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## 7 Administration of the system and implementation arrangements

### Key points

- Customs, the Minister and the Trade Measures Review Officer (TMRO) should retain their broad roles within the anti-dumping system, though with some changes to their specific responsibilities. These roles and responsibilities should be reconsidered at the time of the next review.
- Current appeals processes should be modified to remove the need for reinvestigation of matters by Customs (unless the TMRO explicitly recommends such reassessment) and to widen the list of appellable decisions.
- Target investigation timeframes are often insufficient to allow for thorough assessment. As well as an increase of 30 days to allow for considerations against the public interest test, Customs should have greater flexibility to seek extensions in more complex cases.
  - Imposing a 30-day limit on decisions by the Minister and the reduced need for reinvestigations would provide offsetting time savings.
- Customs and the TMRO should be adequately and appropriately resourced for their functions under the new system.
- Customs should indicate in its investigation reports the relevance, if any, of the outcomes of any comparable overseas cases to the investigation at hand.
- To further improve the transparency of the anti-dumping system, there should be:
  - greater and more accessible public reporting on the number and nature of unsuccessful applications for anti-dumping measures
  - enhanced public reporting on the magnitude of anti-dumping measures and on the underlying variable factors.
- The Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.
- To give the parties time to adjust, there should be a two-year delay before the new public interest test and the changes to the continuation provisions take effect. The new arrangements should be independently and publicly reviewed five years after that.

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In the two previous chapters, the Commission has proposed a small number of changes to the legislative basis for Australia's anti-dumping system which it considers would deliver a better balance between the system's benefits and costs.

But whatever legislative changes are made in response to this inquiry, some changes to the current administrative arrangements are warranted to promote more transparent and fair outcomes and to ensure that there is an appropriate balance between timely decision-making and a rigorous assessment process. In framing its recommendations on these matters, the Commission has had regard to the analysis and findings of the various administrative reviews over the last decade, including the 2006 Joint Study (see box 7.1).

This chapter also discusses the implementation of the Commission's proposed reform package and future review arrangements.

## **7.1 Decision-making responsibilities**

The Commission is recommending that the Australian Customs and Border Protection Service (Customs), the Minister and the Trade Measures Review Officer (TMRO) should retain their current administrative and decision-making responsibilities within the anti-dumping system. However, their roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11), having regard to their efficiency and effectiveness within the refocused system which the Commission is recommending.

### **The assessment of applications for measures**

Submissions to the inquiry provided a range of commentary on Customs' performance as an assessment body.

While pointing to opportunities for improvement in that performance, those in favour of retaining a 'strong' anti-dumping system argued that Customs should retain its current responsibilities — observing that it has accumulated considerable expertise and is fair and balanced in applying the legislative requirements. Typifying these views, CSBP stated that it saw Customs as:

... housing built up expertise across all facets of an anti-dumping inquiry — injury analysis, market assessment, normal value and export price; having ... historical knowledge of past inquiries; ... strong contacts with other dumping administrations; and housing built up knowledge of the WTO Anti-Dumping Agreement and Australia's commitment in this regard ... (sub. 15, p. 11)

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### **Box 7.1 The 2006 Joint Study**

The Joint Study was initiated to ensure that administration of Australia's anti-dumping system reflects best practice and to respond to concerns of Australian manufacturers about the effectiveness of the system. The study was carried out by Customs and the Department of Industry, Tourism and Resources, along with the Department of Foreign Affairs and the TMRO. Its terms of reference specifically excluded examination of anti-dumping policy or the legislative basis for the system.

The study put forward more than 20 recommendations to improve the administrative arrangements — a number of which are discussed further in the text. All of the recommendations were accepted by the Government and, according to the advice received by the Commission, except for one (relating to warnings about making false and misleading statements), have now been implemented.

As well, the study briefly documented a range of issues, including some policy questions, that it judged were outside its terms of reference. Several of these — including the adequacy of access to anti-dumping protection for agricultural producers; consideration of wider benefits and costs; consideration in injury assessments of additional or potential profits; easing the so-called 'standing' requirements; giving the TMRO the power when reviewing a Minister's decision to substitute new findings; and introducing a time limit for the Minister's decision — were discussed in the previous two chapters, or are examined below in this chapter.

These participants went on to suggest that any relocation of the assessment function to a body such as the Australian Competition and Consumer Commission (ACCC) or the Productivity Commission would see dumping issues afforded lesser priority in view of the other functions of these bodies, and fairness given insufficient weight in the assessment process relative to efficiency.

There was also opposition to a return to a bifurcated assessment regime on the grounds that it would involve wasteful duplication of investigative effort and diminish the role of Customs in the assessment process. For example, the Cement Industry Federation stated that:

A single administration of the Anti-Dumping System is considered the most effective means of delivering timely outcomes and does not incur the additional resources involved in liaising with two separate administrative agencies. (sub. 9, p. 4)

A few other participants were, however, more open to the possibility of changes to assessment responsibilities. For example, the Australian Steel Association (sub. 28, para. 432) emphasised that, in view of the significant impacts that decisions have on interested parties, 'the quality of the decision making [should] be optimal and not be diminished by concerns as to speed and duplication'.

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For its part, the Commission considers that there would be little merit in returning to a bifurcated assessment model such as applied during the tenure of the Anti-Dumping Authority from 1988 to 1998. The potential for duplication of effort, with consequent adverse impacts on timeliness and costs, and the uncertainty for stakeholders associated with the rehearing of the facts by a second body, are two important considerations in this context.

There is a somewhat stronger case for a separation of organisational responsibility for determining dumping and material injury/causality along the lines of some overseas regimes (such as in Canada and the USA — see appendix C). In particular, assessing material injury and causality requires different expertise from the task of establishing dumping. Also, the bifurcation of the process on this basis would involve less potential for duplication of effort. However, the number of anti-dumping cases is now probably too small to justify the costs of establishing a specialist agency to undertake the second stage of the assessment function.

The Commission is similarly unconvinced that there would be a net benefit from shifting responsibility for undertaking assessments under the new arrangements from Customs to a different body. The main argument for doing so would centre on the capacity of Customs to analyse wider impacts under the proposed public interest test. But, as discussed in chapter 5, the Commission has framed its recommended, exhaustive, list of circumstances when the imposition of measures would not be in the public interest to draw heavily on the analysis already undertaken by Customs in assessing dumping and injury matters. And in any cases where public interest issues were especially complex, it would obviously be open for Customs to seek advice from entities more experienced in the analysis of such matters.

Also, it would take considerable time and resources for a new assessment body to acquire the specific knowledge that currently exists within Customs in relation to the complexities of the system and the World Trade Organization (WTO) rules and procedures, and to replicate the linkages that Customs has established with overseas investigation bodies and the WTO.

Nonetheless, the Commission considers that the issue of assessment responsibilities should be revisited at the next review when Customs' capacity to effectively and efficiently undertake the new and revised functions would be more evident. The proposal in the Draft Report to retain Customs as the assessment body was widely supported — see, for example: the Australian Dried Fruits Association (sub. DR52, p. 1); the Australian Plantation Products and Paper Industry Council (A3P) (sub. DR45, p. 2); James Stevenson (sub. DR42, p. 13); Penrice Soda Products (sub. DR54, p. 3); Qenos (sub. DR48, p. 4); and Sulo (sub. DR58, p. 2).

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## Final decision-making responsibility

The final decision on whether to impose anti-dumping or countervailing duties, or to accept an undertaking from an overseas supplier, currently rests with the Minister. This separation of decision-making from the investigation process provides for independent scrutiny of the outcomes of that process.

Indeed, a number of participants argued that Ministerial involvement is important to maintain the integrity of the system, especially given the commercial and broader economic ramifications of the decisions involved. For example, the Trade Remedies Task Force (TRTF) stated:

To allow a Minister to be in a position to form his or her own evaluation is ... seen as a worthwhile exercise of discretion in appropriate circumstances ... Submissions could be made [to the Minister] as to the weight of evidence or to raise legal issues that have been ignored or inadequately considered during the investigation. (sub. 26, pp. 38–39)

In practice, however, there has only been one instance in the last decade where the Minister has departed from the recommendations of Customs (and then not on the basis of the discretion for the Minister to consider factors beyond dumping, injury and causality matters). This (and some question marks about the extent of the Minister's discretion — see chapter 2) led the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 6) to conclude that 'the responsibility for the anti-dumping system and decision-making should be undertaken by a government agency (or agencies) rather than through elected Parliamentary Representatives'.

Similarly, James Stevenson (sub. DR42, p. 11) stated, 'If an appropriate and lawful system concludes dumping is occurring then there is no need for the Minister to be involved.' And the Australian Steel Association (sub. DR57, para. 240) opposed any role for the Minister in the system, particularly if a public interest test were introduced, because there might be 'undue political pressure on the Minister'.

The Commission also sees considerable advantages in removing the Minister from the process. Given that Customs' advice has almost always prevailed, there have seemingly been few benefits from Ministerial involvement to offset the slower decision-making entailed. And, as discussed below, the Administrative Appeals Tribunal (AAT) or other specialist body would arguably be better equipped than the Minister to take on the enhanced decision-making responsibility that would be necessary under a more robust appeals process.

However, as also discussed below, an AAT approach would be more costly than an enhanced appeals mechanism that retained the role for the Minister. More broadly, at least until the public interest test is bedded down, retaining the Minister as the

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ultimate decision maker may help to assuage concerns that the test will unreasonably deny access to anti-dumping protection.

On balance, the Commission considers that a cautious approach is warranted and that, for the time being at least, the Minister should continue to be responsible for making the key decisions within the system. But if the public interest test is operating effectively at the time of the next review, it might well then be appropriate to dispense with Ministerial involvement and instead leave all decision-making to non-political entities.

### **Responsibility for hearing appeals**

As in the case of the assessment function, the proposed consideration of wider impacts in anti-dumping cases raises the question of whether responsibility for hearing appeals should be relocated to another body.

Most participants saw the TMRO as a cost-effective appeals mechanism. However, a smaller number considered that there should be a more robust arrangement. For example, the Australian Steel Association (sub. DR57, para. 256), suggested that consideration be given to a strengthened merits review process, such as through the AAT (see box 7.2). The Law Council of Australia and the Law Institute of Victoria, while not opposing an ongoing role for the TMRO, advocated that any subsequent litigation be undertaken on the basis that:

... the decision maker can substitute a new decision “on the merits” in a manner consistent with the reviews undertaken by the Administrative Appeals Tribunal. (sub. 29, p. 21)

And Richard Whitwell (trans. pp. 77–78) argued for the elevation of the review process to the level of a judicial tribunal, such as the Australian Competition Tribunal, in order to improve the veracity of the process.

The Commission similarly sees some advantages in using the AAT (or other specialist tribunal) in the appeals process. The AAT is the appeals body in some broadly comparable regulatory areas and has expertise that could be relevant in the anti-dumping area. Further, as noted earlier, use of the AAT would obviate the need to retain the Minister in the decision-making process.

However, the AAT approach could entail higher costs for the parties involved and possibly a more lengthy process as well. More importantly, for the reasons outlined above, the Commission is recommending that, for the time being at least, the Minister be retained as the ultimate decision maker.

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**Box 7.2 The Administrative Appeals Tribunal**

The Administrative Appeals Tribunal (AAT) provides independent merits reviews of a wide range of administrative decisions made by Australian Government Ministers, departments, agencies, authorities and other tribunals.

In undertaking most reviews, it considers afresh the relevant facts, law and policy and will either affirm, vary or set aside the decision under review.

Proceedings of the AAT are conducted with as little formality and technicality, and with as much expedition, as the requirements of the *Administrative Appeals Tribunal Act* and a proper consideration of the matters permit. The AAT is not bound by the rules of evidence and can inform itself in any manner it considers appropriate.

The AAT falls within the portfolio of the Attorney-General.

Further, the Commission considers that the robustness of the TMRO arrangement could be enhanced through a small number of procedural changes (see below). And though, as with Customs, there are some questions over the TMRO's capacity to assess wider impacts, it too could draw on independent advice were any assessments under the public interest test to be especially complex. Of course, this would require the TMRO to be adequately resourced (see section 7.3).

On balance, the Commission considers that the TMRO should retain its role for the time being. Again, however, the Commission recommends that, in conjunction with the reassessment of the roles of Customs and the Minister, the benefits and costs of instead employing the AAT (or some other specialist appeals tribunal) should be revisited at the time of the next review.

RECOMMENDATION 7.1

*The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission's other recommendations.*

*These roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11) in the light of experience with the new system.*

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## 7.2 The configuration of the appeals mechanism

As outlined in chapter 2, the extent of parties' rights to merits review, and the powers of the TMRO, differ across the different steps in the process. For example:

- While any interested party may appeal decisions concerning the imposition of anti-dumping duties, not all measures-related decisions are appellable (see below).
- Where an appeal relates to a decision by the CEO of Customs — for example, to terminate an application or investigation — and the TMRO reaches a different conclusion, it can substitute another decision. But where an appeal relates to a decision to impose or not impose anti-dumping duties, the TMRO can only recommend to the Minister that Customs reinvestigate the finding(s) concerned.

In reviewing decisions, the TMRO may only take account of information available to Customs in the course of the original investigation.

Over the last five years, the TMRO has reviewed around 80 per cent of the decisions by the Minister relating to the imposition of anti-dumping duties and around 90 per cent of the decisions by the CEO of Customs to terminate an investigation. The TMRO recommended that Customs reinvestigate around 60 per cent of the cases where measures had been imposed, and affirmed around 80 per cent of the decisions to terminate investigations.

Most local industry interests argued that the scope of the current arrangements is appropriate and that there is no need to extend the powers of the TMRO. Typifying these views, the TRTF stated:

Any consideration of extending the function [of the TMRO] to include more than the present role would have resource implications for the present role which is performed by one officer. Additional resources would need to be provided and different set of skills needed for the role of the TMRO. The position of the TRTF is that the present role of that officer is sufficient and there is no need for change. (sub. 26, p. 42)

However, others, such as the Australian Steel Association (sub. 28, paras. 849–857), contended that the mandate of the TMRO is unduly limited. Similarly, the Law Council of Australia and the Law Institute of Victoria stated:

In many cases, the TMRO does not have the jurisdiction to review decisions. Even when the TMRO has jurisdiction to review decisions, the subsequent reinvestigation of decisions by Customs and the Minister leave aggrieved parties with recourse only to Federal Court litigation. Such litigation is, obviously, expensive and time-consuming. (sub. 29, p. 21)

The Commission concurs that the current appeal arrangements are not sufficiently robust, especially in the context of the introduction of a public interest test that

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would require Customs and the Minister to have regard to wider impacts. Some of the current restrictions on the types of appellable decisions and the process that sees many successful appeals simply reinvestigated by Customs are particularly questionable.

### **The list of appellable decisions**

Decisions that are not currently appellable, include those relating to:

- the continuation of dumping or countervailing measures beyond the initial five-year term — that is, the decision whether or not to commence a continuation inquiry and the Minister’s subsequent decision if one is undertaken
- the acceptance of undertakings
- variations to the variable factors and magnitude of measures made under the current ‘review of measures provision’
- not initiating a review of the amount of interim dumping duty.

Obviously, there will be costs in adding to the list of appellable decisions. However, for continuation decisions in particular, the Commission considers that these costs would be warranted. While the basis for a decision to continue — or not to continue — anti-dumping and countervailing measures is different from the basis for the original decision to impose measures, in terms of the ensuing commercial implications, there is little or no difference between the two. Several submissions, for example from Penrice Soda Products (sub. DR54, p. 3), Qenos (sub. DR48, p. 3) and Sulo (sub. DR58, p. 2), supported the Draft Report proposal that continuation decisions should be appellable.

In practice, permitting appeals against decisions to accept undertakings may be of limited value. That is, an overseas supplier whose offer of an undertaking is not accepted can raise its prices, thereby creating a de facto undertaking (albeit one that currently involves the importer applying to Customs for a refund of duties paid). Similarly, as discussed in chapter 6, the Commission considers that allowing appeals against changes to the magnitude of measures under the proposed new adjustment mechanism could undermine the timeliness and cost-effectiveness of this mechanism. (However, the recalibration of the variable factors as part of a continuation decision should be appellable, consistent with the Commission’s recommendation on the other elements of continuation decisions.)

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## The reinvestigation process

The provision which limits the TMRO to ordering a reinvestigation by Customs where it disagrees with a decision made by the Minister is, in the Commission's view, a further significant shortcoming in the current arrangements. An appeal arrangement which simply leads to reinvestigation by the provider of the advice on which the decision was based cannot reasonably be regarded as robust or fair.

There are several ways in which this deficiency could be addressed:

- remove the need for reinvestigation by handing final decision-making responsibility where there is a successful appeal to the AAT or another specialist tribunal
- allow the TMRO to substitute a decision made by the Minister
- require Customs to reinvestigate the case on the basis that the findings in the original investigation that were successfully appealed were flawed — as canvassed by the Law Council of Australia and the Law Institute of Victoria (sub. 29, pp. 17–18)
- remove the need for reinvestigation by requiring the Minister to make a final determination having regard to the findings of both the TMRO and the initial advice from Customs.

### *The Commission's view*

The previously discussed considerations that militate against using the AAT (or other specialist tribunal) in place of the TMRO and the Minister, are also germane to the option of using the AAT in situations where the TMRO's view differs from that of Customs. In particular, at least until the public interest test is bedded down, retaining the Minister as the ultimate decision maker would be beneficial. This same consideration also weighs against allowing the TMRO to substitute decisions made by the Minister (as distinct from those made by the CEO of Customs).

Ordering a reinvestigation by Customs starting from the premise that some of the initial findings were flawed could preclude Customs merely reaffirming its original advice to the Minister. But if acceptance of the grounds on which an appeal has been upheld would necessarily lead Customs to overturn its original advice, then the question arises as to what a reinvestigation would add.

As it argued in the Draft Report, in the Commission's view, the best general approach would be to require the Minister to make a final decision based on the original advice from Customs and the advice from the TMRO. This would avoid the moral hazard problems associated with Customs investigating its own decisions and

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reduce the time taken to finalise appealed cases. Though there are no pre-specified time limits for reinvestigations by Customs, in recent years they have averaged around 80 days, (not including the time taken for the Minister to make a second decision).

In responding to the Draft Report, CSR (sub. DR47, p. 5), the Food & Beverage Importers Association (sub. DR46, p. 2), Poly Pacific and Townsend Chemicals (sub. DR51, p. 9) and SCA Hygiene (sub. DR60, p. 3) supported this general approach, with several commenting that it would speed up the decision-making process. However, OneSteel (sub. DR49, p. 7), Sulo (sub. DR58, pp. 2–3) and Qenos (sub. DR48, p. 4) opposed the change, with the latter arguing that the conflicting advice would cause a dilemma for the Minister.

The Commission accepts that an approach requiring the Minister to make a decision based on two sets of competing advice could be seen as putting the Minister ‘on the spot’. But this is not a reason to maintain the flawed current arrangements. If it transpires that the proposed general approach is not effective — for example, were it to significantly increase the spectre of lobbying, or simply lead to de facto reinvestigation by Customs — then this would strengthen the case for moving to an AAT-type approach and removing the Minister from the decision-making process.

However, on further consideration, the general approach could be usefully augmented with scope for the TMRO to recommend reinvestigation by Customs having regard to specific matters. This would cater for situations where the TMRO found Customs’ analysis and/or findings to be flawed, but did not have the information available to determine what the appropriate conclusion should be. Such flexibility would help to ensure that the TMRO was not forced to come to a definitive position simply to provide the Minister with a competing recommendation. Provision for a conditional and constrained reinvestigation would also enable the introduction of relevant new information if circumstances had changed, or if particular information germane to the case had not been considered in the initial investigation.

The Commission in turn gave consideration to the question of whether the outcomes of reinvestigations involving new information should be appealable. On in-principle grounds, there would be some case for allowing merit reviews in these situations. However, the risk is that this could lead to a series of reinvestigations. Therefore, in the Commission’s view, broadening (merit) appeal rights to encompass this subgroup of reinvestigations, would not be warranted. But there should continue to be scope for parties to appeal the Minister’s final decision — whether based on competing advice from Customs and the TMRO, or a reinvestigation by Customs — to the Federal Court on matters of law.

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Finally, the Commission notes that even though the fundamental role of the TMRO in examining whether the original decision was reasonable would remain unaltered, this would not preclude fine tuning or clarification of that role to facilitate the introduction of the proposed new arrangements (as suggested by Customs (sub. DR61, p. 2)).

RECOMMENDATION 7.2

*The following changes should be made to the current appeals arrangements for anti-dumping decisions.*

- *Decisions on whether or not to commence an investigation into the continuation of anti-dumping or countervailing measures beyond the initial five-year term — and any ensuing decisions by the Minister — should be appellable.*
- *Where the Trade Measures Review Officer (TMRO) finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to the Australian Customs and Border Protection Service (ACBPS) for reinvestigation, unless the TMRO explicitly recommends a reinvestigation. In the event of the latter:*
  - *the reinvestigation and report to the Minister should be conditioned and constrained by a directive from the TMRO on where the initial investigation was flawed*
  - *within the confines of that directive, there should be scope for the ACBPS to consider relevant new information.*

*Any such reinvestigations and ensuing decisions by the Minister should not be appellable.*

## 7.3 Timeliness and resourcing issues

### What is the scope to further reduce assessment timeframes?

Expediting assessments of applications for anti-dumping measures has been an ongoing focus in the administrative reviews of the system over the past two decades. As a result, Australia now has one of the speediest systems in the developed world (see chapter 2).

Significantly, a common view among inquiry participants was that there is not much slack left in the system. Indeed, a number suggested that there is now not enough

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time allowed for more complex investigations. For example, the Cement Industry Federation contended that:

It is not always practical to align each and every investigation with the legislated timeframe of 155 days (hence the need for timeframe extensions, from time to time). (sub. 9, p. 10)

And the TRTF suggested that:

It may be worthwhile considering having the investigation period extended by an additional 30 days, rather than having constant extensions of time. (sub. 26, p. 38)

In this regard, Customs indicated that it has been seeking and receiving extensions to standard time limits in a growing number of cases. In fact, over the past decade, Customs has completed only around 40 per cent of investigations within the 155-day timeframe, with the average extension on the remainder being close to 60 days. It noted that the amount of time required for an investigation is dependent on many factors including:

... the number of interested parties, number of countries involved, complexity of issues (including whether there is a simultaneous dumping and countervailing application) and available resources. (Australian Customs and Border Protection Service, sub. 33, p. 12)

It is conceivable that better resourcing of the investigation process or improvements in investigatory skills (see below) could facilitate somewhat speedier assessments. Improvements in the timeliness of particular investigations might also be possible were Customs able to more expeditiously secure necessary information from overseas suppliers. However, the provisions covering the determination of the variable factors where sufficient information is not furnished by the overseas supplier, suggest that any such time savings would be generally modest.

The Commission therefore concludes that a more balanced and nuanced approach to investigation timeframes is now required. Timeframes that necessitate frequent appeals for extensions are in many respects tokenistic and can create unrealistic expectations which can be hard to manage. And the Commission's proposed consideration of wider impacts as part of the assessment process will require specific recognition within the statutory timeframes (see recommendation 5.1).

That said, a generalised and significant increase in the current time limits could reduce the discipline on parties to proceed in the most expeditious fashion. Accordingly, at least for the time being, a preferable approach to a generalised increase in the specified time limits would be to increase the flexibility provided to Customs in seeking extensions of time for more complex cases. At present, Customs can only seek an extension once and then only at a relatively early stage in the investigation process. A requirement for Customs to include all correspondence relating to extensions on the public file — in addition to notification through the

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issue of an Australian Customs Dumping Notice — would help to ensure that this greater scope to seek extensions was used appropriately.

Further, it would be useful if Customs reported annually, and in a publicly accessible and consolidated fashion, on the actual times taken on all investigations. Its ‘Anti-Dumping and Countervailing Actions — Status Reports’ would be an appropriate vehicle for doing so.

Some respondents to the Draft Report supported this approach — for example, A3P (sub. DR45, p. 5) and PolyPacific and Townsend Chemicals (sub. DR51, p. 10). However, others raised concerns about any lengthening of investigation timeframes through either increases in the statutory time limits or ‘easier’ access to extensions — for example, the Australian Dried Fruits Association (sub. DR52, p. 4), CSR (sub. DR47, p. 5), Qenos (sub. DR48, p. 4) and Sulo (sub. DR58, p. 3). Some went on to suggest that longer time frames could be avoided by better resourcing for Customs and, that when extensions are granted, provisional measures should automatically be applied from day 110 of an investigation.

The Commission understands the concerns that underlie opposition to greater scope for extensions to investigation timeframes. Indeed, to keep the number of extensions to a minimum, it has emphasised the importance of appropriate resourcing for Customs (see below).

However, as noted above, given the increasing complexity of investigations, without a significant increase in statutory timeframes, extensions will necessarily be part and parcel of the system. To avoid easing the time discipline in less complex cases, as it argued in the Draft Report, the Commission considers that a more accessible and transparent extension arrangement would be preferable at this stage. Indeed, the ability of Customs to seek extensions when required might reduce any incentive it may have under the current system — where there is only one opportunity to seek an extension — to make ‘ambit claims’ to provide for contingencies. Accordingly, a more flexible extension arrangement could, in practice, sometimes result in speedier investigations.

The Commission further considers that it would not be appropriate to automatically put in place provisional measures at day 110 whenever an extension is granted — even if this were possible without breaching WTO requirements. The merits of an application are not correlated to the complexity of an investigation and therefore the need for additional time. And though securities would not be collected if the application for measures was ultimately unsuccessful, their impost could clearly disadvantage the importer/overseas supplier in the intervening period.

The change which the Commission is recommending to the investigation extension arrangements may well prove sufficient to balance competing timeliness and

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thoroughness considerations. Nonetheless, the adequacy of the general time limits should be assessed as part of the next review, having regard to experiences with a more liberal extension provision and the time demands associated with consideration of wider impacts, as well as to the efficiency of Customs in deploying the resources available to it.

### **Ministerial decision-making timeframes**

In the Commission’s view, it is incongruous that Ministerial decision-making is the only step in the non-appeals component of the process which is not subject to a time constraint — even if in practice most decisions have been forthcoming without undue delay. This deficiency should be rectified. Accordingly, the Commission proposes that all decisions by the Minister should be subject to a 30-day time limit (including decisions relating to appeals).

In conjunction with the proposed changes to the appeal arrangements to significantly reduce the need for reinvestigations by Customs, the proposed time limit on the Minister would be an offset to the additional time required to allow for the application of the public interest test and the greater scope for Customs to seek extensions of the investigation period.

Responses to the Draft Report were consistently supportive of the introduction of such a time limit — see, for example, A3P (sub. DR45, p. 5), the Food & Beverage Importers Association (sub. DR46, p. 2) and Sulo (sub. DR58, p. 3) — although, as noted above, some participants suggested the Minister be removed from the decision-making process altogether.

#### RECOMMENDATION 7.3

*Provision should be made for the Australian Customs and Border Protection Service (ACBPS) to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.*

*This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the next review (see recommendation 7.11), having regard to experience in the intervening period under the new system.*

*Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the ACBPS should provide an annual, consolidated, summary of the timeliness of each of its investigations in the preceding 12 month period.*

***Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit.***

## **Resourcing and skilling issues**

Some of the Commission's proposed changes, and in particular the public interest test requirement, would increase the costs of undertaking investigations. Other changes, such as the proposed annual adjustments to the magnitude of all measures and enhanced monitoring of the impacts of measures, would also add to the demands on Customs' resources. However, these impacts would be offset to at least some extent by: the removal of the need for Customs to reinvestigate appealed cases when the Minister makes a decision based on the competing advice of Customs and the TMRO; and the changes to the duty collection arrangements in conjunction with the abolition of the duty refund system.

Nonetheless, several participants argued that the investigation process should be better resourced and that the range of skills available to Customs, in particular, should be augmented. For example, the Plastics and Chemicals Industries Association contended:

Greater resources ... need to be provided to Customs to ensure the appropriate expertise is available. This expertise could be brought in on a case by case basis, but it is vital that those dealing with the case ... have greater sectoral/industry specific knowledge, preferably with expertise in business and markets. (sub. 31, p. 11)

Further commentary of this nature is reported in box 7.3.

The Commission is obviously not in a position to determine precise resourcing requirements for either Customs or the TMRO. These will depend on several factors, including:

- the ultimate configuration of the new arrangements determined by the Government
- whether any new skills are required (although the Commission reiterates that it does not see the public interest test as adding significantly to current skill needs)
- the efficiency with which available resources are used and hence on the effectiveness of the governance arrangements for the two entities. (In this regard, on the basis of its informal discussions with stakeholders, the Commission has formed the impression that the concerns reflected in box 7.3 may have as much

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to do with governance practices within Customs, as with a lack of access to appropriate skill sets)

- the balance between in-house and outsourced resources. Were infrequently required skills contracted in, rather than maintained on a permanent basis (within Customs in particular), then the overall costs of appropriately resourcing the system would most probably be lower.

### **Box 7.3 Stakeholder views on Customs' investigative capacities**

Stakeholders raised a number of specific concerns about Customs' investigation skills. For example:

[Bradken] recommends that the investigation teams are well resourced with personnel and expertise commensurate with the case under review, with access to industry specific experts, capable of really understanding the nuances of the industry under consideration, and industry-seasoned personnel with a track record of success in forensic accounting, legal and international marketing. (Bradken, sub. DR59, p. 1)

Customs would benefit substantially from an increased understanding of investigative processes and research methodologies in anti-dumping investigations as undertaken by other administrations (e.g. USA and EU). (Cement Industry Federation, sub. 9, p. 6)

More attention should be paid to the adequate resourcing of inquiries ... [including] ... more productive use of personnel, ... improved planning, ... the mandatory inclusion of industry expert resources on investigative teams and access by Customs to forensic financial investigators. Customs should not be limited to resourcing investigations with its own personnel, but must include outside expertise on its teams. (CSR, sub. DR47, pp. 5–6)

A number of NFF members have ... raised concerns over the drain of corporate and industry-specific knowledge within Customs' Trade Measures Division and with the Dumping Liaison Unit, particularly as it relates to the specific treatment of agricultural products ... The NFF believes that it is critical that Customs maintain a body of expertise on the application of Australia's anti-dumping system across all sectors, in particular, agriculture. (National Farmers' Federation, sub. 6, p. 7)

Our experience has been one where Customs officers were basically incapable of determining 'like goods' in circumstances where it was a contestable issue. They relied upon and were influenced by the customers of the goods under investigation ... The misinformation basically led to the collapse of our application until such time as it was resurrected at the 'eleventh hour' with the assistance of academic input. Unfortunately at that point of the investigation we were already 'dead in the water'. (PolyPacific and Townsend Chemicals, sub. DR51, p. 11)

The Commission further notes that implementation of the skill-related initiatives ensuing from the Joint Study should, over time, also help to address some of the concerns voiced in this inquiry. For example, consistent with a greater emphasis on contracting in required skills, the Joint Study recommended that Customs develop procedures to facilitate the use of experts to improve its analysis and decision-making.

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That said, without adequate and appropriate resourcing, the effectiveness of the new arrangements — and especially the public interest test in screening out cases where measures would be ineffectual or disproportionately costly — will inevitably be compromised. The recommendation in the Draft Report related to the sufficiency of resourcing was widely endorsed by participants irrespective of their views on the specific requirements of the system.

RECOMMENDATION 7.5

*The Australian Government should ensure that the Australian Customs and Border Protection Service (ACBPS) and the Trade Measures Review Officer (TMRO) are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks.*

## **The outcomes of overseas investigations**

Though the Commission is not making any detailed recommendations on skilling issues, there is one aspect of the investigation process impacting on the quality of assessments where there appears to be some ‘low hanging fruit’. Specifically, several participants contended that Customs is overly reluctant to draw on the outcomes of, and analysis in, overseas anti-dumping cases, to the detriment of the investigation process. For example, Orica Australia stated:

Increased recognition is required of investigations by other administrations (eg. EU, Canada and the USA) in respect of goods exported by the same exporter (or related party) the subject of the Australian industry’s application. For example, the EU and USA have anti-dumping measures applicable to ammonium nitrate exported from Russia – non-confidential information available from the EU and USA investigations could assist the Australian investigation. Similarly, investigations by other administrations into related products to ammonium nitrate could also assist – eg. EU and USA investigations into urea and urea ammonium nitrate solutions would provide insight into normal value considerations. (sub. 18, p. 8)

In a similar vein, Windsor Farm Foods observed:

WFF’s experience with its preserved mushrooms case was that Customs paid little attention to the findings of the US administration in its investigations ... There were aspects of the US investigations relating to government ownership and participation in the Chinese food processing sector which should have been considered in the Australian investigation. It is unacceptable for the findings by other administrations to be totally discounted in favour of simple question and answer responses from exporters. (sub. 37, p. 11)

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Of course, every investigation will have unique aspects, meaning that caution is required in transposing any overseas analyses to Australian circumstances. In elaborating on this point in response to the Draft Report, the Australian Steel Association (sub. DR57, para. 265) noted that specific key variables in overseas cases — such as normal values, like goods and injury determinations — may not be directly transferrable to an Australian investigation. Similarly, PolyPacific and Townsend Chemicals said:

We see dumping cases in Australia as having circumstance peculiar to the Australian market and therefore distinctly separate from circumstances applicable in other markets. Decisions should only be made based on the merits of the information, data and arguments, as presented in Australia. (sub. DR51, p. 11)

However, the Commission considers that Customs may be overlooking some opportunities to usefully draw on overseas experience and investigations — particularly in countervailing cases or those involving claims of subsidised inputs, where information on subsidies may otherwise be difficult to obtain.

Importantly, the use of such information, where appropriate, need not distract from a proper assessment process, a point of concern to the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 3). Rather, information assembled as part of overseas cases may provide a means to both test and augment the information available to domestic investigations, and thereby enhance rather than compromise thorough assessment. At the very least, there should be the expectation that Customs will take proper account of relevant overseas outcomes and that its reports should provide assurance to stakeholders that it has done so. The proposal to this effect in the Draft Report was welcomed by several participants, for example, the Australian Dried Fruits Association (sub. DR52, p. 4) and Qenos (sub. DR48, p. 4).

RECOMMENDATION 7.6

***In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate in its investigation reports whether there have been any comparable recent cases in other countries; what the outcomes of those cases were; and what is the relevance, if any, of those outcomes to the investigation at hand.***

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## 7.4 Increasing transparency

The benefits of transparent regulatory arrangements in promoting procedural fairness, reducing risks to firms and promoting the public interest more generally are widely recognised.

Significantly, as noted in chapter 4, submissions from across the full spectrum of stakeholders raised concerns about the lack of transparency in the current anti-dumping arrangements. The same concerns were also evident in submissions to the Joint Study and led to several (now implemented) recommendations to deliver more transparent outcomes. These included: more comprehensive ‘public file’ summaries of confidential information submitted to investigations; prompter lodgement of material on the public file; access to public file information via the Customs’ website; and a variety of improvements to Customs’ public reporting of its activities, policies and analytical approaches.

Some of the Commission’s recommendations elsewhere in this report would also have transparency benefits, including reporting by Customs on the wider impacts of anti-dumping measures (recommendation 5.1) and strengthened appeals processes (recommendation 7.2). And its proposed easing of some of the current time pressures on Customs (recommendation 7.3) would more generally facilitate greater transparency in the assessment process. In addition, the Commission sees scope for a small number of further reforms to address some particular transparency issues.

### **Information on applications that do not proceed to investigation**

Public notification of applications for anti-dumping and countervailing measures prior to initiation is precluded by the WTO agreements. Specifically, the Anti-Dumping Agreement indicates that:

The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. (WTO Anti-dumping Agreement, Article 5.5)

This prohibition on early public notification presumably reflects a concern to avoid any unnecessary trade chilling effects from applications that do not subsequently proceed to the initiation phase. And in countervailing cases, it enables discussions ‘out of the public glare’ with the government alleged to have provided an actionable subsidy.

However, these provisions have led to the situation where typically very little aggregated information is published after-the-event on unsuccessful applications for measures. This means that there can be a less than complete public picture of the usage of anti-dumping systems and trends over time. Thus in Australia’s case, while Customs has provided some limited information in its Annual Reports on aggregate

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numbers of applications, including on those which are rejected or withdrawn prior to initiation, there is nothing to this effect on Customs' anti-dumping website or in its regular 'Anti-Dumping and Countervailing Actions — Status Reports'. Moreover, the information in its Annual Reports does not provide any detail on the sectoral or country break-up of rejected or withdrawn applications that would allow for comparison with the much more extensive information published on the nature of initiated cases and measures in force.

Accordingly, in the Draft Report, the Commission proposed that Customs should report annually — in its 'Anti-Dumping and Countervailing Actions — Status Reports' and on its anti-dumping website — on the number of applications for measures that do not proceed to initiation, and the products and countries that were the subject of those applications.

This proposal attracted strong criticism from several participants. While supporting more accessible reporting on the number of applications that do not proceed to initiation, the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 13) contented that disclosure of the products and countries that were the subject of such applications would serve no useful purpose and could, in fact, be commercially detrimental to the local producers concerned. Local industry interests expressed similar concerns — see, for example, the Australian Dried Fruits Association (sub. DR52, p. 4), Qenos (sub. DR48, p. 5) and Sulo (sub. DR58, p. 3). Indeed, A3P (sub. DR45, p. 5) was one of the few participants to support the draft recommendation.

However, in the Commission's view, information on product coverage and the countries involved is highly relevant from a transparency perspective, not least by shedding additional light on the usage and impacts of the system. By way of analogy, were information on initiated cases limited only to numbers of cases, public scrutiny would be substantially compromised.

Moreover, it is difficult to see how commercial interests would be significantly prejudiced by more detailed, after-the-event, reporting on non-initiated applications on a consolidated basis. Indeed, if a case is initiated — that is, the application is sufficiently meritorious to warrant investigation — details of the applicant companies and the countries of origin of the imported goods concerned immediately become public. And to the extent that greater after-the-event reporting on non-initiated applications deterred less meritorious claims, there could be both some cost savings and lesser incentives to engage in strategic filing behaviour.

There might be a concern that even consolidated, and after-the-event, reporting on unsuccessful applications could be potentially inconsistent with Article 5.5 in the Anti-Dumping Agreement and its counterpart in the Countervailing Measures Agreement. But as alluded to above, the intent of these Articles is seemingly to

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preclude reporting at the time of application on a case-specific basis. Thus, the Commission does not see an extension to Customs' current after-the-event reporting on unsuccessful applications as being particularly problematic in a WTO context.

The Commission is therefore not inclined to modify its Draft Report proposal.

RECOMMENDATION 7.7

*Through its 'Anti-Dumping and Countervailing Actions — Status Reports', the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.*

### **The treatment of confidential material submitted to Customs**

While having due regard to the protection of commercially sensitive information, a well functioning anti-dumping system should give adequate opportunity for parties involved in investigations to respond to contentions made by others. And more general access to such information can have broader transparency benefits by facilitating scrutiny of the quality of the assessment process and its outcomes.

To these ends, the WTO agreements require investigating authorities to maintain a public record containing the non-confidential component of submissions and other relevant public material, together with non-confidential summaries of confidential material 'in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'. However, the Agreements do not provide more specific guidance on what is to be included in these non-confidential summaries.

In previous reviews, there has been considerable disquiet about this aspect of the Australian arrangements. For example, submissions to the Joint Study expressed concerns about the content of non-confidential documents — and, in particular: the practice of simply blacking out text to create non-confidential summaries; the slow placement of documents on the public file; and difficulties of accessing the file which, at that time, had to be viewed in person.

In response, the Joint Study recommended that:

- every deletion in non-confidential summaries should be followed by a bracketed summary containing sufficient detail to permit a reasonable understanding of the substance of the deleted information
- all relevant documents should be available on the public file at least two weeks prior to the publication of the Statement of Essential Facts
- the public file records should be available electronically.

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But while these changes have now been made, there continue to be concerns about the adequacy of the public file arrangements and, in particular, the amount of detail typically provided in non-confidential summaries. Thus, the Australian Steel Association contended that:

... the highest priority should be to rigorously test claims for confidentiality and ensure that non-confidential summaries go as far as possible to present meaningful data. (sub. 28, para. 413)

It is clearly the case that the current confidentiality arrangements can make it very difficult for parties to contest ‘the facts’ of the matter. As a result, and notwithstanding the changes to the public file arrangements emanating from the Joint Study, the verification of facts and data submitted to an investigation remains heavily reliant on Customs.

One option for reducing this reliance on verification by Customs — and allowing for more ‘contesting of the facts’ — would be the introduction of arrangements known as Administrative Protective Orders (APOs). Such orders would provide legal representatives for interested parties with access to the confidential information provided by other interested parties during an investigation. Confidentiality arrangements of this nature are widely used in the USA and Canada and can, in fact, be used in Australia if an anti-dumping matter goes to the Federal Court on administrative appeal. Their generalised introduction to Australia’s anti-dumping system was advocated by several participants, including the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 9), the Australian Steel Association (sub. DR57, paras. 258–261) and Richard Whitwell (trans. pp. 77–78).

The case for an APO arrangement was examined in the Willett Review (1996), which recommended against introduction, largely on account of the associated increase in the costs of taking and defending anti-dumping actions. Cost considerations similarly led the Commission to reject the introduction of APOs in the Draft Report, though it noted that allowing professionals other than lawyers to act as agents within the APO framework could somewhat lessen such impacts.

In response to the Draft Report, the Australian Steel Association questioned whether the introduction of APOs would, in fact, generally increase costs. It said that stakeholders are already spending time and resources ‘hypothesising’ over the data submitted by other parties:

You’re doing the work in any event, you’re just doing it very badly and in a more time-consuming way than if you were given the material. (trans. p. 46)

And the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 4) contended that any increase in costs associated with APOs would be offset by an improvement in the quality of decision-making.

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Nonetheless, having further considered the arguments, the Commission is still not attracted to an APO approach. While allowing for greater contesting of facts and thereby somewhat improving the information available to decision makers, these benefits would come at a cost of a more adversarial, longer and potentially more expensive process — especially if access to confidential information under these orders were limited to lawyers. And decisions could still rely heavily on the judgement of Customs, the TMRO and the Minister, given that the APO approach would not necessarily resolve competing claims.

In the Commission's view, a better approach, for the time being at least, would be to apply the non-confidential summary arrangements more rigorously and implement better public reporting on the outcomes of investigations (see below). As well as enhancing general transparency, such greater public disclosure would increase the scope for participants to challenge decisions through the appeals process if they were based on flawed information. However, if such incremental initiatives prove insufficient, then the introduction of an APO arrangement — providing scope for the involvement of a range of relevant professions and drawing on their associated sanctions — might become warranted.

### **Reporting on the outcomes of investigations**

In a system that relies so heavily on judgement, and where there are significant constraints on participants' ability to contest the facts of the matter, even if an APO arrangement were to be introduced, it is crucial that:

- the basis for decisions is properly explained and documented
- the outcomes of that decision-making process are similarly clear.

This is not the case at present.

The focus in the first instance must be on reports by Customs to the Minister setting out whether the conditions for the imposition or continuation of anti-dumping measures have been met. However, transparency in regard to the magnitude of measures imposed, and changes in their levels over time, is also important.

#### *What are the concerns?*

The Joint Study (2006) recommended that Customs examine means to improve its reporting, specifically through:

- improving its analysis and reporting of material injury and causal link, taking into account the approaches of other jurisdictions (recommendation 15)

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- amending the anti-dumping website to provide access to all relevant information and reports with improved navigation links and making approved forms available in an electronic format (recommendation 22).

But, as is evident from submissions to this inquiry, the adequacy of Customs' reports in regard to the basis for, and explanation of, its findings continues to be a source of concern. Particular matters on which reporting is seen to be deficient include: likeness; normal values and the other key parameters relevant to the magnitude of any anti-dumping measures; the analysis of injury and the determination of causality; and the threat of a reoccurrence of dumping if measures were discontinued.

In essence, key parts of the investigative process and its outcomes are still widely viewed as a 'black box'. For example, Dow Chemical commented that administration of the system is at times:

... contradictory as well as obscure and does little to engender confidence that the formal assessments of non-injurious pricing, material injury and causality are managed in an impartial and equitable manner. (sub. 3, p. 19)

In a similar vein, A3P observed that:

... members' experience regarding the transparency of the anti-dumping system and outcomes is somewhat negative in that there is limited transparency, lack of feedback, and some inconsistencies in the assessment and investigation process. Improvement in these areas would ease potential applicants' concerns pre-application and avoid follow-up and misunderstandings post-outcomes being applied or dismissed. (sub. 21, p. 6)

Moreover, when measures are imposed, the information that is provided to affected parties on the basis for those measures will depend on the circumstances of the case. Rarely will any of the parties receive full information on the underlying parameter values or, in some cases, even the duties that have actually been imposed. As a result:

- Several local suppliers that have 'won' anti-dumping cases noted that they could not be certain what the impacts on selling prices of the imported goods concerned should have been, and thus whether they had received a good return for the time and cost involved.
- Following the imposition of measures, new exporters and importers may not find out what precise duties are applicable to them until they have entered into contracts to supply goods to parties in Australia and are able to provide contract prices to Customs.
- The Commission's discussions with stakeholders revealed that there are widespread misconceptions about the frequency with which the lesser duty rule is applied (a little less than half of the current measures).

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- For the parties not directly involved in a case, and which cannot immediately access the public file for investigations, the availability of information on the magnitude of measures is even more limited.

### *What improvements are possible?*

Given the WTO rules, and the nature of the assessment process and the measures that may ensue from it, there are limits on the extent to which the concerns outlined above can be addressed. In particular, while it is relatively easy to specify what matters should be covered in reports, assessing the adequacy of what is produced is much more subjective. The aforementioned confidentiality issues will also constrain what information can be placed in the public domain.

That said, an environment in which even key stakeholders cannot reasonably evaluate some of the foundations for Customs' advice, or the particular effects of the measures imposed, is not conducive to creating confidence in the system. With the proposed consideration of wider impacts, stakeholder confidence in the veracity of assessments will be even more important.

Thus, in the Commission's view, there needs to be much more information in the public domain on the magnitude of measures in place and the basis of the underlying calculations. As well as reducing the current uncertainty for stakeholders, provision of such information would allow for greater scrutiny of Customs' assessments and of the implications of the ensuing decisions for stakeholders and the community. As alluded to earlier, it would also increase the scope for decisions to be challenged through appeals if those decisions had been based on flawed information.

Indeed, there is an argument that transparency considerations should, to at least some extent, override confidentiality issues in determining how much information is publicly available. That is, a consequence of seeking measures, or being found to have engaged in dumping, might reasonably be that some otherwise confidential material will be made available to other stakeholders and the general public.

Notably, the sort of confidentiality concerns that are cited in a dumping context were apparently less of an issue when tariffs were set on a needs basis to ameliorate the publicly discussed cost disadvantages of local producers. And the Gruen Review (1986, para. 7.2.5) recommended that all normal values and non-injurious prices should be made publicly available at the time of a decision, and that Customs should each year publish ad valorem equivalents of measures. It also recommended that Customs and the Industries Assistance Commission exchange information to allow a 'thorough analysis of the impact of the system on the levels of protection afforded to different industries'.

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The Commission further considers that concerns that the release of a greater amount of information on normal values and other variable factors might reduce cooperation by overseas suppliers in anti-dumping investigations may be somewhat overstated. Were these suppliers to be less cooperative because of the disclosure implications, then they would be at greater risk of having measures set using the alternative, and potentially less favourable, benchmarks.

But though the Commission considers that more information should be publicly available, determining just how much, and in what form, is far from straightforward. For example, the variability in export prices from consignment to consignment means that ‘real-time’ public reporting of actual duties collected could involve considerable time and effort for Customs. And from a general transparency perspective, a plethora of constantly changing information could confuse rather than illuminate. Also, there are challenges in finding ways to present such information while still complying with the confidentiality provisions in the WTO agreements, which prevent the disclosure of confidential information unless the parties concerned give permission.

Given this, the Draft Report canvassed some ‘half way house’ options for increasing transparency which would not involve the direct disclosure of any commercially sensitive information submitted by parties involved in particular cases. Specifically, it suggested that:

- As recommended by Gruen (1986), Customs could, on an annual, and non-case attributed, basis provide details of the ad valorem equivalents of all new measures introduced in the previous 12 months.
- Alternatively, or additionally, Customs could periodically report the range of actual duties paid on individual products subject to measures.

However, given the sensitivity of the issue, the Commission sought further input from participants on precisely what additional information might reasonably be disclosed — having regard to both the major information gaps under the current arrangements and the desirability of maintaining appropriate protection for commercially sensitive information.

Several participants responded to this request, but only in general terms. The Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 14) said a balance needs to be struck between transparency and disclosure of confidential information which could provide some parties with a competitive advantage. The TRTF expressed a similar general view, and added:

A company who is already suffering injury from predatory dumping practices should not have any additional injury caused by the passing of information to its competitors. The effectiveness of the anti-dumping system relies on its ability to ensure that both

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local and overseas suppliers have confidence in the protection of the sensitive information provided in the course of any investigation. (sub. DR44, p. 4)

Several other local producers — for example, BlueScope Steel (sub. DR55, p. 21) — made similar observations.

However, A3P (sub. DR45, p. 5) supported the publication of more information on the magnitude of measures and the underlying parameters, stating that such disclosure would lessen misunderstandings and the need for follow-up after measures had been applied. Windsor Farm Foods (sub. 37, p. 9) likewise advocated greater transparency, notably in the areas of normal value determination and adjustments to normal values.

Notwithstanding the very general nature of these responses, the Commission's own further analysis has:

- reinforced its view that there needs to be greater disclosure
- suggested ways of going further than the options canvassed in the Draft Report, while still maintaining appropriate protection for commercially sensitive information.

In particular, variables such as normal values and dumping margins are often calculated using information submitted by several parties. In such circumstances, making these variables public would not seemingly be a breach of the confidentiality of the information submitted by a particular party. Further, the Commission notes the European Union's practice of publishing actual dumping duties in ad valorem terms, as distinct from the Australian practice of simply reporting dumping margins and not revealing whether the lesser duty rule has been applied.

In essence, the Commission is recommending that, as a general principle, Customs should in future seek to publish full information on the actual magnitude of any anti-dumping measures imposed and the underlying variable factors, unless these would directly reveal commercially sensitive cost or price data submitted by one of the parties. And in this latter case, Customs should reduce the amount of information published on the measure in question by the minimum necessary to provide the requisite protection for the data involved. Also, it is recommending that information on annual adjustments to measures under the proposed new adjustment mechanism (see recommendation 6.5) be published on the same basis, and that there be summary (after-the-event) reporting on the number of cases in which the lesser duty rule has been applied.

*Through its various reports and/or Australian Customs Dumping Notices, the Australian Customs and Border Protection Service (ACBPS) should be required to publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures and the underlying variable factors that is consistent with maintaining appropriate protection for commercially sensitive information submitted by individual parties.*

- *Where the ACBPS determines that the firm-specific nature of the measures or the variable factors (or some other reason) militates against disclosing full details on those measures, it should reduce the amount of information published by the minimum necessary to provide the requisite protection for the commercially sensitive material concerned.*
- *At the very least, the ad valorem equivalents of measures should be publicly notified at the time of imposition and following annual adjustments under the new adjustment mechanism (see recommendation 6.5).*

*Customs should also report annually on the number of cases where the lesser duty rule has been applied.*

## **7.5 Information issues**

### **Access to ABS import data**

For those seeking the imposition of anti-dumping or countervailing measures, lack of access to Australian Bureau of Statistics (ABS) import data suppressed on confidentiality grounds has been a perennial issue in past administrative reviews and one that has again been raised in this inquiry. In essence, the concern is that without access to such data, whether directly or through a third party, it can be difficult to mount a sufficiently robust case for Customs to initiate an investigation. For example, the Plastics and Chemicals Industries Association stated that:

It has become all too easy for the ABS to suppress vital market information on confidentiality grounds. The suppression of this data restricts the capacity of participants to ... pursue action where there is suspicion that injurious behaviour is occurring. (sub. 31, p. 11)

OneSteel contended that making such import data more widely available could have other benefits:

Perhaps if this information was readily available, claims of ‘frivolous and vexatious applications’ may fall as potential applicants can better assess their material injury claims prior to making a decision to lodge an application. (sub. 16, p. 14)

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And Australian Paper went as far as to advocate full disclosure of details of individual import shipments.

Suppression of country of origin information in Customs/ABS import statistics is common in tariff codes affecting the pulp and paper industry. The problem is deeper than just country of origin volumes and prices. Even when import data for an individual tariff code and country of origin is available, there may be several suppliers of a good, or one tariff code may contain several distinct goods at quite distinct prices, some dumped or subsidised ... The only way this can be resolved is by full disclosure of individual import shipments as takes place in the US system. (sub. DR41, p. 3)

The Commission understands these frustrations. Indeed, it is somewhat incongruous that export data published or available on request from government agencies in other countries — which may closely approximate data that has been suppressed by the ABS — is sometimes used by an applicant for anti-dumping measures. In these circumstances, from the applicant's perspective, the effect of the confidentiality provisions is simply to increase the time and expense involved in seeking anti-dumping protection without having any ultimate material impact on the availability of the information concerned.

The confidentiality provisions concerned are, of course, generally applicable and set out in the ABS's enabling legislation. As such, they encompass considerations that extend beyond the anti-dumping system. In particular, the ABS stated that it:

... enjoys a high level of community trust and cooperation because the community is confident that the information it provides to the ABS will be protected ... [If the ABS lost] that confidence, the community may not provide information to the ABS, or may not provide accurate information, both of which would reduce the quality of ABS statistics. (sub. DR53, p. 2)

The ABS further indicated that it had made two submissions along these lines to the very recently finalised review by the Australian Law Reform Commission (ALRC) of the relevant laws and practices relating to the protection of Commonwealth information, including the scope and appropriateness of legislative provisions regarding secrecy and confidentiality. In that review, the ALRC considered options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government through providing appropriate access to information. The ALRC reported to the Attorney-General on 11 December 2009.

In the Draft Report, the Commission proposed that the ALRC consider recommending a change to the legislation governing the operation of the ABS to preclude the suppression of import data when the same or similar information can be publicly accessed from the export statistics of other countries.

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The proposal received strong support from participants, though several suggested that it did not go far enough. For example, BlueScope Steel contended that:

... the ABS takes an overly conservative approach and suppresses information beyond that which is required to protect the legitimate commercial interests of international suppliers and the local importing industry. (sub. DR55, p. 21)

And, as noted above, some participants suggested that the confidentiality restrictions be relaxed completely, such as along the lines of the arrangements in the USA.

However, reflecting its general concern to preserve confidence in the use of information supplied to it, the ABS (sub. DR53, pp. 1–2) was strongly opposed to the Draft Report proposal, suggesting that such a change would require it to play a direct role in administering the anti-dumping system. It further posited that there will always be differences between the records of goods imported into Australia and the counter-party export records (observing, for example, that differences between the date of export and the date of import could lead to differences in monthly data).

As it transpires, the Commission now understands that this particular matter was outside the scope of the ALRC review.

Nonetheless, the Commission still sees a strong case for some change to the current arrangements. And it does not share the concerns of the ABS that the Bureau's reputation for integrity, and the public's confidence in the security of material provided to the Bureau, would be undermined by a common sense approach to publishing data that is available elsewhere. In this regard, it is notable that for import data, the ABS does not rely on any voluntary participation by stakeholders — rather, it acquires that data directly from Customs. Also, while there may be small differences in import and export data ensuing from timing differences and variations in statistical codes, this does not negate the general argument in favour of publication.

The Commission accepts there may be some internal administrative costs associated with changing the relevant practices — and that these costs would need to be balanced against the associated reduction in costs for applicants for anti-dumping measures. Accordingly, and given that the matter appears to have been outside the scope of the ALRC review, the Commission is now recommending that the Government should consult with the ABS on the best way to ensure that the publication of such import data is not in future unreasonably precluded in circumstances where broadly equivalent data are publicly available from other sources.

*The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.*

### **Access to other price information**

Several participants also raised concerns about the difficulties for local industries of obtaining overseas price information to enable calculation of normal values and hence to support a prima facie case of dumping. Thus, the National Farmers' Federation contended that the Government should:

... take on a far greater role in assisting affected industries to compile market information on pricing and subsidy arrangements in overseas countries suspected of dumping products into Australia ... [utilising] Australia's extensive international network of diplomatic posts, Austrade and Customs representatives ... (sub. 6, p. 6)

The Plastics and Chemicals Industries Association (sub. 31, p. 11) echoed this view, suggesting that Australia's extensive international network, and in particular its diplomatic posts, could have a greater role in assisting affected companies. Australian Pork (sub. DR39, p. 6) also supported such initiatives, with a view to reducing the compliance costs for industries pursuing anti-dumping and countervailing activities. And, to further assist firms contemplating action against products imported from countries such as China, A3P suggested that:

... Customs (in conjunction with industry and potentially Austrade) [be] more proactive in benchmarking prices and costs in other 'Free Market Economies' in order to form an opinion if a 'Market Situation' exists or what the 'Normal Value' may be. This potential approach would be a significant improvement over the current approach where it is up to the applicants to prove pricing in a foreign country. (sub. DR45, p. 10)

However, the Commission does not see a case for initiatives of this sort. There are obvious limits on how heavily the Government can become involved in assisting Australian firms to take anti-dumping action. Also, in response to recommendations by the Joint Study (2006, pp. 16–17), Customs' new application guidelines have clarified the information requirements for normal values, as well as inviting applicants for measures to contact Customs for advice on accessing supporting trade data. The TRTF (sub. 26, p. 32) said that these and other changes to the application process made in response to the Joint Study have resulted in 'major improvements' over the previous arrangements.

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## 7.6 Implementation and review of the new arrangements

### Transitional issues

When making significant changes to policy settings, it can be beneficial to give those who may be adversely affected by them time to adjust — either through a phasing arrangement, or through a delay before the changes take effect.

In this case, many of the Commission’s proposed reforms do not raise adjustment issues and should be implemented as soon as practically possible. However, in the case of the proposed public interest test and the changes to the continuation provisions, immediate introduction would not, in the Commission’s view, be reasonable. Accordingly, in the Draft Report, the Commission proposed that once the legislation to give effect to the proposed reform package is passed, there be a two year delay before these particular components take effect.

The need to delay the introduction of the public interest test in particular was questioned by the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 3). In commenting on the Draft Report proposal, they argued instead that applications not already in the system should immediately be subject to the public interest test, with only investigations underway, or applications for measures already submitted, dealt with under the current legislative requirements.

However, as several local industry interests argued, considerable work goes into the lodgement of applications prior to filing, which could be rendered redundant under such a grandfathering approach. More generally, the proposed public interest test and the new continuation requirements are significant changes to the current regime, with potentially substantial commercial ramifications for the particular parties concerned. Hence, in the Commission’s view, some additional breathing space, beyond that which would be offered by quarantining those ‘in the system’ at the time the reforms take effect, is appropriate.

At the same time, the Commission does not see the need for a more extended delay to enable, for example, further study of overseas approaches — as suggested by the Department of Agriculture and Food Western Australia (sub. DR43, p. 4). In the Commission’s view, such further assessment would be better conducted in the context of the next review (see below), once the new arrangements have been bedded down and there is a case history against which to assess the effects.

RECOMMENDATION 7.10

***All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see recommendation 5.1) and the changes to the continuation provisions (see recommendation 6.4). These should take effect two years later.***

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## Review arrangements

The Commission further proposes that there be a broad and independent public review of the revised arrangements five years after the reform package is fully operational (or seven years after the enabling legislation is in place). The review should examine the impacts of the new requirements and what further changes, if any, are required, having regard to relevant policy developments in other countries.

### RECOMMENDATION 7.11

*There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:*

- *the impacts on decision-making of the public interest test and whether that case history points to any gaps or deficiencies in the test and/or the accompanying legislative guidance, or to the need for supporting changes to other aspects of the legislative architecture*
- *the need for changes to the system framework separate from the public interest test requirements*
- *the efficiency and effectiveness of the Australian Customs and Border Protection Service, the Trade Measures Review Officer and the Minister in administering the anti-dumping system and giving effect to the new requirements, and whether any changes to their responsibilities are warranted in the light of that experience*
- *whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities*
- *what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes*
- *the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more might be done in this regard*
- *whether there have been changes to overseas anti-dumping regimes that could be relevant to the Australian system.*