
B A brief history of Australian anti-dumping policy

Key points

- Though Australia's anti-dumping system has been in place for over 100 years, it was not until the early 1980s that usage of the system became significant.
 - This was triggered by global recession, falling commodity prices and the Government's reluctance to raise tariff levels.
- Usage of the system peaked in the mid-1980s, which led to a backlash against the system from some users of the products subject to measures.
- Since the mid-1980s (aside from a brief upsurge in the early 1990s) usage of the system has steadily declined.
- The last major review of the anti-dumping system was carried out in 1986 (the Gruen Review). Subsequent reviews — including the Willett Review in 1996 and the Joint Study in 2006 — have focussed largely on the administration of the system.

Australia's anti-dumping legislation dates back to the *Australian Industries Preservation Act 1906*. Distinct from general tariff matters, the legislation aimed to prevent 'predatory' dumping of imports that was intended to drive domestic competitors out of business. However, no action was ever taken under this Act, largely because of the difficulty of proving that an importer was 'acting with intent to destroy or injure' an Australian industry, as required under the Act (Whitwell 1997, p. 11).

Removal of notions of predatory behaviour

Following an inquiry in 1921 by the then newly established Tariff Board, and drawing on Canadian and US legislation, the *Customs Tariff (Industries Preservation) Act 1921* established 'broader procedures for the imposition of penalty duties on imports deemed to have been sold at prices lower than in their suppliers' home markets'. Through changes to the normal value provisions, the Act greatly expanded the scope of 'dumping'. It also removed a previous requirement to seek the agreement of the High Court before anti-dumping measures could be

imposed. The Tariff Board assumed responsibility for investigating cases and advising the Minister, who in turn was responsible for making decisions regarding the imposition of duties.

The introduction of the Act also marked the separation of anti-dumping legislation from anti-trust law. The latter continued to operate under the *Australian Industries Preservation Act 1906* until its repeal and replacement by the *Restrictive Trade Practices Act 1965* and subsequently the *Trade Practices Act 1974*.

1921–1960: anti-dumping takes a back seat to tariffs and import licensing

Over the next four decades, Australia's anti-dumping system was relatively uncontroversial. Its role in helping to support Australia's expanding manufacturing sector was largely overshadowed by high levels of tariff protection, particularly between the two world wars, and import licensing (quantitative import restrictions). The latter was introduced as a wartime measure in 1939 and used extensively through much of the 1950s, particularly after March 1952 in response to balance of payments concerns. Indeed, the Government applied dumping duties on only 60 occasions over this entire 40-year period (Whitwell 1997, p. 18).

The major international development of relevance during this period was the formation of the *General Agreement on Tariffs and Trade* (GATT) in 1947. The GATT was approved by the Australian Parliament with the passage of the *International Trade Organisations Act No 73 1948*. The GATT did not proscribe dumping. Rather, through *Article VI: Anti-dumping and Countervailing Duties*, it permitted the application of anti-dumping or countervailing duties where 'the effect of the dumping or subsidization ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry'. However, *Article VI* did not specify any procedures for imposing anti-dumping duties, with the result that there continued to be differences in the systems of the relatively small group of developed countries which at that time had legislation to deal with dumping.

Amendments to the anti-dumping legislation in 1957 provided for countervailing duties on imports subsidised by an overseas government, and also for action against dumping which injured the trade of a third country. The latter amendment was designed essentially as a reciprocal arrangement with the United Kingdom to protect, from potential injury by 'third countries', trade between the two countries (Whitwell 1997, p. 17).

The 1960s and 1970s: emergence of anti-dumping as a significant instrument

Following the abolition of most import licensing controls in 1960, anti-dumping measures emerged as an important element of Australia's industry support arrangements. In May 1961 only nine goods were subject to dumping duties; by July 1971, that number had risen to 46 (Whitwell 1997, pp. 18–19).

The political environment for anti-dumping action at this time was generally supportive. Legislative amendments in 1961 widened the criterion of normal value to address dumping from countries where cost or price information was not available, principally the communist bloc countries (Lloyd 1973).

A Committee of Economic Inquiry, appointed by the Prime Minister in 1963, reported that anti-dumping measures supplemented tariffs and that, in the absence of those measures, pressures on tariff levels would be significantly greater. Amendments to the Act in 1965 included rules for determining the export price in related party transactions to address a potential loophole under which export prices could be artificially inflated to avoid duty.

In 1967 the *Anti-Dumping Code*, the precursor to the current World Trade Organization (WTO) agreements, was negotiated as part of the Kennedy Round of multilateral trade negotiations (1964–1967). Building on the provisions in the GATT, the Code set out rules for the application of anti-dumping measures.

A key outcome of the Kennedy Round was an obligation on member countries to align their anti-dumping systems with the requirements of the Code. Although Australia's existing anti-dumping legislation was broadly consistent with the Code, Australia did not immediately accede because of concerns that the scope for discretionary interpretations afforded under its existing arrangements might be affected (Snape, Gropp and Luttrell 1998).

However, Australia came under growing pressure from its trading partners to accede. And in 1973, the newly elected Whitlam government set up an interdepartmental committee to review Australia's anti-dumping legislation and examine the case for accession. The Government accepted the committee's recommendations to accede and amended the legislation accordingly in 1975.

The 1975 amendments also transferred responsibility for investigating dumping complaints and making recommendations to the Minister to the Australian Customs and Border Protection Service (formerly the Australian Customs Service). Until this time, these responsibilities had resided with the Industries Assistance Commission

(IAC) (formerly the Tariff Board). However, the IAC was retained as a review body to hear appeals against Ministerial decisions (Whitwell 1997).

Despite assuming an increasingly important role over the 1960s and 1970s, the dumping arena remained relatively ‘non-controversial’ (Gruen 1986, p. 8). Many industries showed little interest in the anti-dumping provisions because they were already highly protected by tariffs and other import barriers.

One significant technical change arose as a result of amendments to the US Tariff Act in 1974. Up to this point, ‘normal value’ had been defined by most countries as the price prevailing in the exporter’s home market. But as a result of the US amendments, sales in the exporter’s home market that were deemed to be ‘below cost’ were no longer regarded as an acceptable basis for determining normal values. Following informal discussions in 1977-78 between anti-dumping authorities in Australia, Canada, the USA and the European Communities, the thrust of the American approach was adopted and maintained by these other authorities, even though the change was not formally introduced into Australian legislation until 1984 (Gruen 1986).

The Tokyo Round of multilateral trade negotiations (1973–1979) revised the GATT *Anti-Dumping Code* and also heralded the introduction of the *Subsidies and Countervailing Duties Code*. While the Australian Government subsequently acceded to both codes in the early 1980s, the accessions appeared to have little practical effect on the capacity for Australia to take anti-dumping or countervailing action (Snape, Gropp and Luttrell 1998).

The early 1980s: anti-dumping activity accelerates

With the onset of global recession and sharply falling commodity prices in the early 1980s, and the Government’s reluctance to raise tariff levels or implement other border protection measures, political pressure mounted for action against low priced imports.

Several legislative changes were made to facilitate easier access to anti-dumping measures and to ensure that protection afforded local industries was not undermined. Amendments in 1983 allowed the Minister to disregard domestic sales in the exporting country altogether if they did not incorporate all production and marketing costs, thereby moving Australia closer to US practice at the time. More specifically, these amendments allowed for the construction of a normal value that covered all costs, including production, selling and administration expenses, plus a reasonable profit margin (Snape, Gropp and Luttrell 1998). The section of the Act

which obliged the Minister not to take action ‘inconsistent with Australia’s international obligations’ was also removed.

Perhaps not surprisingly, given the prevailing economic and political landscape, the number of new anti-dumping measures accelerated sharply over the first half of the 1980s, with the total number of measures in force rising from 82 at the end of June 1981 to a peak of 190 at the end of June 1984 (Gruen 1986, p. 8).

However, an ‘offsetting’ legislative change that came into effect in 1984 was the provision that an amount of duty no greater than sufficient to remove injury be applied (the so-called ‘lesser duty rule’). An indicative, but not exhaustive, set of factors defining material injury was also added to the legislation at this time (IAC 1985).

The mid-1980s: backlash and the Gruen Review

In late 1985, dumping duties were re-imposed on certain fertilisers from the USA. This decision brought to a head the differing perspectives on the anti-dumping system between producers seeking action against dumped imports and users of those imports (see box B.1). In early 1986, the Government responded to growing concerns about the anti-dumping system by establishing an independent review of the *Customs Tariff (Anti-Dumping) Act 1975*, conducted by Professor Fred Gruen.

Box B.1 Backlash against the system — the fertilisers case

In 1985, as part of its industry policy reforms, the Government terminated a subsidy on purchases of fertilisers. World prices of fertilisers were low at the time, in part because of a surge in global production capacity. The Australian fertiliser industry, under pressure from the removal of the subsidy and low prices of imports, applied for anti-dumping measures.

The Government subsequently imposed anti-dumping duties on fertiliser imports from the USA, even though their selling price in Australia, after adjustments for costs such as freight, was no lower than in the USA (calculated using the 1983 legislative amendments which allowed the Minister to disregard domestic sales in the exporting country if it were considered that such sales would not permit recovery of all production and marketing costs).

Australian farmers, hit by the removal of the fertiliser subsidy and the imposition of dumping duties on imports, voiced their anger. Amid a political backlash, the Government provided farmers with temporary payments to offset the increased costs resulting from the anti-dumping duties until a major review of the anti-dumping system could be conducted.

Gruen's report (Gruen 1986, p. iii) noted that Australia made greater use of anti-dumping measures than other comparable countries, with the potential to 'frustrate the achievement of other government objectives in the industry, trade, competition and economic policy areas'. Gruen (p. 26) further observed that 'it is normally in an importing country's overall economic interest to take the external trading environment as given and accept cheap imports, even if they are dumped or subsidised'.

However, he also said that the principle of 'fairness' in international trade was widely supported in the Australian community, and noted the 'existing fragile consensus between Government, industry and unions on the need for change towards a less assisted, more outward-looking, restructured industry'. Gruen (1986, p. 42) therefore recommended the system be continued, but subject to some substantial changes, particularly in the area of calculating normal values. In addition, he recommended the introduction of a sunset clause to 'signal clearly to industry that the anti-dumping system was seen predominantly as emergency protection from unfair trading' (p. 42).

Legislation to implement the Government's response to Gruen's report was introduced into Parliament in April 1988. A two-tier administrative system was implemented, with Customs conducting investigations and taking cases to a preliminary finding stage, while a specialist tribunal — the Anti-Dumping Authority (ADA) — reviewed the preliminary findings and made final recommendations to the Minister. The IAC's role in the process was terminated. Other changes included the introduction of a three-year sunset clause for anti-dumping measures and, as also recommended by Gruen, the introduction of specific time limits for the various steps in the assessment process.

Moreover, while the Government agreed with Gruen's recommendation not to introduce a public interest test, it indicated the Minister would take into account national interest criteria in exercising his/her discretion when considering reports from the ADA. And the Government further directed the ADA that 'anti-dumping duties are not to be used as a substitute means of providing assistance to import competing industry in Australia, nor to shield industry from the need to adjust to changing economic conditions' (Jones, 1988).

The 1990s: another (short-lived) upsurge

After declining sharply in the second half of the 1980s, anti-dumping activity again increased in the early 1990s, with the number of new investigations initiated exceeding the previous peak a decade earlier (although the number of new measures imposed and the total number of measures in force remained well below the 1980s'

peak). The Government enhanced the system's accessibility in 1991 by reducing the assessment timeframes introduced in 1988 and extending the default term for measures from three to five years. The Minister also urged Customs and the ADA to be more sympathetic to the predicament of local industry when making their assessments (Snape, Gropp and Luttrell 1998).

However, by 1995 the numbers of new anti-dumping investigations and new measures imposed had dropped to very low levels, with the ADA speculating the sharp declines were related to improving economic conditions. Usage of the system has since remained at relatively low levels (see chapter 3).

The main international development of relevance in this period was the establishment of the WTO to replace the GATT, following the Uruguay Round of multilateral trade negotiations (1986–1994). The Uruguay Round resulted in only minor changes to Australia's anti-dumping and countervailing law and administration, largely relating to the transparency of inquiry procedures (Snape, Gropp and Luttrell 1998).

The current arrangements

The current legislative framework and arrangements for the administration of Australia's system were introduced in 1998 following the Willet Review in 1996. The 1998 amendments abolished the ADA, ending the two-stage investigation system. Customs again assumed sole responsibility for all anti-dumping investigations, while the Trade Measures Review Officer, located within the Attorney General's Department, was established to provide an independent administrative appeals mechanism.

In 2006, a Joint Study was carried out by Customs, the then Department of Industry, Tourism and Resources, the Department of Foreign Affairs and Trade and the Trade Measures Review Officer. It was initiated to ensure that the administration of the anti-dumping system reflected best practice and to respond to concerns of Australia's manufacturers about the effectiveness of the system. The terms of reference specifically excluded examination of anti-dumping policy or the legislative basis for the system. The outcomes of this study are discussed in box 7.1.