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**AUSTRALIAN CUSTOMS SERVICE  
CUSTOMS ACT 1901 - PART XVB**

**TRADE MEASURES BRANCH  
SUPPLEMENTARY REPORT  
TO  
CUSTOMS REPORT NO. 20**

**Ordinary Portland Cement  
from  
Indonesia, the People's Republic of China,  
Malaysia and Thailand**

**13 December 2001**

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## ABBREVIATIONS & ACRONYMS

ACDN	Australian Customs Dumping Notice
CEO	Chief Executive Officer of Customs
minister	Minister responsible for Customs
NIFOB	Non-injurious free-on-board price
SEF	statement of essential facts
the Act	The <i>Customs Act 1901</i>
the goods	The goods the subject of the application
USP	unsuppressed selling price
WTO	World Trade Organization
MOFTEC	Ministry of Foreign Trade and Economic Cooperation
SOE	state owned enterprise
NJC	Nanjing Jiangnan Cement Company Limited
JCF	Jiangnan Cement Factory
GML	Great Market Limited
NCA	Nanjing Cement Association
SABMI	State Administration of Building Materials Industry

# 1 OVERVIEW

On 11 September 2000 Customs reported to the former Minister about its findings from an investigation into the alleged dumping of ordinary portland cement exported from the People's Republic of China, Indonesia, Malaysia and Thailand. Customs found that exports of cement from Indonesia, Malaysia and Thailand had been dumped. It also found that exports from China had not been dumped. Customs did not consider that the Australian industry had suffered material injury from dumping and did not recommend that anti-dumping measures be applied to imports of cement from any source.

In December 2000 the former Minister issued guidance to Customs about the determination of normal values in an 'economy in transition' (in this case China) and clarified the meaning of material injury. The documents issued by the former Minister had the potential to affect Customs' report and she asked that it be re-evaluated.

Before the re-evaluation could commence Customs received legal advice identifying certain impediments to the implementation of the former Minister's price control guidelines. As the re-evaluation was dependent on the guidelines, the re-evaluation could not proceed until these impediments were addressed. The Minister issued revised guidelines on 28 June 2001.

To undertake the re-evaluation Customs released an issues paper on 28 June 2001 and invited submissions. Following consideration of the views expressed by interested parties Customs concluded that the findings made in its report of 11 September 2000 would have been no different had the Ministerial Guidelines of 28 June 2001 and the former Minister's affirmation of December 2000 been in existence at the time it made its report.

In response to the summary, further submissions were received. Those submissions have been taken into account in the preparation of this supplementary report.

Customs' first report based its conclusions on facts from the period up to the end of the March quarter 2000. Because of the extended period of time to conclude the investigation this supplementary report assesses other new or updated information. The data relates mainly to the determination of export prices for Chinese cement and injury to the Australian industry. The information is not persuasive that the initial findings by Customs were incorrect.

From its re-evaluation and consideration of additional data, Customs has not identified grounds to alter the recommendations from its first report of 11 September 2000. Specifically, Customs recommended that the Minister should not apply anti-dumping measures to imports of ordinary portland cement from Indonesia, the People's Republic of China, Malaysia and Thailand.

## 2 FINDINGS AND INTRODUCTION

This report has been prepared as a supplement to Customs Report no. 20 *Ordinary Portland Cement exported from Indonesia, the People's Republic of China, Malaysia and Thailand*. The supplement should be read in conjunction with that report and to other documents available from the public record.

### 2.1 CUSTOMS' FINDINGS

The following findings are made from the re-evaluation and consideration of updated data:

- The findings in Customs' report of 11 September 2000 would have been the same had the Ministerial Guidelines of 28 June 2001 and the former Minister's affirmation of December 2000 existed at the time the report was made.
- Chinese export prices were reasonably assessed by Customs.
- The 'updated' data supplied by the Australian industry about its economic performance in the period since Customs' reported to the Minister in 2000 is not reliable for use in analysis.
- If the economic data was accepted on its face it is not persuasive that Customs' findings and recommendations made to the former Minister in 2000 should be altered.

The results of Customs' investigation, re-evaluation and consideration of updated data do not support a recommendation that the Minister impose dumping duties on exports of ordinary portland cement to Australia.

1

## 2 **2.2 CUSTOMS' INVESTIGATION**

3 Customs' investigation into the alleged dumping of ordinary portland cement  
4 began on 9 December 1999 and examined exports to Australia of ordinary  
5 portland cement made between 1 January 1999 and 31 March 2000. Customs  
6 reported that exports from Indonesia, Malaysia and Thailand during that  
7 period were dumped with margins ranging between 9% and 175%.

8 Customs also reported that exports from China were not dumped.

9 To assess whether Australian cement producers had been materially injured  
10 by dumped imports, Customs analysed the economic performance of industry  
11 members during the period 1 January 1997 until 31 March 2000. From its  
12 inquiries Customs concluded that dumping from Indonesia, Thailand and  
13 Malaysia had not caused, and did not threaten, material injury to Australian  
14 cement producers.

15 Customs reported these findings to the former Minister on 11 September  
16 2000.

17 Customs' re-evaluation was undertaken by reference to its report about  
18 findings from an investigation into the alleged dumping of ordinary portland  
19 cement forwarded to the Minister on 11 September 2000. The report was not  
20 published. However the report was largely based on Customs' statement  
21 of essential facts no. 20 (*Ordinary Portland Cement from Indonesia, Malaysia,*  
22 *the People's Republic of China and Thailand*) released on 26 July 2000 and  
23 submissions received in response to that statement. The re-evaluation was  
24 limited to comply with the Minister's request. It covered two specific matters in  
25 Customs' report: price control situations in 'economies in transition'; and  
26 whether Customs had properly assessed material injury caused by dumping.

## 27 **2.3 UPDATED INFORMATION**

28 In the period since Customs first reported to the Minister, information was  
29 provided by interested parties relating to the scope of the re-evaluation, export  
30 prices from China, the economic performance of the Australian industry in the  
31 period following the March quarter 2000, and the meaning of Article 5.10 of  
32 the WTO Dumping Agreement<sup>1</sup>.

## 33 **2.4 MINISTER'S REQUEST FOR RE-EVALUATION**

34 In 1999 the *Customs Act 1901* was amended to provide a special approach  
35 for determining the normal value of allegedly dumped goods from countries in  
36 the process of transition to a market economy. The cement investigation was  
37 the first occasion where the provisions were considered. In this case, the  
38 provisions apply only to circumstances in China. The other nominated  
39 countries are unaffected.

40 In late December 2000 the former Minister for Justice and Customs:

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<sup>1</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

- 1 • issued guidelines to assist Customs apply the new provisions. The  
2 guidance is not specific to the cement investigation and has general  
3 application. Until the guidelines were issued, the Minister had specified  
4 no particular factors that Customs must examine to decide whether a  
5 price control situation was extant; and
- 6 • affirmed a 1990 Ministerial Direction on material injury and causal link  
7 (causal link refers to the relationship between dumping and material  
8 injury). The affirmation clarified aspects of that Direction.

9 Customs reported its findings on the cement investigation to the Minister prior  
10 to the issue of the guidelines and the affirmation. When issued, the Minister  
11 had not made a decision in respect of the cement investigation and  
12 considered that both the guidelines and the affirmation had the potential to  
13 affect Customs' report. The former Minister requested that Customs advise  
14 about a suitable process for a '*re-evaluation of the alleged dumping of*  
15 *ordinary portland cement given my directions to Customs on matters material*  
16 *to this case*'. In January 2001 the Minister agreed to a procedure proposed by  
17 Customs.

18 Due to a ministerial change in late January 2001, Customs sought  
19 confirmation from the new Minister that the re-evaluation should proceed. On  
20 20 February 2001 the Minister endorsed the approach proposed by Customs.  
21 On 28 February 2001 Customs publicly notified that aspects of the cement  
22 investigation would be re-evaluated and wrote to all interested parties.

23 Before the re-evaluation could commence Customs received legal advice  
24 identifying certain impediments to the implementation of the price control  
25 guidelines. As the re-evaluation was dependent on the guidelines, the re-  
26 evaluation could not proceed until these impediments were addressed. The  
27 Minister issued revised guidelines on 28 June 2001. On the same day  
28 Customs released an 'issues paper' for the cement re-evaluation. To  
29 encourage maximum participation in the re-evaluation Customs wrote to all  
30 known interested parties and invited submissions by 20 July 2001.

31 The guidelines applying to economies in transition are set out in Australian  
32 Customs Dumping Notice 2001/42 *Ministerial Guidelines – Section*  
33 *268TAC(5E) Price Control Situation in Relation to an Economy in Transition*.  
34 The Minister's affirmation is contained in Australian Customs Dumping Notice  
35 2001/13 *Section 269TAE Ministerial Guidance on Material Injury and Causal*  
36 *Link*. The ACDNs are available at appendices C and D and from the internet  
37 at <http://www.customs.gov.au/notices/index.htm>.

38

### 3 CUSTOMS' RE-EVALUATION

#### 3.1 SCOPE OF THE RE-EVALUATION

The instruction by the former Minister to undertake the re-evaluation, dated 22 December 2000, stated:

*'I am returning to Customs the final report on the cement case unsigned with the expectation that a new analysis will be undertaken by Customs in light of the understandings now reached on the treatment of economies in transition and material injury'.*

The Minister's request was for 'a new analysis' and not a reinvestigation. The 'understandings now reached' was a reference to the matters as set out in ACDN 2001/42 *Ministerial Guidelines – Section 268TAC(5E) Price Control Situation in Relation to an Economy in Transition*; and ACDN 2001/13 *Section 269TAE Ministerial Guidance on Material Injury and Causal Link*.

The Minister's request for a re-evaluation referred only to the determination of a normal value for Chinese ordinary portland cement and to the consideration of material injury to the Australian industry in the context of Customs' September 2000 report. Customs assessed whether its recommendations would have been different had the Minister's guidelines on price control and the affirmation about material injury existed when it first reported on 11 September 2000.

#### 3.2 RE-EVALUATION PROCEDURE

The Minister approved the following procedural aspects for the re-evaluation:

- Customs would advise interested parties (by letter and public notice) that it would undertake a limited re-evaluation of its investigation, the reasons for the re-evaluation and the process to be followed in undertaking the re-evaluation;
- Customs would produce and disseminate an 'Issues Paper' seeking written submissions within 21 days;
- On completion of the re-evaluation Customs would forward a supplementary report detailing the result of its re-evaluation and any revised recommendations along with the original report to the Minister for consideration.

Customs notified that the re-evaluation would be done in ACDN 20001/16, by a notice placed in the *Australian Financial Review* of 28 February 2001, and by letters to interested parties dated 22 February 2001 and 28 June 2001. Interested parties were invited to make submissions to the re-evaluation to ensure that all views could be considered.

Within the terms of the Minister's instruction only written submissions to the re-evaluation were accepted.

1 Customs maintained a public record during the re-evaluation meeting the  
2 requirements of Australian legislation and Article 6 of the WTO Dumping  
3 Agreement<sup>2</sup> relating to evidence. The public record may be examined at:

4 Trade Measures Branch  
5 Customs House  
6 5 Constitution Avenue  
7 CANBERRA ACT 2601

8  
9 ☎ +61 (02) 6275 6547

10  
11 A Probity Adviser was appointed to provide assurance the re-evaluation was  
12 undertaken in accordance with the Minister's request, consistent with legal  
13 requirements, Australia's WTO obligations and accounting principles. A  
14 statement of compliance was received from the Adviser.

15 **3.3 SUBMISSIONS RECEIVED**

16 Customs received twelve submissions in response to the issues paper  
17 released on 28 June 2001, and a further six in response to its summary of  
18 submissions released on 31 August 2001. Non-confidential summaries of the  
19 submissions are available from the public record. The submissions comprise  
20 those made by foreign governments, exporters, the Australian cement  
21 producing industry and the Australian cement importing industry.

22 The submissions addressed four matters within the scope of the re-evaluation:

- 23 1. Whether a price control situation exists in respect of domestic sales  
24 made by the relevant Chinese exporter.
- 25 2. Whether the outcome of the price control consideration leads to a  
26 conclusion that the goods exported from China were, in fact, dumped.
- 27 3. In light of the affirmation issued by the Minister, if a conclusion can be  
28 made that the Australian industry has, in fact, been materially injured or  
29 is threatened with material injury from dumping.
- 30 4. Issues arising from the elapsed time since the investigation commenced.

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<sup>2</sup> idem.

## 4 PRICE CONTROL

Dumping, broadly defined, is the export sale of a good at a price less than its normal value. A normal value is usually established from the price charged in an exporter's domestic market or from the cost of production and sale. In the case of imports from a country where the government has a complete, or substantially complete, monopoly of its trade and where prices may be fixed by the state particular difficulties arise in the determination of a normal value<sup>3</sup>. Until 1999, Customs would usually determine a normal value in such a country by reference to a 'surrogate' price obtained from a suitable market economy.

In 1999 the *Customs Act 1901* was amended to provide a new approach to determine the normal value of allegedly dumped goods from a country with an economy in the process of adjustment from central management<sup>4</sup> to a market economy. In an anti-dumping investigation this is usually referred to simply as an 'economy in transition'.

Because adjustment to a market economy may not be uniform, the legislative amendments made provision to establish whether an exporter's domestic selling price of particular goods is subject to government control. The legislation restored flexibility to the investigation of dumping from such countries recognising that a particular good may still be subject to price control, even though the economy as a whole is not. If a price control situation is extant the Minister may determine normal value having regard to all relevant information. This can include, but is not limited to, information obtained from countries other than the country of export.

In December 2000 the Minister for Justice and Customs issued guidelines to Customs to assist in the consideration about whether a price control situation exists in an economy in transition to a market economy. Because of certain legal issues, the guidelines were amended and re-issued on 28 June 2001<sup>5</sup>. The most recent guidelines are applicable to the re-evaluation completed by Customs.

The guidelines were issued in reference to a specific part of the *Customs Act 1901*<sup>6</sup>. The Act states:

- (5E) A price control situation applies in relation to the domestic selling price of like goods to the goods first referred to in subsection (5D):
- (a) if the exporter of the goods so referred to sells like goods in the country of export and the domestic selling price of those like goods is controlled, or substantially controlled, by a government (at whatever level) of that country; or.....

<sup>3</sup> Footnote 2 to paragraph 1 of Article VI of the GATT 1995.

<sup>4</sup> Customs legislation at ss266TAC(5D) refers to a situation where, in the past, 'the government of the country of export had a monopoly, or a substantial monopoly, of the trade of that country and determined, or substantially influenced, the domestic price of goods in that country'.

<sup>5</sup> ACDN 2001/42 refers.

<sup>6</sup> Sub section 269TAC(5E) defines price control. The definition is for application in sub section 269TAC(5D).

1  
2 The legislation identifies the relevant consideration to be whether a  
3 government controls the domestic selling price for like goods sold by the  
4 particular exporter.

5  
6 The Minister's guidelines refer to 'principal considerations' and 'other  
7 influencing considerations' relevant to the determination of a price control  
8 situation. Not all of the considerations make direct reference to selling prices.  
9 Some relate to inputs used in the producer/exporter's production, others relate  
10 to corporate governance matters, and the remainder refer to the domestic  
11 market in which the producer/exporter sells. In view of the construction of the  
12 legislation the considerations identified by the guidelines require judgement  
13 about their relationship (and effect) on the domestic prices of the  
14 producer/exporter. That is, the guidelines are not in themselves  
15 determinative, but provide a framework for the examination of the issue.

16  
17 The price control guidelines have been used by Customs to analyse the  
18 situation in China and to formulate recommendations about matters on which  
19 Customs considers the Minister ought to be satisfied<sup>7</sup>.

#### 20 **4.1 VIEWS OF INTERESTED PARTIES**

21 The investigation identified one company that had exported cement to  
22 Australia from China during the investigation period. Customs visited that  
23 company, Nanjing Jiangnan Cement Company Limited (NJC), in April 2000.  
24 A report about the visit is available from the public record. At that time,  
25 Customs concluded that a price control situation did not exist in relation to  
26 domestic sales of cement by the Chinese exporter. The normal value  
27 assessed for NJC was constructed using the company's costs to make and  
28 sell cement in China. Chinese market prices were not used in the  
29 construction.

30 The re-evaluation assessed whether or not the same conclusion would have  
31 been reached had the Minister's guidelines been in existence and applied at  
32 the time Customs made its recommendations to the Minister.

33 Of the submissions referring to the issue of price control two made no specific  
34 reference to the guidelines issued by the Minister<sup>8</sup> but considered the  
35 methodology applied by Customs in making its initial recommendation was  
36 correct.

37 A submission from Freehills, made on behalf of Chinese interests, stated that  
38 the information reported by Customs about the Chinese producer's corporate  
39 status, suppliers and the industry was largely correct. The submission  
40 concluded that the facts do not suggest the Chinese Government controls the  
41 price of cement sold by NJC. It states '*[n]ot only is NJC free to determine the  
42 price at which it sells cement (and this is the relevant legal consideration),*

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<sup>7</sup> Section 269TC. At the conclusion of an investigation and before a dumping duty notice can be published Customs' is required to furnish a report to the Minister that recommends, among other things, whether '*the minister ought to be satisfied as to the matters in respect of which the minister is required to be satisfied*'.

<sup>8</sup> Submissions from PT Semen Cibinong Tbk and Pt Semen Kupang (Persero).

1 *there is no evidence that the government controls the price of cement sold by*  
2 *what are referred to as “SOEs” [state owned enterprises].*

3 The submission from Freehills is in contrast to a submission from the Cement  
4 Industry Federation and by lawyers on the Federation’s behalf. Each  
5 presented Customs with different opinions about the meaning of ‘control’ as  
6 expressed in the legislation. Freehills (representing exporter interests) takes  
7 a narrow view of the meaning of control. The Cement Industry Federation  
8 (representing Australian producer interests) takes a wider view and has  
9 therefore presented information on a wider range of matters it considers  
10 relevant to price control.

11 To make a recommendation about price control Customs’ approach has been  
12 to analyse the facts against each of the considerations set out in the Minister’s  
13 guidance. This accords with Customs’ understanding of the basis of the  
14 Minister’s request that a new analysis be done.

15 **4.2 THE MINISTER’S PRINCIPAL CONSIDERATIONS**

16 The guidelines state that in determining whether or not a price control  
17 situation applies, regard may be had to four principal considerations. In the  
18 guidelines these principal considerations are labelled (A) to (D).

19

20 **4.2.1 Exporter’s decisions about price, cost, inputs, sales and**  
21 **investments**

22

23 Principal consideration (A) is whether decisions of the relevant producers or  
24 exporters relating to prices, costs, inputs, sales, and investments are made in  
25 response to market signals and without significant state interference. This  
26 consideration is expanded into four sub paragraphs.

27 Sub paragraph (i) addresses whether genuinely private companies or parties  
28 hold the majority shareholding of the relevant producer. The following facts  
29 are relevant to this consideration:

- 30 • The exporter, NJC, is a legal entity.
- 31 • NJC is a joint venture company, the two partners being Jiangnan  
32 Cement Factory (JCF) and Great Market Limited (GML).
- 33 • GML holds 60% of the issued capital and JCF holds 40%.
- 34 • The minority shareholder, JCF, is a wholly state owned enterprise  
35 (SOE).
- 36 • The majority shareholder, GML, is a wholly owned subsidiary of Shui On  
37 Building Materials Ltd that, in turn, is a subsidiary of Shui On  
38 Construction and Materials Ltd.
- 39 • Shui On Construction and Materials Ltd is a public company listed on the  
40 Hong Kong stock exchange.

41 The Cement Industry Federation suggests that Customs’ conclusion about  
42 private ownership is not supported by information in the 1999/2000 Annual  
43 Report of Shui On Construction and Materials where in respect of NJC it is

1 said that ‘*the Group is under a contractual arrangement to jointly control [NJC]*  
2 *with a PRC partner. Accordingly the Directors consider it a jointly controlled*  
3 *entity*’. The term ‘joint control’ is said to be inconsistent with a finding that a  
4 private company has a majority shareholding. The annual report defines  
5 jointly controlled entities to be ‘joint venture arrangements which involve the  
6 establishment of a separate entity in which each venturer has an interest’<sup>9</sup>.  
7 Therefore, the comment in the annual report does not, of itself, provide  
8 evidence to alter a conclusion that a genuinely private company holds the  
9 majority shareholding of NJC.

10 Sub paragraph (ii) considers whether state or provincial officials appearing on the  
11 board or in key management positions are in a clear minority. In respect of this  
12 consideration Customs found the following:

- 13 • The joint venture agreement provides for GML to have a majority of  
14 members on the board.
- 15 • The board chairman is a JCF appointee and a Nanjing municipal  
16 government official.
- 17 • The joint venture agreement states that each member of the board has  
18 one vote.
- 19 • No state or provincial official holds any of the following management  
20 positions at NJC: General Manager, Deputy General Manager, Financial  
21 Controller, Technical Director.

22 The Cement Industry Federation considers this information is inconsistent with  
23 the statement about joint control in the Shui On Construction and Materials  
24 annual report referred to above. What can be interpreted from the statement  
25 has already been addressed. The Cement Industry Federation requests that  
26 Customs recognise the influence and role of the Chairman, a municipal  
27 government official, in an environment where ‘state controls are still  
28 pervasive’. However, it is not apparent that state controls are, in fact,  
29 pervasive. The documents obtained by Customs show the Chairman has a  
30 single vote, like other board members.

31

32 Sub paragraph (iii) considers whether the relevant producer or exporter has  
33 guaranteed freedom to carry on business activities as evidenced by (a) no  
34 restriction on selling on the domestic market (b) the right to do business  
35 cannot be withdrawn outside proper contractual terms, and (c) in the case of  
36 joint venture companies, profits can be exported and capital invested can be  
37 repatriated. In respect of this consideration Customs found the following:

- 38 • NJC sells cement to customers located along the eastern seaboard of  
39 China as well as inland.
- 40 • NJC requires a business licence to operate. The Chinese authorities  
41 have withdrawn business licences for certain cement operations as part  
42 of an initiative to restructure the cement industry.

---

<sup>9</sup> Shui On Construction and Materials annual report, statement of significant accounting policies.

- 1 • NJC is a joint venture company. The joint venture agreement states  
2 that, after paying relevant taxes, profit and loans due to GML can be  
3 taken outside China. NJC made no profits in 1998 and 1999.

4  
5 The Cement Industry Federation suggest that local governments will generally  
6 only purchase from the local cement company (or other entity) in which they  
7 have an interest. Regarding NJC, it is proposed that because most of its  
8 sales are to the eastern seaboard this is indicative of sales to local  
9 governments. Customs found that the geographic distribution of sales to be  
10 limited by the logistics and cost of transporting cement.

11 In respect of NJC's sales to inland customers, the Cement Industry Federation  
12 state these are to a related company and do not indicate a general absence of  
13 restrictions on domestic sales. Verified information from Customs'  
14 investigation shows this view to be inaccurate. NJC's inland sales include  
15 customers other than related parties.

16 In a supplementary submission, the Cement Industry Federation expressed  
17 concern about Customs' understanding of 'the subtlety and lack of  
18 transparency associated with Chinese business practices' and states the  
19 venture partner GML does 'not in any way have control of NJC'. The  
20 Federation refers to the status of the joint venture Chairman as a legal  
21 representative, the voting rights of board members establishing a *de facto*  
22 power of veto for the minority shareholder, and asserts that some senior  
23 managers might be members of the Communist Party.

24 The role of the Chairman is addressed above. Customs is advised that a role  
25 as 'legal representative' creates no special restrictions. The joint venture  
26 agreement does not establish an express power of veto to the minority  
27 shareholder. Although a 2/3 majority of the board must be achieved to  
28 undertake specified actions, these are for a limited class of major decisions  
29 such as long-term business plans or investment decisions. There is no clear  
30 connection between Communist Party membership *per se* and the  
31 consideration about whether 'state or provincial officials' occupy management  
32 positions.

33 The Cement Industry Federation state their information shows that while  
34 profits from a joint venture can be paid as dividends to shareholders, there is  
35 no provision in Chinese company law to allow for the reduction in capital that  
36 has been contributed by a foreign entity to a joint venture. Repatriation of  
37 capital requires MOFTEC approval. Customs is advised MOFTEC has  
38 approved the capital reduction of a joint venture and that for equity joint  
39 ventures like NJC, repatriation of capital can be made at the end of the  
40 venture period. The NJC joint venture is newly established and repatriation of  
41 capital has not been sought.

42 Sub paragraph (iv) considers whether the major production inputs of the  
43 relevant producer or exporter are or are not supplied by state owned or  
44 controlled enterprises at prices which do not substantially reflect free market  
45 conditions. Inputs include, *inter alia*, raw materials, labour, energy and  
46 technology costs. In respect of this consideration Customs found the  
47 following:

- 1 • The major production inputs for cement are limestone, coal, electricity  
2 and labour.
- 3 • A Limestone Supply Agreement is an attachment to the NJC joint  
4 venture agreement. The Limestone Supply Agreement:
  - 5 • requires that JCF supply the joint venture with limestone;
  - 6 • places a cap on the price of limestone payable by the joint venture for a  
7 period following the establishment of the joint venture;
  - 8 • provides for limestone prices to be adjusted infrequently following the  
9 initial price cap period.
- 10 • JCF sources limestone for supply to the joint venture from a quarry  
11 operated by a joint venture company, Jiangnan-Onada Cement  
12 Company.
- 13 • JCF is a minority partner in Jiangnan-Onada Cement Company. The  
14 major partner is Taiheiyo Cement Corporation, a Japanese cement  
15 manufacturer.
- 16 • NJC provided quotes for the supply of limestone from two alternative  
17 sources. Both quotes were lower than the price paid by NJC. NJC could  
18 not state that the suppliers or the quarries were not wholly or partly state  
19 owned.
- 20 • Customs compared the price paid by NJC for limestone with the costs  
21 incurred by cement producers in Indonesia and Malaysia and found the  
22 limestone cost in Indonesia and Malaysia was significantly lower than  
23 the price paid by NJC.
- 24 • NJC sources coal from a number of suppliers. NJC 'suspects' that the  
25 suppliers may be SOEs.
- 26 • NJC is not party to a contract for the supply of electricity. NJC has made  
27 a payment to an electricity authority to guarantee supply over an  
28 extended period.
- 29 • Staff for the joint venture were re-employed from JCF.

30

31 The Cement Industry Federation considers the major inputs relevant to this  
32 consideration to be coal, electricity, gypsum, limestone and labour. Although  
33 labour was initially brought into the joint venture from JCF, a state owned  
34 enterprise, NJC is now the employer. Labour is not supplied by a state owned  
35 or controlled enterprise. Limestone is extracted and first sold by a joint  
36 venture company, but it is purchased by NJC through its joint venture partner,  
37 JCF. On the evidence, coal and electricity are probably supplied by SOEs.  
38 Although the name of the Chinese supplier of gypsum is known, it is not  
39 evident whether this is a state owned enterprise.

40 Some inputs are supplied by state owned or controlled enterprises. Where  
41 the production inputs are supplied by state owned or controlled enterprises  
42 the Minister expects that Customs will examine whether prices substantially  
43 reflect free market conditions. In its first report Customs benchmarked the

1 price of limestone (as the only raw material representing more than 10% of  
2 production cost) against known market prices in Indonesia and Malaysia. The  
3 comparison revealed limestone prices in these other countries to be  
4 significantly less than the actual cost incurred by NJC in China. Customs also  
5 benchmarked other major input costs for NJC. In its summary of submissions  
6 Customs concluded the comparison revealed NJC received no cost  
7 advantage (relative to the accepted market economies of Malaysia and  
8 Indonesia) by sourcing some of its inputs from state enterprises.

9 In a supplementary submission the Cement Industry Federation questions the  
10 validity of Customs' analysis. In its report of September 2000, Customs  
11 recommended the Chinese normal value be determined using production  
12 costs. Normal values for exporters in Indonesia and Malaysia were also  
13 established using production costs. Customs has reasonable cost information  
14 about the production of cement. The benchmarking cost comparison referred  
15 to above applied this information to assess whether sourcing some inputs  
16 from state owned enterprises advantages NJC. The conclusion, repeated  
17 here, is that NJC enjoys no input cost advantage relative to Indonesian and  
18 Malaysian producers<sup>10</sup>.

#### 19 20 **4.2.2 The exporter's accounting records** 21

22 Principal consideration (B) is whether one clear set of basic accounting  
23 records is kept by the relevant producer or exporter, and is independently  
24 audited and maintained in accordance with either generally accepted  
25 accounting principles in the country of export or in line with international  
26 accounting standards.

27 A Chinese accounting rule, said by the Cement Industry Federation to be  
28 different from internationally accepted standards, is that the provision for bad  
29 debts 'shall be 0.5% of the outstanding balance at the end of the accounting  
30 period'. The information submitted by the Cement Industry Federation is  
31 incorrect. The percentage referred to is in relation to a tax regulation  
32 applicable to claims for deductions. An examination of NJC's accounts also  
33 shows an allocation that substantially exceeds 0.5%. The Cement Industry  
34 Federation questions whether the allocation is appropriate. The Minister's  
35 guidelines require the exporter's accounts to comply with accounting  
36 standards. NJC prepares its financial accounts in accordance with the  
37 Statements of Standard Accounting Practice issued by the Hong Kong Society  
38 of Accountants and accounting principles generally accepted in Hong Kong.  
39 KPMG Hong Kong audits NJC's accounts.

#### 40 **4.2.3 Whether production costs are distorted** 41

42 Principal consideration (C) assesses whether the production costs and  
43 financial situation of the relevant producer or exporter are or are not subject to  
44 any significant distortions carried over from the non-market economy system.

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<sup>10</sup> Customs also notes that because the Chinese normal value is cost based, it is higher (and therefore more likely to reveal a dumping margin) than if the input costs from other economies were used instead.

1 In response to this consideration the Cement Industry Federation put forward  
2 several views on the structure of the cement industry in China. The relevance  
3 of this to the consideration, and others, is addressed later in this summary.

4 The Cement Industry Federation claim MOFTEC admits it controls export  
5 prices. Customs' report of what MOFTEC actually said is repeated below<sup>11</sup>.

6 *'MOFTEC sought to explain that there was some government control [over*  
7 *export prices] in cases where exporters were found to be dumping following*  
8 *an investigation by foreign governments, MOFTEC would ensure that a*  
9 *minimum price was complied with.*

10 *MOFTEC was then asked about government controls over export rights and*  
11 *foreign exchange. MOFTEC responded by claiming that the old licensing*  
12 *arrangements were extensively reformed and that licensing now was a matter*  
13 *of registration with the government or using agents that were registered.*  
14 *MOFTEC stated that the government did maintain some controls over certain*  
15 *products, but that cement was not included.'*

16  
17 From the statements by MOFTEC it is not apparent that production costs and  
18 financial situation of NJC are subject to distortion carried over from the non-  
19 market economy system.

#### 20 **4.2.4 Bankruptcy laws**

21  
22 Principal consideration (D) assesses whether the relevant producer or  
23 exporter is subject to bankruptcy and property laws, which guarantee legal  
24 certainty and stability.

25 Customs' report<sup>12</sup> about the situation in respect of Chinese SOEs states:

26 *'The investigation team inquired [with MOFTEC and the State*  
27 *Administration of Building Materials Industry] as to what measures*  
28 *were in place to ensure that SOE's do not continue to sell at a loss. It*  
29 *was stated that SOE's now face bankruptcy proceedings.'*

30 The Chinese Government advised China's bankruptcy laws came into effect in  
31 November 1988 and that other insolvency and liquidation laws are in place  
32 under Equity Joint Venture Law, the Co-operative Joint Venture Law, and the  
33 Wholly Foreign-owned Enterprise law. State owned enterprises have been  
34 subject to insolvency law (for example twenty-eight large and medium-sized  
35 state owned enterprises declared bankruptcy in Jiangsu Province in 1999<sup>13</sup>).

36 It is evident that bankruptcy laws are in operation in China and in the Jiangsu  
37 province, where NJC operates, and that SOEs are subject to those laws.

38 Regarding property laws the Cement Industry Federation noted NJC does not  
39 own land as it is owned by the state. Although NJC does not own land, it has

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<sup>11</sup> Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 26, available from the public record.

<sup>12</sup> idem at pg 27

<sup>13</sup> Pg 71 Statistical Communiqué of the People's Republic of China on the 1999 National Economic Development, Foreign Language Press, China Statistical Information Service Centre, Beijing.

1 purchased rights to use land. Leases are a common commercial arrangement  
2 in market economies.

### 3 **4.3 OTHER INFLUENCING CONSIDERATIONS**

4 The Ministerial guidance identifies other influencing considerations (labelled 1  
5 to 4) to which regard may also be had in determining whether a price control  
6 situation exists.

#### 7 **4.3.1 The broader market**

8

9 An influencing consideration is whether the relevant producer or exporter of  
10 the goods under consideration forms part of a broader market or sector in  
11 which the presence of a state owned enterprise or enterprises has influenced  
12 prices. Customs found that a significant proportion of cement production and  
13 sales in the Nanjing area (and throughout China) is supplied by SOEs. It also  
14 found that all of the cement SOE's in the Nanjing area made losses in 1999.

15 The Cement Industry Federation, in response to this consideration, suggests  
16 that because SOEs are predominant in the cement industry prices are 'hence  
17 set'. It comments that NJC is 'part of the broader building and construction  
18 industry which is primarily government owned and which plays the dominant  
19 role in determining demand for cement and price'.

20 Regarding other market influences the Cement Industry Federation has  
21 provided various viewpoints, including that infrastructure spending by the  
22 Chinese Government is a driver of demand (and hence prices), and that  
23 efforts to restructure the industry is evidence of government involvement such  
24 that a conclusion of price control must be drawn.

25 In its submission Freehills states '*the designation of any company as an SOE*  
26 *does not mean that the prices at which it sells products is controlled by the*  
27 *government*'. The Minister's guidelines do not conflict with this view<sup>14</sup>. When  
28 evaluating submissions, Customs has taken into account that the Minister's  
29 guidelines require that it assess both the presence of state owned enterprises  
30 and any influence on price.

31 Customs considered this aspect during its normal value inquiries. Customs'  
32 report stated<sup>15</sup>:

33 *'It would seem logical to conclude that the presence of SOE's is an influence*  
34 *in the Nanjing cement market and therefore a factor contributing to the*  
35 *problems the market is currently experiencing. However, the material*  
36 *provided by the NCA [Nanjing Cement Association] indicates that other*  
37 *market forces are also in play in the Nanjing market. An extract from the*  
38 *previously quoted December 99 report is reproduced again below.*

39 *It is anticipated that supply will continue to exceed demand in Nanjing over a*  
40 *long period of time. Thus cement price will continue to hover at a low level.*

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<sup>14</sup> For example, consideration (A)(iv) examines whether prices from a state enterprise reflect free market conditions. That is, mere supply by an SOE does not automatically lead to a conclusion of price control - the Minister expects that an assessment be done about whether the prices from an SOE reflect those determined by a market.

<sup>15</sup> Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 28, available from the public record.

1                    *Another reason for the low level of price is because of the surplus supply, the*  
2                    *large and medium size cement enterprises, which supply 80% of Nanjing market*  
3                    *have not jointly worked together to uphold cement prices. They lower their price*  
4                    *to compete fiercely for market share.'*

5  
6                    The extract from the Nanjing Cement Association reports 'fierce' competition  
7                    for market share between cement producers (including SOE cement  
8                    producers). There are other references to strong competition having a  
9                    downward effect on prices<sup>16</sup>. In its cement investigation report Customs  
10                    concluded that although SOE's may have contributed to depressed prices this  
11                    could not be interpreted as a form of price control exercised by the  
12                    government without further evidence to support such a conclusion.

13                    The World Bank<sup>17</sup> when describing progress with price reforms in China said:

14                    *'China's price reforms began in late 1978, implementing a dual-track system*  
15                    *in which the share of production subject to state procurement continuously*  
16                    *declined, and more and more prices were subjected to varying degrees of*  
17                    *market guidance. The reforms began in agriculture and spread slowly, first to*  
18                    *consumer goods and later to intermediate goods industries. In each case a*  
19                    *free market developed in parallel with the controlled market, where state*  
20                    *supply was kept unchanged at the (lower) plan price. Supply in the free*  
21                    *market grew rapidly, so its share in total output rose steadily. Meanwhile the*  
22                    *planned price was raised incrementally until it approached the market price.*  
23                    *By the end of 1994 this dual track system had led to the decontrol of more than*  
24                    *90 percent of retail prices and between 80 and 90 percent of agricultural and*  
25                    *intermediate product prices, all of which are now market determined. Only a*  
26                    *few prices remain fixed or negotiable within a band set by the state.'*

27                    In 1997 the Department of Foreign Affairs and Trade<sup>18</sup> emphasised the  
28                    progress with price reform by reference to supporting studies by the World  
29                    Bank and the International Monetary Fund. A recent list of products and  
30                    services subject to price controls in China<sup>19</sup> does not include cement.

31                    The reports of 'strong' and 'fierce' price competition in the Chinese cement  
32                    industry, in conjunction with other information about price reform in China,  
33                    point to prices in the cement market being able to move unfettered by  
34                    government control. That is, the broader market or sector in which NJC  
35                    participates has the characteristics of a market economy.

36                    The Cement Industry Federation consider it 'completely inconceivable' that  
37                    this conclusion is drawn when the 'government represents the vast majority of  
38                    the market participants'. However, this statement is inconsistent with  
39                    information, including that provided by the Federation, about the degree of

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<sup>16</sup> Shui On Construction and Materials Ltd Announcement of results for year ended 31 March 2001, attachment 14 Cement Industry Federation submission, and Cement Industry Federation submission pg 13, both available from the public record.

<sup>17</sup> 1996 World Bank *World Development Report 1996 From Plan to Market*, International Oxford University Press, Oxford, pg 24.

<sup>18</sup> 1997 Department of Foreign Affairs and Trade, *China Embraces the Market*, Commonwealth of Australia, Pg 77.

<sup>19</sup> Restricted WTO document.

1 competition in the market. Also of about 4,500 cement enterprises in China,  
2 only about 25% are state owned<sup>20</sup>.

3 In its submission the Cement Industry Federation provides information about  
4 industry restructuring underway in the Chinese cement industry. Generally, it  
5 refers to a Chinese Government intention to encourage closures of inefficient  
6 plant and the implementation of standards to increase the production of higher  
7 quality cement. Customs was advised about this intention by SABMI, the  
8 State Administration of Building Materials Industry. Customs reported<sup>21</sup>:

9 *'By the end of year 2000 SABMI expects that low quality production will be*  
10 *reduced by 100 million tonnes. This will be done to reduce pollution and*  
11 *wastage of resources. This is consistent with the government's strategy to*  
12 *improve production capacity of high quality cement by attracting foreign*  
13 *investment to either upgrade or replace existing factories.'*

14 Customs understands the intention of the Chinese Government's plans for  
15 structural reform include encouraging scale economies of production (by the  
16 closure of smaller plants), developing efficiency in production (by the adoption  
17 of newer technology), promoting the production of higher quality cements  
18 (through investment in new plants and implementation of product standards)  
19 and reducing the polluting effects of inefficient production. In the context of  
20 the Minister's guidance Customs considers government activities that may  
21 affect price, and those activities that in effect control price, should be  
22 distinguished. Industry structural reforms may be intended to ultimately attain  
23 more efficient pricing, but under ordinary concepts could not necessarily be  
24 construed as a control over prices.

25 The Cement Industry Federation refer to reports about infrastructure spending  
26 in China and stated *'the demand for cement is principally a function of*  
27 *government infrastructure expenditure which has been directed to promote*  
28 *the use of high grade cement in the local region serviced by the exporter'* and  
29 *'the government infrastructure program is a key driver of demand, and almost*  
30 *all cement is sold to a state controlled entity'*. Customs discussed  
31 infrastructure spending with MOFTEC and SABMI. Examples of infrastructure  
32 projects included highways of 1,045,000 kilometres (1.15 times more than the  
33 current level), expressways of 20,000 to 25,000 kilometres (or around 2.7 to  
34 4.2 times current levels) and the provision within the next decade of 3 billion  
35 sqm of accommodation in city areas and 800 million sqm in country areas.  
36 Macroeconomic policies, such as an expansionary fiscal policy that may  
37 stimulate aggregate demand, are arguably remote from the price control  
38 provisions of Australian anti-dumping legislation that focus on the domestic  
39 selling prices of a particular exporter<sup>22</sup>.

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<sup>20</sup> China Building Materials Industry Association figures published March 2001 and reported in correspondence from Chinese Embassy, received 6 September 2001.

<sup>21</sup> Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 25, available from the public record.

<sup>22</sup> Even the United States, which has treated China as a non-market economy, makes a similar distinction. For example when considering whether to determine separate export prices in a dumping investigation the Department of Commerce stated 'the Department's separate rate test to determine whether the exporters are independent from government control is not concerned, in general, with macroeconomic/border type control eg export

1 In response the Cement Industry Federation consider 'Customs has also  
2 failed to appreciate or acknowledge the likely impact of government initiatives  
3 in restructuring the cement industry at large and the implications this has for  
4 the market and the environment in which companies such as Nanjing Cement  
5 and Jidong Cement operate'. The Federation also refer to the ability to obtain  
6 approval for increased production capacity and Government delays in industry  
7 restructure. The following information was supplied by the Chinese  
8 Government:

9 *The Government of the P.R.C. intends that the Chinese cement industry should*  
10 *be improved. This is the same desire we have for all industries in our*  
11 *economy. The cement industry will be changed because of the improvement of*  
12 *cement quality and environmental standards. There is a policy to adopt*  
13 *advanced production technology and reform backward inefficient technology.*  
14 *For environmental reasons and considerations of quality and cost, inefficient*  
15 *and polluting cement plants must be regulated. These regulations impact*  
16 *upon older cement plants which use vertical shaft kilns to produce clinker.*  
17 *Because of these regulations, all shaft kilns of less than 2.2m diameter and dry*  
18 *process hollow kilns of less than 2.5m diameter will be closed down before the*  
19 *end of 2000. With higher quality cement, not so much will be needed for*  
20 *construction products, and there will be less pollution. Also, the Building*  
21 *Material Code has been changed to support the operations of newer plants.*

22 *Thus by 1999 and 2000, 40 and 60 million tonnes of production capacity*  
23 *would have been taken out of the cement industry. For your information,*  
24 *about 65 million tonnes of production capacity has been already affected. The*  
25 *reduction by the remaining 35 million tonnes is expected to be carried out in*  
26 *2001. Besides, cement enterprises are encouraged to merge to sizeable*  
27 *cement groups in order to achieve better utilisation of resources.*

28 Regarding regulation of capacity, the Chinese Government advised that:

29 *.....SABMI [State Administration of Building Materials Industry] only makes*  
30 *recommendations to MOFTEC or State Economic Commission for their*  
31 *investment and planning purposes. However, there is no direct planning of*  
32 *the overall production capacity. The regulations encourage the modernisation*  
33 *of the industry as has been stated above. It does not manage investment or*  
34 *regulate or manage overall cement production capacity. Its influence is*  
35 *through the discussion of the industry and the regulations which encourage*  
36 *modernisation.*

37 The Chinese Government initiatives appear intended to improve the business  
38 operating environment for cement manufacturers through industry structural  
39 reform. On its own, this does not support a conclusion that prices are  
40 controlled within the meaning of the legislation.

#### 41 **4.3.2 Utility supply**

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licences, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision making process at the individual firm level'. Preliminary Determination, Foundry Coke from China, FR 13885 pg 9.

1 A second consideration is whether the supply of utilities is guaranteed on the  
2 basis of contracts that reflect normal commercial terms and at prices that are  
3 generally available throughout the economy. Customs found the principal  
4 utility used by NJC is electricity. NJC does not have a supply contract with its  
5 electricity supplier but it has paid an amount to guarantee supply for a period.  
6 The supply price of electricity was examined as part of Customs' assessment  
7 of principal consideration (A).

### 8 9 **4.3.3 Supply of land**

10  
11 A third consideration is whether the land on which the facilities of the company  
12 are built is rented from the state at conditions comparable to those in a market  
13 economy country (eg. proper contractual leases). The Cement Industry  
14 Federation submit there is no indication that the contract is at market rates,  
15 terms or tenure and that state ownership of land is 'hardly free market  
16 conditions'.

17 The Minister's consideration refers to leases and rental arrangements – it  
18 does not establish land ownership to be fundamental to the Minister's  
19 assessment of price control. Freehills, responding on behalf of the Chinese  
20 Government, state that '[I]easing, or usage rights, is an entirely acceptable  
21 way of using and paying for land resources.' Leasing is a common  
22 commercial arrangement in market economies.

23 Whether the lease is or is not at market rates is difficult to establish<sup>23</sup>. The  
24 consideration focuses on the conditions under which the rental takes place,  
25 and an example is given about lease conditions being 'proper'. NJC  
26 purchased from JCF the rights to the land on which it operates. The evidence  
27 shows that the rights to land use are subject to the conditions of the joint  
28 venture agreement; the lease is finite but renewable, there is consideration  
29 paid and payable, the payments are not nominal and the amounts are  
30 properly reflected in NJC's accounting records. These are all conditions  
31 comparable to a market economy country.

### 32 33 **4.3.4 Supply of labour**

34  
35 The fourth consideration is whether the company has the right to hire and  
36 dismiss employees and the right to fix salaries. Customs found the following  
37 relevant to this consideration:

- 38 • The joint venture agreement states that the responsibilities of the  
39 General Manager include appointing and dismissing staff.
- 40 • The joint venture agreement states that decisions relating to wages and  
41 benefit payments to workers can be made with the agreement of two  
42 thirds of the directors.

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<sup>23</sup> The value of land, and by consequence its lease value, is determined by variable factors (including but not limited to parcel size, location, access to resources, services, and proximity to infrastructure). In combination these create a unique value. Because of this the land value and lease rate cannot easily be benchmarked to a like situation in another economy.

- 1 • Customs obtained a copy of a 1998 staff management proposal aimed at  
2 reducing staff numbers agreed to by NJC's Board of Directors.
- 3 • Customs obtained a copy of a document approved by NJC's Board of  
4 Directors setting out the method of implementing wage increases for  
5 2000.

6 No substantive submissions from any party were received in response to this  
7 consideration.

#### 8 **4.3.5 Other information**

9

10 The Minister's guidance states that he will have regard to any other  
11 information that is relevant to the consideration of the existence or otherwise  
12 of a price control situation.

13 Other information supplied by the Cement Industry Federation, not already  
14 addressed elsewhere in this supplementary report, includes that NJC has not  
15 been profitable since it commenced operations in 1998. Sales at a loss occur  
16 in all economies and are sufficiently common that there are specific anti-  
17 dumping provisions to address the situation. All of the other cement  
18 companies exporting to Australia made losses during the investigation period.  
19 Sales at a loss by NJC are not indicative of a price control situation.

20 The Cement Industry Federation in its submission, and in other  
21 correspondence to Customs, referred to the operations of Hebei Provincial  
22 Jidong Cement Plant (Jidong). Jidong did not export any cement to Australia  
23 during the investigation period. Jidong has no known association with NJC,  
24 the exporter investigated and whose sales are being assessed for price  
25 control. Domestic sales by Jidong are irrelevant to the determination of a  
26 normal value for NJC.

#### 27 **4.4 CONCLUSION REGARDING PRICE CONTROL**

28 The considerations identified by the Minister's guidelines require a judgement  
29 to be made about their relationship (and effect) on the domestic prices of the  
30 producer/exporter. The evidence evaluated in respect of each of the  
31 Minister's considerations does not support a conclusion that NJC's domestic  
32 selling price of cement is controlled, or substantially controlled, by a  
33 government (at whatever level).

#### 34 **4.5 DUMPING MARGIN - CHINA**

35 In September 2000 Customs recommended to the Minister that a normal  
36 value for NJC be determined according to section 269TAC5(G) of the Act.  
37 Had the Minister's guidelines existed at that time, its recommendation about  
38 the determination of normal value would be unchanged.

39 The conclusion that ordinary portland cement exported from China was not  
40 dumped during the investigation period is unaltered by the Minister's  
41 guidelines.

42

## 5 MATERIAL INJURY

Before anti-dumping measures can be applied three things must be established (i) that imported goods have been dumped, (ii) that an Australian industry producing like goods has been injured, and (iii) injury that can be attributed to dumping is 'material' (this latter point is usually referred to as 'causal link').

In March 1989 the Anti-Dumping Authority completed an inquiry into the meaning of material injury<sup>24</sup>. The Authority's conclusions formed the basis of a Ministerial Direction issued in 1990. The Direction stated:

*'The Comptroller shall make a preliminary finding that sufficient grounds exist for the publication of a dumping duty notice or a countervailing duty notice only when dumping or subsidisation has caused, or is threatening, "material" injury to the Australian industry producing like goods - that is, injury which is not immaterial, insubstantial or insignificant; injury which is greater than that likely to occur in the normal ebb and flow of business.*

*The Government expects that material injury, or the threat thereof, will only rarely be taken as proven when the Australian industry producing like goods has not suffered, or is not threatened with, a "material" diminution of profits or when the dumped or subsidised imports do not hold (or threaten to hold) a sufficient share of the Australian market to cause or threaten "material" injury, in the sense in which "material" is defined above. Nevertheless, the Government acknowledges that (rare) cases may occur in which material injury may indeed be caused or threatened even though the Australian industry's profits have not been "materially" reduced and even though the dumped or subsidised imports hold only a small share of the Australian market.*

*The Comptroller shall take the above comments to apply, adjusted as necessary to the circumstances of the case, when considering whether dumping or subsidisation has "materially" hindered the establishment of an Australian industry.'*

In December 2000 the former Minister affirmed this Direction. Like the Minister's guidance on 'economies in transition', the former Minister's affirmation is not specific to the cement investigation. However, unlike the Ministerial guidance, the affirmation referred to a document in existence at the time Customs completed its report. In effect, the affirmation clarified aspects of the Ministerial Direction – it did not create any new considerations.

Both the Direction and affirmation confirm a requirement to assess profits and the volume of imports when considering of material injury. The former Minister's affirmation states that these two matters are not to be read cumulatively. That is, material injury from dumping can be established where there is a 'material' diminution of profits but it is not also necessary that dumped imports hold a significant market share (but imports must nevertheless be sufficient to cause or threaten the material injury).

<sup>24</sup> Anti-Dumping Authority 1989, *Inquiry into Material Injury, Profit in Normal Values and Extended Period of Time*, AGPS, Canberra

1 The affirmation also confirms that, in the former Minister's view, in only rare  
2 cases will material injury be proven where there has not been a material  
3 diminution of profit or where dumped imports hold only a small share of the  
4 Australian market.

5 **5.1 VIEWS OF INTERESTED PARTIES**

6 To assist interested parties prepare submissions to the re-evaluation Customs  
7 identified in its issues paper several matters raised by the former Minister's  
8 affirmation.

9 The issues paper identified certain issues that would have arisen had cement  
10 from China been found to be dumped. Because Customs has concluded that  
11 its finding in relation to price control is not altered by the guidelines these  
12 issues do not arise.

13 Four submissions were received about whether blended cements and clinker  
14 could be included along with ordinary portland cement as like goods<sup>25</sup>.  
15 Neither the Ministerial Direction nor the former Minister's affirmation alter the  
16 interpretation of the definition of like goods. The Ministerial Direction and the  
17 former Minister's affirmation refer only to injury to an industry producing like  
18 goods, that is, apparently exclusive of clinker and blended cements.  
19 However, Customs' injury assessment included consideration of blended  
20 cements and clinker. The submissions create no reason why Customs should  
21 exclude blended cements and clinker from its consideration of injury.

22 Other issues relate to the volume of dumped imports and their impact on the  
23 Australian market. During the investigation period, the volume of dumped  
24 imports was small in comparison to the size of the Australian market (less  
25 than 1%). Although identified as a rare case, neither the Ministerial Direction  
26 (that applied at the time of Customs' report to the Minister) nor the former  
27 Minister's affirmation preclude that a small market share may be sufficient to  
28 cause material injury. For the most part, the Australian industry producing  
29 cement does not submit that its injury has been in the form of lost sales  
30 volume or lost market share. It has stated that injury is essentially  
31 quarantined to price effects '*as local prices have had to be reduced in order to*  
32 *avoid lost sales and increased import penetration through dumped imports*  
33 *undercutting local producers' selling prices*'. From its consideration of  
34 submissions, Customs' findings about the extent of injury attributable to the  
35 quantity of imports do not appear to be substantially at issue.

36 The remaining issue concerns cement prices and the profits of Australian  
37 cement producers. In its submission to Customs, the Cement Industry  
38 Federation reiterates how dumping has in its view caused injury. In summary,  
39 it is stated that because of the industry structure and the homogenous nature  
40 of cement, the industry has no option other than to import parity price. In this  
41 situation, if it is shown to exist, the rare circumstance described in the  
42 Ministerial direction is feasible: the price outcome from a small volume of

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<sup>25</sup> S. 269T defines like goods to be 'goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration'.

1 imports (that establishes a credible threat from imports) could, in theory,  
2 cause an adverse price effect and a material diminution of profits.

3 In its assessment of material injury, at no time did Customs conclude the  
4 volume of imports to be too small to cause material injury.

5 When considering whether injury could still be proven by a material diminution  
6 of profit, Customs found that the Australian industry's profits in 1998 and 1999  
7 (the years where dumped imports were present in the Australian market) were  
8 higher than in 1997 (when there were no imports).

9 The Cement Industry Federation submit that although profits do not appear to  
10 have been reduced other factors are relevant. It states '*[p]rices declined  
11 when volumes increased to record levels; profitability stayed flat when it  
12 should have risen from the combination of observable cost reductions,  
13 observable volume increases and expected price increases during peak  
14 demand*' and '*[t]he very substantial investment by the Australian industry to  
15 reduce costs should also have produced additional profits in line with the cost  
16 reductions achieved*'<sup>26</sup>. Although there has not been a material fall in profits,  
17 the Cement Industry Federation submits that, but for the presence of imports,  
18 the industry's prices (and hence profits) would have been higher.

19 Customs did consider, as required by the Ministerial Direction, whether a  
20 relationship could be established between dumped import prices and  
21 domestic prices. The evidence observed by Customs does not support the  
22 position made by the Cement Industry Federation<sup>27</sup>. Imports were present in  
23 the Queensland market for about twelve months prior to any price change of  
24 significance, in Victoria price changes preceded imports, and price changes in  
25 New South Wales and Western Australia occurred in the complete absence of  
26 imports. Because price changes could be associated with factors other than  
27 imports, Customs concluded that a causal link between dumped imports and  
28 injury to the Australian industry could not be made.

## 29 **5.2 CONCLUSION ON MATERIAL INJURY**

30 Customs' conclusions on material injury would have been no different had the  
31 former Minister's affirmation been made prior to Customs' report to the  
32 Minister.

33

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<sup>26</sup> CIF Submission dated 20 July 2001, public record version, pg 26.

<sup>27</sup> With the exception of the Northern Territory.

## 6 UPDATED INFORMATION

Several submissions refer to the time taken for the investigation to be resolved. The reasons for this are explained elsewhere in this supplementary report.

The submissions identify two issues. The first, raised by the Cement Industry Federation, is that Customs and the Minister must have regard to reasonably current information in reaching conclusions and making decisions for this investigation. The second, raised by the Malaysian Government, Indonesian Government and Indonesian exporters, is that a decision consistent with WTO anti-dumping requirements cannot now be made.

### 6.1 RECENT INFORMATION

Customs' statement of essential facts issued 26 July 2000 assessed injury to the Australian industry by examination of data up to the end of the March quarter 2000. The Cement Industry Federation states that *'much of the information from this period has been superseded by subsequent events, and other information has come to light which clearly indicates that the information underlying Customs' earlier analysis was incomplete or its significance not fully appreciated by Customs'*<sup>28</sup>. An area said to be incomplete is Customs' analysis of material injury and threat of material injury.

Updated industry data is provided in the submission from the Cement Industry Federation dated 20 July 2001. The data covers each Federation industry member<sup>29</sup> for the period beginning the March quarter 1997 to the end of the March quarter 2001. In effect, an additional year of industry data is provided.

#### 6.1.1 Reliability of the data

The Cement Industry Federation's submission states the data 'is consistent with the spreadsheet format adopted by Customs and previously provided to local producers by the ACS for the purpose of soliciting further financial data. This information satisfies the requirements of Appendices 3 and 4 of the Anti-dumping Application'<sup>30</sup>.

In the statement of essential facts<sup>31</sup> Customs made a number of observations about the standard of industry data provided to the investigation:

- The analysis of industry data revealed inconsistencies between industry members. For example, some revenue was reported on a delivered basis, while other revenue was reported on an ex-works basis. Some rebates were reported as a selling expense, while other rebates were deducted from revenues.

<sup>28</sup> CIF submission dated 20 July 2001, page 1.

<sup>29</sup> There are seven members of the CIF. Another two Australian producers, the Buckeridge Group and Morgan Cement, are not members. There is no updated data relating to these companies.

<sup>30</sup> CIF op. cit. page 16.

<sup>31</sup> Statement of Essential Facts dated 26 July 2000, page 55.

- 1 • The Cement Industry Federation disagreed with Customs' proposal to  
2 standardise and consolidate data instead preferring injury be assessed  
3 to each member and then an overall conclusion drawn. The Cement  
4 Industry Federation's submission to the re-evaluation repeats that  
5 'materiality of injury should be assessed firstly on an individual company  
6 basis and then consolidated to assess its materiality to the industry as a  
7 whole'<sup>32</sup>. During its assessment, Customs did not fully adopt the  
8 approach recommended by the Cement Industry Federation as it would  
9 have inconsistently measured each member's performance and required  
10 an arbitrary assessment of total performance.
- 11 • During verification Customs found that industry members could not  
12 readily trace the data submitted by industry to company records. Five  
13 out of the seven members had to resubmit basic financial data.
- 14 • Customs found some industry members had not included certain costs in  
15 their financial data. Several companies failed to include finance costs  
16 even though a lack of return on investment was stated to be an injury  
17 factor.

18 Although it is claimed the updated data is presented in a format already  
19 accepted by Customs, difficulties previously experienced (as outlined above)  
20 raise doubts about its reliability. The data itself is also problematic. It is  
21 inconsistent and certain issues are unexplained.

- 22 • The sales information includes data attributable to 'capacity swaps'<sup>33</sup>.  
23 Not all capacity swaps are identified separately and sales prices vary.  
24 An inability to properly determine the effect of the swaps creates  
25 inconsistencies in the analysis of purchases and sales for the parties  
26 involved. The issue is significant as the value of the swaps is  
27 substantial.
- 28 • It is not apparent how selling, general and administrative costs are  
29 treated with respect to capacity swaps.
- 30 • Production costs for one producer are shown as two separate amounts –  
31 a survey figure and a management account figure. The two production  
32 cost amounts reported to be applicable for one quarter vary by more  
33 than 20%.
- 34 • Some sales are reported on a delivered basis, others appear to be net of  
35 freight. However, not all freight costs are identified. This affects a  
36 comparison of prices both between Australian producers and with import  
37 prices.
- 38 • Where freight costs are shown there is significant inconsistency. In  
39 some instances the freight cost is a large positive number, in others it is

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<sup>32</sup> CIF op. cit. page 26.

<sup>33</sup> 'Capacity swaps involve exchanging production volumes between producers, making it possible to have a presence in a market that would otherwise not be viable due to the high cost of transporting cement to those locations. The arrangements are complex and only exist where a reasonable balance in demand between two producers can be achieved.' SEF op. cit. pg 21.

1 a negative number. The variability between years is on occasion more  
2 than 1000%. In other instances, freight is not identified at all.

- 3 • An inability to determine the effect of freight precludes the identification  
4 of a net selling price. Consequently price depression, price suppression  
5 and price undercutting cannot reliably be assessed.

6 The analysis of the cost and selling information suggests the data may be  
7 inaccurate, incomplete, or both.

8

### 9 **6.1.2 Cogency**

10

11 The updated data is said to indicate ‘the level of price depression and loss of  
12 sales revenue which has adversely impacted on profitability’<sup>34</sup> and that ‘the  
13 combination of declining selling prices and reduced sales volume has  
14 significantly impacted on profitability’<sup>35</sup>. It is claimed the full impact of price  
15 reductions is apparent in the period immediately following the investigation<sup>36</sup>  
16 and that the data confirms the injury claims made by the Australian industry in  
17 its application.

18

### 19 **Production and sales volumes**

20

21 The data shows production and sales volume declined from the June 2000  
22 quarter onwards. The decline can be correlated to a fall in domestic building  
23 and construction activity (as can changes in production and sales volumes in  
24 earlier quarters). Cement demand is affected by domestic market factors.  
25 Imports, by volume, hold a small share of the Australian market. During the  
26 investigation period, all imports of cement represented less than 2 per cent of  
27 the market, and dumped imports held less than 1 per cent of the market.  
28 Since the end of the investigation period, import volumes have declined.  
29 Injury to the industry from declining sales volumes cannot be attributed to  
30 imports.

31

### 32 **Prices**

33

34 The price data, subject to the reliability issues identified above, shows prices  
35 declined during the investigation period. For the most part, the additional data  
36 shows little or no price recovery since the conclusion of Customs’  
37 investigation.

38 In its submission and analysis of the bulk cement price data, the Cement  
39 Industry Federation notes prices declined in the March, June and September  
40 quarters of 1999. These price changes were considered by Customs both in

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<sup>34</sup> CIF op. cit. pg 16

<sup>35</sup> ibid. pg 23.

<sup>36</sup> ibid. pg 25.

1 its statement of essential facts and report to the Minister<sup>37</sup>. Although it is the  
2 stated purpose of the information, there is little analysis of the level of the  
3 subsequent prices to show how the data reveals Customs' analysis was  
4 incorrect.

5 In the period subsequent to Customs investigation there have been shipments  
6 of Chinese Cement into another Australian State. Price data submitted by the  
7 Cement industry, if reliable, shows cement prices in that State have been  
8 steady before and after the shipments. This is consistent with Customs earlier  
9 findings about the correlation between imports and domestic prices, that is,  
10 *'imports were present in the Queensland market for about twelve months prior*  
11 *to any price change of significance, in Victoria price changes preceded*  
12 *imports, and price changes in New South Wales and Western Australia*  
13 *occurred in the complete absence of imports'*<sup>38</sup>.

14 A report prepared by the Centre for International Economics was submitted to  
15 Customs titled *'How the Cement Industry Works'*. The report was  
16 commissioned by the Cement Industry Federation and was supplied in  
17 support of the Federation's view that the characteristics of the cement  
18 industry, its cost structure and market constraints left it vulnerable to import  
19 competition. In particular, it contended import competition forced the industry  
20 to adopt import parity pricing in order to maintain market share. Customs  
21 requested an analysis of the CIE report by The Law and Economics  
22 Consulting Group. Their advice was that the conclusions drawn in the report  
23 were unreliable because they were inconsistent with the facts and based on  
24 untested theory and dubious assumptions.

## 26 **Revenue and profitability**

27  
28 The Cement Industry Federation attributes losses in revenue and profitability  
29 to falls in prices and volumes. The price and volume data do not support a  
30 finding of a causal relationship with dumped imports.

### 32 **6.1.3 Conclusion**

33  
34 The additional data is not persuasive. It does not suggest the analysis done  
35 by Customs has either been 'superseded by subsequent events' or that the  
36 'earlier analysis was incomplete or its significance not fully appreciated by  
37 Customs'.

## 38 **6.2 WTO PROVISIONS**

39 Article 5.10 of the Anti Dumping Agreement<sup>39</sup> states:

---

<sup>37</sup>These price changes were addressed in Customs statement of essential facts, pages 59, 60, 106 – 117. Customs report to the Minister of 11 September 2000 also addressed the issue.

<sup>38</sup> Customs 'Summary of Submissions to the Re-evaluation' 31 August 2001, pg 26.

<sup>39</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

1        *‘Investigations shall, except in special circumstances, be concluded within one*  
2        *year and in no case more than 18 months, after their initiation.’*

3        A submission from the Indonesian Government refers to the article:

4        *‘Bearing in mind that the investigation concerned was initiated on 9*  
5        *December 1999 and the eighteen month period laid down in article 5.10 of the*  
6        *Agreement on Implementation of article VI of GATT 1994 (agreement) has*  
7        *already passed, the Indonesian Authorities understands that the issue paper*  
8        *and summary of facts represents an internal procedure with no legal standing*  
9        *in the context of the Agreement’ (sic).*

10       A similar submission was received from the Malaysian Government.

11       Customs reported its results to the Minister on 11 September 2000, well within  
12       the period specified by the Agreement. However the Agreement does not  
13       define when an investigation is concluded, nor is the Agreement explicit about  
14       what action is available or intended where the stipulated time frames are  
15       exceeded. A view, implied by the Indonesian Government’s submission, is  
16       that an investigation is not concluded until a final determination is made. Also  
17       implied is that where a determination is not made within the time period the  
18       expectation is that the relevant investigation be terminated.

19

## 7 CHINESE EXPORT PRICES

1  
2  
3 The Cement Industry Federation raised issues and presented new information  
4 about Customs' consideration of export prices from China.

5 Customs' determination of Chinese export prices is available from the public  
6 record in reports about on site visits to the Australian importer and Chinese  
7 manufacturer of cement. Export price information was also made available in  
8 the *Statement of Essential Facts*.

9 An investigation period is specified to determine whether dumping has  
10 occurred, in this case from 1 January 1999 onwards. A longer period  
11 overlapping the investigation period is specified to consider injury, in this case  
12 1 January 1997 onwards. These periods were publicly notified at the  
13 commencement of the investigation according to the law and established  
14 administrative procedure.

15 The Cement Industry Federation stated that Customs failed to include a  
16 Chinese exporter and Australian importer in its analysis. The particular  
17 exporter, Jidong, sold two shipments to Australia in 1998. There have been  
18 no subsequent shipments by this exporter, nor is there an indication any  
19 future shipments are in contemplation. The shipments were not included in  
20 the assessment of dumping because they occurred prior to Customs'  
21 investigation period. However, the shipments were taken into account in the  
22 consideration of injury as is required by the law.

23 The Cement Industry Federation considers the shipments made by Jidong are  
24 relevant to the determination of a normal value for the current Chinese  
25 exporter, NJC. The Cement Industry Federation misinterprets the normal  
26 value provisions of the Act. Jidong did not export any cement to Australia  
27 during Customs' investigation period. Jidong has no known association with  
28 NJC (the exporter investigated by Customs) and whose sales are being  
29 assessed for price control. Domestic sales by Jidong are irrelevant to the  
30 determination of a normal value for NJC.

31 Another claim is that Customs limited its export price inquiry to one shipment  
32 from China and that the relevant export payment terms are not characteristic  
33 of international commodity trading. Customs did not limit its inquiries to one  
34 shipment; all export shipments made in the investigation period up to the time  
35 of its visit to the exporter were examined, including all payments that were  
36 required to be made by that time. Customs' conclusion about the actual  
37 trading arrangements of the exporter is based on commercial documentation  
38 sighted and verified through its investigations. It is further alleged that the  
39 export prices between the Australian importer and Chinese exporter are not at  
40 arms length, that is, price is contrived to avoid a finding of dumping or there  
41 are compensatory payments that affect price. Ferrier Hodgson, a firm  
42 experienced in insolvency and forensic accounting, has examined Customs'  
43 export price information and the claims by the Cement Industry Federation.  
44 Ferrier Hodgson consider the evidence supports Customs' finding that the  
45 transactions between the Nanjing Jiangnan Cement Company and Global  
46 Cement were made at arms length.

- 1 None of the issues raised by the Cement Industry Federation alter Customs'
- 2 conclusions about export prices for Chinese cement.
- 3

1  
2  
3  
4  
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7

<b>8 CONCLUSION</b>
---------------------

The results of Customs' re-evaluation and consideration of updated data do not alter the recommendations made to the Minister in September 2000. Customs does not recommend that the Minister impose dumping duties on exports of ordinary portland cement to Australia.

1  
2

<b>9 APPENDICES</b>
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- Appendix A      Evidence relied upon
  
- Appendix B      Chronology
  
- Appendix C      *Australian Customs Dumping Notice 2001/42 Ministerial Guidelines – Section 268TAC(5E) Price Control Situation in Relation to an Economy in Transition*
  
- Appendix D      *Australian Customs Dumping Notice 2001/13 Section 269TAE Ministerial Guidance on Material Injury and Causal Link.*
  
- Appendix E      Glossary

3





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## EVIDENCE RELIED UPON

In this report, in relation to findings of fact, the evidence relied upon by Customs is as follows:

<b>Section</b>	<b>Evidence relied upon</b>
4 Price Control	Information provided/obtained from: <ul style="list-style-type: none"><li>- the Australian industry;</li><li>- Chinese Government;</li><li>- other interested parties; and</li><li>- others.</li></ul>
5 Material Injury	Information provided by: <ul style="list-style-type: none"><li>- the Australian industry;</li><li>- other interested parties; and</li><li>- others</li></ul>
6 Updated Information	Information provided by: <ul style="list-style-type: none"><li>- the Australian industry;</li><li>- other interested parties;</li><li>- others; and</li><li>- Customs commercial database.</li></ul>
7 Chinese Export Prices	Information provided by: <ul style="list-style-type: none"><li>- the Australian industry</li><li>- exporters;</li><li>- importers;</li><li>- others; and</li><li>- Customs commercial data base</li></ul>

7  
8

2 **CHRONOLOGY – CEMENT INVESTIGATION**

19 November 1999	Industry lodges properly documented application.
9 December 1999	Customs initiates investigation.
28 March 2000	Minister agrees to 120 day extension for Customs to prepare its Statement Of Essential Facts.
26 July 2000	Statement of Essential Facts issued in accordance with extension.
11 September 2000	Customs reports its findings to Minister.
7 December 2000	Price control guidelines issued.
December 2000	Minister affirms direction on material injury.
16 January 2001	Minister agrees to process of re-evaluation.
30 January 2001	Ministerial change to portfolio.
20 February 2001	Incoming Minister confirms re-evaluation should proceed.
28 June 2001	New guidelines on price control issued. Customs invites submissions to re-evaluation.
20 July 2001	Closing date for submissions.
31 August 2001	Summary of submissions released.
7 September 2001	Submissions received in response to summary
5 October 2001	Election announced; caretaker provisions commenced 8 October.
23 November 2001	Third Howard Ministry announced.
13 December 2001	Supplementary report provided to Minister



1  
2  
3 **Australian Customs Dumping Notice**  
4 **No.2001/42**  
5

6 *CUSTOMS ACT 1901*

7  
8 **MINISTERIAL GUIDELINES - SECTION 269TAC(5E)**  
9

10 **PRICE CONTROL SITUATION IN RELATION TO AN**  
11 **ECONOMY IN TRANSITION**  
12  
13

14 The Minister for Justice and Customs has issued the following guidelines in relation  
15 to a price control situation in an economy in transition.

16  
17 **“Procedure**

18  
19 Relevant producers or exporters in an economy in transition are to be advised they  
20 have the opportunity to submit information to show that a price control situation does  
21 not apply to the goods under consideration. Such information is to be provided in the  
22 context of answers to questions contained within the exporter's questionnaire. This  
23 information should deal with each of the considerations referred to below.  
24

25 Adverse inferences may be drawn where there is failure by the producer or exporter to  
26 materially and substantially respond to the questions in the exporter's questionnaire.  
27  
28

29 **Principal Considerations**  
30

31 In determining whether or not a price control situation applies, regard may be  
32 had to the following particular considerations:

33  
34 *(A) Whether decisions of the relevant producers or exporters relating to prices,*  
35 *costs, inputs, sales, and investments are made in response to market*  
36 *signals and without significant state interference.*  
37

38 To assist in assessing this consideration, information should be provided as to  
39 whether:

40  
41 *(i) genuinely private companies or parties hold the majority*  
42 *shareholding of the relevant producer or exporter;*  
43

1 (ii) state or provincial officials appearing on the board or in key  
2 management positions are in a clear minority;

3  
4 (iii) *the relevant producer or exporter has the guaranteed freedom to*  
5 *carry on business activities. In this regard, information is sought*  
6 *as to whether:*

7  
8 (a) there is no restriction on selling on the domestic market;

9  
10 (b) the right to do business cannot be withdrawn outside proper contractual  
11 terms; and

12  
13 (c) in the case of joint venture companies, profits can be exported and  
14 capital invested can be repatriated.

15  
16 (iv) major production inputs of the relevant producer or exporter are or are  
17 not supplied by state owned or controlled enterprises at prices which  
18 do not substantially reflect free market conditions. Inputs include, inter  
19 alia, raw materials, labour, energy and technology costs.

20  
21 (B) *Whether one clear set of basic accounting records is kept by the relevant*  
22 *producer or exporter and is independently audited and is maintained in*  
23 *accordance with generally accepted accounting principles in the country of*  
24 *export and in line with international accounting standards.*

25  
26 (C) Whether the production costs and financial situation of the relevant  
27 producer or exporter are or are not subject to any significant distortions  
28 carried over from the non-market economy system.

29  
30 (D) *Whether the relevant producer or exporter is subject to bankruptcy and*  
31 *property laws, which guarantee legal certainty and stability of performance.*

32  
33  
34 **Other Influencing Considerations**

35  
36 In considering whether a price control situation exists, regard may also be had to the  
37 following further considerations:

38  
39  
40 (1) Whether the relevant producer or exporter of the goods under consideration  
41 forms part of a broader market or sector in which the presence of a State  
42 owned enterprise or enterprises has influenced prices.

43  
44 (2) Whether the supply of utilities are guaranteed on the basis of contracts that  
45 reflect normal commercial terms and prices which are generally available  
46 throughout the economy.

47

1 (3) Whether the land on which the facilities of the company are built are rented  
2 from the State at conditions comparable to those in a market economy country  
3 (eg. proper contractual leases).  
4

5 (4) Whether the company has the right to hire and dismiss employees and the right  
6 to fix salaries.  
7

8 I shall also have regard to any other information received which is relevant to my  
9 consideration of the existence or otherwise of a price control situation.  
10

11 The relative importance I give to any one or more of the above considerations will  
12 depend upon the facts as they emerge in the course of the particular anti-dumping  
13 inquiry.”  
14

15 This ACDN replaces ACDN No. 2000/60.  
16  
17  
18  
19  
20  
21

22 SUE PITMAN  
23 National Manager  
24 Trade Measures Branch  
25 CANBERRA ACT  
26 28 June 2001  
27



1  
2 **Australian Customs Dumping Notice**  
3 **No.2001/13**

4  
5 **CUSTOMS ACT 1901 - PART XVB**  
6 **Section 269TAE**

7  
8 **MINISTERIAL GUIDANCE ON**  
9 **MATERIAL INJURY AND CAUSAL LINK**

10  
11  
12 In December 2000, the former Minister for Justice and Customs (Senator Vanstone)  
13 affirmed the Ministerial Direction of 1990 on material injury, and on causal link.

14  
15 “I should firstly like to state that the reference in the 1990 Ministerial Direction to the  
16 volume of dumped imports and a diminution of profit are not to be read cumulatively.  
17 This is consistent with the wording of the direction (which refers to one or the other)  
18 and the anti-dumping agreement.

19  
20 I would draw attention to the fact that the 1990 Direction does not use the word  
21 ‘significant’ in determining if an indicator is ‘material’. This Direction defines  
22 ‘material’ to be ‘not immaterial insubstantial or insignificant’. This is a minimum test.

23  
24 I do not consider that any minimum standard can be used to determine whether  
25 dumped goods have a sufficient share of the Australian market to cause or threaten  
26 material injury. This question can only be determined on a case by case basis.

27  
28 Likewise, where an industry has suffered a diminution of profits through price  
29 depression or suppression which is ‘material’, there is not an additional requirement  
30 imposed by the Ministerial Direction that there must also be a finding that dumped  
31 goods have a significant market share.

32  
33 In determining the question of the profit of an industry in an expanding market, I  
34 would endorse the comments made by the Minister for Industry Technology and  
35 Commerce in his letter of 16 December 1991

36  
37 ‘...the Customs Service considering an industry which has been expanding its market  
38 rapidly, might decide that no action be taken against dumping which has merely  
39 slowed the rate of industry’s growth without causing it to contract. Should such a case  
40 arise I expect you to bear in mind that a substantial diminution in an industry’s rate of  
41 growth can be just as serious to the Australian economy as the movement of the  
42 industry from growth to decline. In this matter as in all others of course, your

1 judgement should be guided by observable facts and not by unsupported assertions  
2 that an industry would have been far more prosperous if dumping had not occurred'

3  
4 Also I would endorse the comment in the letter *viz.*

5  
6 'an industry which at one point in time is healthy and could shrug off the effects of the  
7 presence of dumped products in its market could at another time, weakened by other  
8 events, suffer material injury from the same amount and degree of dumping.'

9  
10 Some uncertainty has arisen over the requirements for establishing that material injury  
11 has been caused by dumping, when other factors may also be contributing to the  
12 injury suffered by an industry. I consider in such circumstance that if the injury  
13 caused to an industry from dumped sources is material then that is sufficient. This is  
14 consistent with the anti-dumping agreement.

15  
16 In considering what is material injury, I would expect Customs to have regard to all  
17 indicators of material injury, and where a particular indicator is not relied upon, a  
18 reason must be given for that decision."

19  
20 Any enquiries regarding this notice may be directed to Michael Mulgrew, Director  
21 Policy, Trade Measures Branch telephone 02 6275 6195.

22  
23  
24  
25  
26  
27 Sue Pitman  
28 National Manager  
29 Trade Measures Branch

30  
31 7 February 2001  
32  
33

1

2 **GLOSSARY**

3

4 **Arms Length**

5 Section 269TAA of the Customs Act sets out the circumstances where a transaction is to be  
6 treated as non arms-length.

7

8 A transaction cannot be considered to be arms-length if:

9

- 10 • there is a consideration other than price; or
- 11
- 12 • the price is influenced by a relationship between the importer and exporter; or
- 13
- 14 • the buyer will be reimbursed, compensated or receive a benefit in respect of  
15 the price (unless it is an established, normal business practice to do so).
- 16

17 Export sales may also be determined as not at arms length if the importer is selling at  
18 a loss.

19

20 **Ascertained Export Price, Normal Value And Non-Injurious Price**

21 Where a decision is taken to impose provisional or final dumping measures, it is  
22 necessary to ascertain what is or would be the normal value, the export price and the  
23 non-injurious export price (in the case of final measures) of those goods. The details  
24 of these ascertained prices must be published in the formal notice unless the release  
25 of such details contains information regarded by an interested party as confidential.  
26 The ascertained export price should not be confused with the actual export price.

27

28 See also *Normal Value, Export Price, Non-Injurious Price* and *Interim Duty*

29

30 **Australian Industry**

31 Section 269T(4) of the *Customs Act* states there is an Australian industry in respect of 'goods  
32 of a particular kind' if there is a person or persons who produces like goods in Australia.  
33 Where the like goods are close processed agricultural goods, the Australian industry will  
34 include producers of raw agricultural products.

35

36 Goods are not regarded as produced in Australia (other than unmanufactured raw  
37 products) unless the goods are wholly or partly manufactured in Australia. To be  
38 considered wholly or partly manufactured in Australia, at least one substantial  
39 process in the manufacture of the goods must be carried out in Australia.

40

41 Applications must be supported by a sufficient part of the Australian industry.  
42 Section 269TB(6) defines a sufficient part of the Australian industry as domestic  
43 producers whose collective output is more than 50% of the total production of those  
44 that have commented on the application. Supporters of the application must also  
45 account for 25% or more of the total production.

46

47 See also *Close Processed Agricultural Goods* and *Like Goods*

48

49 **Close Processed Agricultural Goods**

50 Refer s. 269(4), (4A), & (4B) of the *Customs Act*. Close processed agricultural goods are  
51 defined as goods that are derived substantially or completely from raw agricultural goods  
52 where the raw goods are devoted substantially or completely to the processed goods. There

1 must also be either a close price relationship between the goods, or a significant part of the  
2 production costs of the processed goods is constituted by the cost of the raw goods. Producers  
3 of close processed agricultural goods form part of the Australian industry in respect of  
4 considerations of material injury.

## 5 6 Dumping

7 Dumping occurs when goods are exported to Australia at a price that is below the “normal  
8 value” of the goods. Normal value is usually the domestic price of the goods in the country of  
9 export.

10  
11 Australia's anti-dumping and countervailing legislation is found in Part XVB of the *Customs*  
12 *Act 1901* and *Customs Tariff (Anti-Dumping) Act 1975*. The legislation reflects Australia's  
13 rights and obligations as a signatory to the WTO Anti-Dumping Agreement and Agreement  
14 on Subsidies and Countervailing Measures and with the Government's industry and economic  
15 policies.

16  
17 Australia's legislation does not seek to establish whether dumping was or is  
18 predatory, and in some sense unfair. Rather, the objective is simply to identify the  
19 price differentiation if it exists, any material injury caused thereby, and to provide a  
20 mechanism to remove the injurious effect of subsequent imports.

## 21 22 Dumping Duty

23 Dumping duty is distinct from import duties. Dumping duties may apply to imports covered  
24 by measures in accordance with s. 269TG(1) of the *Customs Act* as well as all future imports  
25 under s. 269TG(2). Public notice is given if a dumping duty is to be imposed.

## 26 27 Dumping Margin

28 The dumping margin is the difference between the export price and the normal value.  
29 Dumping margins are usually calculated for each individual exporter and can be expressed as  
30 a value or as a percentage of the export price.

31  
32 Dumping margins can be determined using different methodologies depending on the  
33 circumstances of the investigation. Under s. 269TACB of the *Customs Act* export  
34 prices are compared with normal values to arrive at dumping margins as follows:

- 35
- 36 • the weighted average export price over the whole of the investigation period with the  
37 weighted average of corresponding normal values over the whole of that period; or
  - 38
  - 39 • using the above method in respect of parts of the investigation period as if each of these  
40 parts were the whole of the investigation period; or
  - 41
  - 42 • the export price in respect of individual transactions over the whole of the investigation  
43 period with the corresponding normal values determined over the whole of that period; or
  - 44
  - 45 • a combination of methods referred to above in respect of part or parts of the investigation
  - 46

47 If the number of exporters who have provided a submission is so large that it is impractical to  
48 calculate individual dumping margins for each of the exporters, statistical sampling may be  
49 used to calculate dumping margins for those exporters with the largest volume of exports to  
50 Australia. The dumping margins established under this approach might then be used for the  
51 remaining exporters and applied as residual margins for that country.

## 52 53 Export Price

54 Export prices are determined under s. 269TAB of the *Customs Act*.

1  
2 Usually the export price is determined under s. 269TAB(1)(a) using the actual price  
3 paid by the Australian importer, less post exportation charges, where:

- 4  
5 • the importer is not the exporter;  
6  
7 • the transaction is arms length: and  
8  
9 • the goods have been purchased by the importer from the exporter.

10  
11 When the sales are considered not to be arms-length, s. 269TAB(1)(b) and the  
12 related s. 269TAB(2) provide a method to determine the export price on the basis of  
13 the selling price by the importer, less prescribed deductions, provided:

- 14  
15 • the subsequent sale in Australia by the importer was to a non-associated  
16 person; and  
17  
18 • the goods have been sold in the condition in which they were imported.

19  
20 Prescribed deductions include any duties or sales tax paid or payable on the goods and all  
21 other costs or charges incurred after exportation and profit.

22  
23 When the conditions of s. 269TAB(1)(a) and (1)(b) cannot be met, s. 269TAB(1)(c) permits  
24 the export price to be determined having regard to all the circumstances of the exportation.

25  
26 When sufficient information has not been furnished, or is not available, to enable the export  
27 price to be determined under the preceding provisions, the export price is determined having  
28 regard to all relevant information under s. 269TAB(3).

29  
30 See also *Arms Length*

### 31 32 Final Measures

33 Final measures can take the form of dumping or countervailing duty (pre 1/1/93  
34 measures), interim dumping or countervailing duty (post 1/1/93 measures) or an  
35 undertaking by the exporter (or in countervailing cases the exporter or the  
36 government of the exporting country). In accordance with s. 269TM, dumping and  
37 countervailing duties and undertakings remain in force for a maximum of five years,  
38 unless revoked earlier.

### 39 40 Initiation Report

41 A report recommending or rejecting an application on the basis that reasonable grounds do or  
42 do not exist for the publication of a notice. The report will set out the reasons as to whether or  
43 not, *prima facie*, the application meets the provisions of s. 269TC of the Customs Act.

### 44 45 Interim Dumping/Countervailing Duty

46 Under the interim duty scheme, introduced on 1 January 1993, an amount of  
47 dumping/countervailing duty is collected on every importation of the goods. That duty  
48 is known as interim dumping/countervailing duty. Interim duty does not apply to  
49 goods that became subject to final anti-dumping and countervailing measures before  
50 1 January 1993.

51  
52 Interim duty (in the case of final measures) is the sum of: the difference between the  
53 ascertained normal value (or the ascertained non-injurious price if that is lower) and

1 the ascertained export price of the goods, plus the amount by which the actual export  
2 price is less than the ascertained export price. The interim duty may be levied on an  
3 *ad valorem* basis (i.e. x% of the export price), as a price per unit of quantity (e.g. \$y  
4 per tonne) or as a combination of the two.

5  
6 See also *Ascertained Normal Value, Export Price and Non-Injurious Price*

## 7 8 Investigation

9 Customs role in the dumping and subsidisation investigation is to:

- 10  
11 • consider applications for the publication of dumping duty and countervailing duty  
12 notices;  
13  
14 • make recommendations to the minister on whether sufficient grounds exist or that  
15 there are not sufficient grounds for the publication of dumping duty and/or  
16 countervailing duty notices; and  
17  
18 • where appropriate, require and take securities in respect of any dumping duty/  
19 countervailing duty that may become payable.  
20

21 The legislation imposes time limits within which an investigation is conducted:

- 22  
23 • 20 days to examine an application and if not satisfied about certain matters  
24 reject the application;  
25  
26 • if an application is not rejected, at day 60+ (calculated from the day of  
27 initiation of the investigation) to reach a preliminary affirmative determination  
28 (if appropriate); at day 110 to issue a statement of essential facts (unless this  
29 date has been extended by the minister); and day 155 to make a  
30 recommendation to the minister;  
31

32 Interested parties are invited to make submissions within the first 40 days after the  
33 notification of the initiation of an investigation. An extension to a deadline for receipt  
34 of submissions by interested parties may be extended if a request is received in  
35 writing and the request is reasonable and practicable given the circumstances of the  
36 investigation. Interested parties are also given an opportunity to respond to the  
37 statement of facts.  
38

## 39 Investigation Period

40 A period specified in the initiation notice over which importations of the goods under  
41 consideration are examined. The investigation period is relevant to the application of  
42 provisions dealing with such matters as the determination (for normal value  
43 purposes) of whether sales are in the ordinary course of trade, and in calculations to  
44 establish whether dumping or subsidy is negligible.  
45

## 46 Like Goods

47 Section 269T(1) of the *Customs Act* defines 'like goods' as:

48  
49 goods that are identical in all respects to the goods under consideration  
50 or that, although not alike in all respects to the goods under  
51 consideration, have characteristics closely resembling those of the goods  
52 under consideration.  
53

1 **Material Injury**

2 The minister may impose measures to relieve the affect of dumping up to the level of  
3 the dumping margin, when it has been proven that dumping has caused or is  
4 threatening to cause material injury to the Australian industry. Section 269TAE of the  
5 *Customs Act* lists factors that may be regarded in determining whether the Australian  
6 industry has suffered material injury caused by dumping and subsidisation.

7  
8 The factors include:

- 9
- 10 • the size of the dumping margin/s in respect of the goods exported to Australia and/or  
11 particulars of any countervailable subsidy received in respect of goods exported to  
12 Australia;
  - 13
  - 14 • the quantity of goods under consideration exported to, and consumed in Australia  
15 during a particular period and the consequential effect on the quantity of like  
16 goods produced or manufactured in Australia by the Australian industry and sold  
17 or consumed in Australia;
  - 18
  - 19 • the export price of the goods under consideration and the price paid for the goods  
20 sold in Australia and the consequential effect on the price paid for like goods  
21 produced or manufactured by the Australian industry and sold in Australia; and  
22
  - 23 • the effect that the exportation of goods under consideration to Australia in those  
24 circumstances has on the relevant economic factors in relation to the Australian  
25 industry.

26  
27 **Non-Injurious Price (NIP)**

28 Dumping duties may be applied where it is established that dumped imports have caused or  
29 threaten to cause injury to the Australian industry producing like goods. The level of  
30 dumping duty cannot exceed the margin of dumping, but lesser duty may be applied if it is  
31 determined that it is sufficient to remove the injury. A non-injurious FOB price (NIFOB) or  
32 non-injurious price (NIP) is calculated for this purpose. The NIFOB and the NIP provide the  
33 mechanism whereby this lesser duty provision is given effect - the FOB price that would be  
34 sufficient to remove the injury caused to the Australian industry by the dumping.

35  
36 The terms NIFOB and NIP have essentially the same meaning. The term NIFOB is not  
37 specifically defined in legislation and applies only to anti-dumping measures imposed before  
38 1 January 1993. The NIP is defined but the method of calculation is not covered in the  
39 legislation.

40  
41 Customs generally derives the NIP by first establishing a price at which the local industry  
42 might reasonably sell its product in the absence of the price effects of dumped/subsidised  
43 imports. This price is known as the unsuppressed selling price. From this, the costs incurred  
44 in importation are deducted until a notional selling price at an FOB level is derived.

45  
46 **Normal Value**

47 Normal value is the key to establishing whether dumping exists and s 269TAC of the  
48 Customs Act sets out the methods used to ascertain the normal value of goods exported to  
49 Australia. (Refer to Australian Customs Service Manual Vol. 22 - Dumping & Subsidisation,  
50 Division 2 Section 6 for a full discussion on establishing the normal value of the goods).

51  
52 Usually, the normal value is ascertained under s. 269TAC(1) as the price paid for like goods  
53 in the domestic market of the exporting country provided:

54

- 1 • the goods are exported to Australia;
- 2
- 3 • the sale is in the ordinary course of trade:
- 4
- 5 • the sale is for home consumption in the country of export;
- 6
- 7 • the exporter's domestic sales are arms length ;
- 8
- 9 • the volume of sales in the domestic market of the exporting country is such as
- 10 to permit a proper comparison with sales to Australia - generally an
- 11 acceptable volume is taken to be 5% or more of the volume of the goods
- 12 exported to Australia; and
- 13
- 14 • the situation in the exporters domestic market is such that the sales are suitable for
- 15 determining a normal value.
- 16

17 If the exporter's domestic sales do not satisfy all of the above criteria, the same tests  
18 are applied to sales by other sellers of like goods on the domestic market of the  
19 exporting country.

20  
21 Normal value cannot be determined under s. 269TAC(1) where:

- 22
- 23 • domestic sales that would be relevant for determining a price are absent or of low
- 24 volume;
- 25
- 26 • the market situation in the country of export is such that it renders domestic sales as
- 27 unsuitable for use in determining normal value; or
- 28
- 29 • it is not practical to obtain information in relation to sales by other sellers of like
- 30 goods on the domestic market within a reasonable period.
- 31

32 Section 269TAC provides alternative methods for determining normal values where the  
33 criteria of s. 269TAC(1) are not satisfied.

34  
35 Under s 269TAC(2)(c) and unless s. 269TAC(2)(d) applies, the normal value of the goods is  
36 the sum of:

- 37
- 38 • the cost of production or manufacture of the goods in the country of
- 39 export; and
- 40
- 41 • on the assumption that the goods, instead of being exported, had
- 42 been sold for home consumption in the ordinary course of trade in the country
- 43 of export, the administrative, selling and general expenses (AS&G)
- 44 associated with the sale; and
- 45
- 46 • an amount of profit.
- 47

48 In circumstances where a normal value cannot be determined from domestic selling prices  
49 because sales are found to be not in the ordinary course of trade, a profit component is not  
50 included.

51  
52 Under s. 269TAC(2)(d) where normal value cannot be determined under the provisions of  
53 s. 269TAC(1), and the minister so directs, the normal value of the goods is the price paid for

1 like goods sold in the ordinary course of trade in arms length transactions for exportation to  
2 an appropriate third country.

3  
4 Customs seeks evidence relating to both sections in order to decide which is the most suitable  
5 method for ascertaining normal value.

6  
7 Where it is satisfied that sufficient information has not been supplied or is not  
8 available to determine normal values under any of the preceding provisions, the  
9 normal value may be ascertained under s. 269TAC(6) having regard to all relevant  
10 information.

11  
12 Section 269TAC(4) provides a number of methods for ascertaining normal values  
13 where the government of the country of export has a monopoly, or substantial  
14 monopoly of the trade of the country, and determines or substantially influences the  
15 domestic price of goods in that country.

16  
17 Sections 269TAC(8) and 269TAC(9) provide for adjustments to be made to the  
18 normal value to account for differences where the domestic and export sales prices:

- 19  
20 • relate to sales occurring at different times;  
21  
22 • are not in respect of identical goods; or  
23  
24 • are modified in different ways by taxes or terms or circumstances of the sales.  
25

26 Section 269TAC(10) enables the normal value to be determined in the country of origin  
27 instead of the country of export when it is considered appropriate by the minister.  
28

### 29 Notice

30 A notice is a dumping duty or countervailing duty notice. It is a legal document signed  
31 by the minister or his/her delegate, giving effect to the provisions of the Customs Act  
32 and the Dumping Duty Act.

### 33 Ordinary Course of Trade

34 Section 269TAAD of the Customs Act defines sales that are not in the ordinary course of  
35 trade. In general, where Customs is satisfied that the price paid for like goods is less than the  
36 cost to make and sell, in arms length transactions, then the sales are taken not to have been  
37 made in the ordinary course of trade if these sales:  
38

- 39  
40 • have been for an extended period of time - usually considered to be a 12  
41 month period but not less than 6 months;  
42  
43 • are in respect of a substantial quantity of the goods - 20% or more of the  
44 volume sold on the exporters domestic market or for exportation to a third  
45 country; and  
46  
47 • those costs are unlikely to be recovered within a reasonable period of time.  
48

### 49 Preliminary Affirmative Determination

50 A determination made by Customs not less than 60 days of the date of public notification if  
51 provisional measures are to be imposed. Generally it will be published in a national  
52 newspaper and an ACDN.  
53

1 A public report is issued by Customs following consideration of an application for the  
2 imposition of anti-dumping or countervailing measures. It contains the preliminary  
3 determination and the recommendations concerning provisional measures.

4  
5 The investigation process will proceed as normal until the recommendation is made to the  
6 minister unless an undertaking is offered and accepted.

#### 7 8 **Provisional Measures - Securities**

9 Generally, provisional measures are applied in order to prevent further injury, or threat of  
10 injury, to the Australian industry after the preliminary affirmative determination is made until  
11 a final finding is reached (when interim measures may be put in place). Provisional measures  
12 may also be collected in other circumstances, for example, a breach of undertaking or where  
13 interim duty is payable on goods as a result of an accelerated review.

14  
15 Securities will be calculated as the sum of:

- 16  
17 (a) the amounts equal to the ascertained dumping margin; and  
18  
19 (b) the amounts, if any, by which the actual export price is less than the ascertained  
20 export price.

21  
22 Sections 42 to 45 of the act provide the legal authority for Customs to require and take  
23 provisional measures in the form of securities, and to refuse delivery of these goods until such  
24 time as the required security is given. Securities are collected on an individual shipment basis  
25 and in the case where securities have been imposed to protect the Australian industry during  
26 the remainder of an investigation, continue to be collected until a recommendation is made to  
27 the minister.

28  
29 Where the minister accepts the recommendation to impose duties, current securities  
30 are converted to an interim duty liability. If the interim duty liability for the period of  
31 the final finding is less than the amount of securities collected, any additional  
32 securities are refunded.

#### 33 34 **Public File**

35 A file maintained by Customs, in accordance with s. 269ZI of the *Customs Act*, containing  
36 non-confidential information pertaining to anti-dumping and countervailing investigations.  
37 The file is held at Customs House, 5 Constitution Avenue, Canberra City. It is available for  
38 viewing and copying by all interested parties by contacting Trade Measures Office  
39 Management staff on (02) 6275 6057.

#### 40 41 **Scope**

42 Customs cannot recommend to the Minister whether anti-dumping action can be taken unless  
43 it has satisfactorily addressed the integral questions: have the goods been dumped, what has  
44 been the recent economic performance of the industry and has dumping caused material  
45 injury.

#### 46 47 **Securities - See Provisional Measures**

#### 48 49 **Statement of Essential Facts**

50 A statement placed on the public record at or before day 110 in the investigation process that  
51 sets out the facts on which the CEO will base his recommendation to the Minister. The  
52 statement invites interested parties to respond to the issues raised therein.

53

## 1 Subsidisation

2 In many countries, subsidies are provided for the production or export of goods. Where  
3 subsidised exports cause, or threaten to cause, injury to an Australian industry, countervailing  
4 duties can be imposed.

5  
6 Subsidisation occurs when a government, or a public body, or a private body who has been  
7 entrusted or directed by that government to carry out a function on its behalf; provides a  
8 financial contribution towards the production, manufacture or export of goods.

9  
10 The financial contribution must involve:

- 11 • a direct transfer of funds; or
- 12
- 13 • a direct transfer of funds depending on particular circumstances occurring; or
- 14
- 15 • the acceptance of liabilities either actual or potential; or
- 16
- 17 • the forgoing or non-collection of revenue (except an allowable exemption or
- 18 remission); or
- 19
- 20 • the provision of services other than normal infrastructure.
- 21
- 22

23 Financial contribution can also relate to any form of income or price support that is used to  
24 either directly or indirectly increase exports from the country or limit imports into the  
25 country.

26  
27 The financial contributions described above are only considered a subsidy for the goods under  
28 consideration if they confer a benefit in relation to those goods.

29  
30 Section 269TJ of the Act requires a subsidy to be a countervailable subsidy before provisional  
31 measures can be imposed. A countervailable subsidy is defined under s. 269TAAC which  
32 states that for a subsidy to be a countervailable subsidy, it must be specific and must not be an  
33 excluded subsidy. Section 269TAAC further defines the terms “specific subsidy” and  
34 “excluded subsidy”.

35  
36 Section 269TACC outlines how Customs determines whether benefits have been conferred  
37 from a countervailable subsidy.

## 38 Trade Measures Review Officer

39 Various sections of the Customs Act refer to Customs decisions that are appellable.  
40 Applicants may ask the TMRO to review Customs decisions in the case of:

- 41 • an application that is not accepted for investigation
- 42
- 43 • termination of investigations
- 44
- 45 • a negative preliminary decision under s. 269Z
- 46

47 The TMRO may confirm Customs initial decision or remit the matter to Customs for  
48 investigation. The Officer does not perform an investigative function.

49  
50 Interested parties may also ask the TMRO may also review certain ministerial decisions, such  
51 as

- 52 • the publication of a dumping duty notices
- 53
- 54 • a decision not to impose duty.

1

2