the purchaser of acquiring, producing, transporting, repairing, or modifying "production materials" which are supplied by the purchaser to the manufacturer free of charge or at reduced cost. Note that "acquire" does not just mean "purchase"; it also means receive in exchange for other goods (e.g. swap or barter), lease, or obtain under hire purchase or licence.

"Production materials" are

- (a) materials, components or other goods that form part of the assists that go into the imported goods - that is, they are incorporated into the imported goods (in other words, tangible items which physically exist in the imported product); and
- (b) materials consumed in the production of the assists that form part of the imported goods (e.g. catalysts, lubricants, abrasives, thinners and similar materials, and scrap and waste fabric from the production of garments).

Purchaser's tooling costs

These are the costs of "production tooling" provided by the purchaser to the manufacturer free of charge or at reduced cost.

"Production tooling" includes tools, dies, moulds or other machinery and equipment used in the production of the imported goods. In this case the purchaser does not supply materials or components which are incorporated into the imported goods, but rather the tooling and equipment used by the overseas manufacturer to make the goods which the purchaser imports.

Purchaser's work costs

These are the costs of "production work" done by (or funded by) the purchaser and provided free of charge or at reduced cost to the manufacturer.

"Production work" includes artwork, blueprints, plans, models, sketches, design work, development and engineering work.

Some of these are "intangibles" and therefore this category is the most difficult and complex of the "assist" categories. In addition, it is obvious that these assists may be used by the manufacturer to produce goods which are not sold to the Australian purchaser who provided the assists. In these circumstances, it may become necessary for the Collector to make a fair and equitable "apportionment" of the cost of the assists to the imported goods.

Purchaser's subsidiary costs

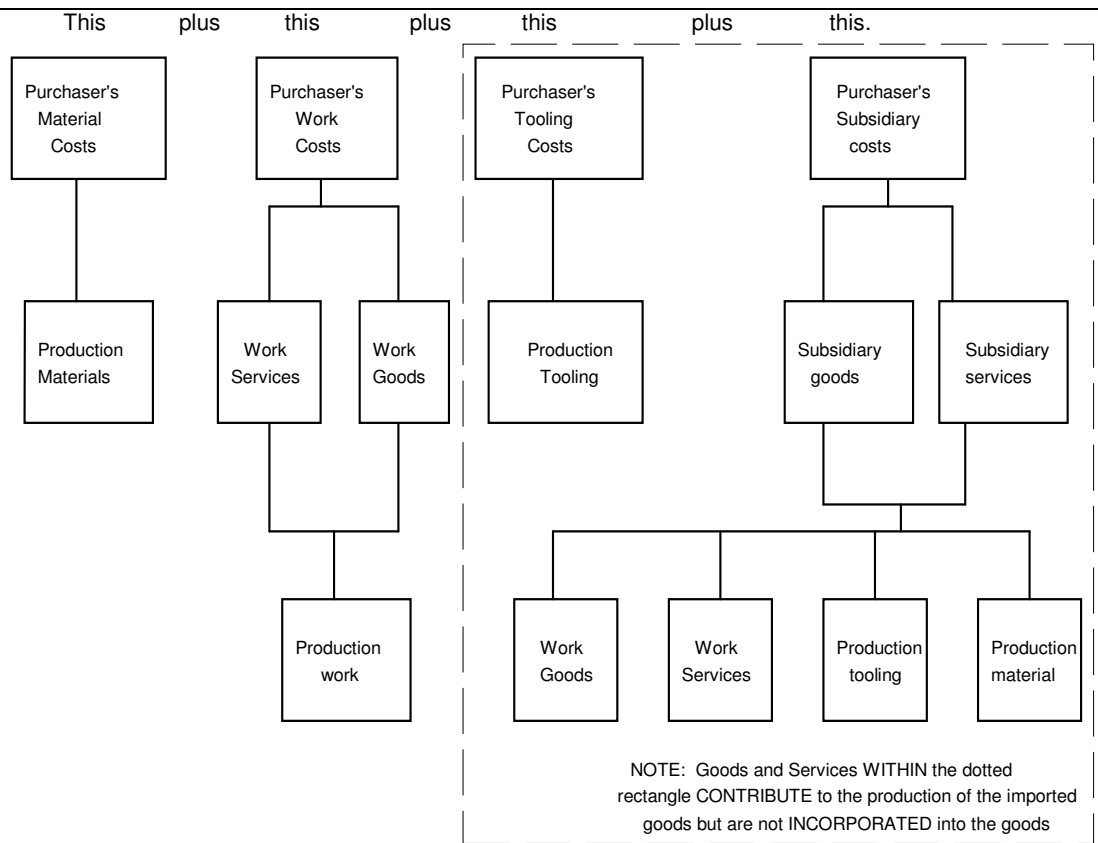
Assists may also take the form of goods or services supplied free of charge or at reduced cost by the purchaser for production of other goods ("subsidiary goods") which in turn are used in the production of the imported goods.

It is in the nature of "subsidiary goods" that they are not supplied directly in the production of the imported goods, but rather are supplied to assist in relation to other goods and services, which are themselves provided to assist directly in the production of the imported goods.

3. Two charts, setting out the various forms of assists, their inter-relationships and their scope, follow.
4. Production assists can be divided into two simple categories:
 - those which are incorporated into the imported goods;
 - those which contribute to the production of the imported goods but which are not incorporated into those goods (outlined by a dotted line).
5. Value of Assists:
 - supplied by unrelated parties: cost of acquisition.
 - supplied by related parties: cost of production.
6. Note that assists such as blueprints, plans, artwork etc produced in Australia are not part of value.

ASSISTS (PRODUCTION ASSIST COSTS)

1. **Transaction Value** includes **price related costs** (s161(1))
2. **Price Related Costs** include **production assist costs** (s154(1))
3. **Production Assist Costs** are the sum of:



NOTE: **Work Goods** and **Work Services** relating to **production work** (e.g. art work, design work etc) undertaken outside Australia are included in customs value;

Work Goods and **Work services** relating to **production work** undertaken in Australia are not part of customs value.

PRODUCTION ASSIST COSTS: VALUE OF ASSISTS

PRODUCTION ASSIST COSTS - "ASSISTS"				
	1. MATERIAL COSTS	2. TOOLING COSTS (May be apportioned)	3. WORK COSTS (May be apportioned)	4. SUBSIDIARY COSTS (May be apportioned)
Description	Materials, components or other goods that form part of the goods are consumed in production.	Production tooling (tools, dies, moulds, machinery or equipment) used in production.	Work goods (art work, design work, development work and engineering work, including models, plans and sketches) undertaken outside Aust; Work services relating to production work undertaken outside Australia.	Subsidiary goods or services relating to items 1, 2 or 3 above, relating to production of the goods.
Condition	Supplied, directly or indirectly by the purchaser, free of charge or at reduced cost.	Supplied, directly or indirectly by the purchaser, free of charge or at reduced cost.	Supplied, directly or indirectly by the purchaser, free of charge or at reduced cost. Work Goods: If available generally to the public, cost to the public of acquisition***	Supplied, directly or indirectly by the purchaser, free of charge or at reduced cost. Subsidiary Goods: Relating to work goods. If available generally to the public, cost to the public of acquisition.
Non-Related	Cost of acquisition	Cost of acquisition	Cost of acquisition***	Cost of acquisition
Related	Cost of Production	Cost of Production	Cost of Production***	Cost of Production
Plus	† Transportation costs (Does not include duty)	† Transportation costs	† Transportation costs	† Transportation costs
Plus	Repairs or modification	Repairs or modification	Repairs or modification Work Services: Cost of supply of services (Unrelated, or Collector determines related)	‡ Repairs or modification Subsidiary Services: Cost of supply of services Unrelated or Collector determines related)
Plus			Cost of supply of any other services outside Australia ***	Cost of supply of any other services outside Australia

† Section 158

- Packing costs including fumigating, cleaning, coating, wrapping, or other preparation.
- All freight - foreign, overseas and Australian.
- All insurance - foreign, overseas and Australian.
- Customs Duty, sales tax, and other duties or taxes (except for production materials)

‡ Relating to Work Goods and Work Services undertaken **outside** Australia

*** If produced in Australia, not part of Value

1) INTERNAL AND EXTERNAL USE
 2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines
 3) File Number: 2008/038154-01

“Australian inland freight and insurance”

1. References:

CCH: Australian Customs Law and Practice ¶ 5-530

2. Defined in:

Subsection 154(1).

3. Used in:

- “**Value unrelated amount**” in Subsection 154(1), which related to **deductive value methods**.
- Section 158, “Interpretation - transportation costs” in respect of “**assists**” (production assist costs);
- Subsection 161(2) “**adjusted price**” in relation to “**Transaction Value**”.

4. Rationale:

Because Australia values imported goods at the FOB level (or, more precisely, at **place of export** level), it follows that Australian inland freight and insurance is, in general, not part of customs value. Thus in an FIS (Free into Store) or DDP (Delivered Duty Paid) sale, there is an amount of Australian inland freight and insurance which must be deducted from the price. “Inland” in this context means freight and insurance for movement after the point of importation.

The Act defines Australian inland freight and Australian inland insurance separately but in practically identical terms. It is:

- (a) the amount paid by a **trader** to someone who is not a **related party**; or
- (b) the amount paid by a **trader** to a **related party**; or
- (c) the sum of the above two amounts, if more than one applies.

5. Policy and Procedure:

1. The Collector must be satisfied as to the correctness of the amounts above.
2. Australian inland freight and insurance relating to the imported goods themselves (or the goods derived from them) is not part of value when using the various **deductive value methods**. It is a **value unrelated amount**.
3. However, Australian inland freight and insurance is included in the value of **assists**. In this case it is the Australian inland freight and insurance of the goods on their outward journey to the overseas manufacturer, along with the **overseas freight and insurance** which is added to the value of the assist.

“Bulk cargo”

Policy and Procedure:

1. It is a characteristic of bulk cargo that the amount actually landed will usually differ from that invoiced.
2. Provided that
 - the variation is not significant; and
 - the requirements of the transaction value method are met

the customs value will be determined on the basis of price (subsection 154(1)), that is the total of all payments made or to be made.
3. Unless there is a significant variation in the quantity landed as against that invoiced or there is a variation in the payment made or to be made, the invoice price will normally be accepted as a basis for determining the customs value.
4. If the quantity landed varies significantly from that invoiced, sufficient reliable information (section 160) will be required so that the price (subsection 154(1)) for the imported goods can be determined.
5. Where there is a variation in the price, either by a further payment to cover the additional quantity landed or by a rebate to compensate for a shortfall, this must be taken into account in determining the customs value.

“Class”; “class or kind”

1. References:

WTO: Valuation Agreement, Article 15(3)

2. Defined in:

Neither “class” nor “class or kind” is explicitly defined in the valuation legislation.

3. Used in:

Subsection 154(1) definitions:

Australian Inland Freight
Australian Inland Insurance
Foreign Inland Freight
Foreign Inland Insurance
Overseas Freight
Overseas Insurance
Value Unrelated Amount

Subsection 155(1):

Buying Commission

Section 161F:

Computed Value

Section 161K:

Owner to be advised of value.

4. Comment:

The only guidance to hand is the definition in Article 15(3):

15(3). In this Agreement, “goods of the same class or kind” means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.

“Commission, buying”

1. References:

CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989: pp. 23-4
 Sherman and Glasshof: Customs valuation, pp 109-110
 CCH: Australian Customs Law and Practice ¶ 5-635
 Hansard: Senate, 29 May 1987 p 3204 column 2
 WTO: Valuation Agreement, Article 8(1)(a)(i) and Article 15(3)
 WCO: Commentary 17.1 and Explanatory Note 2.1
 Valuation Code: A6

2. Defined in:

Subsections 155(1) and (2).

These provide criteria which a Collector must be satisfied have been met before a commission will be accepted as a buying commission and therefore not included in the customs value as a price related cost.

3. Used in:

price related costs

price

value unrelated amount (when calculating a deduced value).

4. Policy and Procedure:

Introductory

1. Commissions in general are **price related costs** and are part of the customs value of imported goods.
2. There is an exception to this general rule. The definition of **price related costs** includes: “(d) commission, other than a buying commission.” In other words, a buying commission is not a price related cost.

Definition and nature of Buying Commission

1. The Act states, at subsection 155(2), that a buying commission is:

... an amount paid or payable by or on behalf of the purchaser of the goods directly or indirectly to a person who, as an agent of the purchaser, represented the purchaser in the purchase of the goods in the import sales transaction.
2. For example, person A, an Australian importer, does not have the time nor the staff to scour a particular overseas market for goods. Instead, A commissions overseas agent B, who is familiar with the market, to seek out the goods on A’s behalf, and pays B a commission accordingly. The commission is traditionally a percentage of the cost of the goods.
3. Agent B will perform a number of activities in respect of the goods, the type of activities in fact that a buyer from company A would perform if A could send such a person. Since the cost, expenses etc of A’s own staff member doing

those same activities would not form part of value, neither should the cost of the agent doing the same things.

Existence of a Buying Agency Relationship

1. There are two distinct phases in dealing with buying commissions:
 - (i) to establish the existence of a buying agency relationship between the parties; and
 - (ii) to ensure that the agent's commission is a buying commission in terms of section 155 of the Act.
2. The coverage of buying commission is contained in the WTO Valuation Agreement Article 8(1)(a)(i) and in the WCO Explanatory Note 2.1 and Commentary 17.1. Commentary 17.1, while not a formal part of the WTO Valuation Agreement, discusses buying commissions in some detail. The *Customs Act 1901* has a much more detailed coverage, arising in part from the use in the past of the buying commission provision as a duty evasion device.
3. The Act divides commissions into two groups: buying commissions, which are deductible; and other commissions, which are not. The Act further states that, in effect, a commission is not a buying commission unless the Collector is satisfied by the importer that it fits the criteria of the Act.

155(2) An amount paid by a purchaser of imported goods to another person in the circumstances referred to in subsection (1) shall be taken not to be a buying commission **unless** a Collector is **satisfied** ... (emphasis added).

4. How can a Collector be satisfied? By asking for, and critically examining, evidence. Some guidance in this issue is found in WCO Commentary 17.1, which covers Buying Commissions and says in part:
 4. This commentary provides guidelines on the question of the evidence necessary to establish under what circumstances fees paid by a buyer to an intermediary can be considered as a buying commission.
 5. In this context, all relevant documents necessary to ascertain the existence and precise nature of the services in question should be made available to Customs and Border Protection.
 6. Among such documents, one would be the agency contract between the agent and the buyer, stating the formalities and the activities which the agent may have to perform in the discharge of his duties up to the time that he puts the goods at the disposal of the buyer. The agency contracts should accurately reflect the terms of the agreement between the buyer and the agent and other documentary evidence, such as purchase orders, telexes, letters of credit, correspondence, etc. which clearly supports the *bona fides* of the agency contract are to be produced should Customs and Border Protection so request.
 7. In cases where written agency contracts do not exist alternative documentary evidence, such as mentioned in paragraph 6 above, which clearly establishes the existence of an agency relationship to be produced should Customs and Border Protection so request.

8. In cases where sufficient evidence establishing an agency relationship is not produced, Customs and Border Protection may conclude that no buying agency relationship exists.
5. The mere existence of a written buying agency agreement may not in itself be evidence adequate to satisfy a Collector on a buying agency. Where a buying agency is claimed, a Collector is justified in seeking the sort of documentary evidence that is referred to in paragraph 6 of the above extract from WTO Commentary 17.1.
6. This documentation could include:
 - agency agreement, if a written agency agreement exists;
 - correspondence between parties which establishes the existence of an agency relationship, including price negotiations and the like;
 - order/invoices establishing the identities of the vendor, buyer and buying agent;
 - bank documentation; and
 - the buying agent's statements of account to the buyer.

Commissions that are not Buying Commissions:

1. In the Act, the Collector must be satisfied that the purchaser's buying agent acts solely for the purchaser in the transaction, and is not the agent of, or in any other way represents, the producer, supplier or vendor, or is otherwise associated with any such person, except as the agent of the purchaser.
2. If the agent is selling goods that have been purchased on his own account, or if the agent is involved in the production, transportation, purchase or selling of the imported goods other than as agent of the purchaser, then the commission paid to such an agent must be included in the transaction value because it is not an eligible buying commission.

Agents whose commissions are not Buying Commissions:

1. Subsection 155(2) sets out the legal criteria in detail, and unless a Collector is satisfied that none of the circumstances in paragraphs 155(2)(a) to (f) applies, the claimed amount is not a buying commission.
2. Agent's activities that tend to prove that a commission is not a buying commission fall into two groups:
 - (i) those relating to goods of the same class (see subparagraphs 155(2)(a)(ii) and 155(2)(b)(ii); and
 - (ii) those relating to the imported goods (see subparagraphs 155(2)(a) to (f)).

"goods of the same class":

Where the agent does any of the following:

- (ii) produces or controls the production of any goods of the same class as the imported goods or their production assist goods. (Note that "of the same class" is interpreted as explained in WTO Article 15.3, reinforcing the view that the agent must be completely divorced from the production of goods of the same industry or industry sector; thus cheap rubber

thongs and expensive hand-tooled cowboy boots belong to the same class - that is, footwear); or

- (iii) supplies or controls the supply of any services (or services of the same class) whose value would be taken into account; i.e. "work services" or "subsidiary services" (subsection 154(1));

then the commission is not a buying commission. The purpose of this is undoubtedly to ensure that dealers in goods don't charge off their profit margins as "buying commission". In effect, the provision is saying that the person concerned (in the example in (ii) above) is in the shoe business, not the buying agency business, and therefore the commission is not a buying commission. Some examples of commissions covered by the above:

Example 1: The agent manufactures rubber thongs, but acts as a buying agent for an importation of leather shoes. If it is established that the two sorts of goods are of the same class, the commission is not a buying commission.

Example 2: The agent controls the supply of an ingredient essential to the manufacture of the product, such as a syrup for a soft drink, and arranges contract manufacture on behalf of the purchaser of the final product. In this case, the commission is not a buying commission because the agent is dealing in goods of the same class - the syrup which is a component of the end product.

The imported goods

1. When the agent does any of the following:
 - (i) purchases, exchanges, sells or otherwise trades the imported goods other than in the capacity as agent of the purchaser; or
 - (ii) supplies any services in relation to the imported goods; or
 - (iii) transports the imported goods or components of the imported goods on his own account for any purpose (Note that an agent is allowed to arrange such transport - the purpose of this is to deal with cases where the agent is in effect in the transport business rather than simply acting as an agent); or
 - (iv) acts as agent for, or in any other way represents, the producer, supplier or vendor, or is otherwise associated with any such person except as the agent of the purchaser. (Note that the term "associated" includes circumstances where the agent is related (subsection 154(3)) to the vendor); or
 - (v) receives any commission, fee or payment from any person in relation to the importation of goods under a contract of sale, other than the buying commission payable by his principal.

then any commission charged is not a buying commission.

Example 1: An agent is allowed to disburse payments on behalf of his principal (i.e. to the vendor) as long as the agent does not receive any benefit from the activity apart from costs incidental to disbursing the funds. The commission paid to this agent is still a buying commission.

2. It is understood to be a normal commercial practice for agents to represent several purchasers from time to time in relation to particular kinds of goods; or from time to time to act as the vendor's agent in relation to other transactions with other parties. Neither of these circumstances necessarily precludes the commission in the transaction under examination from being a buying commission.

3. The purpose of these conditions is to restrict buying commission to transactions where the agent is acting solely for the purchaser, and to prevent abuse in cases where an agent acts for both parties in the transaction, (or where the "agent" is in fact the vendor).
4. A buying agent does not necessarily have to carry out the buying agency functions; the agent can arrange for another party to do this - in effect subcontract out. The commission paid to the buying agent is still a buying commission.

Evidence of Buying Commission

1. Details of a buying commission must be disclosed by the parties to the transaction, particularly information as to the identity, role and remuneration of the buying agent. In most cases it is expected that this would consist of:
 - a copy of the agency agreement; and
 - copy of order placed on the vendor by the purchaser or his buying agent; and
 - the vendor's invoice for the goods setting out the parties to the import sales transaction and the price paid or payable by the purchaser; and
 - a statement of account, prepared by the buying agent, providing complete accounting for all expenses incurred by and disbursement made by the buying agent on the purchaser's account.
2. The price represents all payments to the vendor by the purchaser in accordance with the contract of sale. If a commission is included in such payments to the vendor it may indicate that the agent is the vendor, or is related to the vendor, or that the commission is a selling commission. The commission may therefore not be a buying commission.
3. Similarly, where an agent invoices the Australian purchaser for the goods plus his commission, Customs and Border Protection should require production of the vendor's invoice. If the purchaser is unable to obtain a vendor invoice from the buying agent, doubts will be raised about the *bona fides* of the buying agent and the price payable under the actual contract of sale with the vendor. If the only invoice produced to Customs and Border Protection is that from the alleged buying agent, Customs and Border Protection has no alternative but to value the goods on the basis of that invoice price including the claimed buying commission.
4. It should be noted that the existence of a buying agency agreement between purchaser and the agent does not conclusively establish the agent's position. The activities of the agent are the true indicator of a buying agency. If there is satisfactory evidence that the actual activities of the agent are at odds with the written agency agreement, the relationship established by the activities will prevail over the agreement; and if the relationship doesn't conform to the requirements of the legislation, any commission is not a buying commission.
5. If an importer is unable to satisfy reasonably the Collector as to the status of his agent in relation to the matters mentioned above, commission payments to such an agent will not be accepted as buying commissions and hence will be regarded as part of the customs value.

6. It is by no means uncommon for a “buying agent” to supply to the importer a letter, often couched in the very words of the legislation, stating that they do not do any of those things that might prevent their commission from being treated as a buying commission. A check of the database of Supplier Codes might show the same organisation as a vendor in its own right of the imported goods or goods of the same class or kind. This does not necessarily mean the importer and the alleged agent conspired to produce a fake document. It could be evidence, that the commission is not a genuine buying commission in terms of subsection 155(2).

“Commission, (confirming)”

1. References:

CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989 pp 10-11
 CCH: Australian Customs Law and Practice ¶ 5-635
 WTO: Valuation Agreement, Article 8(1)(a)(i)
 WCO: Explanatory Note 5.1
 Sherman and Glashoff: Customs valuation pp 109-110
 Valuation Code: A6

2. Defined in:

Commissions are not defined in the valuation legislation, apart from a definition of buying commission as set out in subsection 155(1). **Buying commissions** are fully treated in this document under their own reference.

3. Used in:

price
price related costs
value unrelated amount (when using the deductive value method).

4. Nature of Confirming Commission:

1. Various forms of financial services are available to exporters to guarantee against the risk of non-payment or insolvency on the part of a buyer. These services generally give rise to a payment to an intermediary, which, for that fee, will accept the risk on behalf of the exporter. Payments made for such services, often known as confirming commissions, may, however, be denoted by other names in various countries.
2. Guarantee of payment by the buyer can be undertaken through normal banking channels, government agencies and insurance companies. It is also one of a variety of services performed by specialised commercial companies called confirming houses which may act for buyers or vendors. Such companies, in either case, often call their charge for guarantee of payment confirming commission.
3. Frequently, a buyer opens a letter of credit with his own bank but the vendor may lack confidence in the buyer’s bank. The vendor then seeks to confirm the letter of credit through another bank, usually in his own country, which guarantees him (the vendor) against the commercial risk of non-payment by the buyer’s bank. The fee charged by the vendor’s bank for this service is a confirming commission.

5. Policy and Procedure:

1. A confirming commission is not strictly a commission as envisaged by the WTO Valuation Agreement at Article 8(1)(a)(i). Rather, it is more like a form of insurance premium.
2. It may take four forms:
 - The vendor may make the arrangements on his or her own account, and simply adjust the price of the goods accordingly. Such a commission is invisibly subsumed into the price and is always part of value.
 - The vendor may make the arrangements on his or her own account, and identify it with another line on the invoice. Such a commission is also part of price and hence part of value. If confirmation of the instrument of payment for the imported goods is considered to be for the benefit of the vendor as it insures against non-payment by the buyer's bank, and if, as a condition of sale, the buyer pays confirming commission to the vendor, that payment is part of the **price** actually paid or payable.
 - The **vendor** may make the arrangements on his or her own account, and then arrange for a separate invoice from the provider of the service to the purchaser, who pays the bill direct to the provider. This fee is part of price and hence part of value. If confirmation of the instrument of payment for the imported goods is considered to be for the benefit of the vendor as it insures against non-payment by the buyer's bank, and if, as a condition of sale, the buyer pays confirming commission to a third party, that payment is part of the price actually paid or payable.
 - The buyer may make the arrangements on his or her own account. Very rarely, is a buyer able to satisfactorily show that, on his own initiative and to ensure conclusion of a contract of sale, he provided a vendor with an irrevocable and confirmed letter of credit, all charges for which he paid direct to the confirming institution. In such a case, no condition of sale having been imposed by the vendor and the benefit having been realised by the buyer, the charge would not be part of the price actually paid or payable for the imported goods.
3. Confirming commission is not to be confused with any charge imposed on the buyer by a financial institution for the service of raising a letter of credit. Such a charge is not part of the price actually paid or payable for the imported goods.

6. Summary:

Confirming commissions are paid to financial institutions in order to strengthen the credibility of a purchaser. Where a purchaser, of his own account, uses a confirming institution to establish his credentials with a vendor, then such fees do not form part of the price. Nor, in such a case, would the commissions be regarded as a price related cost as such commissions are held to be paid for financial services rather than in respect of the goods.

In short, confirming commission incurred by the vendor, and passed on to the buyer as part of the cost of the goods, or separately invoiced, is part of the price actually paid or payable and is included in the customs value.

“Commission, (other)”

1. References:

CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989 pp 10-11
CCH: Australian Customs Law and Practice ¶ 5-635
WTO: Valuation Agreement, Article 8(1)(a)(i)
Sherman and Glashoff: Customs valuation pp 109-110
Valuation Code: A6

2. Used in:

price
price related costs
value unrelated amount (when using the deductive value method).

3. Policy and Procedure:

Commissions are ordinarily part of **price**, or a **price related cost**, as the circumstances require. The two possible exceptions are **buying commission** and (very rarely) certain limited types of **confirming commission**.

“Computed valued goods”

1. References:

WTO: Valuation Agreement, Article 4, Article 6 and Note to Article 6
CELA (No 2) 1987: Replacement Explanatory Memorandum 1989 p 7, p 28

2. Defined in:

Subsection 154(1).

3. Used in:

Subsections 161(8) and (9); See also section 161F, **Computed Value**.

4. Purpose and Rationale:

1. WTO Article 4 provides that, on the request of the importer, the order of application of Articles 5 and 6 shall be reversed. That is, the “computed value” method may be applied before the “deductive value” methods.
2. However, the Note to WTO Article 6 (computed value) points out that “customs valuation is determined under this Agreement on the basis of information readily available in the country of importation.” It then goes on to say, “in order to determine a computed value, however, it may be necessary to examine the costs of producing the goods and other information which has to be obtained outside the country of importation.”
3. The Note continues: “The ‘cost or value’ referred to in Article 6.1(a) is to be determined on the basis of information relating to the production of goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the *producer*...” [italics added]

4. It is most unlikely that a producer would provide confidential production information to strangers, even paying customers, and so the WTO commentary concludes that its most likely use is when the vendor and the importer are **related** parties.
5. In the Act, the legal restriction of the **Computed Value** method to goods exported by a producer is implemented in a slightly circuitous manner, using the interaction of three different definitions: "computed valued goods", "exporter's goods" and "produce":
 - **computed valued goods** are **exporter's goods** whose owner has asked for the reversal of valuation order, and for which a computed value can be determined.
 - **exporter's goods** are goods exported to Australia by their producer according to the definition of "produce" (See the Encyclopaedia entry on Exporter's Goods).

5. Policy and Procedure:

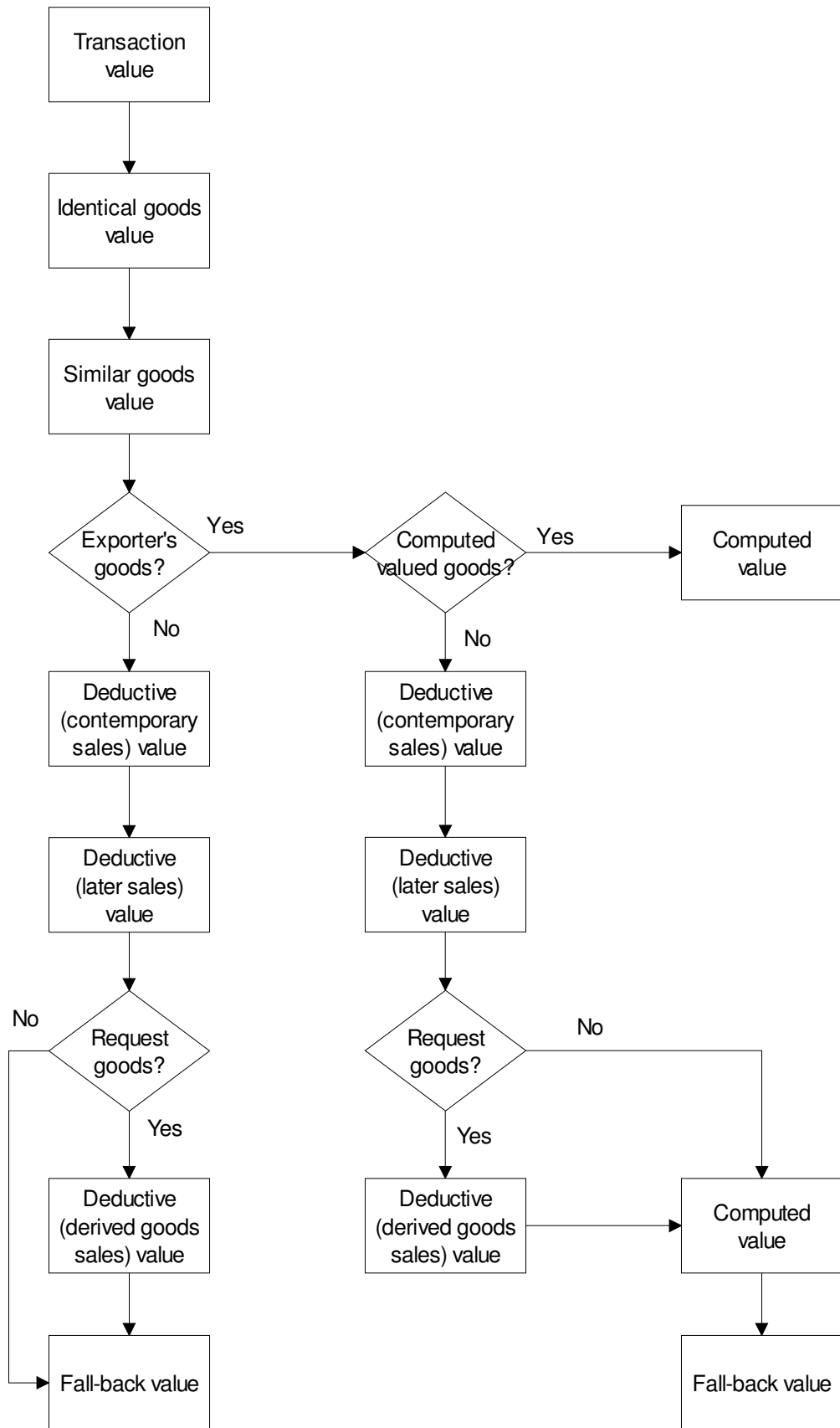
Normal Order of Valuation: Subsection 159(8)

- If goods are being valued in the normal order of valuation, and all of the methods above Computed Value have been tried and have not yielded results, Computed Value may be used provided that the goods are exporter's goods.
- If the goods are not exporter's goods then a Collector must pass over this method and proceed to the next, because subsection 159(8) applies exclusively to exporter's goods.

Reversed Order of Valuation: Subsection 159(9)

- The reversed order of valuation can apply only if the goods are computed valued goods. As noted above, "computed valued goods" are, by definition, exporter's goods. If the importer (owner) has asked for the reversed order of valuation, then a Collector is obliged to apply that method of valuation, but only after Transaction Value, Identical Goods Value, and Similar Goods Value have been tried unsuccessfully.
- Computed valued goods are also, by definition, goods whose computed value can be determined by a Collector. If the importer doesn't have the information needed to allow the Collector to determine the value by this method, then they are not "computed valued goods". Although the legislation nowhere says so specifically, it follows that the request by the importer becomes null and void, and the normal order of valuation applies. That is, back to deductive (contemporary sales) value and thence downwards.

FIGURE 4.1: EFFECT ON SEQUENCE OF VALUATION METHODS



1) INTERNAL AND EXTERNAL USE
 2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines
 3) File Number: 2008/038154-01 79

“Computed value” method

1. References:

WTO: Valuation Agreement, Article 4, Article 6 and Note to Article 6
CELA (No 2) 1987: Replacement Explanatory Memorandum 1989, pp 33-4
CCH: Australian Customs Law and Practice: ¶ 6-000
Sherman and Glashoff: Customs valuation pp 227-233

2. Defined in:

Subsection 161F(1).

3. Used in:

Subsections 159(8) and (9); See also Section 154(1), **Computed Valued Goods**.

4. Procedure and Policy:

1. This is a seldom-used method of valuation. It involves computing a customs value from the overseas manufacturer’s production costs, and this is not information which is likely to be freely available, as it is bound to be considered highly confidential by the manufacturer.
2. It can also be very difficult, even if the information is available, due to:
 - documents being in a foreign language; and
 - different accounting conventions.
3. In practical terms, this method is most likely to arise when the importer is closely related to the exporter - such as a wholly owned subsidiary - and can therefore obtain the information.
4. The method attempts to arrive at an FOB value by summing the following costs:
 - Australian arranged material costs, subsidiary costs, works costs and tooling costs;
 - The value of all other goods, in addition to those above, used in production;
 - All additional costs incurred by the manufacturer;
 - Profit and expenses (including marketing costs) typical of the **class or kind** of goods from that country;
 - **Packing costs**; and
 - **Foreign Inland Freight and Insurance**
5. “Australian arranged” costs, in the first dot point above, are defined in subsection 161F(2) as having the same meaning as “purchasers...” costs in the **assists** provisions.
6. Accounting standards used for calculating expenses, etc, are not specified in the legislation. However, it is expected that generally accepted accounting principles (GAAP) would be applied, in the light of the manufacturer’s own methods of accounting and record-keeping.

7. Note 6 to Article 7 in the WTO Valuation Agreement is an extensive and useful guide to the broad principles involved in applying this method of valuing goods.
8. An importer may seek to use Computed Value method before any of the deductive value methods are employed. See Computed Valued Goods.

“Day of exportation”

1. References:

WTO: Valuation Agreement, Article 9
CCH: Australian Customs Law and Practice, ¶ 5-545, ¶ 5-100
ACN No. 2002/01, dated 1 February 2002.
Valuation Code: B4.

2. Defined in:

Subsection 161J(4).

3. Purpose and Rationale:

It is of relevance to customs value by establishing the applicable **rate of exchange**.

4. Policy and Procedure:

1. The day of exportation is:
 - The day the goods left the **place of export**; or
 - If posted, the day the goods were posted.
2. In both of the above cases, the Collector must be satisfied as to the correctness of the dates. If the Collector is not satisfied, then the Collector must determine a day of export.
3. Containerised goods, whether air or sea cargo, are often packed for export at the manufacturer’s premises or at a containerisation facility. While the date the goods are packed may be known, the date the container is removed from the premises may not readily be available to the importer at the time the goods are entered for home consumption.
4. Where the owner has no reliable and reasonably available information, at the time the goods are entered for home consumption, to establish the actual day of departure or transportation from the **place of export**, Customs and Border Protection will accept the day of departure of the vessel/aircraft from the loading port/airport, as shown on the bill of lading or sea/air waybill
 - in the case of a bill of lading or sea waybill, the date of departure can be obtained from the ‘on board’ date endorsed on the bill.
5. If the ‘on board’ data is unavailable, the date of departure of the vessel should be obtained from the shipping company.

“Deductible financing costs”

1. References:

WTO: Decision 3.1
Sherman and Glashoff: Customs valuation Kluwer, 1988; pp 94-7
CCH: Australian Customs Law and Practice: ¶ 5-510
CELA (No 2): 1987 Replacement Explanatory Memorandum (1989) p 8; p 29
SAAB-Scania Imports Pty Ltd v Collector of Customs - Federal Court, NG 113 and 188 of 1990
GFT Australia Pty Ltd v Collector of Customs - AAT: V92/444, 1992
GFT Australia Pty Ltd v Collector of Customs - Federal Court: VG 491 of 1992
Valuation Code: A8
GFT Australia Pty Ltd v Collector of Customs - Federal Court (Full bench): VG 74 of 1994.

2. Defined in:

Subsection 154(1) Definition of “deductible finance costs”.

3. Used in:

Section 161, in definition of adjusted price, in Transaction Value method.

4. Background to the Provision:

1. The provision for deductible financing costs is not included in the Articles of the WTO Valuation Agreement itself, but in Decision 3.1 adopted by the WTO Committee on Customs Valuation during its ninth meeting, 1984. (See WTO Compendium).
2. This decision is incorporated into subsection 154(1) of the *Customs Act 1901*.
3. Broadly, the provision allows the deduction from the price of interest charges, provided that:
 - the charges are distinguished to the satisfaction of the Collector from the price paid or payable for the goods;
 - the agreement allows the importer to delay the payment of the price in return for payment of interest;
 - the charges are pursuant to a written agreement; and
 - a reasonable rate of interest is charged.

5. Policy and Procedure:

In GFT (Federal Court: VG 491 of 1992) the Court restated the above criteria in the following words:

Before an amount can be deducted as a ‘deductible financing cost’, each of the following must be satisfied:

- (a) The sum sought to be deducted must be ‘interest’, a term which is not defined.
- (b) The interest must be payable under a written contract, agreement or arrangement.

- (c) The contract, agreement or arrangement must permit the purchaser to delay the payment of the price in return for the payment of interest.
- (d) The contract agreement or arrangement must be one entered into between the purchaser and the vendor (or another person) in relation to the goods; and
- (e) The contract agreement or arrangement must distinguish (to the Collector's satisfaction) the interest from the price actually paid or payable for the goods.

"Interest"

The Court used two references to define interest:

Concise Oxford Dictionary: "Money paid for use of money lent or for not extracting repayment of a debt."

Halsbury's Laws of England (4th Ed) Vol 32 paragraph 106: "Interest is the return or compensation for the use of or retention by one person of a sum of money belonging to or owed to another."

In GFT, the importer negotiated a unit price payable in 180 days, which was probably greater than if the unit price had been negotiated for 30 days. The amount payable did not change if the importer paid early.

"Written contract, agreement, arrangement"

In the final appeal decision handed down by the Full Court of the Federal Court in the GFT case (VG 74 of 1994), the Court found that this provision of the legislation should be given a broad interpretation. As such, the Court found that the interest terms specified in the purchaser's invoice from the vendor were sufficient to meet this requirement. Whilst the endorsement on the invoice was not a written contract, it was sufficient to evidence a written **arrangement** as required by the legislation

"Distinguished from price"

Once price has been established, and the written contract, agreement or arrangement to delay the payment of that price in return for the payment of interest has been examined, there should be little difficulty in distinguishing that interest from the price.

"Reasonable Rate of Interest"

Once the above stage has been reached, the question arises: is the interest rate reasonable? Evidence will be required that the charges incurred under any written agreement are in accord with the interest charges incurred by the seller in the country of export for exposure to the currency of the contract of sale. Several international financial journals, such as *The Economist* or the *Wall Street Journal* provide acceptable evidence of international interest rates.

"Demonstration of Price"

Finally, sub-paragraph (b) of the definition of "deductible financing costs" provides that a Collector may require the purchaser to demonstrate that identical or similar goods are actually sold at the claimed price. Note this is an option available to the Collector if he

is not satisfied on the existing evidence. In other words, it is not mandatory in every case.

"Identical goods" and "similar goods" are defined in section 156; see also in this Division.

If a Collector requires the above demonstration, it should be sought in writing, citing the legal basis (e.g. "in terms of the definition of "deductible financing costs" in subsection 154(1)" and using the phraseology of paragraph (b). A simple phone request for a "price list" would probably not suffice.

"Deductive value methods"

1. References:

WTO: Valuation Agreement, Article 5 and Note to Article 5
CELA No 2 1987: Replacement Explanatory Memorandum, 1989, pp 30-33
CCH: Australian Customs Law and Practice, pp 5-850
Sherman and Glashoff: Customs valuation, pp 209-226.

2. Defined in:

Subsection 154(1); sections 161C, 161D, and 161E.

3. Used in:

Subsections 159(5), 159(6), and 159(7).

(For determining Customs value when it is not possible to use transaction value, similar or identical goods value, and the owner of the goods has not requested the Collector to use computed value before deductive value for exporter's goods.) See also **Request Goods**.

4. Policy and Procedure:

1. There are three Deductive Value Methods: Contemporary Sales, Later Sales and Derived Goods Sales, and they are applied in the following order of precedence:
 - contemporary sales within 45 days before or after the date of importation of the goods to be valued (section 161C);
 - later sales, taking place up to 90 days after importation of the goods to be valued (section 161D);
 - sales of goods derived from the imported goods (section 161E.)
2. Deductive Values are obtained by calculating from the selling price realised on the Australian market by goods that are:
 - comparable to the imported goods;
 - in significant quantities;
 - at the first level of trade after importation;
 - to an unrelated party.
3. Each of the three methods involves a different method of calculating the unit price of goods. These are fully set out in sections 161C to 161E.

4. Having determined the sale price on which the deductive value will be based, the next step is to deduct from that price value unrelated amounts, deductible administrative costs, and deductible financing costs. After dividing by the number of units involved, this process will bring the price of the goods back to the equivalent of their unit price at the place of export. This becomes their customs value.
5. In a nutshell:

$$UP = \frac{P - (V+DA+DF)}{N}$$

Where

UP	=	Unit price
P	=	Price
V	=	Value Unrelated Amounts
DA	=	Deductible Administrative Costs
DF	=	Deductible Financing Costs
N	=	Number of Units

“Determination of value; review of determination”

1. References:

Section 161K; section 161L
 Regulation 108 (which refers to subsection 71B(4), COMPILE provisions)
 Subsection 71B(4)
 CELA No 2 1987: Replacement Explanatory Memorandum, 1989, pp 37-38.

2. Defined in:

Not defined.

3. Policy and Procedure:

1. Determination of Value:

Section 161K states that when the value of imported goods is determined by the CEO or Collector in accordance with the Division it shall be recorded on the entry, or the owner will be “otherwise advised”. The Act does not specify how the owner is to be ‘otherwise advised’, and as a consequence there is no prescribed documentary “determination” as such. In practical terms, the initial “determination” of value is likely to take one of two forms:

By Acceptance:

Under self-assessment, the value of imported goods is self-assessed and the importer enters the goods accordingly; the value is recorded on the entry by the importer. When the entry goes down the ‘green line’ and is automatically accepted and processed by the Customs and Border Protection computer system, the value has been determined by acceptance. This is set out in the subsection 161K(2), and (more clearly) in the Replacement Explanatory Memorandum 1989, pp 37-38.

By Decision:

This arises where a value is actually determined by Customs and Border Protection, by whatever procedure. It includes re-determinations arising from audits and the like, or from the outcome of legal proceedings. The Act does not specifically state that in every case value shall be determined; but that is the only logical outcome of applying subsection 161K(1).

2. Notification of Determination:

Subsection 161K(2) requires notification of determinations in a manner prescribed. Regulation 108 prescribes by reference to subsection 71B(4), which in effect provides that automatic computer response through COMPILE suffices as notification (and hence, as a determination).

In the case of re-determinations, determinations on written request, etc, this may not be appropriate or even practicable, and the "otherwise advised" option of subsection 161K(1) applies. The advice may be by means of PWA, letter, or the like. It should always be in writing.

3. Statements of Reasons:

Subsection 161K(3) provides importers with the right to a statement of reasons for any determination, provided it is requested within 28 days of the making of the determination (which, in most cases, is the date the goods are entered). The subsection also sets out minimum information to be supplied in response to a request for a statement of reasons. Customs and Border Protection must respond within 28 days.

This applies to all determinations, whether by acceptance or by decision.

As a matter of good administrative practice, when making determinations for which a written response is required, officers should include as a matter of course the minimum information set out in subsection 161K(3). That information is:

- (a) the valuation method used (e.g. Identical Goods method)
- (b) the findings on material questions of fact, and the evidence on which the findings were made; and
- (c) any calculations made.

The officer should also give a valid reason for the valuation method used if it is not the Transaction Value method as well as an explanation as to why other preceding methods were inapplicable.

4. Review of Determination of Value:

Section 161L provides a mechanism for a review of determinations by Customs and Border Protection at any time. However, there is little practical point to a review which is outside the time periods allowed for both refund or call-up of duty (see below).

A review may arise from several causes:

- Request by an importer;
- Audit;
- Outcome of Court Action;
- Change to legislation.

In a review, the delegate of the CEO empowered to review a decision may:

- (a) affirm the determination;
- (b) vary it;
- (c) revoke it and make a new determination.

Whilst the action of **affirming** a determination or decision is obvious in a review situation, some explanation is necessary to distinguish between the purpose of (b) and (c). Customs and Border Protection would **vary** a determination in situations where there is no change to the method of valuation being used, however the **actual customs value** changes. If, on the other hand, the method of valuation for the goods needs to be changed, (e.g. transaction value is rejected due to insufficient reliable information), the delegate under s.161L needs to **revoke** the original determination and make a **new determination** of customs value under part (c).

If an importer wants a review of a determination, the importer should first seek a review in the region where the original determination was made. If the importer is not satisfied with the outcome of that review, a further review may be sought in Central Office.

The outcome of a review must be notified formally to the importer, with reasons (see Statement of Reasons above) because such a decision is in effect a re-determination.

Call-up of Duty:

Note that call-up of duty as a result of re-determination or review of determination is restricted by section 165 to 4 years after the date of payment, except for circumstances of fraud or evasion, in which circumstances no time limit exists.

Refund of Duty:

Refunds arising from re-determinations and reviews of determination are controlled by section 163 and associated regulations 128, 128A and 128B. Note that regulation 128B includes provisions for set-off of refunds against duty liability.

External review:

Section 161L does not, of course, preclude the importer's right to external administrative review of the determination, through the AAT or Federal Court or other due process after paying under protest.

5. Re-Determination of value if goods deteriorate or become out of date during storage on a wharf or in Customs Warehouse:

- From time to time importers who have taken advantage of the warehousing facility offered under the *Customs Act 1901* will seek to have goods revalued. (It also sometimes arises from new local buyers in respect of goods abandoned at the wharf or airport), e.g. where the original purchaser has relinquished the goods ordered due to financial difficulties. This request also often arises in the case of fashion wear, which becomes quickly out-dated. The argument advanced by the importer is that the commercial value of the goods is now much less than when they were warehoused and the customs value ought to be reduced to reflect this.

There is no provision in either the WTO Valuation Agreement or in the *Customs Act 1901* to do this. Any re-determination of value under the provisions of the legislation

will inevitably produce the same value as the value of the goods at the time of importation. In almost every instance, **transaction value method** would have been used, based on the **import sales transaction** which brought the goods to Australia. That transaction has not changed, and neither has the transaction value.

Similarly, if some other valuation method was used in the first instance, that valuation method would still apply and the customs value would remain the same.

An importer is entitled to make the commercial decision to warehouse goods rather than to pay duty on their arrival. The importer is also entitled to make a commercial decision on the length of time the goods are left in a warehouse before clearance. However, neither the WTO Valuation Agreement nor the *Customs Act 1901* makes provision to compensate importers for reductions in the commercial value of goods after being warehoused.

“Documentation standards”

1. References:

CCH: Australian Customs Law and Practice: ¶ 3-070
Saab Scania Imports Pty Ltd v Cody, (1988) 16 ALD 777.

2. Defined in:

Subsection 4(1): Commercial Document.
Subsection 160(1): Sufficient reliable information.
Section 240: Retain documents.

3. Policy and Procedure:

1. The importer is not required to lodge a special form of invoice. Normal commercial documentation is acceptable, i.e. documents prepared in the ordinary course of business for the purposes of a commercial transaction involving the goods or the carriage of the goods, such as an invoice and a bill of lading in respect of the goods or a receipt given on the sale of the goods.
2. It is expected, however, that these documents would contain the basic information required by Customs and Border Protection for valuation purposes, including the following:
 - identification of the parties to the transaction;
 - the description and quantity of the goods;
 - the selling price of the goods, including the terms of sale, the currency and method of payment;
 - particulars of all arrangements or undertakings that have or may have the effect of varying the selling price of the goods, whether by way of discount, rebate, commission, compensation or any other means;
 - amounts of the costs for labour, packing and materials incurred in packing the goods including shipping or airfreight container packing costs;
 - details of any royalties or licence fees or other deferred payments, such as any part of the proceeds of any use, resale or disposal of the goods by the purchaser that are payable (price related costs);

- details of any goods or services (i.e. production assist costs) that have been supplied, whether or not free of charge or at a reduced cost, directly or indirectly, by the purchaser in connection with the production of the goods;
 - details of any goods or services that have been supplied, whether or not free of charge or at a reduced cost, directly or indirectly, by the purchaser in connection with production assists (see above);
 - any foreign inland freight or foreign inland insurance in respect of the goods paid by the purchaser in respect of the imported goods; and
 - details of any overseas freight and overseas insurance costs in respect of the imported goods.
3. It is the purchaser's responsibility to obtain from the vendor any information not contained in normal commercial documentation which Customs and Border Protection may require to ensure that the goods are entered in accordance with the provisions of the Customs Act. One example of additional evidence that may be required to enable clearance is the production of manufacturer's and/or vendor's invoices in cases of transactions arranged through intermediaries.
4. The onus is at all times on the importer to produce complete and legible documentary evidence to support the entry at the time of lodgement. Subsection 160(1) of the Customs Act provides that determination of the customs value of goods is dependent upon there being available to the Collector sufficient reliable information for the purpose.
5. Section 240 places certain legal requirements upon importers. The importer is required to keep all commercial documents necessary to enable a Collector to ascertain:
- whether the goods are correctly described;
 - properly valued; or
 - rated for duty,
- for a period of five years from when the goods are entered for home consumption.
6. If the goods are not to be entered for home consumption, the importer must retain all relevant commercial documents until the goods cease to be subject to the control of Customs and Border Protection.
7. Subsection 240(2) provides that, where a commercial document is required to be surrendered to another person by force of Commonwealth or State law, or in accordance with ordinary commercial practice, then it shall be sufficient to retain a certified true copy in the manner prescribed by subsection 240(3), for the period during which the document is required to be so surrendered.
8. Failure to keep the commercial documents in a manner that can be readily used by a Collector in the execution of the Collector's duties, or to inform the Collector as to the whereabouts of the relevant commercial documents, or the commission of any act which defaces or alters a commercial document required to be kept, is an offence punishable by a fine not exceeding \$2,000 (or \$5,000 where the person has previously been convicted of a records offence (subsection 240(6))).

9. Subsection 240(5) permits the notation or marking of a document in accordance with ordinary commercial practice. Such action is not considered to alter or to deface a commercial document.
10. Section 240 obliges importers to keep commercial documents for the periods of time specified. This is so that Customs and Border Protection may determine, after the goods have been entered for home consumption, whether any errors in valuation or tariff classification processes have occurred.

“Exempted pallets and containers”

1. References:

European Convention on Customs Treatment of Pallets Used in International Transport: Geneva, 1960
 Customs Convention on Containers, 1972, as amended
Customs Valuation (Amendment) Act 1987: Explanatory Memorandum, pp 11-12
 CELA (No 2) 1987: Replacement Explanatory Memorandum (1989) pp 8-9
 Valuation Code: B5.

2. Defined in:

Subsection 4(1) (“pallets”, “containers”).
 Subsection 154(1) (“exempted pallets and containers”).

3. Used in:

Customs Value
Place of Export
Day of Exportation.

4. Policy and Procedure:

1. Covers re-usable containers or pallets that are temporarily imported into Australia in terms of sections 162A or 162B respectively, and is of relevance in the computation of customs value, and in determination of the place of export and day of export.
2. Exempted containers and pallets are not part of the customs value of the goods.
3. The Customs Convention on Containers defines “Container”, as a container that:
 - is fully or partially enclosed so as to constitute a compartment intended for containing goods;
 - is of a permanent character and strong enough to be suitable for repeated use;
 - is specially designed to facilitate the carriage of goods by one or more modes of transport without intermediate reloading;
 - is designed for ready handling, particularly when being transported from one mode of transport to another;
 - is designed to be easy to fill and empty; and
 - has an internal volume of one cubic metre or more.
4. The universal 20 foot and 40 foot metal shipping containers, and the aircraft cargo containers known as “aircraft unit load devices”, are of course exempt containers. So too are the devices known as “flat racks”, (and sometimes as

"platform containers" or "platform flats") which use the standard ISO dimensions and lifting fittings. These containers have folding ends which can be locked into an upright position for handling by cargo container cranes and for secure storage on container ships.

5. "Aircraft pallets", when used with "aircraft unit load devices" and carried with them, are accessories and equipment for containers, and are covered by Article 1(c) and Annex 6 to the Convention on Containers. Otherwise, they are "pallets" under Article 1(b) of the European Convention.
6. "Bolsters", being essentially the floorpans of standard ISO containers, to which cargo such as machinery can be bolted for transport, are not enclosed, and hence are not "containers". However, they fit the European Convention definition of pallets, and may be treated as such.
7. In some cases, equipment (for example, diesel electricity generator plant) is permanently installed on an ISO standard bolster for ease of use in the field after importation, and is not intended to be dismantled from that base. In such a case, the bolster is part of the goods and included in the value of the goods.
8. The familiar wooden pallets on which cargo is often stacked, strapped or shrink-wrapped for ease of handling by forklift trucks are of course covered by the European Convention. Their value is not part of the value of the goods.

"Exporter's goods"

1. References:

WTO: Valuation Agreement, Article 6 and Note to Article 6
CELA (No 2) 1987: Replacement Explanatory Memorandum pp 10-11.

2. Defined in:

Subsection 154(1): Exporter's Goods (see also subsection 154(1) Computed Valued Goods).

3. Used in:

Computed Value subsections 159(8); 159(9).

4. Policy and Procedure:

1. Subsection 154(1) defines "exporter's goods" as being goods which have been exported by their producer. Further on in subsection 154(1), "produce" is defined as including "grow, manufacture, mine, process and treat".
2. This definition is included in the valuation legislation for the purposes of the computed value method in section 161F.
3. An essential pre-requisite for the use of this method is the availability of data which are unaffected by any intermediary transactions. So "exporter's goods" are those where the vendor is the person who grew, manufactured, mined, processed or treated the goods, rather than subsequent owners, wholesalers, distributors, exporters, and the like.

5. Examples:

Example 1:

Importer: Marcus Racing, Victoria
 Vendor: Newman-Haas Racing, Riverside, California
 Goods: One "Lola" racing car chassis, made of composite materials
 C. Origin: UK
 Manufacturer: Lola Cars, UK

The goods are not being sold by the producer (manufacturer) of the goods, Lola Cars in the UK, but by a motor racing team in California, USA. They are not exporter's goods.

Example 2:

Importer: Finland Kit Furniture Co, Sydney
 Vendor: Finland Kit Furniture Co, Helsinki
 Goods: Kit Furniture
 Origin: Finland
 Manufacturer: Finland Kit Furniture Co, Helsinki

The goods appear to be manufactured by the vendor, and are probably exporter's goods. The vendor and importer are probably related, which means that the vendor may have been willing to provide the importer with confidential production costs. Naturally, these factors should be confirmed.

"Fall-back value"**1. References:**

WTO: Valuation Agreement, Article 7 and Note to Article 7
 Sherman and Glashoff: Customs valuation, pp 235-240
 CCH: Australian Customs Law and Practice: ¶ 6-050.

2. Defined in:

Subsection 154(1); Section 161G.

3. Policy and Procedure:

1. The fall-back method may be viewed as a "flexible" means of valuing goods, although it is not a distinct method of valuation as such.
2. If all the other methods of valuation cannot successfully be applied, the fall-back method allows the Collector to revisit, "flexibly", those methods in their original order and to attempt to apply them to the goods to be valued with less stringent application of the criteria set down for those methods.
3. It does not allow the use of capricious or arbitrary valuation methods. (Refer to section 161G, which clearly sets out what is not acceptable.)
4. The following two examples typify the methodology involved.

Example 1:

Sample goods are imported free of charge. They are not sold by the exporter to the importer, and indeed, even though they are used up in Australia, ownership remains with the exporter.

The accompanying documentation includes a value for Customs purposes. The available evidence indicates the stated value is realistic for those goods.

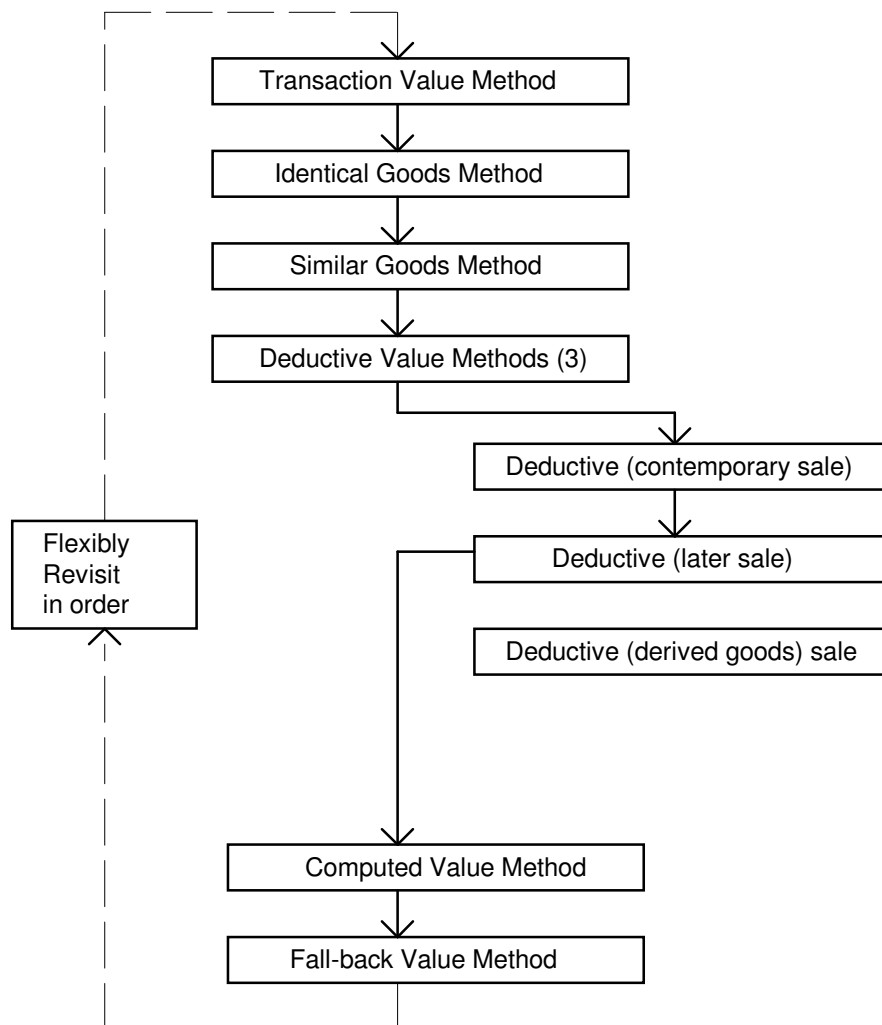
Because there is no contract of sale, there can be no transaction value. If all other methods fail - identical and similar goods methods, deductive methods, and computed methods, then the fall-back method applies. The documented customs value could be accepted as a notional sale of the goods under fall back. Customs and Border Protection is thereby using a flexible application of the Transaction Value method to value the goods.

Example 2:

Goods are imported without a contract of sale, but a single shipment of identical goods was imported 48 days before. The Identical Goods method could be applied, but the importation is outside the 45 day period required by the legislation.

All other methods fail. The Collector may therefore “flexibly” revisit that identical goods importation, and if satisfied with that value, may accept it under the fall-back method.

FALL-BACK VALUE METHOD



“Foreign inland freight and insurance”

1. References:

WTO: Valuation Agreement, Article 8, paragraph 2.
CELA No 2 1987: Replacement Explanatory Memorandum 2, 1989, pp 10-11
Sherman and Glashoff: pp 65-7; pp 163-7
CCH: Australian Customs Law and Practice ¶ 5-630
ACN No. 89/116, dated 23 August 1989
ACN No. 90/71, dated 4 June 1990
Valuation Code: A5.

2. Defined in:

Section 154(1).

3. Used in:

Price Related Costs
Similar Goods Value
Identical Good Value.

4. Rationale:

This definition, along with the definition of trader, was introduced in 1987 to counteract a duty evasion scheme. Using this scheme, importers could indulge in “price splitting”, paying the overseas inland freight and insurance directly to the overseas carrier. Since the payment was not directly or indirectly to the vendor or for the benefit of the vendor, it was not part of “price” as then defined. The intent of the legislation, which set the valuation level at FOB, was thereby defeated, duty was evaded, and protection eroded. This provision ensures that, no matter to whom or by whom the freight is paid, it is part of price.

5. Policy and Procedure:

1. Foreign inland freight and insurance are defined as being charges incurred in a foreign country for getting the goods to their place of export. The definition also includes the cost of any documentation involved, such as stamp duty on an insurance certificate. The charges are included in the definition of price related costs which are to be added to adjusted price to make up the customs value.
2. To counteract the manipulation of these charges through related party transactions, the definition requires that a Collector be satisfied with the correctness of the amount. In the case of payments between related parties, if a Collector is not satisfied with their correctness, the Collector determines an amount on the basis of the ordinary costs of:
 - same services;
 - for same class or kind of goods;
 - under same conditions;
 - between non-related parties.
3. The amounts paid for foreign inland freight and foreign inland insurance also come into play in determining identical and similar goods values, where the Collector can adjust the amounts taken into consideration to allow for different

export arrangements between the goods being valued and the goods used as a benchmark.

4. Where the amounts relating to foreign inland freight and insurance cannot reasonably be determined because they are included in a total charge for shipping or for the goods, then the following estimates may be used as a practical guide:
 - foreign inland freight to the place of export may be estimated provided that importers and agents are confident that a shortpayment of no more than \$20 in duty would occur had the actual amount been included in the customs value
 - foreign inland insurance may be estimated at 0.25% of the ex-works price of the goods plus any foreign inland freight.
5. There are numerous, often obscure, incidental charges involved in the export of goods from a foreign country which are noted on documents and which may or may not be part of the customs value. The underlying principles in dealing with these are as follows:
 - identify the place of export. If the charges relate to transportation to that place, they are part of foreign inland freight. Thus, if the goods are sold FOB airport, and the place of export is an airport, such things as airport terminal handling charges, handling fees, and pickup surcharges are part of foreign inland freight.
 - remember that the Collector must be reasonably satisfied about the nature of the charges.

“Identical goods value”

1. References:

WTO: Valuation Agreement, Article 2 and Article 15 (definition). See also Interpretive Note to Article 2.

WCO: Commentary 1.1

CELA (No 2) 1987: Replacement Explanatory Notes 1989: pp 29-30

Sherman & Glashoff: Customs valuation, pp 201-207.

CCH: Australian Customs Law & Practice ¶¶5-750

Valuation Code: B9.

2. Defined in:

Section 161A; see also associated definitions and references:

- about the same time (Subsection 154(1); also encyclopaedia)
- comparable goods (Subsection 154(1); also encyclopaedia)
- identical goods (Section 156; also encyclopaedia)
- unit value (Subsection 154(1)).

3. Used in:

Circumstances where the transaction value of the imported goods cannot be determined.

4. Policy and Procedure:

1) **INTERNAL AND EXTERNAL USE**

2) **BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines**

3) **File Number: 2008/038154-01**

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1. Identical Goods Value method is the first method to be tried if the Transaction Value method cannot be used.
2. The Identical Goods method calculates the value of imported goods by reference to the unit price of comparable identical goods imported into Australia about the same time as the imported goods, and which themselves have been valued by the transaction value method. In other words, this method requires evidence of a previously accepted transaction value of goods which are identical to the goods to be valued.
3. The meaning of identical goods:
 - “Identical goods” must be goods which are the same in all material respects, including physical characteristics, quality and reputation, as the imported goods
 - the goods must have been produced in the same country as the imported goods
 - the goods must not include certain Australian production assists
 - the Collector must first look to goods that have been produced by or on behalf of the same producer as the goods being valued. Only if there are no importations of identical goods from the same producer at about the same time can “identical goods” produced by someone else be used.
4. The valuation is assessed by the unit price, not of identical goods as such, but of “comparable identical goods”. The difference is important.
5. In order to be “comparable identical goods”, the goods:
 - must have been exported to Australia at about the same time (i.e. plus or minus 45 days); and
 - either:
 - were sold in the same, or substantially the same, quantities, as the imported goods in an import sales transaction at the same trade level as the import sales transaction of the imported goods; or
 - are of a kind that reasonable inquiry by the Collector has not shown to be so sold.
5. If there is only one sale of identical goods that meet the above mandatory criteria then they are by default “comparable identical goods”. Adjustments must be made for trade level, differences in foreign inland freight and insurance, and quantity discounts.
6. If, on the other hand, there are numerous imports of identical goods at about the same time, then the import closest in terms of trade level and quantity, and source should be used.
7. If there are two or more lots of “comparable identical goods” which produce different unit prices, then the lowest unit price must be used.
8. The unit price of comparable identical goods is the transaction value of those goods, divided by the number of units of those goods. The unit price is then multiplied by the number of units of the imported goods.

Example: The goods to be valued consist of 1,000 size 7 widgets imported from UK and made by UK Widgets Plc.

A shipment of comparable identical goods - size 7 widgets made by UK Widgets Plc - was imported into Australia 18 days before. It was the only shipment into Australia at about the same time.

That shipment consisted of 5,000 widgets with a total Customs Value determined by the Transaction Value method of \$A50,000. There were no discounts for quantity.

The Unit Value of the comparable identical goods was \$10 each. Applying this to the shipment to be valued, the Customs Value is $\$10 \times 1,000 = \$10,000$.

9. The example is, of course, simplified. Adjustments may have to be made to ensure that like is compared with like. The two shipments may have come from different ports, by different means of transport, have been sold at different trade levels, or may have been subject to quantity discounts.
10. Different ports will affect both overseas and foreign inland freight and insurance; different means of transport will affect overseas freight and insurance; different trade levels (e.g. ex-factory or ex-wholesale distributor) may involve adjustment to the unit price; and different quantities may involve adjustment for quantity discounts.

Caution - Commercial in Confidence

There is no difficulty with the Identical Goods Value method if the "comparable identical goods" were imported by the same importer as the shipment to be valued. However, it is quite possible that a product may be imported by two different importers, and the use of the other importer's shipment could have the effect of disclosing confidential commercial information to a rival.

"Import sales transaction"

1. References:

CELA No 2 1987: Replacement Explanatory Memorandum, 1989: pp 11-12
 WTO: Valuation Agreement, Article 1
 WTO: General Introductory Commentary Paragraph 1
 CCH: Australian Customs Law and Practice ¶ 5-250; ¶ 5-325
 Valuation Code: A1.

2. Defined in:

Subsection 154(1).

3. Used In:

"**purchaser**" in Subsection 154(1)
 "**vendor**" in Subsection 154(1)
 "**buying commission**" in Section 155
 "Interpretation - **identical goods** and **similar goods**" in Section 156
Transaction Value (Subsection 161(1))
Identical Goods Value (Section 161A)
Similar Goods Value (Section 161B)
 "**related persons**" in Subsection 161H(2).

4. Policy and Procedure:

1. Establishment of the existence or otherwise of an import sales transaction is the starting point for all methods of valuation. If it is found that there has been no import sales transaction entered into before the goods become subject to Australian Customs control, it will be necessary to move on to other methods beyond Transaction Value.
2. The definition of import sales transaction firstly gives guidance in choosing which contract is to be taken as the primary contract of sale, and then directs which other contracts, agreements or arrangements shall be added to the primary contract to provide a complete account of the dealings that have brought the goods to Australia.
3. When there are several contracts entered into in respect of the goods before they reach Australian Customs control, the criteria are:
 - if there is only one contract, and it is both for the importation of the goods into Australia and for their export from a foreign country; that contract;
 - if there is only one contract, and it is for importation into Australia, even though it was not a sale for export from a foreign country; that contract;
 - if there are two or more contracts for importation into Australia, the last one entered into before the goods reached Customs control shall be used.

It should be noted that there is nothing in the definition of import sales transaction which requires the purchaser to be resident in Australia. It is on the terms of the contract, not the address of the parties which determines the status of the contract for Customs valuation purposes.

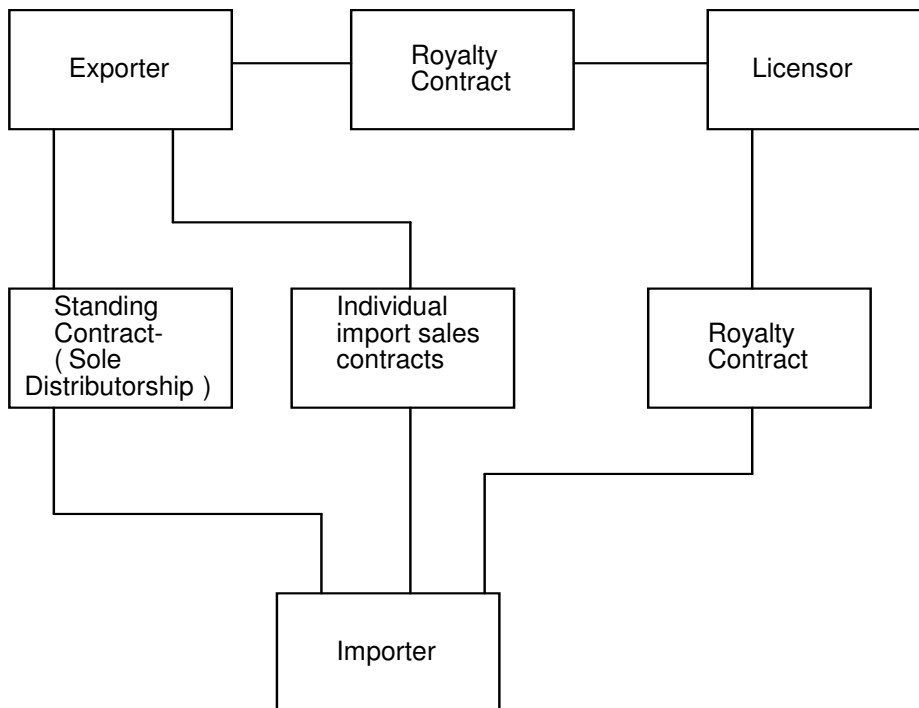
4. Having chosen the contract of sale, the circumstances surrounding the contract are examined to determine if there are any other contracts, agreements or arrangements that provide for an increase in the price of the goods prior to importation.

Example 1: A contract for supply of telephone cable is agreed at a fixed contract price for a two year period. A secondary arrangement provides for a price adjustment if the world price of copper increases by more than 10% during the contract period. During the two years, copper prices rise more than 10%, and shipments begin to come in at the higher price. Any such increase imposed would be regarded as part of the import sales transaction.

5. We are also directed to include in the import sales transaction any contract, agreement or arrangement that the Collector determines is so closely connected with the primary contract and with the goods that a single transaction is formed.
6. The definition of import sales transaction casts a wide net, aimed at capturing not only the primary contract for the supply of the goods, but also all of the ancillary arrangements and agreements that make up the import sales transaction.
7. In some cases, such as royalty agreements, those ancillary arrangements may have their genesis several years before the specific import sales contract. Similarly, between importers and exporters who deal with each other on a regular basis, there may not be a written contract for each shipment, but rather

a reliance on an established trading relationship. In such cases the import documents may not in themselves constitute a contract, but are evidence of such a contractual relationship that has evolved over the years.

IMPORT SALES TRANSACTION
EXAMPLES OF SOME OF THE CONTRACTS THAT MAY EXIST AND HAVE AN IMPACT ON THE IMPORT SALES TRANSACTION:



An importation is not always the creature of a single contract. A single importation may be surrounded by a network of related and ancillary contracts, written or verbal, which should be taken into account when determining the import sales transaction.

Some of the contracts may be inapplicable or irrelevant, but they do need to be considered.

“Overseas freight and insurance”

1. References:

CCH: Australian Customs Law and Practice ¶ 5-540 to 5-560.

2. Defined in:

Subsection 154(1).

3. Used in:

“**Value unrelated amount**” in Subsection 154(1)

Section 158, “Interpretation - transportation costs” in respect of “**assists**” (production assist costs)

Subsection 161(2) “**adjusted price**” in relation to “**Transaction Value**”.

4. Rationale:

Because Australia values imported goods at the FOB level (or, more precisely, at place of export level), it follows that overseas freight and insurance is, in general, not part of customs value. Thus in a CIF, FIS (Free into Store) / DDP (Delivered Duty Paid) sale, there is an amount of overseas freight and insurance which must be deducted from price.

The Act defines overseas freight and overseas insurance separately but in practically identical terms, in relation to freight and insurance from the place of export.

It is:

- (a) the amount paid by a trader to someone who is not a related party; or
- (b) the amount paid by a trader to a related party that would have been the amount if the parties weren't related; or
- (c) the sum of the above two amounts, if more than one applies.

5. Policy and Procedure:

1. The Collector must be satisfied as to the correctness of the amounts above.
2. Overseas freight and insurance relating to the imported goods themselves (or the goods derived from them, in the case of deductive (derived goods) method of valuation) is not part of value. It is a value unrelated amount.
3. However, overseas freight and insurance is included in the value of assists; but note that this is outgoing freight, from Australia.

“Packing costs”

1. References:

WTO: Valuation Agreement, Article 8(1)(a)(iii)

Sherman and Glashoff: Customs valuation Kluwer, 1988; pp 110-111

CCH: Australian Customs Law and Practice: 5-625

CELA (No 2) 1987: Replacement Explanatory Memorandum (1989) p 16, 27, 33

Valuation Code: A4.

2. Defined in:

Sub-paragraph (b) of definition of Price Related Costs (subsection 154(1)).

3. Used in:

Transaction Value (subsection 161(1)).

4. Policy and Procedure:

1. The cost of packing goods for removal from the place of export to Australia, or placing them in the condition in which they are imported into Australia, is part of the customs value, irrespective of to whom the amount is paid.

2. This is spelled out in the definition of price related costs:

“price related costs”, in relation to imported goods, means:

- (a) ...;
- (b) packing costs for materials and labour paid or payable, directly or indirectly, by or on behalf of the purchaser in respect of the goods (including, but without limiting the generality of the foregoing, costs of fumigating, cleaning, coating, wrapping or otherwise preparing the goods for their exportation from a foreign country or otherwise placing them in the condition in which they are imported into Australia, but not including the cost of any exempted pallet or exempted container concerned in their exportation).

3. The phrase “or otherwise placing them in the condition in which they are imported into Australia” in this definition recognises the possibility that goods imported into Australia may not have been, at any time, packed or otherwise prepared for exportation from a foreign country. They may have been packed for their domestic market, and subsequently imported into Australia in that condition. In the absence of this phrase, such packing would not be part of the value of the goods, while otherwise identical packing, which was for export, would be.

4. The phrase also makes it clear that “fumigating, cleaning, coating, wrapping...” is not a complete and exhaustive list of packing activities and techniques, but an indicative one.

5. “Packing costs” therefore include not only the cost of the packages and the labour involved in placing them in those packages, but also associated costs such as:

- fumigation
- cleaning
- coating
- wrapping
- container stuffing
- cradling (e.g. for yachts)
- shoring
- other preparation for export.

6. Costs not included are:

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| 1) INTERNAL AND EXTERNAL USE |
| 2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines |
| 3) File Number: 2008/038154-01 101 |

- Exempted pallets and containers
- Cradling and shoring, if that cradling and shoring is part of the transportation vessel.

“Place of export”

1. References:

CCH: Australian Customs Law and Practice ¶ 5-540
CELA (No 2) 1987: Replacement Explanatory Memorandum (1989) p 36
Valuation Code: B3.

2. Defined in:

Subsection 154(1).

3. Used in:

Applicable **rate of exchange (“day of exportation”)**
Overseas Inland Freight and Insurance.

4. Purpose and Rationale:

1. Establishes the dividing line between overseas freight and overseas insurance (which are deductions from price) and foreign inland freight and foreign inland insurance (which are additions to price).
2. Used to identify the day of exportation for rate of exchange calculations.

5. Policy and Procedure:

The place of export is:

- If the goods are posted: the place from which the goods were posted; or
- If exported in a sea or air cargo container: the place where they were packed into that container for export; or
- Goods that were exported under their own power (self transported goods), such as yachts, aircraft, and the like: the place, or last place, in that country from which the goods departed for Australia; or
- Non-containerised cargo exported from a country by sea or air: the place, or first place, in that country where the goods were placed on board a ship or aircraft for export from that country; or
- Non-containerised cargo exported from a country by land, or by river, canal or other inland waterway: the place where the goods finally crossed the border of that country.

“Post-importation technical assistance”

1. References:

WTO: Valuation Agreement, Note to Article 1
 WCO: Commentary 9:1
 CCH: Australian Customs Law and Practice ¶ 5-520
 Sherman and Glashoff: Customs valuation: Kluwer, 1988; pp 171-2
 CELA (No 2) 1987: Replacement Explanatory Memorandum (1989) p 29
 Valuation Code: A9.

2. Defined in:

Not defined in legislation; but see subsection 161(2)(b) (**adjusted price**).

3. Policy and Procedure:

1. Among the allowable deductions from price, in order to calculate “adjusted price”, are certain post-importation charges, as set out in subsection 161(2):

adjusted price, in relation to imported goods, means the price of the goods determined by a Collector who deducts from the amount that, but for this subsection, would be the amount of that price, such amounts as the Collector considers necessary to take account of the following matters:

- (a) ...;
- (b) any costs that the Collector is satisfied:
 - (i) are payable for the assembly, erection, construction or maintenance of, or any technical assistance in respect of, the goods;
 - (ii) are incurred after importation of the goods into Australia; and
 - (iii) are capable of being accurately quantified by reference to the import sales transaction relating to the goods;...

2. The Note to Article 1 of the WTO Valuation Agreement uses somewhat different language:

- (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment.

3. In the context of this issue, “incurred” means that the definitive commitment or liability to pay the cost must arise after importation due to the completion of that work or service. The charge is not “incurred” if the specified work is not carried out in Australia after importation of the goods. That is, no charges are incurred for work not done.

“Price”

1. References:

WTO: Valuation Agreement, Article 1, Article 8 and Note to Article 1
Sherman and Glashoff: Customs valuation, p 29
CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989: pp 15-16
CCH: Australian Customs Law and Practice ¶ 5-400
Valuation Code: A2.

2. Defined in:

Subsection 154(1).

3. Used as:

The starting point for determining the **adjusted price** of goods in their **import sales transaction**.

4. Policy and Procedure:

1. The definition of price encompasses
 - all consideration
 - passing to the benefit of the vendor
 - as a result of the sale of the goods.
2. The first step in determining the price of the goods in an import sales transaction, is to identify all consideration that passes directly or indirectly from the purchaser to the vendor.
3. Note that the consideration passing to the vendor includes, as well as funds, the value of any goods or services supplied to the vendor, by or on behalf of the purchaser, in exchange for the goods. This may include services supplied, or barter or contra trade credits. For example, a buyer of a motor vehicle purchases the vehicle after trade-in of the previous vehicle. The total consideration in this case is the money price paid for the new car plus the value of the trade-in, i.e. the invoice price of the new vehicle.
4. The consideration will be regarded as forming part of price if it passes, directly or indirectly, to the vendor. It may also be passed via a person related to the vendor, or passed to another party for the direct or indirect benefit of the vendor

Example 1:

It has been held that a payment made to a third party, to relieve the vendor of an obligation to make a payment (e.g., a debt), is for the benefit of the vendor and thus part of price.

5. Payments that are not for the benefit of the vendor do not form part of price, but may be captured as price related costs.
6. Charges in respect of activities undertaken on the purchaser's own account as well as rebates the benefit of which has not been received by the purchaser at the time of entry are not included in the price.

Example 2:

An importer contracts to purchase shoes at \$12 per pair. Under the contract, the purchaser will receive a discount off the price (via a subsequent rebate) if he sells the entire shipment and places new orders within three months of receiving the current shipment. In this case, the purchaser's right to a discount is conditional on some future event which may or may not occur. At the time of entry, the customs value is \$12 per pair, i.e. it includes the 'potential' discount.

7. The next step required by the definition of price is to deduct any customs duty or taxes that are paid as a result of the importation of the goods into Australia.

Example 3:

A purchaser enters into a contract on DDP terms. The price includes the supply, shipment, landing, clearance and delivery of the goods into the importer's premises. Any customs duty payable will obviously be included in the price struck for the deal. This duty does not form part of the price of the goods. Note that other deductions will be made, not at this stage, but when we proceed to adjusted price.

8. As well as consideration passing under the primary contract of sale, price also includes any payments made under any other contract, agreement or arrangement that is for the doing of anything to increase the value of the goods and/or that is so closely connected to the primary contract of sale, that a single transaction is formed.

Example 4:

A payment made to a third party under a separate contract for testing and calibrating goods prior to shipment would not form part of the price of the contract for the goods, but would be regarded as the price for a separate service from a separate vendor. Thus we would have two prices in view, and both contracts would be regarded as being so closely connected that a single transaction is formed as provided for in terms of paragraph (e) of the definition of import sales transaction.

9. Part of the task of determining the price of the goods is to determine just what goods and services are to be exchanged for the consideration passing to the vendor. This will assist in moving from price to adjusted price which is the next step towards arriving at a transaction value. Matters to consider include;
 - level of sale (FOB,CIF, DDP)
 - post-importation activities such as erection and testing
 - deductible financing costs

“Price related costs”

1. References:

WTO: Valuation Agreement, Article 8.

2. Defined in:

Subsection 154(1).

3. Used in:

Customs Value: (Customs Value = Adjusted Price + Price Related Costs).

4. Policy and Procedure:

1. The WTO concept of international transactions recognises that in any transaction there will be several components. Apart from the price of the goods asked by the vendor and paid by the purchaser, there will be other charges, additional to the core price of the goods, that the purchaser may incur. Article 8 of the WTO Valuation Agreement directs that certain of these charges shall be part of the transaction value of the goods, and, if they are not already included in the price, they must be added to give a full account of the transaction.
2. In the *Customs Act 1901* these additions are called “price related costs”, and comprise:
 - any **production assist costs** which refer to assistance provided by the purchaser to the vendor to produce the goods, such as production materials, and tooling;
 - **packing**, fumigation and similar costs incurred to get the goods into the condition in which they are imported into Australia;
 - **Foreign inland freight and insurance** charges to get the goods to their **place of export** (see also the associated definition ‘transportation’, section 154(1);
 - **commissions**, other than buying commissions;
 - certain **royalties and licence fees**;
 - any **proceeds of subsequent sale** of the goods paid or payable in the future.
3. All of the above terms in boldface type are dealt with fully under their own entries in this Division. See also Figure 3:1 in Division 3, Transaction Value Method.
4. Unlike price, which must be paid to the vendor, or for the direct or indirect benefit of the vendor, price related costs may be paid to any party.
5. The definition of foreign inland freight also refers to the *transportation* of the goods before they leave the place of export. The term *transportation* is defined in the legislation to include transportation by post, as well as storage costs and handling charges incidental to transportation of the goods. Thus, in the case of **non-containerised cargo**, all charges incurred in placing the goods on board the departing vessel or aircraft are part of FIF. This will include wharf crane charges.

6. Make sure that all the costs surrounding a transaction are correctly identified. The definition of price related cost is intended to cast a wide net over a whole range of charges, and some charges may not necessarily be what they are described as in the documentation: for example, a charge described as a royalty could be, on careful inspection, an assist, a commission, or proceeds of a subsequent sale.
7. Therefore, in assessing "price related costs" each charge should be tested against all of the provisions in turn, rather than simply testing the charge solely in terms of how it is described in the documents in the transaction.

"Proceeds of subsequent resale"

1. References:

Subsection 154(1) - "**price related costs**"
WTO: Valuation Agreement, Article 8(d)
CCH: Australian Customs Law and Practice ¶ 5-735.

2. Used in:

Price, as a price related cost.

3. Purpose and Rationale:

Part of the price of the goods may be calculated on the basis of what those goods fetch when subsequently resold. A common example is "consignment" goods:

Example 1:

A shipment of grand pianos is exported to Australia. Neither party has any real idea of what the goods will realise on the Australian market. The exporter, therefore, prices them at \$10,000 dollars each, plus half of whatever the local seller gets for them above \$10,000.

Another example is a two tiered price contract:

Example 2:

Goods are sold to an Australian importer at a price which has two elements: \$5 per unit, plus 10% of wholesale price. The value would consist of the unit price plus the amount raised in a wholesale sale. Sometimes the amount raised on the resale is described as a royalty and is paid to the vendor. Such payments are more accurately covered by this provision.

"Rate of exchange"

1. References:

S 161J
WTO: Valuation Agreement, Article 9
CCH: Australian Customs Law and Practice, ¶ 5-100
CELA (No. 2) 1987: Replacement Explanatory Memorandum (1989), p 2, 36
ACN No. 2002/01, dated 1 February 2002

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| 1) INTERNAL AND EXTERNAL USE |
| 2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines |
| 3) File Number: 2008/038154-01 107 |

Valuation Code: C5.

2. Purpose and Rationale:

1. The rate of exchange is used in computing customs value, which must be expressed in Australian currency.
2. The applicable rate of exchange is that which prevails on the day of exportation of the goods.

3. Policy and Procedure:

1. Rates of exchange are obtained by Customs and Border Protection from the Reserve Bank and are maintained by Customs and Border Protection on the Integrated Cargo System. In addition, Customs and Border Protection arranges for the publication of weekly exchange rates in the *Australian Financial Review* every Thursday. Customs and Border Protection sources may be accepted as authoritative.
2. The selection of rates of exchange published by Customs and Border Protection is not comprehensive; it is intended to cover the country's common trading partners.
3. To obtain a rate of exchange for an unlisted currency, an owner should obtain documentary evidence from an Australian bank of the commercial rates of exchange prevailing for that currency on or about the day of exportation.
4. For a currency where a rate of exchange is not issued, the owner of the goods should obtain documentary evidence of the commercial rate of exchange for that currency on or about the day of exportation, from a leading bank in Australia.
5. Where goods are exported to Australia and are entered on the same day, and the rate of exchange for that day is not yet available, the owner of the imported goods may apply the rate of exchange for the previous day. When the rate of exchange for the day of exportation becomes available, the owner of the imported goods may need to amend the entry, quoting the correct rate of exchange.

"Rebates"

1. References:

CELA (No 1) 2002: Explanatory Memorandum, 2002

2. Defined in:

Subsection 154(1).

3. Used in:

**Transaction Value Method
Price.**

4. Policy and Procedure:

1. The definition of "price" requires the Collector to disregard rebates in relation to goods subject to a contract of sale.
2. Rebates are separately defined as:
 - *rebate*, in relation to goods the subject of a contract for sale, means any rebate of, or other decrease in, the amount that would constitute the price of the goods other than such a rebate or decrease the benefit of which has been received when that amount is being determined.
3. The WTO Valuation Agreement directs that price shall be the price of the goods at the time of export. This means that discounts or rebates that are not available to the purchaser at the time of export should be disregarded. In other words, the sales contract which brings the goods to Australia must contain provision for the discounts/price rebates (refer Power Pak Aust P/L AAT V88/735 of 23.5.1989). Note, however, that in rebates, as defined in subsection 154(1), the benefit of discounts or rebates must have been received when the price was being determined, which is not quite the same thing as the Valuation Agreement, although very close. Discounts that have been taken off the price remain as deductions.

Example 1:

If an importer purchases 1,000 units @ \$10.00 each and the vendor has given a 10% volume discount which is shown on the invoice and the net amount payable is \$9,000, this lesser amount is the purchase price and will form the basis of transaction value.

4. Discounts are often offered for prompt payment. If the importer can show that the benefit of that discount has been received when the price is being determined, then the deduction can be allowed in arriving at the customs value. If the benefit is received after determination of the customs value (i.e. after entry), the importer may have grounds for a refund of any overpayment of customs duty.

"Related parties"**1. References:**

WTO: Valuation Agreement, Article 1(1)(d), Article 15(4) and Article 15(5)
WCO: Advisory Opinion 1.1 (Example IV), Commentary 14.1 and Explanatory Note 4.1
Sherman and Glashoff: Customs valuation, pp 185-199
CCH: Australian Customs Law and Practice ¶ 5-250.

2. Defined in:

Subsections 154(3), (4) and (5).

3. Used in:

Subsection 161H(2): When Transaction Value may be rejected because the relationship between the parties has affected the price of the goods.

4. Purpose and Rationale:

1. The relationship between vendor and importer of goods is an absolutely critical one under the WTO Valuation Agreement, and under the *Customs Act 1901*.
2. Under the legislation, the Collector may disregard the price paid for goods as a basis for Customs valuation purposes if there is reason to believe that the relationship between the buyer and the seller has affected the price paid. The transaction value method of Customs value presupposes that the transaction is at arms length; that the transaction is market driven rather than relationship driven. The whole thrust of the valuation legislation is to find an arms-length value.
3. Therefore, whenever an importation involves a transaction between related parties, the question of whether that relationship has affected the price must be considered. If it has, then Transaction Value must be rejected. However, the notes to Article 1 of the WTO Valuation Agreement state that it is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examinations will only be required where there are doubts about the acceptability of the price.
4. Therefore, two questions must be asked:
 - are the parties related in terms of the legislation?; and
 - has that relationship affected the price paid for the goods?

5. Are the Parties Related?:

1. Subsection 154(3) sets out the circumstances under which parties to a transaction are considered to be related to one another.
2. If the parties are people ("natural persons"):
 - they are blood relatives, or related by marriage or adoption (154(3)(a));
 - one of the persons is an officer or director of a company controlled by the other person (whether the control is direct or indirect) (154(3)(a)); or
 - they are members of the same partnership (154(3)(e)).
(In other words, persons related by blood, by family, or by formal business ties.)
3. If the parties are companies ("bodies corporate"):
 - they are both controlled by the same corporation (or the same individual) (154(3)(b));
 - they are members of the same partnership (154(3)(e));
 - both corporations together control a third corporation (154(3)(b)); or
 - the same individual (or corporation) has control of at least 5% of the general meeting votes in each of the corporations (154(3)(b)).
4. If the parties are a mixture of people and companies:
 - one is a corporation which is controlled by the other (which may be either a corporation or an individual) (154(3)(c));

- one is an individual who is an employee, officer or director of the other (which may be either a corporation or an individual) (154(3)(d)); or
 - they are members of the same partnership (154(3)(e)).
5. "Control" means the capacity to impose any restraint or restrictions on, or exercise direction over, the corporation (subsection 154(4)).
 6. Note that subsection 154(3) states that parties are related for the purposes of valuation if, and only if, the conditions of subsections 154(3) and 154(4) apply.
 7. There are numerous reference works along the lines of "Who Owns Whom", in which relationships between Australian and overseas corporations (and between overseas corporations) are set out. The fact that two parties to a transaction have totally different names does not necessarily mean they are not related. In the motor vehicle manufacturing industry for instance, there is a complex web of interlocking relationships producing some extremely unlikely bedfellows.

6. Does Relationship Affect Price?:

1. Once a relationship under the law has been established, the question then arises: Does that relationship affect the price of the goods?
2. This section seeks to explore the market factors that drive pricing decisions, in an attempt to develop tests that can be applied to determine when it is appropriate to consider abandoning transaction value.
3. There are several elements affecting a pricing decision made between a local firm and a related overseas supplier. It is worth considering those elements and the way in which they contribute towards the final pricing regime that evolves between the parties.
4. Some of the considerations which might drive a pricing decision are set out in a diagram below.
5. This leads to the final determination of the relationship between the buyer and the seller in terms of local pricing and disposal of the goods.
6. It may at first seem irrelevant to consider local factors as they appear to come into play only after the goods have been duty paid. However, several recent cases of "work back pricing" have come to notice. Under this system, the local firm determines what price the local market will bear; an export price is then constructed to take into account such expenses as shipping, duty, insurance, profit etc.
7. Local pricing strategies, offering varying degrees of elbow room to the local firm include:
 - complete autonomy
 - regional autonomy
 - set mark-up on landed cost
 - set profit on gross sales
 - pricing driven by market share goals
 - shut out of competitors
 - avoidance of dumping complaints

- set minimum quantity (take or pay)
- profitability to be achieved within specified time
- segmented pricing policy depending on end user

**COMMERCIAL AND OTHER CONSIDERATIONS
DRIVING TRANSFER PRICING DECISIONS**

<p>Australian market objectives:</p> <ul style="list-style-type: none"> • profitable sales only • capturing or maintaining a market share • sales to a volume budget • sales to a value budget • shut out of competitors 	<p>Circumstances of the supplier:</p> <ul style="list-style-type: none"> • supply of goods • costing basis for export sales (opportunity or incremental) • level of sale required (after sales support) • product life cycle in home market
<p>Working relationship between the parties:</p> <ul style="list-style-type: none"> • financial health of both parties (cash or capital transfer) • level of interdependency • level of trust • needs of hidden third parties 	<p>The commercial environment:</p> <ul style="list-style-type: none"> • dumping duties • taxation of repatriated profits • taxation of proceeds such as royalties and licence fees • taxation of profit in Australia • taxation of earnings in country of export or country of sale • customs duty • sales tax
<p>Product factors:</p> <ul style="list-style-type: none"> • stage of the product’s life cycle • elasticity of demand • substitutability • level of promotion and advertising • patents which grant exclusivity of product. • level of competition 	

It can be seen that minimisation of customs duty is but one of very many factors which might influence transfer pricing policy between an overseas exporter and its Australian subsidiary, and quite possibly the least of them.

8. It is only after the above elements have been taken into account that the pricing arrangement between the buyer and seller will be finalised and will become visible to Customs and Border Protection. Decisions will be made on:
- overall pricing policy
 - negotiability
 - characterisation of proceeds (interest, royalties, fees)
 - retention or repatriation of profits.

7. If Collector is satisfied Relationship may have Affected Price:

1. When the Collector is satisfied that
- the parties are related; and
 - the price may have been influenced by the relationship;

the Collector must write a letter to the importer saying so and setting out the reasons for forming that view. The letter must invite the importer to submit any information that may satisfy the Collector that:

- the relationship did not affect the price of the goods; or
- to demonstrate that the Transaction Value of the imported goods is effectively an arms-length value;

and the letter must give the importer at least 28 days to respond.

2. To demonstrate that the imported goods are an arms-length value and that the Transaction Value method is appropriate, the importer may test the unit value of the imported goods against unit values of identical or similar goods, using the Identical Goods Value, Similar Goods Value, Deductive (Contemporary Sales) Value or Computed Value methods.
3. If the Collector is thereby satisfied, the Transaction Value method is appropriate and must be used.
4. If after the 28 days (or longer, as specified in the letter; 28 days is the absolute minimum) has elapsed the Collector is not satisfied, then Transaction Value may not be used. The importer must be advised of such rejection in writing. The other valuation methods must then be attempted in the required sequence.

8. Some Additional Notes:

1. The total volume and value of international related party transactions, and their cash value, is enormous; and the proportion of all import transactions that are between related parties is substantial.
2. Non-arms-length prices are not uncommon. In many cases, however, the result of the non-arms-length prices is that the customs value of the goods is higher than it would otherwise be.
3. The objective of the transaction may be to minimise profits in a country with high corporate tax rates, and maximise profits in a country with low corporate tax rates, or it may be to avoid dumping duty. Given that company tax in Australia is substantially higher than the average import duty rate, the incentive is to increase the customs value to reduce the profit margin in Australia.
4. If the relationship between the parties affects the price, then the above procedures should be followed, regardless of whether the effect of a non-arms-length sale increases or decreases the customs value.

“Request goods”

1. References:

Subsections 154(1), 159(7) and 159(8)
 WTO: Valuation Agreement, Article 5(2)
 CCH: Australian Customs Law and Practice ¶ 5-950
 CELA (No 2): Replacement Explanatory Memorandum 1989 p 19.

2. Used in:

Deductive (derived goods sales) value (Subsection 161E(1)).

- 1) **INTERNAL AND EXTERNAL USE**
- 2) **BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines**
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3. Purpose and Rationale:

1. The relevant passage in the Explanatory Memorandum states:

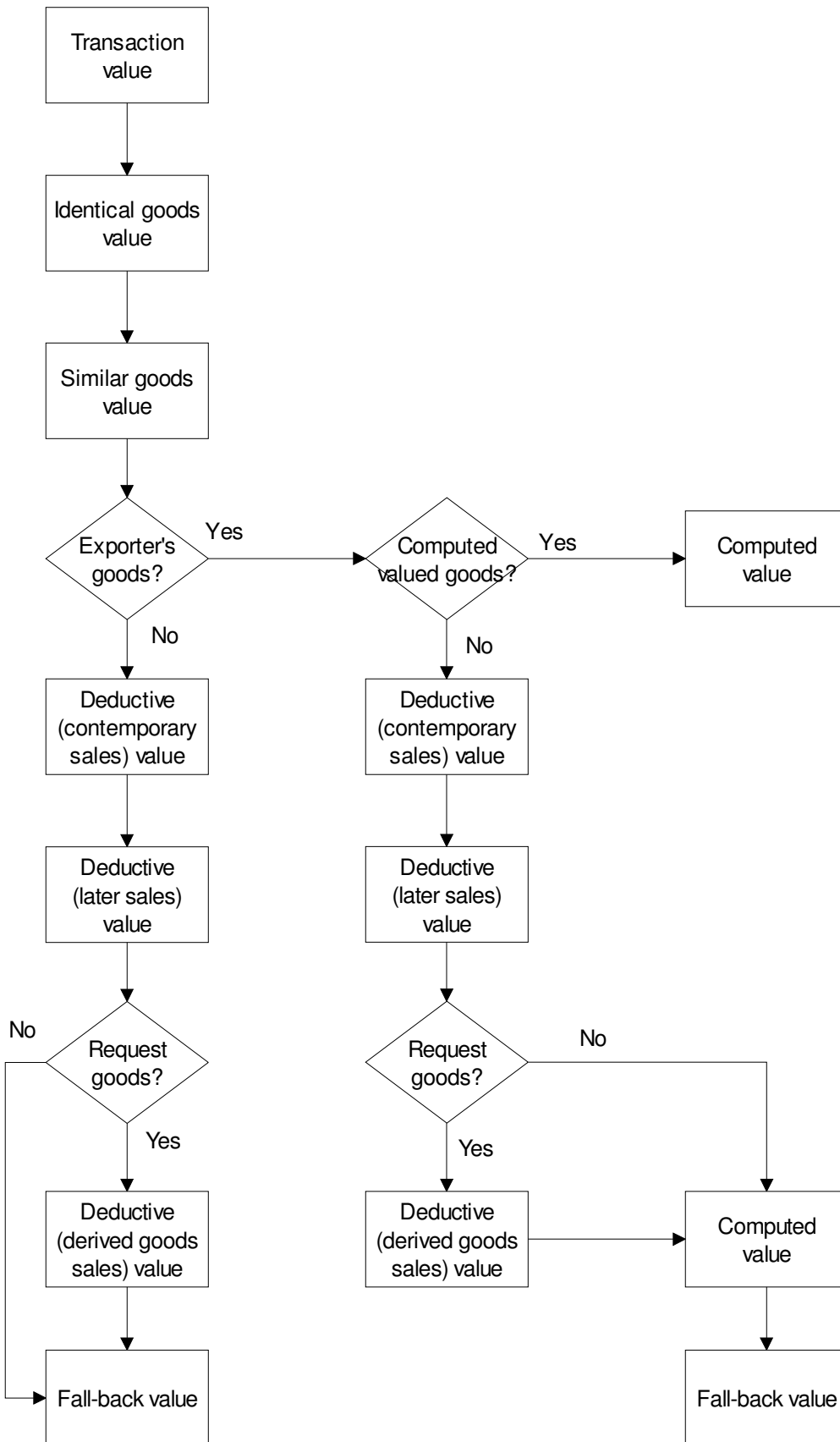
The purpose of this definition is to ensure that a Collector cannot apply the Deductive (Derived Goods Sales) method of valuation without the consent of the owner.

2. This is consistent with WTO Valuation Agreement Article 5(2), which also prevents the method being used unless requested by the importer. The relevant phrase in that Article is: "... if the importer so requests, the Customs Value shall be based on the unit price at which the imported goods, after further processing, are sold".

4. Policy and Procedure:

1. When using methods of valuation other than the Transaction Value method, the owner of goods may, subject to certain conditions, request a Collector to use the Deductive (Derived Goods Sales) Value method. It is the only time the Deductive (Derived Goods Sales) Value method can be used.
2. The request may be made only when all of the following conditions are met:
 - Transaction Value method can not be determined by a Collector;
 - Identical Goods Value cannot be determined by a Collector;
 - Similar Goods Value cannot be determined by a Collector;
 - Deductive (Contemporary Sales) Value cannot be determined by a Collector;
 - Deductive (Later Sales) Value cannot be determined by a Collector;and
 - the owner has not invoked his right to reverse the order of the deductive and computed valuation methods (see "computed valued goods" in Appendix 4:1).

REQUEST GOODS: EFFECT ON SEQUENCE OF VALUATION METHODS



“Royalties and licence fees”

1. References:

WTO: Valuation Agreement, Article 8, paragraph 1(c)
WCO: Advisory Opinions 4.1 to 4.6
Sherman and Glashoff: Customs valuation pp 121-155
CCH: Australian Customs Law and Practice, ¶ 5-655, ¶ 5-700, ¶ 5-705
Valuation Code: A7
Estee Lauder v Comptroller General of Customs, G611 of 1990; 28 June 1991
Collector of Customs v Marym Aust Pty Ltd, VG 6 of 1992; 12 June 1992
Mattel Pty Ltd v Collector of Customs, VG 487 of 1992: 15 February 1994.

2. Defined in:

Section 154 as being within the meaning given by the interpretation provided at section 157. Note that the interpretation at section 157 is not an exhaustive definition of what is a royalty, but expands the common meaning of the term. For the purposes of this discourse, royalties and licence fees are held to be synonymous.

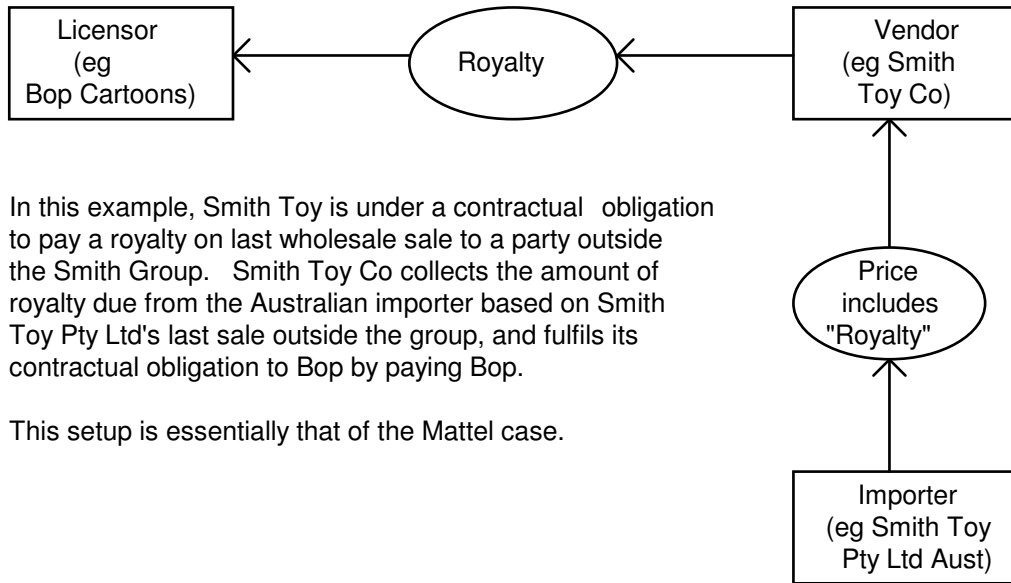
3. Used in:

Price related costs (subsection 154(1))
Transaction Value (subsection 161(1)).

4. Policy and Procedure:

1. The first question to ask when confronted by a payment described as a “royalty” is: what is the nature of the payment? This will require examination of the circumstances surrounding the transaction and in particular the contracts, agreements or arrangements under which the payment described as a royalty is paid.
2. There are several possible outcomes from this examination. There is no universally agreed meaning of the word “royalty”, so, although described as a royalty, many payments will be found to be more properly classified as:
 - part of the price for the goods (see Mattel case, paragraph 3 below);
 - an assist;
 - a commission;
 - a non-dutiable royalty, such as a payment for the right to reproduce the imported goods;
 - proceeds of subsequent resale, disposal or use.
3. Is the payment described as a “royalty” paid directly or indirectly for the benefit of the vendor, or to relieve the vendor of an obligation to a third party?

If so, then it is part of price and there is no need to add it under the provisions of price related costs for the reason that it is encompassed by the definition of price itself. A typical royalty that is part of price is when the royalty contract is between the licensor overseas, and the vendor overseas (Mattel):



In this example, Smith Toy is under a contractual obligation to pay a royalty on last wholesale sale to a party outside the Smith Group. Smith Toy Co collects the amount of royalty due from the Australian importer based on Smith Toy Pty Ltd's last sale outside the group, and fulfils its contractual obligation to Bop by paying Bop.

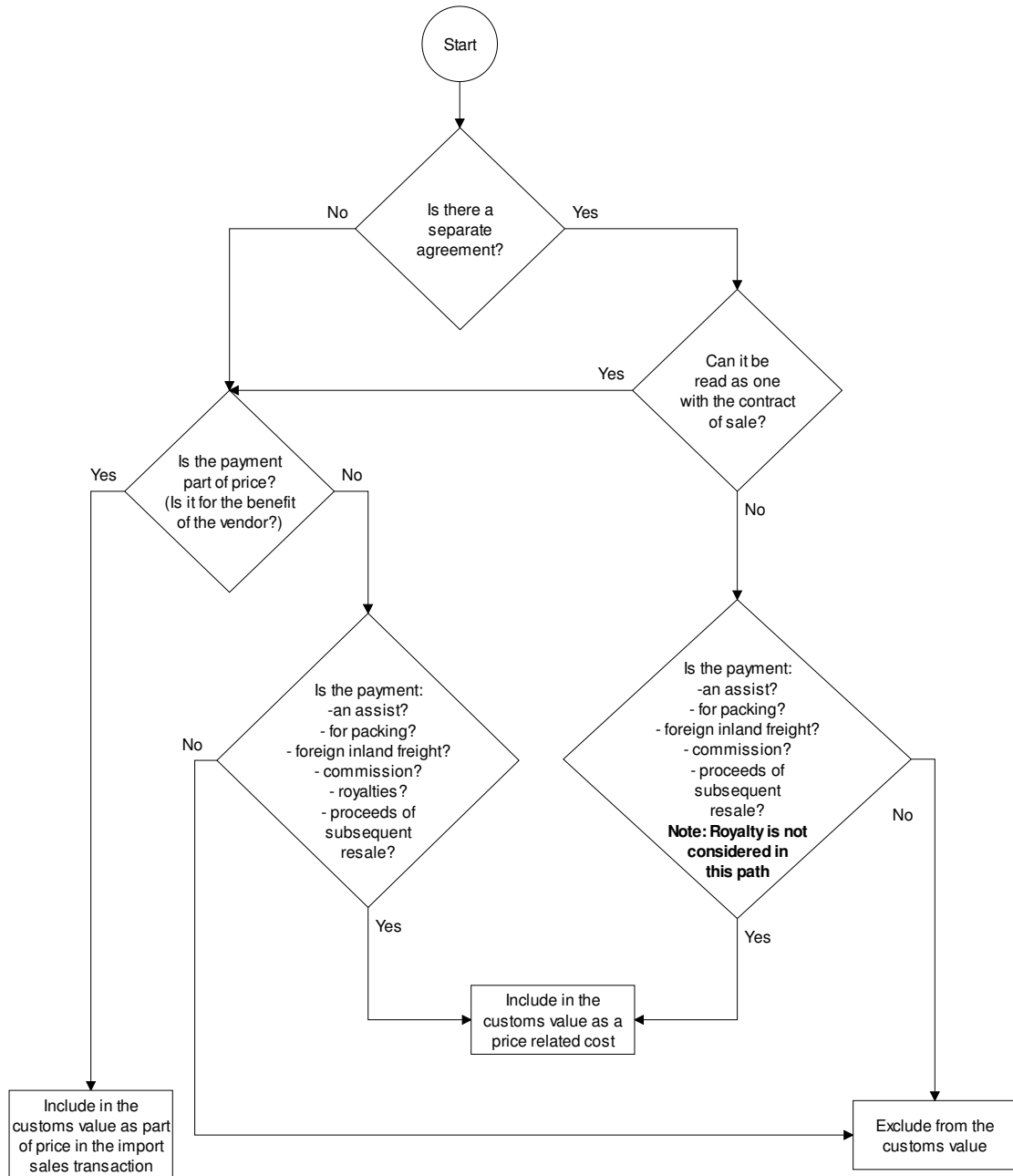
This setup is essentially that of the Mattel case.

In the above example, the importer is not "party principal" to the royalty contract. It is the vendor who must pay the royalty, and to finance the payment, the vendor passes on the royalty obligation to the purchaser, and the amount corresponding to the royalty payable is part of the price of the goods.

4. If the payment cannot be regarded as part of the price of the goods, the next step is to consider the payment in terms of being a price related cost. As well as royalties, the provisions of price related costs cover assists, commissions and proceeds of subsequent sale of the goods, all of which should be considered as well as the provisions relating to royalty.
5. Of the elements of price related costs, royalties alone have the requirement that the payment must be made "under the import sales transaction". In *Marym and Estee Lauder*, courts have found some royalty payments to have been made under agreements so far removed in time, purpose and intent from the import sales transaction, that the payments could not be held to have been made "under the import sales transaction". In *Mattel*, the courts held that the AAT was justified in determining that the payment on account of royalty was made under ("pursuant to") the import sales transaction. Each case must be judged according to the prevailing circumstances surrounding the transactions.
6. The meaning of "royalty" for the purposes of the valuation legislation is spelled out in subsection 157(1) of the Act. That interpretation provides in subsection 157(1)(e) for the inclusion of royalties paid for the forbearance of the doing of certain things by the vendor. Royalties that are said to be paid in exchange for exclusive distribution rights are covered by this provision. In that case, the payment is made so that the vendor will forebear to sell goods to a competitor in that distribution area.
7. The diagram below is a decision tree designed to aid in determining whether a given payment described as a royalty is, or is not, part of the customs value.
8. In a nutshell, a royalty will be part of the customs value if it is:
 - a royalty within the meaning of subsection 157(1); and
 - paid under ("pursuant to") the import sales transaction; and
 - paid directly or indirectly to the benefit of the vendor; and

- part of price; or,
- a price related cost.

EXAMINING THE TRANSACTION TO DETERMINE THE DUTIABILITY OF PAYMENTS DESCRIBED AS "ROYALTIES"



1. If there is NO separate agreement, and the payments are for the benefit of the vendor, the payments are part of PRICE.
2. If there IS a separate agreement, AND it can be read as one with the Contract of Sale, AND the payments are for the benefit of the vendor, then the payments are also part of PRICE.

“Satisfaction of a collector”

1. References:

SAAB-Scania Australia v Collector of Customs, AAT V88/692 and V88/456, 12.2.1990
Briginshaw v Briginshaw (1938) 60 CLR 336
Cherry Lane V Collector of Customs (1988) 8 AAR 460.

2. Used in:

Subsection 154(1) (in definitions of “Australian Inland Freight”, “Australian Inland Insurance”, “Deductible Financing Costs”, “Foreign Inland Freight”, “Foreign Inland Insurance”; “Overseas Freight”, “Overseas Insurance”, and “Price”); Subsection 154(2); Sections 156, 160, 161, 161A, 161B; 161H and 161J.

3. Interpretation:

The word “satisfaction” is not defined or explained in the valuation legislation. However, the issue was raised in the SAAB-Scania AAT case cited above.

The essence of the issue was stated by the AAT in these words:

The words of the legislation imposes upon the Collector the duty of assessing the information upon which he has to be satisfied. The proof of the matters on which he has to be so satisfied ought to be clear. To do that does not require in our view that the Collector be satisfied beyond reasonable doubt. If it was intended, the legislation would have said so.

What the Collector has to do is look at the facts presented to him and exercise a judgement on those facts based on his knowledge and understanding of the conditions surrounding the importation ...

The AAT then discussed the Cherry Lane case:

In our view, applying what was said by Dixon J in Briginshaw (supra) the evidence is to be considered on the basis that the appropriate standard to be applied when considering the degree of satisfaction to be met by the Collector is the civil one. With the utmost respect, we are unable to agree with the conclusions of the Tribunal in Re Cherry Lane Pty Ltd v Collector of Customs that a requirement the Collector be “satisfied” intends a higher standard of proof than the civil one.

The AAT relied upon Briginshaw v Briginshaw, and quoted with approval the following extract from that case:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of a belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for those purposes.

Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that an affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.

The AAT, after quoting the above from *Briginshaw v Briginshaw*, went on to state:

In that case the statute (The Marriage Act 1928) required that in proceedings for dissolution of marriage, the court satisfy itself, so far as it reasonably can, as to the facts alleged. The Court considered the words "reasonably satisfied", and held that the standard of proof required was the civil standard.

We do not think there is any special legislative direction given in the words of the Act, which is concerned with revenue collection. The language of the section does not say what is the standard of proof, but the words used are clear and well understood.

In summary, then, the satisfaction of the Collector must be reasonable, and to the civil standard, that is, "on the balance of probabilities". (The criminal standard is "beyond reasonable doubt")

"Similar goods value"

1. References:

WTO: Valuation Agreement, Article 3 and Article 15 (definition). See also Interpretive Note to Article 3
WCO: Commentary 1.1
CELA (No 2) 1987: Replacement Explanatory Notes 1989: pp 29-30
Sherman & Glashoff: Customs valuation, Kluwer, 1988 pp 201-208.
CCH: Australian Customs Law & Practice ¶¶5-800
Valuation Code: C1.

2. Defined in:

Section 161B; see also associated definitions and references:

- **about the same time** (subsection 154(1); also encyclopaedia)
- **comparable goods** (subsection 154(1); also encyclopaedia)
- **similar goods** (section 156; also encyclopaedia)
- unit value (subsection 154(1)).

3. Used in:

Circumstances where neither the transaction value of the imported goods nor the identical goods value can be determined.

4. Policy and Procedure:

1. Similar Goods Value method is the third method to be tried. It is used if the Transaction Value method and the Identical Goods Value method cannot be used.
2. The Similar Goods Value method calculates the value of imported goods by reference to the unit price of comparable similar goods imported into Australia about the same time as the imported goods that were valued by the Transaction Value method. In other words, this method requires evidence of a previously accepted Transaction Value of goods which are similar to the goods to be valued.
3. The meaning of similar goods:
 - "Similar goods" must be goods that closely resemble the imported goods in respect of component materials and parts and in respect of physical characteristics
 - The goods must be functionally and commercially interchangeable with the imported goods having regard to the quality and reputation (including relevant trade marks) of each lot of goods
 - the goods must have been produced in the same country as the imported goods
 - The goods must not include certain Australian production assists
 - The Collector must first look to goods that have been produced by or on behalf of the same producer as the goods being valued. Only if there are no importations of similar goods from the same producer at about the same time can "similar goods" produced by someone else be used.
4. The valuation is assessed by the unit price, not of similar goods as such, but of "comparable similar goods". The difference is important.
5. In order to be "comparable similar goods", the goods:
 - must have been exported to Australia at about the same time (i.e. plus or minus 45 days); and
 - either:
 - were sold in the same, or substantially the same, quantities, as the imported goods in an import sales transaction at the same trade level as the import sales transaction of the imported goods; or
 - are of a kind that reasonable inquiry by the Collector has not shown to be so sold.
6. If there is only one sale of similar goods that meet the above mandatory criteria then they are by default "comparable similar goods". Adjustments may be made for trade level, differences in foreign inland freight and insurance, and quantity.
7. If, on the other hand, there are numerous imports of similar goods at about the same time, then the import closest in terms of trade level and quantity, and source should be used.

8. If there are two or more lots of “comparable similar goods” which produce different unit prices, then the lowest unit price must be used.
9. The unit price of comparable similar goods is the transaction value of those goods, divided by the number of units of those goods. The unit price is then multiplied by the number of units of the imported goods.

Example: The goods to be valued consist of 1,000 bicycle handlebars, 30cm size, of clear anodised alloy imported from UK and made by UK Widgets Plc.

A shipment of comparable similar goods - black anodised alloy bicycle handlebars, 29 cm size, made by UK Widgets Plc - was imported into Australia 18 days before. It was the only shipment into Australia at about the same time.

That shipment consisted of 5,000 handlebars with a total Customs Value determined by the Transaction Value method of \$A50,000. There were no discounts for quantity.

The Unit Value of the comparable similar goods was \$10 each. Applying this to the shipment to be valued, the Customs Value is $\$10 \times 1,000 = \$10,000$.

10. The example is, of course, simplified. Adjustments may have to be made to ensure that like is compared with like. The two shipments may have come from different ports, by different means of transport, may have been sold at different trade levels, or may have been subject to quantity discounts.
11. Different ports will affect overseas and foreign inland freight and insurance; different means of transport will affect overseas freight and insurance; different trade levels (e.g. ex-factory or ex-wholesale distributor) may involve adjustment to the unit price; and different quantities may involve adjustment for quantity discounts.

Caution - Commercial in Confidence

There is no difficulty with the Similar Goods Value method if the “comparable similar goods” were imported by the same importer as the shipment to be valued. However, it is quite possible that a product may be imported by two different importers, and the use of the other importer’s shipment could have the effect of disclosing confidential commercial information to a rival.

“Terms of trade”

1. Introduction

1. The “terms of trade” in the international sale of goods basically defines the costs borne by the parties and the point at which responsibility passes from one party to another. The publication INCOTERMS, issued by the International Chamber of Commerce, sets out standard conditions relating to terms of trade.
2. The most common terms of trade encountered in Customs valuation are:

FOB (Free on board)

C&F, CIF (Cost and Freight; Cost Insurance and Freight), now called CFR
FIS (Free into Store); now obsolescent, having been replaced by DDP)
DDP (Delivered Duty Paid)
DDU (Delivered Duty UnPaid)

3. The *Customs Act 1901* values imported goods at the **place of export**, in contrast with most other countries which value at the CIF level.
4. The place of export is FOB only in respect of non-containerised cargo, a form of shipping increasingly rare in international trade - e.g., bulk cargo.
5. Goods are commonly invoiced and sold in terms of one or another of the above terms of trade.

2. Explanation of Terms: FOB

1. FOB means "free on board".
2. Under an FOB contract, the vendor undertakes to pay all the costs up to the point at which the goods pass over the ship's rail onto the vessel. This includes:
 - Packing for export
 - Transport and insurance to the port of export (overseas inland freight and overseas inland insurance)
 - Taxes, fees, charges and formalities needed to load the goods on board at the port of shipment.

3. Explanation of Terms: C&F/CIF/CFR

1. C&F and CFR mean "cost and freight"; CIF means "cost, insurance and freight".
2. Under these contracts, the vendor undertakes to pay all costs involved in moving the goods to the port of destination. That is, to the point at which the goods pass over the ship's rail upon unloading.
3. The only substantial difference between the two terms is that under a C&F/CFR contract, the importer pays the overseas insurance, while under a CIF contract the exporter pays the overseas insurance.

4. Explanation of Terms: FIS/DDP

1. FIS means "free into store". Although obsolete, the term may still be encountered occasionally. It has been superseded by DDP: "delivered duty paid".
2. Under this contract, the vendor incurs all expenses up to and including duty payment in the country of destination and transport to the importer's premises.
3. Where there is a change of customs duty payable in respect of goods imported under an FIS / DDP contract, section 152 of the *Customs Act 1901* provides for an adjustment of price, to take account of the changed duty circumstances not envisaged in the contract.

“Trader”

1. References:

CELA No 2 1987: Replacement Explanatory Memorandum, 1989, p 20.

2. Defined in:

Subsection 154(1).

3. Used in:

Australian Inland Freight and Australian Inland Insurance
Foreign Inland Freight and Foreign Inland Insurance
Overseas Freight and Overseas Insurance.

4. Rationale:

The definition of “trader” is essentially a drafting device to avoid repetition and long-winded wording in the legislation provisions referred to above. The definitions, particularly of “foreign inland freight” and “foreign inland insurance” were introduced as anti-avoidance measures.

5. Policy and Procedure:

1. In broad terms, the “trader” is the party who pays the shipping company, or airline, or freight forwarder, to carry the goods. In the case of FIS and CIF contracts, the “trader” is usually the vendor or the exporter. In the case of FOB contracts, the “trader” is usually the importer or purchaser.
2. Ultimately, of course, the importer or purchaser always pays the freight; in FIS and CIF contracts, the importer or purchaser pays indirectly through the price (e.g., \$12,000 CIF Sydney). In FOB contracts, the importer or purchaser pays the freight directly.
3. The purpose of the word “trader”, then, is to distinguish and identify the party to the contract who directly pays for the transportation of the goods.
4. It also ensures that payments for foreign inland freight and insurance direct to shipping companies by the importers remain within the price, even though they are not paid directly or indirectly to the vendor or for the benefit of the vendor.

“Unit prices”

1. References:

Refer to each of the primary valuation methods listed below

2. Defined in:

Subsection 161A(2): identical goods value
Subsection 161B(2): similar goods value
Subsection 161c(2): deductive (contemporary sales) value
Subsection 161D(2): deductive (later sales) value

Subsection 161E(2): deductive (derived goods sales) value.

3. Used in:

Identical, similar (and deductive) values, when comparing the value of the imported goods to comparable values of other goods.

4. Policy and Procedure:

1. Unit prices are designed to assure that like is compared to like in the above methods of valuation. Each of these valuation methods has its own way of calculating the unit price of the goods to which the imported goods will be compared, or, in the case of derived goods, for deducting the worth of the goods as they were originally imported.
2. The basic methodology is to determine the sale price of the goods which will be used in comparison with the goods to be valued. Each valuation method has a unique method of determining this reference sale, set out in sections 161A to 161E. From the price of the goods in the reference sale, additions or subtractions are made to take account of different trading circumstances between the goods in the reference sale and the goods to be valued. Having made those adjustments, dividing the adjusted selling price by the number of units sold will provide a unit price.
3. Examples of each of the methods of selecting comparable goods, selecting a reference sale, determining what adjustments must be taken into account, and determining a unit price are given within sections 161A to 161E references to each valuation method.

“Value unrelated amount”

1. References:

WTO: Valuation Agreement, Article 5, Article 15.3 (“class or kind”) and Notes to Article 5
CELA (No 2) 1987: Replacement Explanatory Memorandum, 1989, pp 20-1
CCH: Australian Customs Law and Practice ¶ 5-850
Sherman and Glashoff: Customs valuation: pp 214-224.

2. Defined in:

Subsection 154(1).

3. Used in:

Deductive Value methods.
(See also: Unit Price).

4. Policy and Procedure:

1. Because the Deductive Value methods involve working backwards from the sale of goods, a number of amounts or costs incurred up to and including the point of sale have to be deducted from the sale unit price to arrive at the value at the equivalent of FOB level. These are known as “value unrelated amounts”.

2. These amounts fall into two categories: the "actual" amounts relating to the imported goods being valued; and what may be described as "usual" or "typical" amounts. The following three are in the first category:
 - Australian inland freight and insurance;
 - Customs duty, sales tax and the like; and
 - Overseas freight and insurance.
3. In two cases, however, the legislation explicitly directs us not to use "actual" amounts but "typical" amounts:
 - If the sale is on commission: the amount of commission usually earned for the sale of goods of the same class and quantities; or
 - If the goods are not sold on commission, the amount usually added for profit and expenses in the particular industry concerned.
4. The words italicised in paragraph 3 above are taken from the Explanatory Memorandum. The Act itself uses the expression "class or kind of goods" in referring to profit and expenses.
5. WTO Valuation Agreement Article 15(3) is somewhat more explicit. It states:

In this agreement "goods of the same class or kind" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.
6. This is further dealt with in Note 9 to Article 5:

In determining either the commissions or the usual profits and general expenses under Art. 5.1, the question whether certain goods are "of the same class or kind" as other goods must be determined on a case by case basis by reference to the circumstances involved. Sales in the country of importation of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Art. 5, "goods of the same class or kind" includes goods from the same country as the goods being valued as well as goods imported from other countries.

Division 5: Private importations of motor vehicles and yachts

Section 1: Privately imported motor vehicles

For information relating to the importation of a motor vehicle including the determination of the customs value of the vehicle please follow the attached hyperlink.

<http://www.customs.gov.au/site/page.cfm?u=4371>

Section 2: Privately imported yachts

5.2.1 Introduction

- (1) The procedures set out in Appendix 5.2 will generally be applied by Customs and Border Protection when valuing privately imported yachts.

It should be noted, however, that many decisions relating to the valuation and duty assessment of privately imported yachts can be made only at the time of importation.

The information in Appendix 5.1 is regularly updated in the Guide to the importation of privately owned yachts, ships and other vessels which is available from all Australian Customs and Border Protection Service Information Centres.

- (2) The Customs value of privately imported yachts will normally be assessed by one of three different methods of valuation under the Customs Act.

These methods in their sequence are:

- Transaction Value Method;
- Fall-back ("Flexible Transaction Value") Method;
- Fall-back ("Flexible Deductive") Method.

Appendix 5.2 Guide to the importation of privately owned yachts, ships and other vessels

People within Australia can obtain further information on matters in this guide by contacting an Australian Customs and Border Protection Service Information Centre on 1300 363 263 for the cost of a local call.

In order to clear your yacht, ship or other vessel through the Australian Customs and Border Protection Service (Customs and Border Protection), a formal clearance is required. This will involve the lodgement of an approved form entitled an Entry for Home Consumption (in triplicate) with Customs and Border Protection and the payment of customs duty and of goods and services tax (GST) after processing. At the time of lodgement, you will also need to provide any documents to substantiate the details that you have included on the Entry for Home Consumption, e.g. Bill of Lading and invoices.

Customs and Border Protection imposes a cost recovery fee for the processing of import entries. The amount of the fee depends on whether the entry is lodged electronically or manually and on the number of entry lines.

You may, if you wish, seek advice from a Customs Broker about the importation and Customs clearance of your vessel. While this is not a requirement, many importers do so because of the information requirements of Customs and Border Protection and the possibility of penalties being imposed for the supplying of incorrect or misleading information. You will find a listing in the yellow pages of the local telephone directory under 'Customs Brokers/Agents'.

To enable Customs and Border Protection to determine the value of your vessel, you must be able to produce to Customs and Border Protection, when required, any relevant documents that may assist Customs and Border Protection in determining the Customs Value. Such documents may include your passport, all purchase documents, bills of sale, registration papers, service records and shipping Bill of Lading etc.

How is customs value established for a yacht?

Primary method

The primary method of valuing imported goods, including yachts, is the Transaction Value method. This means that the customs value is based on the price actually paid or payable for the vessel when it is sold for export to Australia. The Transaction Value method will be utilised to the greatest possible extent.

It is important to note that there are situations where yachts cannot be valued by the Transaction Value method. Some examples of those situations are:

- where there is insufficient reliable information or evidence that Customs and Border Protection can use to verify either that the sale occurred or the price paid or payable, i.e. where the purchaser cannot present to Customs and Border Protection at the port of importation satisfactory purchase documentation such as invoices, receipts, etc which verify the full purchase price of the vessel;
- where the vessel is not sold for export to Australia, for example if the vessel is built by owner labour and is imported by the owner (and is therefore not subject to a contract of sale);

- where the vessel is in a substantially different condition from when the contract of sale for export was concluded, for example:
- the vessel has been damaged, or
- its condition has substantially deteriorated, or
- it has been extensively modified; and
- where the purchaser and the vendor are related parties (i.e., related through business or family) and that relationship has influenced the price of the vessel.

Where any of the above situations have occurred, the Alternate Methods of determining the Customs Value will be considered.

Alternate Methods of determining the Customs Value

There are several Alternate Methods to determine the Customs Value of privately owned vessels. However, to utilise these methods Customs and Border Protection needs to be in possession of relevant information including details of sales equivalent vessels which have occurred "about the same time" as the vessel to be valued. It is highly unlikely that the information necessary to utilise these valuation methods would be available to Customs and Border Protection and the application of these methods may therefore not be practical.

The Fall-Back Deductive Method will usually be the most appropriate method for establishing the Customs Value of privately imported vessels when it is unable to be determined using the previous methods. Simply put, the Customs Value is based on an Australian market appraisal of the vessel provided by an independent marine surveyor. This appraisal will include elements of freight to Australia, customs duty and GST. From such an appraisal, appropriate deductions may be made in order to calculate an amount equivalent to the FOB price of the vessel at its place of export.

Importer's responsibility to obtain an Australian valuation

Where an 'expert' appraisal is necessary to establish the value of the vessel, it is the importer's responsibility to obtain and pay for that service. Such appraisal must be to the satisfaction of Customs and Border Protection. Where Customs and Border Protection requires a further appraisal, the cost will be borne by Customs and Border Protection. Where the cost of the appraisal that the importer has paid can be substantiated that amount may be included in the deductions made to calculate the equivalent FOB price of the vessel.

Overseas freight

(i) General provisions

When determining the customs value, by either the primary method or one of the alternate methods, the cost of overseas freight (and of overseas insurance) is not included.

The cost of the overseas freight needs to be substantiated to the satisfaction of Customs.

Where the customs value is determined using the market appraisal method, the actual cost of overseas freight may be unknown. In that case, the cost of overseas freight will be assessed by Customs and Border Protection.

NOTE: The cost of overseas freight is not included for the purpose of calculating the customs value (and therefore the customs duty). That same cost is, however, included for the purposes of calculating the GST. The section on "How Is Customs Duty and GST Calculated on Imported Yachts?" provides further information.

(ii) Self transported goods

Self transported goods includes a ship (or vessel) imported otherwise than in a another ship or an aircraft. In other words, the vessel is sailed to Australia, and that is how it is imported. For example, an owner may construct a yacht and sail it to Australia. Or, a purchaser may enter into a contract of sale for an overseas vessel and arrange for the vessel to be sailed to Australia on the purchaser's behalf.

A reasonable allowance may be made for amounts paid or payable in respect of overseas freight. In the case of self transported goods, that allowance may be made for such essential sailing costs that are necessarily incurred in sailing the vessel to Australia by the most commercially viable route.

The most commercially viable route may be taken as meaning that route that involves the minimum number of necessary stops for taking on essential supplies/fuel for a vessel of the class or kind that is imported.

Customs will disregard that part of the allowance claimed in respect of non-commercially viable segments of the voyage. For example, in a contract of sale of a yacht involving the sailing of the vessel from San Francisco to Sydney, the vessel may not necessarily travel by the most commercially viable route; in effect, a working holiday.

Guidelines as to what may be regarded as essential sailing costs are provided on page 142. It is important to note that any amounts claimed as part of the allowance must be substantiated to the satisfaction of Customs and Border Protection. This means that the owner must be able to produce relevant invoices, receipts, dockets etc to Customs and Border Protection to substantiate the claimed amount.

(iii) Place of export

As the allowance for overseas freight is a deduction to be taken into account when calculating the equivalent FOB price of the vessel at its place of export, it is very important that the legal place of export be determined.

Place of export means:

- if the yacht was packed in a container the place where this occurred;
- for a yacht not packed into a container, the place, or first place, the yacht was placed on board a ship for export;
- the place, or last place, in the country from which the yacht departed for Australia.

It is the importer's responsibility to provide sufficient reliable information to prove from which country the vessel was exported to Australia. For example, where the owner can prove that he/she made representations to apply for migrant status prior to departure for Australia, this may indicate from which country the vessel was exported for Australia.

In situations where the owner is unable to provide sufficient reliable information regarding the country from which the vessel was exported to Australia, Customs will

determine the place of export as the final port of call in the last country visited prior to the vessel arriving in Australia, and determine any allowance for overseas freight accordingly.

(iv) *Essential sailing costs*

Essential sailing costs are those costs which may be used to determine the allowance for overseas freight. If an Australian market appraisal has been obtained as a basis for determining the customs value, overseas freight may be deducted from this appraisal when calculating the equivalent free-on-board (FOB) price of the vessel at its place of export.

Essential sailing costs relate to necessary expenditure incurred while the vessel is actually sailing between (and entering or leaving) those ports of call on the most commercially viable route. It would NOT include any in-port expenditure related to the vessel's period of stopover.

Where supported by sufficient reliable information, essential sailing costs would include:

- cost of maps, charts, pilot books, light/radio lists, sight reduction tables and similar printed navigational matter;
- air fares in getting crew to the pick up point;
- crew's hire/wages or forage allowance in lieu (NOTE: allowance is for minimum number of crew required to sail vessel of same class or kind, and will be based on expert advice where required);
- victual or food costs (NOT including alcoholic beverage/tobacco costs);
- NOTE: Customs and Border Protection may require expert advice from a suitable authority as to the average number of sailing days that it would take for a vessel of the same class or kind to sail from the place of export to Australia so as to determine an appropriate allowance for such victual costs.
- basic on-board medical supplies or first aid kit costs;
- bunkering or fuel/oil supply costs;
- official or commercial port, harbour, dock, mooring, sea canal, landing and similar costs; and
- Customs/Immigration fees for visas, entry, clearance and the like.

The following are NOT regarded as essential sailing costs for Customs valuation purposes:

- items that normally form part of a sea-going vessel's fittings or equipment such as ship's radio, radar equipment, compasses, signal flags, and any safety equipment such as life jackets, flare guns etc that would normally be included in the vessel's current Australian market appraisal upon importation; and
- any restoration or modification costs incurred in respect of the vessel or its equipment during the voyage from the place of export to Australia. Such costs would improve the vessel's condition and so their value would be reflected in the vessel's current Australian market appraisal upon importation.

In all cases Customs and Border Protection will ensure that the total of allowable costs as outlined above does not exceed the estimated costs of overseas freight, for the transportation of a vessel of the same class or kind, from the place of export to Australia, under the most commercially viable conditions.

It is important to note that Customs and Border Protection will not have regard to any costs for the above-mentioned sailing expenditure unless the owner can substantiate such costs by sufficient, reliable documentary evidence.

How is Customs duty and GST calculated on imported yachts?

The customs duty payable is currently set at 5% of the customs value.

The amount of GST payable to Customs on the importation of a yacht is 10% of the Value of the Taxable Importation (VoTI).

The VoTI is the sum of:

- the customs value of the yacht; plus
- the amount paid or payable for the international transport of the yacht to its final destination in Australia (see under the heading 'Overseas freight') and to insure the yacht for that transport; plus
- the customs duty payable on the yacht.

Example:

For a yacht where the Customs value was \$100,000, the duty rate 5% and international transport and insurance \$5,000, the calculation would be:

	Customs value	\$100,000
+	International transport and insurance	\$5,000
+	Customs duty @ 5%	= \$5,000 Payable
=	VoTI	\$110,000

GST (VoTI @ 10%) = \$11,000 Payable

Total amount payable is.	
	\$5,000 (Customs duty)
+	\$11,000 (GST)
=	<u>\$16,000</u>

Division 6: Valuation advice service

Section 1: Introduction

- 6.1.1 Customs and Border Protection, on request, provides written advice on valuation matters through the Valuation Advice Service. The VAS exists to advise importers on specific issues relating to the assessment of the customs value. It does not extend to Customs and Border Protection advising the amount of the customs value.
- 6.1.2 In order to provide an effective service to importers, Customs has a standard of 30 days for responding to applications for a "valuation advice".

Section 2: Adequate applications

- 6.2.1 A valuation advice will be given only where:
- a. Evidence is presented of a commitment or firm intent to import;
 - b. The application contains adequate and correct information; and
 - c. The application contains an explanation, with reference to the Act, of the valuation issues involved and the reasons for the applicant's own valuation.
- 6.2.2 Valuation advices will not be provided as guides on how to alter or structure transactions to avoid or to minimise the payment of duty and/or indirect taxes.
- 6.2.3 Inadequate applications will be rejected.

Section 3: How to lodge an application

- 6.3.1 Where the appropriate facilities exist, applications for a Valuation Advice may be made directly through the Customs and Border Protection computer system. Alternatively, they can be made by completing a Valuation Advice Application, Form B 174. The form is in triplicate, and is available from Customs Houses, where they may also be lodged for processing.
- 6.3.2 At the time that an application is made for a Valuation Advice, Customs and Border Protection will register the application with a unique VAN (Valuation Advice Number) and the applicant will be advised of that number.

Section 4: Applications with more than one valuation issue

- 6.4.1 Each application must be for a single valuation issue. A list of Issue Codes is at Appendix 6:1. Where there is more than one issue, separate applications must be lodged for each.

Section 5: Supporting information and documentation

- 6.5.1 It is unrealistic to expect a correct and binding Valuation Advice if inadequate or incomplete information is provided to Customs and Border Protection on the issue. The essential principle to be followed is that all information that is relevant to the request for advice should be supplied with the application. As a general rule, for an application to be accepted it must:
- (1) identify the goods and also the parties to the importation/transaction;
 - (2) where relevant, explain the roles of each party;
 - (3) identify all contracts, agreements and arrangements and the portions of them that are relevant to the transaction;
 - (4) where relevant, explain the financing and payment arrangements; and
 - (5) nominate the relevant provisions of the Act that the applicant has considered and detail the reasoning on the claimed issue.
- 6.5.2 Appendix 6:3 sets out, in tabular form, a guide to the minimum supporting documentation required to accompany a Valuation Advice application. The list is not exhaustive; if there are any other relevant documents and information, it must also be supplied with the application.
- 6.5.3 In the case of computer-lodged applications, complete supporting documentation must be lodged with Customs and Border Protection within five working days following lodgement, otherwise the application will be voided.

Section 6: Advice conditional on data provided

- 6.6.1 Obviously, a Customs and Border Protection decision on a valuation issue is only as good as the information supplied by the applicant. The Customs and Border Protection conclusion will be reached only on the basis of the statements and supporting documentation provided, and accordingly, the validity of the Valuation Advice is conditional upon correct and complete information being provided.

Section 7: Administrative penalty - indemnity

- 6.7.1 From the time of registering an application until the decision of Customs and Border Protection, normally 30 days, the applicant will be indemnified from administrative penalty in respect of duty short paid in relation to the claimed issue.
- 6.7.2 Where the circumstances and merits of the case are the same, the owner will also be similarly indemnified for other importations entered in the period referred to above.
- 6.7.3 However, the indemnity ceases when an application is withdrawn or where it is voided because of an inadequacy with the application or supporting documentation.
- 6.7.4 Quotation of a Valuation Advice number on entries is optional. Failure to quote a VA number will not affect the indemnity.
- 6.7.5 When goods are being entered, owners should not indicate or request "amber" treatment solely on the basis that it is the subject of a Valuation Advice application or decision.

Section 8: Withdrawal of applications

- 6.8.1 An owner may withdraw an application by advising Customs and Border Protection at any time between registration of the application and the decision by Customs and Border Protection on the application. Withdrawal of the application has the effect of cancelling the application.

Section 9: Payment of duty following advice

- 6.9.1 When Customs and Border Protection has finalised a VA application and notified the owner of the decision, and the reasons for that decision, any Customs duty or indirect tax short paid on entries becomes payable.

Section 10: Validity of advice

- 6.10.1 Advices are valid for all ports in Australia for 5 years from the date of notification of the Valuation Advice. After 5 years the Valuation Advice is automatically cancelled and if an advice is still required a new application must be made.
- 6.10.2 Customs and Border Protection may cancel or amend a Valuation Advice within 5 years, where particular circumstances warrant. Such circumstances include:
- (1) where an amendment is made to the legislation which has relevance to the advice;
 - (2) where incorrect information was provided to Customs and Border Protection or relevant information was withheld from Customs and Border Protection;
 - (3) where Customs and Border Protection changes its view (this may occur as a result of legal precedent); and,
 - (4) where Customs and Border Protection has issued conflicting advices.

Section 11: Cancelled or amended advice

- 6.11.1 Where Customs and Border Protection cancels or amends a Valuation Advice, in-transit provisions may be applied at the discretion of Customs and Border Protection.

Section 12: In-transit provisions

- 6.12.1 Where in-transit provisions apply, the cancelled or amended Valuation Advice continues to apply in relation to goods that:
- (1) were imported into Australia on or before the date on which the cancellation or amendment came into effect, **and** were entered for home consumption before, on, or within 30 days after that date;
- OR**
- (2) had left the place of export on or before that date, **and** were entered for home consumption before, on or within 30 days after the date on which they were imported into Australia.

Section 13: Customs and Border Protection to honour advice

- 6.13.1 A Valuation Advice is not legally binding on Customs and Border Protection. However, Customs and Border Protection policy is to honour a Valuation Advice unless it was provided on the basis of false or misleading information or where the applicant failed to provide Customs and Border Protection with all the relevant information and documentation that was available.

Section 14: Conflicting advices

- 6.14.1 Should an applicant hold or be aware of any conflicting Valuation Advices from Customs and Border Protection for a valuation issue, both advices are to be treated as being void and Customs and Border Protection is to be notified immediately.

Section 15: Appeals against Customs advices

- 6.15.1 Where a Customs and Border Protection decision in a VA is disputed, it should be first discussed with the decision maker. If the advice is still disputed, a review by a Manager in Valuation and Origin in Canberra may be requested.
- 6.15.2 If you are dissatisfied with the review decision and you have paid the duty under protest, you may seek external review by the Administrative Appeals Tribunal (AAT) or a court of competent jurisdiction. However, it should be noted that a VA in itself is not a decision capable of review by the AAT or a court.
- 6.15.3 Customs and Border Protection will not commence work on a VA or a review of a VA and it will cease work on any incomplete VA or review of a VA in the following circumstances:
- (a) where Customs and Border Protection commences duty recovery proceedings for the imported goods that are the subject of the VA, or
 - (b) the applicant for the VA or review of the VA commences proceedings in a court or the AAT in relation to the goods that are the subject of the VA.
- 6.15.4 Valuation and Origin, Canberra handles all appeals lodged with the AAT and the courts, in consultation with Victorian Valuation staff.
- 6.15.5 Valuation and Origin, Canberra, will request the decision-making officer to prepare a draft AAT Section 37 statement, setting out the reasons for the decision.

Section 16: Processing valuation advice applications

- 6.16.1 The following rules and procedures are to be strictly adhered to in the processing of applications for Valuation Advices.
- 6.16.2 The application will be subject to an initial examination to establish whether:
- (1) the claimed issue is identified;
 - (2) the application is correctly completed;
 - (3) the required supporting statements and documentation are included; and
 - (4) a detailed statement is provided, citing the relevant sections of the Act and showing why the applicant believes the claimed issue should be treated in the way submitted in the application.
- 6.16.3 The initial examination should be as soon as possible after receipt so that an indemnity to which the applicant is not entitled lapses without delay.
- 6.16.4 A deficiency in any of these requirements is to result in immediate rejection of the application under Rejection Codes R1, R2 or R3, as set out in Appendix 6:2.
- 6.16.5 A file is to be registered for each accepted application, for the safekeeping of documents, copies integral to the application, the decision and related reasoning.
- 6.16.6 A detailed examination of the application, aimed at delivering the final decision within the 30-day standard, is to follow promptly upon the initial examination.
- 6.16.7 If the complexity of the case has prevented the earlier detection of a deficiency in the information and documentation supplied, and where the applicant might reasonably be excused the deficiency, an "A" ("await") status may be recorded, and advised immediately to the applicant. This will allow the claimant 28 working days to make good the deficiency.
- 6.16.8 Failure to provide the requested information within 28 working days will result in the rejection of the application under Rejection Code R4, unless the applicant has sought from Customs and Border Protection, and been given approval for, an extension of time.
- 6.16.9 Decisions on applications, whether accepting or rejecting an applicant's case, must be logically and completely set out, with relevant sections of the Act cited in support of the reasoning given. This is to be conveyed in full to the applicant, and recorded in full in TAPIN.
- 6.16.10 Officers must keep in mind what effect each of their decisions may have in a wider context. When a case is thought to have general application, it is to be brought to the attention of Central Office so that the result may be discussed nationally.

Appendix 6:1 Valuation issue codes

- A1** Import Sales Transaction (s154)
- A2** Price (s154)
- A3** Assists (s154)
- A4** Packing Costs (s154 - price related costs)
- A5** Foreign Inland Freight and Insurance (s154)
- A6** Commission (s155)
- A7** Royalties (s157)
- A8** Deductible Financing Costs (s154)
- A9** Post-importation technical assistance (s161(2), s154)

- B1** Post-importation Freight and Administrative Costs (s161(2), s154)
- B2** Overseas Freight and Insurance (s154)
- B3** Place of Export (s154)
- B4** Day of Exportation (s161J(4))
- B5** Exempted Container/Pallet (s154, s162A, s162B)
- B6** Related Parties (s154)
- B7** Rebates
- B8** Transaction Value (other than already coded) (s161)
- B9** Identical Goods Value (s161A)

- C1** Similar Goods Value (s161B)
- C2** Deductive Value (s161C, s161D, s161E)
- C3** Computed Value (s161F)
- C4** Fall-back Value (s161G)
- C5** Rate of Exchange (s161J)
- C6** Other

Appendix 6:2 Rejection codes

- R1** Claimed issue not identified
- R2** Application incomplete or not completed correctly
- R3** Insufficient information for a decision
- R4** Additional information not supplied within 28 days
- R5** Other (as advised to applicant and recorded in TAPIN)
- R6** Automatic computer-initiated rejection of computer-lodged application when supporting statements and/or documentation not provided within seven working days.

Appendix 6:3 Minimum supporting information and documentation

The following is a non-exhaustive list of supporting documentation required with Valuation Advice applications. Other material, which may not be listed below, but which is pertinent to the application, should also be supplied.

A1 Import Sales Transaction

1. Statement of roles of all parties in transactions.
2. Details of all contracts, agreements or arrangements for the sale of the goods entered into before the goods reached Customs' control.
3. Copy/details of any other contracts relating to the goods.

A2 Price

1. Details of all amounts actually paid or payable in relation to the goods or services and for rights associated with the goods.
2. Details of all costs of acquiring the goods or services.
3. Details of any other consideration passing in relation to the goods.

A3 Assists

1. Description of goods and services provided by vendor to, or on behalf of, the purchaser.
2. Cost of production or acquisition and delivery of the above goods and services.

A4 Packing costs

1. Nature of materials and labour and costs incurred.
2. Details of where packing occurred in relation to place of export.

A5 Foreign Inland Freight and Insurance

1. Evidence of place of export, place of containerisation or uplift.
2. Evidence of cost of transport up to place of export.
3. Evidence of terms of trade: FOB, CIF, DDP etc.

A6 Commissions

1. Copy of agency agreement.
2. Seller's invoice
3. Warranty from Importer that agent does not engage in actions so as to prohibit consideration as a genuine buying agent in terms of subsection 155(2).

A7 Royalties

1. Statement of role and relationship between all parties involved in the transactions.
2. Copy of royalty agreement.
3. Copy of other agreements that relate to acquisition of goods.
4. Contracts of sale or import documents.

A8 Deductible Financing Costs

1. Evidence of price paid and terms offered.
2. Documents relating to any agreement to allow delayed payment beyond terms of sale.

A9 Post-importation Technical Assistance

1. Copy of contract for goods or services.
2. Statement that the charges are levied in respect of works or assistance undertaken after importation.
3. Cost of assistance.
4. Nature of services.
5. Evidence as to inclusion/exclusion in price paid.

B1 Post-importation Freight and Administrative Costs

1. Statement that charges are levied in respect of post-importation freight and administrative costs.
2. Cost of freight and administration.
3. Nature of services.
4. Evidence of inclusion/exclusion in price paid.

B2 Overseas Freight and Insurance

1. Statement detailing freight and insurance arrangements.
2. Evidence supporting freight and insurance costs claimed.

B3 Place of Export

1. Statement outlining movement of the goods.
2. Evidence of place of containerisation/uplift/border crossing.

B4 Day of Exportation

1. Evidence of chronology of export events:
 - containerisation
 - border crossing
 - ship's departure
 - air way-bill/bill of lading
 - postage.

B5 Exempted Container or Pallet

1. Evidence that the container or pallet is compatible with the Customs Convention on Containers definition as incorporated in the *Customs Act 1901*, section 162A or section 162B.

B6 Related Parties

1. Statement on relationship between parties.
2. Statement on how relationship has affected price.
3. Copy of corporate pricing policy.
4. Copy of distribution agreement.
5. Contracts of sale for the goods.

1) INTERNAL AND EXTERNAL USE

2) BCS CLASSIFICATION: STRATEGIC MANAGEMENT – Policy - Guidelines

3) File Number: 2008/038154-01

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B7 Rebates

1. Statement of nature of rebate received and evidence of receipt.

B8 Transaction Value (other)

1. Statement of issues and evidence supporting claim.

B9 Identical Goods Value

1. Statement why this method of valuation is appropriate.
2. Evidence of unit price of identical goods imported.
3. Evidence of contemporary importation.

C1 Similar Goods Value

1. Statement why this method of valuation is appropriate.
2. Evidence of unit price of similar goods imported.
3. Evidence of contemporary importation.

C2 Deductive Value

1. Statement why this method of valuation is appropriate.
2. Evidence of:
 - selling price
 - selling expenses
 - selling profit
 - other post-importation costs
 - average industry profit margin.

C3 Computed Value

1. Statement why this method of valuation is appropriate.
2. Evidence that goods are Exporter's Goods.
3. Evidence of manufacturing costs in country of export.
4. Evidence of profit margin or markup usual in industry in country of export.
5. Details of Australian arranged inputs not included in price.
6. Evidence of packing costs.
7. Evidence of freight costs.

C4 Fall-back Value

1. Evidence to support use of this method of valuation.

C5 Rate of Exchange

1. Statement why Gazette or *Australian Financial Review* rate of exchange is not used.
2. Evidence supporting rate sought.

C6 Other

1. Statement why issue cannot be dealt with under any other category.
2. Other appropriate information.

