
2 The current anti-dumping system

Key points

- Australia's anti-dumping and countervailing system sits within a broader industry and competition framework, which includes other mechanisms that deal with similar issues (such as the *Safeguards* framework).
- Australia's system is based on the World Trade Organization (WTO) *Anti-dumping and Countervailing Measures* agreements.
 - These agreements do not oblige member countries to take action against injurious dumping or subsidisation; but when doing so, they must comply with the WTO rules.
 - However, there is some flexibility under the agreements for member countries to tailor their anti-dumping systems to their own requirements. As a consequence, methods adopted by particular countries vary.
- The Australian Customs and Border Protection Service assesses applications for anti-dumping and countervailing measures through a multistage process.
 - The concepts are complex and require the exercise of considerable judgement.
 - Other parties involved in the process include the Minister responsible for Customs and Border Protection and the Trade Measures Review Officer.
- Both the Australian system and WTO agreements focus exclusively on whether dumping and/or subsidisation has occurred, and whether this has caused or threatens material injury to the local industry producing like goods.
 - Under Australia's system, the wider effects of measures are not considered.

An anti-dumping and countervailing system (the 'anti-dumping' system) has long been a part of Australia's suite of industry and trade policies (see appendix B). This chapter outlines the design and features of Australia's current system that shape its operation.

2.1 Overview of Australia's anti-dumping system

As set out in chapter 1, Australia's anti-dumping system seeks to remedy the injurious effects of 'dumped' imports on Australian industries, though neither Australia's domestic legislation, nor the WTO agreements on which it is based,

explicitly state the underlying rationale for doing so. The system applies to trade in goods only — it does not cover trade in services.

World Trade Organization framework

The WTO's *General Agreement on Tariffs and Trade* outlines the international legal framework for anti-dumping and countervailing systems and establishes the procedures that must be followed by member states. As a member of the WTO, Australia is obliged to ensure that its approach complies with the *Anti-Dumping Agreement* and *Countervailing Measures Agreement* (see box 2.1).

Nothing in these agreements requires that action be taken against dumped or subsidised imports that cause or threaten material injury to a local industry. Instead, their focus is on providing a discipline on any such actions by member countries. As such, they constitute a minimum set of standards in relation to the use of anti-dumping and countervailing measures. However, member countries are free to impose more stringent requirements, if they so choose.

Box 2.1 The WTO agreements

The WTO is responsible for determining and administering internationally agreed principles and rules for managing dumping issues, as well as for providing a dispute settlement mechanism. Since 1961, Australia has aligned its domestic anti-dumping and countervailing system to each new GATT (and now WTO) agreement.

Two WTO agreements provide the basis for Australia's anti-dumping system:

- The *Anti-Dumping Agreement* (formally known as the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*) prescribes rules for the conduct of anti-dumping investigations and the application of measures, including how member countries may: initiate cases, calculate dumping margins, determine injury, enforce remedial measures and review past determinations.
- The *Countervailing Measures Agreement* (formally known as the *Agreement on Subsidies and Countervailing Measures*) regulates measures designed to remedy material injury caused by subsidised imports, along similar lines to the *Anti-Dumping Agreement*.

The requirements in these agreements are discussed further in appendix C.

Legislative framework and system administration

The *Customs Act 1901* is Australia's primary legislation governing claims for anti-dumping and countervailing measures, while the *Customs Tariff (Anti-Dumping)*

Act 1975 (also known as the *Dumping Duty Act*) and the *Customs Regulations 1926* give additional effect to the system.

The Australian Customs and Border Protection Service (Customs) has primary responsibility for the administration of Australia's anti-dumping and countervailing system, including: investigations of applications for new anti-dumping and countervailing measures; reviews or revocations of existing measures; dumping duty assessments; and applications for continuation of existing measures beyond their initial five-year term. Following investigations, Customs makes recommendations to the responsible Minister (currently the Minister for Home Affairs), and also gives effect to the Minister's decisions. In addition, Customs provides an advisory service to assist interested parties that are considering applying for anti-dumping and/or countervailing measures (the Dumping Liaison Unit).

Many, though not all, of the decisions emanating from these processes are appellable to the Trade Measures Review Officer (TMRO). The TMRO is a statutory appointment made by the Minister, located within the Attorney-General's Department, with powers and responsibilities under the *Customs Act 1901*.

In addition to the anti-dumping and countervailing system, Australia has a number of other policies that attempt to remedy the impact of certain forms of injurious pricing in the marketplace. The two primary examples of these are the WTO 'Safeguards' arrangements (also based on a WTO framework agreement) and the *Trade Practices Act 1974* (TPA). These are discussed in section 2.4.

New Zealand

Since 1990, the *Closer Economic Relations* agreement between Australia and New Zealand has precluded the use of anti-dumping measures with respect to goods originating in either country. However, countervailing action can be applied. Also, s. 46A of the TPA, covering the Australian side of the trans-Tasman market for goods or services, prohibits a New Zealand-based business from using its market power to eliminate or damage an Australian competitor, or from preventing entry into (or preventing competitive conduct in) an Australian market. Reciprocal competition laws addressing anti-competitive conduct exist under New Zealand's *Commerce Act 1986*.

With respect to other preferential trade agreements that Australia has negotiated (such as with Chile, Thailand and the USA), parties have agreed to retain their WTO rights to take anti-dumping and countervailing action.

2.2 How the anti-dumping system works

The *Customs Act 1901* outlines the stages in Australia's anti-dumping and countervailing processes (see figure 2.1). In addition, the Dumping and Subsidy Manual (ACBPS 2009) sets out the principles and practices followed by Customs as they normally apply to anti-dumping and countervailing investigations. These processes are complex and require the exercise of considerable judgment.

Application to Customs for anti-dumping measures

An industry that believes dumping or subsidisation is causing, or threatening to cause, material injury can apply to Customs for the imposition of measures to redress the situation. Any person may lodge an application, provided that it is made on behalf of an industry producing goods 'like' those allegedly being dumped or subsidised.

Applicants are required to provide a range of information and supporting evidence to Customs as part of their application. As well as identifying the imported dumped or subsidised goods and the domestic like goods, the country of export and the relevant Australian industry, applicants must provide:

- estimates of the 'normal value' and export price of the dumped goods (to show that dumping has occurred); or an indication of the price-suppressing effect of a subsidy provided by an overseas government
- an estimate of the material injury the industry has suffered (or is likely to suffer)
- some demonstration of causation between the dumping and the injury.

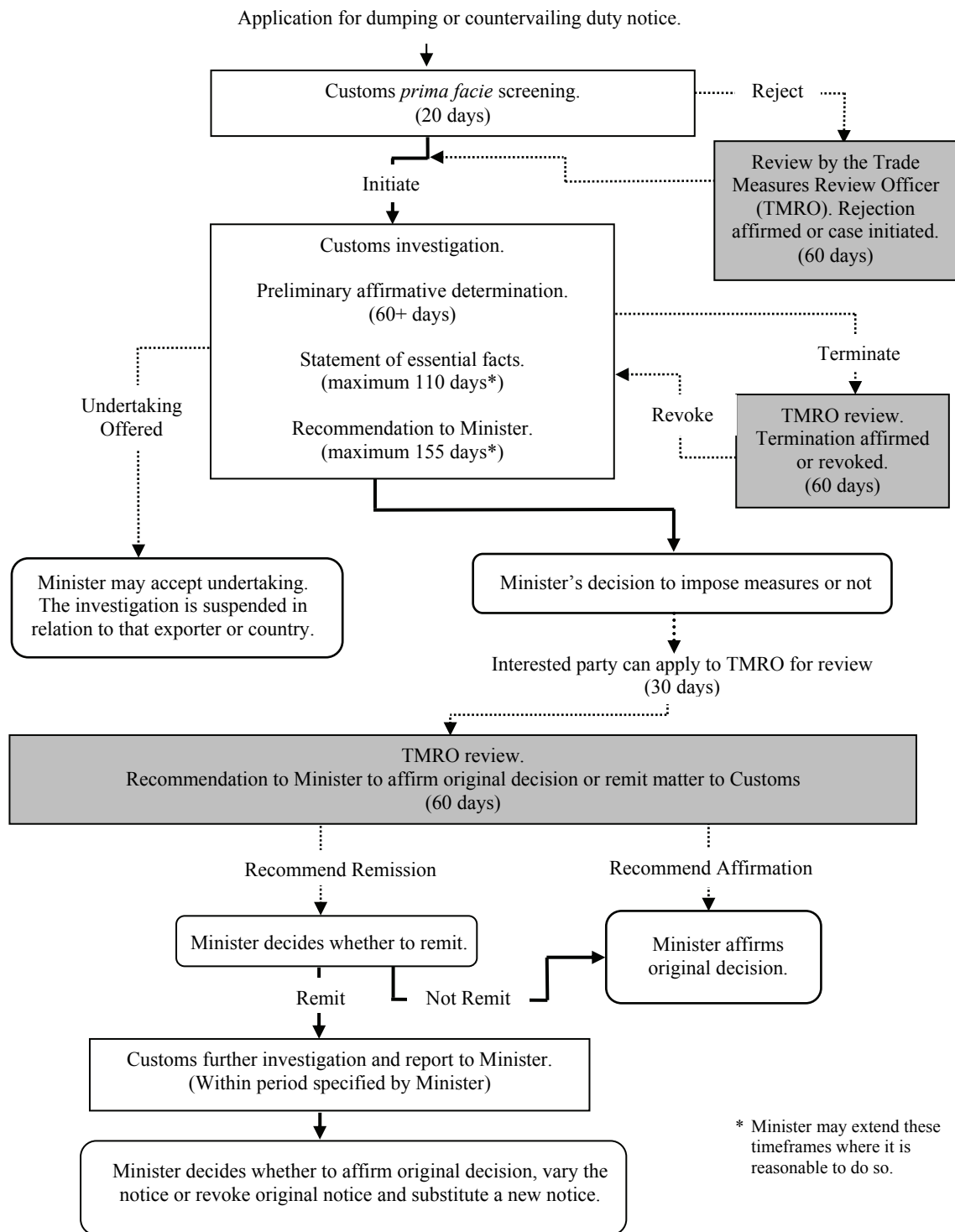
These concepts are considered further in section 2.3.

Customs then has 20 days to undertake a preliminary screening to determine whether or not there is sufficient evidence to initiate a formal investigation. As well as assessing the 'likeness' of the local and imported goods concerned (see section 2.3), the screening process focuses on: the extent of Australian industry support for the application; and whether the *de minimis* thresholds that provide for automatic termination of an investigation apply.

Specifically, to proceed to the next phase of the investigation process, an application needs the support of Australian producers whose collective output comprises both:

- 25 per cent or more of the total Australian production of like goods
- more than 50 per cent of the total production of like goods by those Australian producers who have expressed either support for (or opposition to) the application.

Figure 2.1 How do dumping investigations proceed?



Source: ACS and DITR (2006, p. 7).

These requirements mean that cases are only initiated where a significant proportion of production in the local industry has allegedly experienced (or is threatened with) injury; and, that even where the applicants themselves do not account for the majority of production in the industry, there is (effectively) majority support for the imposition of measures.

In addition, Customs will reject applications or terminate investigations if:

- the dumping margin or subsidy level is *de minimis*
- the volume of dumped or subsidised imports is negligible
- the injury is judged by Customs to be negligible (see box 2.2).

Box 2.2 Termination of applications

The *Customs Act 1901* sets threshold criteria for applications to proceed to initiation. If in its initial assessment of the application Customs determines that any one of the following criteria has not been met, then the application will be terminated.

Dumping or subsidy margins are *de minimis*

A dumping margin less than 2 per cent of the export price of the goods concerned is considered to be *de minimis*.

In countervailing cases, the *de minimis* subsidy margin is 1 per cent. However, a higher threshold applies to developing and least developed countries, where the *de minimis* subsidy margins are 2 per cent and 3 per cent respectively.

Volume of goods is negligible

Customs will also terminate applications where the volume of dumped or subsidised goods is negligible. In cases involving a single country, for an investigation to proceed, the dumped goods must account for more than 3 per cent of total imports of the like goods into Australia (or if the case involves multiple countries, they must collectively exceed 7 per cent).

These same thresholds also apply in countervailing cases where the overseas supplier concerned is based in a developed country. However, where a supplier is from a developing country, the volume of imported goods will be deemed negligible if below 4 per cent of total imports (or where suppliers from multiple countries are involved, collectively 9 per cent).

Negligible injury

If Customs considers that the alleged injury suffered by the Australian industry is not material, then it will terminate the application.

In determining whether an application for countervailing measures against a developing or least developed country should proceed to initiation, the *Customs Act*

1901 sets slightly higher termination thresholds (in effect making applications for measures harder).

As noted above, Customs also provides an advisory service — the Dumping Liaison Unit — to assist parties making applications for measures. In providing advice on the preparation of applications that conform with the legislative requirements, the service is, amongst other things, intended to reduce the number of applications that do not meet the necessary criteria. Customs returns applications that do not meet the necessary criteria to applicants together with reasons for the rejection.

Initiation and investigation of cases

Following acceptance of an application for an anti-dumping or countervailing measure, Customs sets a ‘date of initiation’ to notify the public that an investigation is commencing and invites submissions from interested parties. Public notification is made in the *Commonwealth of Australia Gazette* as well as a national newspaper, and Customs issues an Australian Customs Dumping Notice to explain the procedures and time frames for investigation. The notice will also define the ‘investigation period’ — generally the 12 months preceding the initiation date — over which Customs must determine whether dumping has occurred. Prior to initiation, and in accordance with WTO requirements, Customs is not permitted to contact the overseas suppliers that are subject to an anti-dumping or countervailing application.

For countervailing applications the process is for the most part the same, but with an additional early step. Fifteen days prior to the date of possible initiation, the Australian Government advises the government of the exporting country of the nature of the complaint. The foreign government is offered the opportunity for consultation with the aim of arriving at an agreed solution to the matter. If this consultation process does not resolve the matter within 15 days, then the initiation process applying to anti-dumping cases takes effect.

Once a case has been initiated and an investigation commenced, Customs directly contacts interested parties and invites submissions. These must be lodged with Customs within 40 days of the date of initiation. Following receipt of submissions, Customs investigates and verifies the information. Visits are usually made to importers, exporters and manufacturers to examine company records relevant to the investigation. Where an exporter or importer does not provide Customs with the information needed to determine whether dumping has occurred, Customs may use a variety of alternative methodologies to calculate export prices and normal values (see section 2.3).

From day 60 of the investigation, Customs has the option of making a ‘preliminary affirmative determination’ (PAD) and, in conjunction, imposing provisional measures (usually in the form of a ‘security’ payment) to prevent material injury occurring to the Australian industry concerned while the investigation continues. However, in practice, provisional measures have only infrequently been imposed prior to the release of the Statement of Essential Facts (SEF), with PADs typically issued shortly thereafter. A PAD may also be released without the imposition of provisional measures to enable consideration of an undertaking from an exporter (see below).

The SEF summarises the relevant facts of the investigation and forms the basis of the final report by Customs to the Minister. Specifically, it addresses whether both:

- the goods in question have been dumped or subsidised, and as a result
- the Australian industry has suffered, or is likely to suffer, material injury.

A statutory time limit of 110 days is specified for the release of the SEF following the initiation of an investigation, although Customs may request the Minister to extend the period during which the investigation takes place. When this occurs, the time frame for the final report is commensurately extended.

All interested parties, including foreign governments, exporters, manufacturers, importers, downstream customers and the local Australian industry have 20 days from the publication of the SEF to lodge a response to it.

Customs must complete a final report to the Minister within 155 days of the date of initiation (unless an extension for the preparation of the SEF has been granted) that makes conclusions and recommendations based on its investigation. On the basis of Customs’ recommendations, the Minister decides whether anti-dumping and/or countervailing measures should be imposed.

However, at any time after the release of a PAD (but prior to the Minister’s final decision), an overseas supplier can offer an undertaking to price all future exports at or above the ‘non-injurious’ price. (In countervailing cases, the overseas government can also offer an undertaking to withdraw subsidy support for the exports concerned). Acceptance of an undertaking by the Minister will suspend the investigation in regard to the specific exporter concerned.

There is no time limit on the Minister to make a decision in response to advice from Customs on whether or not to impose anti-dumping or countervailing measures. Also, in reaching a decision, the Minister has discretion to take account of factors beyond dumping and injury. There has previously been some uncertainty in regard to the extent of that discretion.

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- In announcing its response to the Gruen review (1986), the Government indicated that the Minister would take into account the national interest when exercising discretion on whether to impose measures (see appendix B).
 - A 1993 Federal Court case questioned whether the Minister, once satisfied that dumping, material injury and a causal link had been established, was in fact obliged to impose measures (see Law Council of Australia and Law Institute of Victoria, sub. 29, p. 6).

However, the Federal Court recently reaffirmed that the legislation confers a broad discretion on the Minister, though it noted that there must be a reasonable connection between the additional information considered by the Minister and the specifics of the case in question (*Siam Polyethylene Co Ltd v Minister for Home Affairs* [2009] FCA 837, at para. 87).

Revocation and continuation provisions

The WTO *Anti-Dumping Agreement* states that the intended purpose of any anti-dumping measure is to counter the effect of injurious dumping, and that measures should remain in force only as long as is necessary to achieve this.

However, consistent with the WTO agreements, Australia has legislated that measures will generally remain in force for a period of five years.

Moreover, the system allows measures to be extended for further periods of five years. Specifically, at least nine months before the expiry of any measure, Customs must publish a notice inviting local suppliers to apply for an extension. Those suppliers have 60 days to make this application and to provide the required information. Customs then has 155 days to make inquiries and report to the Minister who, on the basis of this advice, may determine that measures should continue for a further five years.

The criteria applied to the continuation of measures are necessarily somewhat different from those applying to the initial investigation, given the ongoing influence of measures in place. In particular, Customs' review focuses on whether expiration of a measure would be likely to lead to the recurrence of the injury that the measure is intended to prevent — meaning that for an anti-dumping measure, for example, it must form a view on whether injurious dumping is likely to recur if the measure were terminated. When undertaking a continuation review, Customs does not recalculate the dumping or subsidy margin, or re-examine the issue of causation, although the former may be simultaneously considered through a concurrent 'review of measures' (see below).

Reviews of the variable factors and duty payable

A party affected by an anti-dumping measure or undertaking (including an exporter, importer, Australian producer of like goods or a foreign government) may, after a measure has been in force for 12 months (and annually thereafter), seek a review of the ‘variable factors’ that determine the magnitude of the measure, including: the normal value and ‘ascertained’ export price, or the subsidy level; and, where applicable, the non-injurious price.

Australia’s anti-dumping system also provides for ‘administrative’ reviews, whereby importers can seek a refund of overpaid duties. Specifically, when a measure is imposed, subsequent consignments are subject to that duty on an interim basis. Where the export price is lower than at the time measures were imposed, an additional duty margin is immediately calculated and imposed by Customs. However, when the export price of subsequent consignments is higher than at the time the measures were imposed, the ‘excess’ duty is not immediately refunded. Rather, the importer may seek a final determination of the duty payable, and a refund of any excess duty paid. An importer can seek a final determination for each six month period it is liable for duties.

Similarly, a new exporter who would otherwise be subject to an ‘all other exporters’ duty rate may seek an accelerated review of the arrangement, to enable the calculation of a dumping duty specific to its circumstances (see section 2.3).

Conduct of investigations and reviews

In conducting investigations and reviews, Customs is subject to various requirements designed to promote transparency. Amongst other things, it must maintain a public file for each dumping investigation containing non-confidential information provided by interested parties. And where parties submit information on a confidential basis, they must provide a summary for inclusion on the public file that contains sufficient detail to allow a ‘reasonable understanding’ of the substance of the information concerned.

As part of this process, Customs publishes its SEF and final report to the Minister on its website. Consistent with the WTO agreements, both reports must include:

- the material findings of fact that support any recommendations
- the particulars of the evidence relied on to support those findings
- the reasons for any recommendation.

Appeal arrangements

Many, though not all, of the decisions made by the Minister (or the CEO of Customs) can be appealed to the TMRO. Some notable exceptions include a decision to accept an undertaking, or a decision to continue or not continue dumping or countervailing measures (see box 2.3). When a decision is appellable, an appeal application must be lodged with the TMRO within 30 days.

Box 2.3 Decisions reviewable by the TMRO

The TMRO may review decisions by:

- the Minister to impose or not impose a measure
- the CEO of Customs to:
 - reject an application for dumping or countervailing measures
 - terminate an investigation
 - recommend to the Minister the refund of an amount of interim duty less than the amount contended.

The TMRO is able to substitute its own decisions for those made by the CEO of Customs. But for decisions made by the Minister, the TMRO can only recommend a reinvestigation by Customs of the matter in dispute.

Decisions not reviewable by the TMRO include:

- a decision by the Minister to accept an undertaking
- a decision by the Minister to vary the amount of the normal value, ascertained export price or non-injurious price underlying a measure from those established by the original investigation (as part of a review of measures)
- a decision by the Minister to continue or not to continue measures
- a decision by the CEO of Customs not to initiate a review of the amount of interim dumping duty.

The range of parties who can appeal also varies according to the nature of the decision. For those decisions made by the CEO of Customs, only applicants for anti-dumping measures (or for duty refunds) may seek a review. However, for decisions made by the Minister, any interested party may lodge an application for a review, including:

- the original applicant
- a party representing, or directly concerned with, either an industry producing ‘like goods’, or with the importation or exportation to Australia of such goods
- trade associations
- the government of the country from which the goods originated or were exported.

In hearing appeals, the TMRO can substitute a decision made by the CEO of Customs. But for decisions made by the Minister, it is limited to recommending a reinvestigation by Customs. In reviewing decisions, the TMRO may only take account of information available to Customs in the course of the original investigation. The TMRO has 60 days to complete its reviews unless granted an extension by the Minister.

Further, parties may be able to challenge decisions by Customs or the Minister on points of law (but not the merits of the case) before the Federal Court. And under the WTO agreements, separate from any appeal arrangements applying within a particular country, member countries may seek a ruling on matters in dispute from the WTO Dispute Settlement Body. This may result in member countries being required to change their anti-dumping legislation to render it compliant with the WTO agreements.

2.3 Key concepts and definitions

Within Australia's anti-dumping system, decisions on whether to impose measures, and the key concepts that underpin those decisions, have been based solely on whether there has been dumping or subsidisation which is, or threatens to be, injurious. This narrow focus is in keeping with the specific requirements in the WTO agreements, although these agreements do not preclude consideration of wider impacts. Indeed, several countries have explicit arrangements in place to consider the public interest (see chapter 5).

Identifying like goods

For a dumping or countervailing application to proceed, there must be Australian production of goods that are identical or substantially similar (known as 'like goods') to the imported goods concerned. Section 269T of the *Customs Act 1901* provides general guidance by defining 'like goods' as:

... goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

In practice, Customs may consider a broad range of product attributes to determine whether goods are 'like'. These can include considerations of: physical likeness (such as size, weight, grade, strength or shape); commercial likeness (degree of competition or substitutability, consumer sensitivity, distribution channels); functional likeness (similarity of end-use); and production likeness (similarity of

manufacturing process or involvement of any patented processes). While no single consideration is sufficient to decide whether goods are ‘like’, and relative weights will partly depend on the nature of the goods, physical attributes will normally carry most weight (ACS 2007). As appropriate, Customs may also draw on previous decisions about other like goods, treatment of the goods under various tariff schedules and information about how the goods are marketed in Australia and the overseas country concerned.

Also, Australia’s specific provisions for cases involving ‘close processed agricultural goods’ directly affect the determination of like goods in these cases.

- Producers of raw agricultural products have the same recourse to anti-dumping and countervailing measures if dumped ‘like goods’ cause or threaten material injury.
- In addition, in cases where the allegedly dumped or subsidised good is a close processed agricultural good, in considering the material injury to the ‘Australian industry’, Customs is, in some cases, able to have regard to impacts on producers of the raw product.

This provision is intended to allow primary producers (in conjunction with a processor) to access anti-dumping measures in situations where it is the importation of processed goods that causes material injury, rather than direct competition from imported primary products. However, such additional access to measures is only potentially available when the following criteria are met:

- the raw agricultural products are substantially devoted to the processed goods
- the processed goods are mainly derived from the raw agricultural products
- the prices of the raw and processed goods are closely related, or the cost of producing the processed goods is closely related to the cost of the raw agricultural products.

As discussed in chapter 6, it is far from clear that, in practice, these provisions have had any meaningful impact on primary producers’ access to the anti-dumping system, or on the outcome of investigations involving processed primary products.

Establishing normal values in dumping cases

‘Dumping’ occurs when goods are exported to Australia at a price below the ‘normal value’ of the goods in their country of origin. The normal value, together with the export price, provides the basis for the level of any dumping measure.

The *Customs Act 1901* defines the normal value of a good exported to Australia as:

... the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

Further, the Act specifies that:

- ‘In the ordinary course of trade’ excludes substantial quantities (those not less than 20 per cent of total sales) sold at less than cost over extended periods.
- Sales are considered to be at ‘arms length’ if they are between unrelated parties and do not involve any additional payments between the parties beyond the sale price.

Where Customs determines that comparable sales in the exporting country are not an appropriate basis for determining the normal value, the legislation sets out a hierarchy of alternative methods:

- other sellers’ domestic sales (in the country of export)
- either a constructed price to make and sell the goods in the country of export, including an allowance for profit; or, the overseas supplier’s sales to a third country
- an amount having regard to all relevant information with scope, in some circumstances, to use constructed prices based on the costs to make and sell in surrogate countries, including Australia.

In practice, a number of adjustments have to be made to establish a normal value that is directly comparable to the export price of the goods concerned. For example, Customs will adjust normal values (where possible) to account for differences in conditions and terms of sale, and in taxation arrangements. Once established, the normal value will remain unchanged for the duration of the measure, unless there is a review of the variable factors — though for duty refund purposes, normal values may be recalculated on a one-off basis (see chapter 6).

In the case of applications for countervailing measures, there is no requirement to establish normal values. This is because, other than for an explicit export subsidy, subsidies will generally lower both the domestic and export price of the goods concerned. Hence, applications and the assessment process focus on how the subsidy benefits the overseas supplier by enabling it to charge a lower price for its products.

Moreover, Customs can only impose countervailing measures against ‘actionable’ subsidies; that is, those foreign subsidies that are ‘specific’, and not excluded by the legislation (see box 2.4). A specific subsidy is one that: is available to particular enterprises; a subsidy for meeting export performance criteria; or a subsidy for preferentially using domestically produced goods.

Box 2.4 Excluded subsidies

At their inception, the *WTO Agreement on Subsidies and Countervailing Measures* and *Agreement on Agriculture* specified a range of subsidies that were not ‘actionable’; that is, countervailing measures could not be applied by member countries to remedy any injurious effects from importation of those subsidised goods. These non-actionable subsidies included those:

- for research activities
- to disadvantaged regions (even if involving a specific subsidy for particular firms)
- to enable firms to adapt to new environmental requirements
- for a variety of agriculturally related purposes, such as pest and disease control, training, marketing and promotion, inspection and advisory services, public purchasing of food stockpiles and purchases for food aid.

The relevant provisions in the agreements giving effect to these exclusions have since lapsed, meaning that member countries are now able to take countervailing action against these subsidies if they cause or threaten material injury.

However, Australia has chosen not to update the *Customs Act 1901* to reflect the changed status of these subsidies, and continues to treat them as not countervailable.

Establishing material injury and demonstrating causal links

Before measures can be imposed, dumping or subsidisation must not only have occurred, but must be found to have caused, or threatened to cause, material injury to the Australian industry that is producing like goods.

‘Material injury’ is not explicitly defined under the *Customs Act 1901* or the WTO agreements. Nevertheless, a widely accepted definition originated from the now defunct Anti-Dumping Authority, which concluded that:

... ‘material’ should be considered in terms of its opposite: thus not immaterial, insubstantial or insignificant; greater than that likely to occur in the normal ebb and flow of business. (ADA 1989, p. 1)

In this context, the Act points to a list of factors that Customs might consider when assessing the incidence of injury, for example, changes in: prices, profits, employment, return on investment, market share and capacity utilisation. Further, it provides guidance on what constitutes a negligible impact, including through the *de minimis* provisions which, as discussed earlier, can lead to an investigation being terminated.

If material injury is found, a causal relationship must then be established between the dumped or subsidised imports and that injury to the local industry. In this regard, the *Customs Act 1901* directs Customs to consider whether any factors other than the presence of dumped goods are causing material injury, including:

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- the volume and price of imported like goods that are not dumped
 - changes in the level of demand for the goods
 - changes in technology, export performance or productivity of the Australian industry.

Basis for setting dumping duties and accepting undertakings

Where the requirements for the imposition of measures are satisfied, the Minister may apply duties or accept an undertaking. In dumping cases, the undertaking must be provided by the overseas supplier, not the Australian importer; while in countervailing cases, the undertaking can be made by the overseas supplier or the foreign government.

In the first instance, anti-dumping duties are based on the assessed dumping margin — the difference between the ‘ascertained’ normal value of the like goods and the ascertained export price. Similarly, countervailing duties are based on the quantum of the foreign subsidy concerned.

However, the dumping margin or the amount of subsidy sets the maximum rate of any measure. This is because, under Australia’s ‘lesser duty rule’, the Minister must consider applying measures only to the extent necessary to remove injury to the domestic industry. To do this, Customs will calculate a non-injurious export price for the dumped or subsidised goods — a price that would be sufficient to remove the injury for the Australian industry. This is generally the price at which the local industry might reasonably sell its product if there were no dumped or subsidised imports — known as the unsuppressed selling price — adjusted for any costs incurred in importing the dumped goods. Customs has advised the Commission that 12 of the 27 measures currently in force have been set on the basis of a lesser duty.

Typically, Customs calculates specific anti-dumping and/or countervailing duty rates for those individual exporters examined during an investigation. In doing so, it will also calculate an ‘all other exporters’ duty rate, which also applies to new exporters who begin exporting to Australia after the measures are imposed. However, exporters subject to this rate may seek an accelerated review of the measure, to enable the calculation of a rate specific to their particular circumstances.

As noted above (see section 2.2), Customs can impose a provisional measure in the form of a security payment, in conjunction with the publication of a PAD (from day 60 of an investigation onwards). Additionally, in limited circumstances, there is scope to apply retrospective measures covering a period of up to 90 days prior to the publication of the PAD. This might occur, for example, if the exporter should have

known, or actually knew, that they were dumping. However, advice to the Commission indicates there has not been a case where such retrospective measures have been imposed for many years.

2.4 Related policies

As noted, Australia's anti-dumping and countervailing system sits alongside the WTO *Safeguards Agreement* and the *Trade Practices Act 1974* (see box 2.5). The former deals with injury caused by a surge in imports, while damage caused by predatory pricing behaviour in the domestic market is one of the many competition matters addressed through the TPA.

Notably, both apply a higher hurdle for action than the anti-dumping system. Thus, the safeguards system states that the level of injury, or threatened injury, must be 'serious' rather than 'material', while the TPA prohibits firms from 'eliminating or substantially damaging' competitors. Also, while the anti-dumping system does not take into account the wider effects of measures on the community:

- the safeguards arrangements require consideration of whether a measure would be in the public interest
- the explicit objective of the TPA (s. 2) is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

2.5 The international context

While Australia has had an anti-dumping and countervailing system for over a century, this is not the experience of many countries. The number of WTO member countries with anti-dumping or countervailing legislation more than doubled between 1980 and 2008, from 36 to 97. Most of this increase reflected the introduction of systems by developing countries. The majority of WTO members now have a system in place.

While the WTO agreements provide the overarching framework for any member country's anti-dumping system, there is flexibility within the agreements for countries to tailor systems to their particular requirements. As a consequence, the models adopted by individual countries vary in a number of key areas, including:

- the number of agencies involved in administering the system
- the time taken to complete the stages of the investigation, and the sequence of investigative tasks

- the breadth and nature of appeals processes
- the treatment of non-market economies and economies in transition
- whether there is provision to consider the broader public interest.

Appendix C elaborates on the features of the anti-dumping systems of a number of the major developed countries, as well as the system in India, which is the largest developing country user of anti-dumping measures.

Box 2.5 Related trade and competition policies

A safeguards measure is a temporary 'emergency protection' (in the form of an increased tariff, a tariff-rate quota or quota) applied in response to a surge of imports that causes, or threatens to cause, serious injury to a domestic industry. Compared with the anti-dumping system, the safeguards system generally sets more demanding qualifying tests and more circumscribed remedial measures. Specifically:

- the level of injury, or threatened injury, must be 'serious' (rather than 'material')
- evidence must include arguments on whether a measure is in the public interest
- measures cannot target imports from a particular country, or individual suppliers within a country
- measures should not last more than four years, although they can be extended for an additional 4 years (but must not exceed eight years in total), and reapplication of an expired safeguard measure that applied for longer than 180 days is prohibited for at least two years
- countries must progressively liberalise measures at regular intervals
- countries applying measures must 'give something in return' to the exporting country.

The TPA has wide-ranging impacts on the conduct of business in Australia. One of its functions is to prevent anti-competitive conduct (including predatory pricing) that would be damaging to competition and hence to the well-being of the community. Of particular relevance is s. 46 which deals with the misuse of market power, and which prohibits corporations that have substantial market power from taking advantage of that power, including by protracted selling at prices below cost, for the purpose of:

- eliminating or substantially damaging a competitor
- preventing entry to markets
- deterring or preventing a person from engaging in competitive conduct.

In 2007, s. 46 was extended to prohibit a firm with a substantial market share from supplying goods or services below cost for a sustained period for the purposes of: eliminating or damaging a competitor; preventing market entry; or deterring competitive conduct (the 'Birdsville Amendment'). Importantly, the application of s. 46 adopts a 'purpose test' that confines its scope to activities undertaken with an intent to damage a competitor, in contrast to the 'effects test' of threatened or material injury under anti-dumping legislation.