

# **A Fair Go For Australian Industry**



Labor's Policy Discussion Paper on Australia's  
Anti-Dumping Administration

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## **Acknowledgement**

Dr Richard Whitwell from Central Queensland University's Faculty of Business and Informatics, for his extensive contribution to this project in research and advice.

## Foreword

Anti-dumping and anti-subsidy (countervailing) administration have been the subject of debate between nation states since the inception of the *General Agreement on Tariffs and Trade 1947 (GATT)*.

Because the current Doha Round of World Trade Organisation (WTO) negotiations has not yet agreed to any change, the discussion paper is framed in the context of the existing key documents:

- *The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)*; and
- *The Agreement on Subsidies and Countervailing Measures 1994*.

Federal Labor supports the use of anti-dumping and anti-subsidy measures to correct distortions in trade that cause injury to Australian industry through unfair competition in the Australian market.

That support is unchanged, but it is increasingly clear to both Labor and industry that the area demands reform. I have therefore developed this Discussion Paper to canvass options for meaningful anti-dumping reform and industry input into Labor's policy development process.

It is important to note the existence of another review in this area by a Customs Joint Study Team with terms of reference to:

*...examine Customs' current administrative practices and consider options to improve the operation of Australia's anti-dumping system within the current legislative arrangements and policy settings. The Joint Study will not examine the Government's anti-dumping policy nor the legislative basis for the current Australian anti-dumping system.<sup>1</sup>*

Labor argues that in limiting the terms of reference within the current legislative arrangements and policy setting, the Howard Government has wasted the opportunity to examine the possibilities of genuine reform.

This paper forms part of Federal Labor's policy deliberations and seeks to explore areas of genuine reform. You are invited to provide a submission or comment on this Discussion Paper. Submissions can be made before 30 March 2007 direct to:

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**Beenleigh Qld 4207**  
**or senator.ludwig@aph.gov.au**

I strongly encourage feedback on the issue of anti-dumping administrative reform and invite you to make a contribution to this process.



**Joe Ludwig**  
Shadow Minister for Justice and Customs

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<sup>1</sup> The joint study report was to be with the Minister by 24 August 2006. The Treasury with their responsibility for economic governance was not part of the joint study.  
[http://www.customs.gov.au/webdata/resources/files/AD\\_JointStudy\\_TermsOfRef.pdf](http://www.customs.gov.au/webdata/resources/files/AD_JointStudy_TermsOfRef.pdf)

## Executive Summary

This discussion paper is designed to engage industry and the wider public in Labor's policy making process – it is in effect a chance to have your say on how anti-dumping and anti-subsidy measures should be run.

The administration of anti-dumping is a market-driven complaint process, relying on affected producers to lodge an industry based complaint. It is through the testing of the evidence presented by the interested parties which leads to a decision of whether or not to impose an anti-dumping duty. It is to the improvement of this process that this discussion paper is directed.

Labor proposes a fairer system for industry, including small and medium size manufacturers that:

- Gives them access to professional advice in the preparation of a case through the engagement of an independent AusIndustry expert;
- Allows them to have their case heard by an expert initiation panel; and
- cuts the average time it takes to process a claim through a more efficient system, where claims are generally of a higher standard.

We suggest that the ACCC as competition regulator take on the job rather than Customs, which we think should remain a border protection agency.

The present system can see a case go the Minister not once but twice for determination. This plan takes the Minister and the politics out of the system. In the first instance a case will be determined by the experts. On appeal, a case will go to the Australian Competition Tribunal.

Labor's plan is about making the system more transparent and giving more certainty to business, allowing earlier resolution of disputes.

To promote discussion, the paper canvasses a number of issues in anti-dumping and countervailing administration. The key proposals are that:

- The administration of anti-dumping and countervailing measures should be transferred from the Australian Customs Service (ACS) to the Australian Competition and Consumer Commission (ACCC), with a right of appeal to the Australian Competition Tribunal (ACT).
- The ACCC has a charter to promote competition and fair trade in the market place for the benefit of consumers, business and the community. Placing the ACCC as the decision maker for applying anti-dumping and countervailing measures will remove the opportunity for political interference in the process.
- Injurious dumping is unfair competition, and ACCC staff have the expertise, relevant commercial qualifications and regulatory experience required to administer these measures. This is also consistent with the move towards consolidation of statutory bodies dealing with similar activities, which reduces duplication of functions within the government sector.
- The decision on initiation of a formal complaint would be made by an expert panel, similar to the takeovers panel, comprised of a representative appointed from each of the Industry, Trade and Treasury portfolios. As well as being independent of the decision maker, the panel would capture the views of key government stakeholders, so decisions can be made within a wider policy context. That is,

there may be alternative ways for the panel to deal with the problem presented by the applicant, other than proceeding through to an anti-dumping investigation.

- The ACCC would deal with the investigation sequentially, first addressing the issue of injury, and only after injury has been established would the verification of dumping or subsidisation be activated. This has the advantage of not requiring any evidence from the foreign exporter to be lodged with the ACCC until after a preliminary injury finding - reducing the expense to both the ACCC and the foreign exporter in those cases where injury is not established. If serious injury is found at the preliminary injury stage provisional measures would be imposed, followed by further consultation (and verification if required) prior to the ACCC reaching a final determination. The ACS would retain a policing role as a part of barrier clearance. Further details of the investigation process are at **Appendix 1**.
- There should be transparency in the process, allowing Australian based lawyers and technical experts' access to all non-confidential and confidential data during the investigation, under strict non-disclosure provisions equivalent to those used in hearings before the Australian Federal Court. This would assist in ensuring that the line of inquiry is clear and that the parties can provide information helpful to the investigation at the appropriate times.
- AusIndustry be used as the initial interface with industry on dumping, with improved access to information, and an expert on anti-dumping matters would guide an applicant through the process where required. This would be of benefit to small and medium sized complainants, as well as separating the liaison function from the decision making body.
- The anti-dumping authority would continue to monitor the effectiveness of the anti-dumping and countervailing measures imposed, while being mindful of the need for strict confidentiality in information flows to interested parties. However, where there is a public inquiry and dumping duties are imposed the information on normal values, non-injurious prices and determined export prices should be publicly available.

A complete list of proposals can be found on page 23.

If adopted, the proposals outlined in this plan not only dramatically cut the average investigation time, but it will free up more time and resources to investigate the most serious cases more thoroughly.

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## Introduction

This discussion paper is aimed at improving the administration of anti-dumping and countervailing duty administration in Australia.

Labor is committed to economic reform as a part of our plan to safeguard a more prosperous future for Australia. Labor is committed to the principles of robust Australian industry in an environment of free trade and fair international competition.

To uphold these principles, Australia requires effective anti-dumping administration. This interest is not being served by the current arrangements.

The role of the Australian Customs Service (ACS) is undergoing rapid change. The increasing focus on border security and trade facilitation are to be welcomed, and will serve Australia well.

However, one area of Customs administration is being left behind. Anti-dumping and countervailing administration are competition-related economic concerns, and do not sit well within the functions of a border protection agency. As the ACS shifts focus, anti-dumping and countervailing administration sit merely as an adjunct to a border protection agency.

This unhappy compromise seems destined to lead to either of two unfortunate results: the area of anti-dumping or countervailing duty administration may be largely ignored by the ACS or alternatively it will operate as a distraction from its proper task of securing the border. This has led Labor to question the effectiveness of the present scheme:

*“The appropriateness of continuing to house anti-dumping policy within the Customs service and not in Industry, the ACCC or trade is highly questionable. By all means, it's Customs that should be stopping the dumped goods at the border, but the policy and assessment section of the Service is the last vestige of another age, in a time when the agency sat in the Industry portfolio, when Customs paid subsidies and bounties and when extensive tariff walls strangled the economy.”<sup>2</sup>*

Labor has recognised the need for a review of anti-dumping policy as part of its National Platform consultations on Customs. The existing Platform provides:

### *Chapter 11*

*30. Labor supports the maintenance of anti-dumping measures. Anti-dumping legislation ensures that overseas exporters do not hurt our industry by selling their products in Australia at a lower price than they charge in their home markets. Where there is an allegation of dumping, it should be independently and urgently investigated by the Australian Customs Service.*

### *Chapter 12*

*82. Labor will put in place anti-dumping measures to ensure that Australian industry is not disadvantaged by unfairly priced imports.*

### *2004 Resolutions*

*In developing strategies for Australian industry to realise more opportunities in the domestic and export markets, Labor will...maintain a strong anti-dumping scheme to ensure Australian industry is not disadvantaged by unfairly priced imports;*

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<sup>2</sup> Senator Joe Ludwig - Speech Customs Brokers and Forwarders Council of Australia - Adelaide - 14th October 2005  
<http://www.alp.org.au/media/1005/specus150.php>

Labor is of the view that the present arrangements are unnecessarily complex and do not enhance our international competitiveness or our ability to protect Australia from unfair competition. In addition, this adversely affects the ability of small and medium sized Australian producers to access anti-dumping and anti-subsidy remedies.

Arising from the above, there are two questions that require answers from a policy perspective:

- Firstly, under what circumstances should anti-dumping duties be applied?
- Secondly, what is a fair, effective and efficient administrative procedure for applying anti-dumping duties?

Although this discussion paper focuses on the second question, the proposed change in the institutional structure will undoubtedly have an impact on how anti-dumping duties are applied.<sup>3</sup>

The proposals outlined in this discussion paper are designed to reduce the complexity of these measures, and make anti-dumping relief accessible to large, medium and small producers.

**Appendix 2** provides some policy background to the application of anti-dumping and countervailing measures, which readers may find useful.

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<sup>3</sup> Report of the Taskforce on Reducing Regulatory Burdens on Business - Final Government Response - 15 August 2006 – “The Australian Government agrees to the recommendation and will commission a full and independent public review of Australia’s anti-dumping arrangements following on from the Joint Study of the Administration of Australia’s Anti-dumping System, which was commissioned by the Ministers for Justice and Customs and Industry, Tourism and Resources in February 2006.” <http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1141>



## Anti-Dumping and Countervailing Measures Defined

**Anti-dumping duty** may be applied by countries to imported goods, where products enter their domestic commerce that are dumped and, as a result, cause injury to the domestic industry producing like goods.

Both dumping and injury need to be present for a domestic industry to mount a successful anti-dumping claim. In addition, a causal association between the dumping and the injury is required.

The term 'dumped' refers to the situation in which goods are sold for export below the normal price prevailing in the domestic market of the exporting country.<sup>4</sup>

The term 'injury to a domestic industry' refers to the resultant business and financial distress on the importing country's industry producing like goods.

**Countervailing duty** may be applied by countries to imported goods, where products enter their domestic commerce that have received the benefit of a subsidy in the country of export and, as a result, cause injury to the domestic industry producing like goods.<sup>5</sup>

## International Agreements on Dumping and Subsidies

The provisions of the Australian Anti-dumping Law<sup>6</sup> are consistent with the World Trade Organisation (WTO) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the WTO Agreement on Subsidies and Countervailing Measures 1994, which permit countries to impose dumping and/or countervailing measures, provided they are consistent with the relevant Agreement.<sup>7</sup> These Agreements were negotiated as part of the Uruguay Round of multilateral trade negotiations.

It is important to note exporters continue to be free to dump goods into the markets of other countries. The destination countries for these goods may, however, impose an anti-dumping duty on these goods if they are found, according to their domestic anti-dumping law, to be injuring their domestic industry (producing like goods).<sup>8</sup>

The WTO Agreements contain minimum standards to which member states have agreed to apply when investigating injurious dumping or subsidisation or providing relief to affected domestic industries. They are concerned with the manner in which the substantive provisions contained in Articles VI (Dumping) and VI, XVI and XXIII (Subsidisation) of GATT 1994 are applied.

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<sup>4</sup> There are other methods for the determination of normal value and export price which derive from the Anti-dumping Agreement referred to above.

<sup>5</sup> *WTO Anti-Subsidy Agreement* 1994 Part V Article 10: Application of Article VI of *GATT* 1994 Note 35.

<sup>6</sup> Customs Act 1901; Customs Administration Act 1985; and the Customs Tariff(Anti-Dumping) Act 1975.

<sup>7</sup> WTO Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [http://www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm) and the WTO Agreement on Subsidies and Countervailing Measures 1994 [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm).

<sup>8</sup> A similar situation applies to subsidised exports, however, Article XVI.4 of GATT 1994 instructs Contracting Parties to cease to grant either directly or indirectly any form of subsidy on the export of a product (other than a primary product) which results in the sale of such a product for export at a price lower than the comparable price charged for the product to the buyers in the domestic market.

## What is Australia's current anti-dumping process?

The Australian Customs Service (ACS) is the body responsible for the determination of anti-dumping claims and provides advice to industries about the investigation process and the information needed in an application for dumping relief.

Where a person believes there are – or may be – reasonable grounds to claim dumping relief, they may lodge an application for dumping duties to be applied to the alleged injuriously dumped imports.

Upon lodgement of an application, the ACS has up to 20 days to determine whether there are reasonable grounds for the claim of (a) dumping of goods and (b) of material injury resulting from the dumping. If the ACS cannot determine there are reasonable grounds, it must reject the application.

A rejected application may be re-submitted in an amended form for re-assessment by the ACS, or a request may be made to the Trade Measures Review Officer (TMRO) for review (the functions of the TMRO are discussed in greater depth below).<sup>9</sup>

If the application is accepted, then the ACS initiates an investigation and invites exporting and importing parties to make submissions within 40 days in response to the applicant's claims. These submissions are made in two forms – a confidential form, which is only available to the ACS, and a non-confidential public form available to all parties. The ACS considers and may if necessary, verify these submissions.

If there is sufficient verified information available indicating that there is injurious dumping, the ACS may impose provisional measures (temporary additional duties) from 60 days after the initiation of the investigation, pending a final decision by the Minister. A statement of the reasons is published with any such preliminary affirmative finding.

On or before 110 days from the commencement of the investigation, the ACS is required to publish a detailed statement of essential facts on which it proposes to base a report to the Minister. Interested parties then have 20 days to lodge a response. This provides exporters, importers and the local industry with an opportunity to analyse the statement and prepare a submission drawing matters of concern to the attention of the ACS.

The final report with the ACS recommendation should be submitted to the Minister within 155 days of the initiation of the investigation, subject to any extensions granted during the investigation phase. The decision by the Minister is subject – on application by a party within 30 days – to a review of the facts by the TMRO.

The grounds on which the applicant believes reinvestigation is warranted must be particularised in the application. The review is restricted to the facts before the decision maker at the time. The TMRO does not have the power to overturn a decision of the Minister, but may recommend sufficient doubt exists about an aspect of the ACS investigation so that the matter should be remitted to the ACS for further investigation and report.<sup>10</sup>

The review is limited to a maximum period of 60 days.

An outline of the timeline for the investigation process is at **Appendix 3 –Attachment C**.

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<sup>9</sup> The Trade Measures Review Officer is an independent statutory appointment Division 8, Part XVB Customs Act 1901, who may review on application a decision of the CEO or the Minister which has a definitive effect on the rights of parties. For example he cannot review a positive preliminary determination but can review a negative preliminary determination, which terminates an investigation. <http://www.ag.gov.au/agd/www/Trademeasureshome.nsf/page/home>

<sup>10</sup> For the ACS account of the anti-dumping process see Anti-dumping and Countervailing Investigation Process – How it Works [http://www.customs.gov.au/webdata/resources/files/Anti\\_dumping\\_and\\_countervailing\\_investigation\\_process1.pdf](http://www.customs.gov.au/webdata/resources/files/Anti_dumping_and_countervailing_investigation_process1.pdf)

## What happens in other jurisdictions?

Processes used in the investigation of anti-dumping and countervailing complaints need to be in conformity with the provisions of the relevant WTO agreements.

**Appendix 3** contains a comparative analysis of the investigation processes used in Australia, Canada, the European Union, and the United States.

In comparing international models, the prime areas of difference are in:

- the time taken to complete the stages of the investigation;
- the nature of the national agencies charged with the administration of the measures; and
- some variation to the sequence of the findings made in the investigations;

### *Injury first?*

Unlike Australia which simultaneously investigates both issues of injury and dumping, the United States and Canada first assess the issue of injury. This allows them to make an early preliminary finding on injury – if this cannot be established the investigation can be terminated without requiring the exporter to disclose any information with respect to the normal value assessment.

This is efficient, both from the point of view of the administration and the parties involved in the inquiry.

The United States also uses a sequential approach which deals with (preliminary) injury, dumping and then a final determination of injury in that order. This has the advantage of allowing the investigation to concentrate on one issue at a time, and deals with injury first.

### *Lessons for Australia*

Both the European Union and US systems take a significantly longer time to complete the inquiry than under the Canadian model. A pure sequential approach may not be effective in reducing the degree of uncertainty which is generated by anti-dumping actions. The Canadian and the Australian approach are preferable to that in the US or EU in terms of the period over which the inquiry process takes to complete.

Australia needs to adopt a reasonable timeframe, while dealing with the issue of injury in the initial stage. Likewise, Australia needs to adopt a more consultative process similar to the Canadian or United States frameworks which both allow greater feedback between parties and the administering authority.

## Phases in Anti-Dumping Investigation

There are four critical phases of an anti-dumping inquiry, namely:

- prior to lodgement;
- initiation;
- the investigation; and
- monitoring outcomes.

They represent quite different problems for the principal parties, the applicant domestic industry and the exporter.<sup>11</sup>

Analysis of the submissions to the ACS Review and previous reviews of the administration of anti-dumping and anti-subsidy measures<sup>12</sup> reveals concerns with all four phases of the inquiry process:

### 1. Prior to lodgement Stage

- Need for more transparency and access to supporting statistical information, and appropriate feedback to applicants before lodgement particularly with respect to information gaps in the application;
- Better guidance for Small and Medium Sized Enterprise (SME) applicants to access the anti-dumping system; and
- Need for improved access to legal precedents and decisions relating to anti-dumping and anti-subsidy matters.

### 2. Initiation Stage

- Need for more balance between Australian domestic and export industry interests, and those of consumers.

### 3. Investigation Stage

- Need for certainty in the application of rules administered by an independent body;
- Need for transparency in providing information to ensure legitimacy of process; and
- Need for an efficient administration with no party unnecessarily burdened.

### 4. Monitoring Outcomes Stage

- Need for maintenance of conditions for investment and employment in industry;
- Need for more effective monitoring of measures once the anti-dumping measures are imposed; and
- Need for consistency with WTO and bilateral treaty obligations.

This discussion paper will now consider each of these issues in turn.

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<sup>11</sup> The importer deals with the goods in Australia, but the dispute is actually between the Australian producer and the foreign exporter.

<sup>12</sup> Gruen FH, *Review of Customs Tariff Anti-Dumping Act*, Canberra, AGPS, 1986; Conroy FJ, *Review of the Australian Customs Service*, Canberra, AGPS, 1993; Whitwell RB, 1997, *The application of anti-dumping and countervailing measures by Australia*, Rockhampton, CQU Press <http://adt.lib.uts.edu.au/public/adt-NTSM20061107.124616/index.html>; Willett, L (1996), *Review of Australia's Anti-dumping and Countervailing Duty Administration* ISBN 064225899 6

# Where should Australia's anti-dumping process be focussed?

## 1. *Prior to lodgement Stage*

### ***Need for more transparency and access to supporting statistical information, and appropriate feedback to applicants before lodgement particularly with respect to information gaps in the application.***

The prior to lodgement stage refers to that part of the process leading up to an application for an anti-dumping or countervailing duty to be applied.

Without exception, previous reports into the administration of anti-dumping measures have found applicants have limited access to information on imports and exporters' domestic sales. This information forms part of the requirements for normal value and export price determination crucial to assessing the dumping margin. Details of imports are also necessary for injury determination.

Import volumes and values can be hidden by the breadth of the statistical classification or by the importer who has applied to the Australian Bureau of Statistics (ABS) for non-disclosure based on confidentiality grounds. For the applicant these can be impossible barriers to overcome in terms of providing sufficient information to the ACS to initiate a case.

To overcome this information barrier, it is suggested that advice on imports be given under a confidentiality agreement to an Australian government agency charged with the responsibility to give advice to the complainant in the preparation of a complaint for lodgement with the anti-dumping authority.

Such an agreement would ensure that confidential import information is not passed to the applicant at any time during the inquiry. It would also ensure that when the administering authority receives a complaint, it also receives under separate cover reasonably available data on imports from domestic statistical sources.

In the interests of procedural fairness, it is necessary that the agency providing advice on the preparation of the complaint be separate from the body making the decision on whether to initiate the anti-dumping case. AusIndustry may be such a separate agency.

AusIndustry is an agency specifically set up to deliver services to Australian industry aimed at improving its competitive position in the economy. Given AusIndustry's mandate, it would be the appropriate government body to provide initial advice to industry on applications for anti-dumping measures.<sup>13</sup> As AusIndustry is not the administering authority for anti-dumping measures, this reduces the potential for conflict of interest.

**Proposal 1:** That the provision of advice on applications for anti-dumping measures, particularly to SMEs, be the responsibility of AusIndustry, and AusIndustry be given access for its own reference to relevant import statistics by way of a confidentiality undertaking.

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<sup>13</sup> AusIndustry is the Australian Government's business program delivery division of the Department of Industry, Tourism and Resources and it provides a range of incentives to support business innovation. AusIndustry delivers a range of more than 30 business products, including innovation grants, tax and duty concessions, small business services, and support for industry competitiveness worth nearly \$2 billion each year to about 10,000 small and large businesses.  
<http://www.ausindustry.gov.au/content/content.cfm?Display=First%20Visit%20to%20AusIndustry?>

**Better guidance for Small and Medium Sized Enterprise (SME) applicants to access the anti-dumping system and appropriate feedback to applicants before lodgement particularly with respect to information gaps in the application**

Small and Medium Enterprises (SMEs) face barriers as applicants in addition to those outlined above:

- They are unlikely under current administrative arrangements to mount an anti-dumping case, as they do not have the necessary resources to pursue such an action;
- Even where SMEs become aware of what they consider to be injurious dumping competition, SME applicants often do not have the same level of resources devoted to monitoring the market for their products; and
- While the foreign exporter may obtain export assistance from its home government in any anti-dumping or anti-subsidy case, the SME does not.

It is reasonable to assume the level of advice needed by an SME would be substantially greater than that needed by the larger industry users of anti-dumping measures – for instance, it may be the first time the SME has lodged an anti-dumping complaint.

The provision of expert guidance to SMEs would help resolve the issue of whether it is dumping or simply low-cost competition which is the cause of any injury. Currently, there is no feasible way that SMEs can resolve this issue.

As long as there is a policy which provides for the imposition of anti-dumping duties, Australian industry needs an effective way to resolve complaints, as the outcome can have a significant effect on the viability of production in Australia.

Depending on the SMEs' circumstances, guidance could be provided by an anti-dumping expert to its industry association or directly to the SME involved. This would be of great benefit to SMEs, and is consistent with AusIndustry's current practice in relation to other government sponsored schemes, and that of the Export Market Development Grant Program.<sup>14</sup>

To be clear, this is not to suggest that AusIndustry take an equivalent role as principal litigant as the ACCC does in relation to cases under s.46 and s.51AC of the *Trade Practices Act 1974*.<sup>15</sup> As a point of interest, it could be argued the Minister already has an intervention power under s269TAG *Customs Act 1901* to initiate an anti-dumping investigation, and provided the conditions of 269TG apply, s8 *Customs Tariff (Anti-Dumping) Act 1976* allows the Minister to impose an anti-dumping duty on his or her own volition. This would not be a path that would be recommended as the normal course of an inquiry.

**Proposal 2:** That AusIndustry provide expert guidance to SMEs through their case from starting the complaint to its finalisation.

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<sup>14</sup> <http://www.ausindustry.gov.au> , and <http://www.austrade.gov.au/publications/AustradeEMDGInBrief.pdf?1141943597477>

<sup>15</sup> Refer to Paragraph E.49 and Recommendation 16 of the Senate Economics References Committee - The effectiveness of the *Trade Practices Act 1974* in protecting small business, March 2004. [http://www.aph.gov.au/Senate/committee/economics\\_ctte/completed\\_inquiries/2002-04/trade\\_practices\\_1974/report/report.pdf](http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf)

## ***Improved access to legal precedents and decisions relating to anti-dumping and anti-subsidy matters***

SME applicants can get little direct help on the complex legal, economic and accounting issues involved in dumping, other than employing expert lawyers or consultants who specialise in this area.

The *ACS Joint Study of the Administration of Australia's Anti-Dumping System* has raised the possibility of the creation of an information facility to assist these SME applicants in their dumping cases.<sup>16</sup>

All procedures, decisions and primary legal materials are already available on line and are available through:

- the ACS Web site [www.customs.gov.au/site/page.cfm?u=4227](http://www.customs.gov.au/site/page.cfm?u=4227);
- the Trade Measures Review Office [www.nadrac.gov.au/agd/www/Trademeasureshome.nsf/page/home](http://www.nadrac.gov.au/agd/www/Trademeasureshome.nsf/page/home);
- Austlii [www.austlii.edu.au](http://www.austlii.edu.au); and
- the World Trade Organisation [www.wto.org](http://www.wto.org); and
- other domestic and international public sites.

It is the secondary material appearing in journals, legal and accounting databases, books and guides, which is not readily available to industry users. An improved presentation of the public information through links to the public sites should be of assistance to occasional users. However, the non-public information will still be difficult for SME users to access as it will require a fee for service for selective access, whereas other services may not allow casual use at all.

The creation of a comprehensive web directory on anti-dumping and countervailing matters should be useful for all users. It is proposed the directory be administered by the anti-dumping regulator as a neutral body (as opposed to AusIndustry).

**Proposal 3:** That the administering authority provide a web site directory which integrates the public and available private sites providing specific information on anti-dumping and anti-subsidy matters.

## **2. *Initiation Stage***

### ***Balance between Australian industry's domestic and export interests, and those of consumers***

Initiation refers not to the lodgement of the application (i.e. the making of the complaint), but rather to the process of determining whether or not any investigation into it should proceed.

In dealing with this stage, Moulis Legal Commercial and International proposed in its submission to the *ACS Joint Study of the Administration of Australia's Anti-Dumping System* that:

*'A special panel should be established for the purposes of deciding whether an investigation should be initiated, with, a small secretariat attached to it, with*

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<sup>16</sup> [http://www.customs.gov.au/webdata/resources/files/antiDump\\_JntStdy\\_SumOfProps.pdf](http://www.customs.gov.au/webdata/resources/files/antiDump_JntStdy_SumOfProps.pdf)

*representatives appointed by the Minister for Industry, Science and Resources; the Minister for Trade; and the Treasurer.*<sup>17</sup>

This suggestion has the advantage that the views of the relevant portfolios can be taken into account at the initiation stage, before any independent investigation of the detailed merits of the case.

The panel itself should consist of independent technical experts in trade, industry and competition policy. It should also satisfy the need for separation of the initiation of the decision from the investigation phase, which will have the advantage of weeding out vexatious or frivolous claims at an early stage in the process, and also allowing for consideration of policy alternatives and international relations issues at the earliest stage of an inquiry.

If a complainant decides to proceed, it is better that alternatives have been explored prior to notification (i.e. to the government of the country of export) that an investigation has been initiated.<sup>18</sup> This is especially true in a subsidy case, as the country allegedly subsidising the like product must be notified before the initiation is publicly announced to determine whether the matter can be resolved through negotiation or reference to a WTO Panel.<sup>19</sup>

Where a complainant's case is refused initiation, there should be access to merits-based review (see Proposal 5a).

**Proposal 4:** That the screening and initiation of the case be the responsibility of a panel appointed by the Minister for Industry, Tourism and Resources; the Minister for Trade; and the Treasurer, where public policy and international relations issues can also be considered.

### **3. Investigation Stage**

#### ***Certainty in the application of rules administered by an independent body***

Coles Myer (as it then was) in its submission to the *ACS Joint Study of the Administration of Australia's Anti-Dumping System* was of the view there should be a separation of the dumping and injury determination, with the injury assessment being made by an independent body such as the Australian Competition and Consumer Commission (ACCC) or the Productivity Commission.

Coles Myer further recommended consideration of the level of competition in the domestic economy in the determination of injury. A similar suggestion has been made by Alan Fels and Fred Brenchley, in an independent critique of the administration of the anti-dumping system.<sup>20</sup>

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<sup>17</sup> The submission also pointed to the obvious preliminary nature of a decision to initiate an inquiry. Article 5.2 of *WTO Agreement* simply requires that the evidence must be relevant, and must substantiate the assertions made before an inquiry can be initiated. [http://www.customs.gov.au/webdata/resources/files/ADJSub\\_11.pdf](http://www.customs.gov.au/webdata/resources/files/ADJSub_11.pdf)

<sup>18</sup> Article 5.5 of the Anti-dumping Agreement 1994 requires notification of the government of the exporting country to be notified before initiation of a complaint.

<sup>19</sup> Article 13.1 WTO Subsidies and Countervailing Measures Agreement 1994 requires notification of the government of the exporting country before initiation, with the view towards entering into government to government consultations.

<sup>20</sup> Alan Fels and Fred Brenchley in their article 'A Club Worth Dumping' AFR 4 April 2006.



There is also a need to link the issues of competitiveness with those of injury, which is a factor that the anti-dumping authority is required to take into account under the *WTO Anti-dumping Agreement*.<sup>21</sup>

The ACCC has expertise in the economic assessment of market conditions in relation to its inquiries under Part IV of the *Trade Practices Act 1974*. For example, in the authorisation of merger case involving Smorgons and One Steel, the prospect of the merged entity seeking anti-dumping relief was a competitive factor considered by the ACCC.<sup>22</sup> This should not be a one-way process, and the anti-dumping authority needs to be fully aware of the competitive environment of the parties seeking relief.

The focus of ACS has been increasingly associated with controlling the border. This is likely to accelerate as ACS continues its transition from an economic governance agency to a law enforcement agency. To effectively fulfil this role its scarce resources and considerable expertise would be better deployed to border control activities.

The anti-dumping administrative authority should have its investigation teams comprised of lawyers, economists and accountants, similar to those used by other advanced countries when investigating anti-dumping cases. Any Commonwealth Government agency taking over the responsibility of anti-dumping administration should have an understanding of the application of competition and related economic issues, and also considerable expertise in conducting commercial investigations.

Such an agency is the ACCC. The ACCC is well equipped to make the preliminary and final determinations on injurious dumping, as it has the necessary expertise in industry investigations. The ACCC also has the clear role to “... *promote(s) competition and fair trade in the market place to benefit consumers, business and the community*.”<sup>23</sup>

Consistent with its normal practice as an independent statutory body, the ACCC would become the decision maker for the purposes of applying anti-dumping and countervailing measures.

Given the Panel set up in Proposal 4 to consider wider policy issues, it is also worthwhile considering whether there is any national interest remaining in having a Minister intimately involved in the decision making process. If the model above were adopted, the Minister is removed from the investigation and decision making process.<sup>24</sup> Without the Minister’s hand in play, the political element of anti-dumping and countervailing administration is removed from the process in favour of a more technical approach.

Naturally, the application and enforcement of anti-dumping measures on goods subject to a dumping notice entering Australia would still be a function of the ACS.<sup>25</sup>

Currently, the ACS CEO’s recommendations to the Minister are subject to a review by a statutory Trade Measures Review Officer (TMRO) attached to the Attorney-General’s Department. The Trade Measures Review Officer only has the power to recommend to

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<sup>21</sup> WTO Agreement Clause 3.3 (b) says that “...a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.” [http://www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm)

<sup>22</sup> <http://www.accc.gov.au/content/index.phtml/itemId/758615/fromItemId/2332>

<sup>23</sup> [http://www.accc.gov.au/content/index.phtml/itemId/54137#h2\\_14](http://www.accc.gov.au/content/index.phtml/itemId/54137#h2_14)

<sup>24</sup> This is the position in Canada where the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal (Tribunal) are jointly responsible for administering SIMA. The CBSA imposes the duty where they have found dumping and the CITT has made a final affirmative finding on injury and causal link. <http://www.cbsa-asfc.gc.ca/sima/brochure-e.html>

<sup>25</sup> This would be done as part of the ACS’s primary function of duty and GST collection, interception of prohibited imports and exports, and immigration clearance.

the Minister that a matter be remitted to the ACS for further investigation and report. As such, the TMRO has an advisory role in reporting to the Minister.<sup>26</sup>

If the ACCC is to be the administering authority, it would be appropriate to move the appeal function to the Australian Competition Tribunal, as this is a body with wide commercial expertise which already reviews decisions of the ACCC. It has a Federal Court Judge as President and has the power to subpoena witnesses and documents, with appeals on questions of law going to the Federal Court.<sup>27</sup> Furthermore, with the proposed administrative change, the Tribunal would be the final decision maker on the merits of the case.

Such changes to the administration of anti-dumping are consistent with the consolidation of like functions within existing agencies. As mentioned above, the main focus of the ACS is on border protection and trade facilitation. As tariffs have reduced dramatically, only the Textiles, Clothing and Footwear (TCF) and motor industry sectors remain with substantial tariff protection. The incentive to smuggle goods to avoid the payment of customs duties has been greatly reduced - as the threat to revenue becomes less relevant, the Customs Service has understandably turned its focus to dealing with modern threats to the nation such as terrorism and the illegal trade in drugs, weapons and people.

So while the link between border protection and anti-dumping is becoming more tenuous, the link between anti-dumping and competition policy is conversely strengthening, as there is a consistent trend towards greater concentration in industry through mergers and acquisitions.

In light of the above, it is time anti-dumping administration be transferred to an agency with a focus on industry competition in the Australian and relevant overseas markets. The ACCC is such an institution that specialises in industry competition. It is therefore the appropriate body for the administration of anti-dumping measures.

**Proposal 5a:** That, on initiation, the investigation be conducted by the ACCC and with any appeal on the merits of its findings to be made to the Australian Competition Tribunal. The findings of these bodies on the merits to be conclusive.

**Proposal 5b:** That the Minister be removed from the decision making process.

### ***Transparency in providing information to ensure legitimacy of process***

There were a number of submissions to the *ACS Review* about the need for information to be placed on a web site and for this to be done in a timely manner.

Nearly all parties in the trade and manufacturing community are based at locations other than Canberra, and can find it inconvenient and costly in having to deal with third parties to get access to information on anti-dumping cases and proceedings. Comprehensive web access would make information available to all without the need to have physical presence in Canberra.

**Proposal 6:** A comprehensive Web based information source for anti-dumping matters is required. This should include all the information on the public file, and be updated in a timely manner.

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<sup>26</sup> **Appendix 4** provides comment on recent changes in the administration of anti-dumping measures.

<sup>27</sup> [http://www.fedcourt.gov.au/aboutct/aboutct\\_admin\\_other\\_act.html](http://www.fedcourt.gov.au/aboutct/aboutct_admin_other_act.html)

The Australian Steel Association Inc in its submission to the *ACS Joint Study of the Administration of Australia's Anti-Dumping System* was of the view there is inadequate disclosure of information through the public file system. Confidential information is only disclosed to legal advisers if a dumping matter goes to the Federal Court on administrative appeal. There is a need to tighten up on confidentiality claims, but it may be worth considering a US-type administrative protective order approach allowing access to confidential information by lawyers for the parties.<sup>28</sup>

The *Trade Remedies Task Force* in its submission does not support the introduction of administrative protection orders on the grounds of being too complex and expensive.<sup>29</sup> However, as a reasonably neutral observer, the *Law Institute of Victoria* supports the concept of providing access to confidential information by the parties under rigorous confidentiality conditions.<sup>30</sup>

Currently there is no provision in the legislation that allows affected parties access to the confidential information provided to the ACS by the opposing parties in support of their case. The ACS is the only party that gets to see the complete arguments in the party submissions and the detail of their investigations.

Therefore, either one of or both of the parties can suffer a disadvantage as the evidence contained in submissions of the other party is hidden. Furthermore, this means that advocating a position in the case is done within an environment where there is a high level of uncertainty as to the position of the other parties.

Clearly there needs to be commercial safeguards, as each is a competitor in the same market - confidentiality is imperative so there can be no commercial gain made from knowledge of another party's confidential business disclosures. Such disclosures can only be shared where there are very strong provisions relating to who can have access to confidential information and how it can be used. These conditions already apply to confidential information disclosed during dumping hearings in the Federal Court.

Labor is proposing to overcome the information vacuum by putting in place a procedural release of confidential information to the legal representatives of the parties subject to strict confidentiality provisions.

There is no doubt that the confidentiality requirements must be tight, but it must also be possible to give parties better access to information relevant to the prosecution or defence of their case.

Labor proposes that all inquiry information should be released to lawyers and relevant aspects to professional expert advisers, appointed by the parties to an inquiry, under an administrative protective order.<sup>31</sup> This will prohibit the release of confidential information by those subject to a protection order, to any other party other than the advocates of the party making the submission or application.

Currently, the ASIC Takeovers Panel<sup>32</sup>, and the Australian Competition Tribunal<sup>33</sup>, both have methods of ensuring that counsel and solicitors for parties and expert witnesses

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<sup>28</sup> [http://www.customs.gov.au/webdata/resources/files/ADJSsub\\_10.pdf](http://www.customs.gov.au/webdata/resources/files/ADJSsub_10.pdf) p.58

<sup>29</sup> [http://www.customs.gov.au/webdata/resources/files/ADJSsub\\_18.pdf](http://www.customs.gov.au/webdata/resources/files/ADJSsub_18.pdf) p.22

<sup>30</sup> [http://www.customs.gov.au/webdata/resources/files/ADJSsub\\_14.pdf](http://www.customs.gov.au/webdata/resources/files/ADJSsub_14.pdf)

<sup>31</sup> US Provisions - APO procedures are contained in 19 CFR 351.304, 305, and 306. The procedures for imposing sanctions for violation of a protective order are contained in 19 CFR 354

<sup>32</sup> Takeover Panel – Rules for Proceedings - March 2005 - Disclosures and Confidentiality - 8.4: “If the Panel is satisfied that a party would be likely to be adversely affected by the disclosure of confidential information to another party, the Panel may direct that certain information be (a) provided to the other party’s legal representatives only, and withheld by them from the party itself; or...” as provided by s.127 and s.186 Australian Securities and Investment Commission Act 2001 [http://www.takeovers.gov.au/display.asp?ContentID=754 - P521\\_56369](http://www.takeovers.gov.au/display.asp?ContentID=754 - P521_56369)

<sup>33</sup> S 165 (3) *Trade Practices Act 1974*

have access to the confidential material before the panel/tribunal. This approach is also consistent with the US anti-dumping disclosure provisions.<sup>34</sup>

**Proposal 7:** That the lawyers for the parties and expert advisers be allowed to:  
a) access the confidential information submitted to the investigators under a non-disclosure order; and  
b) access to a detailed statement of reasons for their findings under a non-disclosure order.

### ***An efficient administration with no party unnecessarily burdened***

Currently the ACS evaluates dumping and injury, reaches a preliminary finding and may impose interim duties accompanied by a statement of reasons 60+ days after initiation. This process requires both the importers and overseas exporters to respond to questionnaires within 40 days of initiation.

It would be a more efficient process to separate the evaluations of whether there has been 'injury' and whether there has been 'dumping'. The outline of the proposed process is at **Appendix 1**.

This proposed process requires the administering authority to first evaluate whether there is an injury case based on the information in the application, the confidential trade data available to it, and from importer submissions. This avoids any unnecessary widening of the inquiry to investigate the individual exporters, which is the case under the current Australian practice.

Of course, this does not preclude exporters from responding earlier to the exporter questionnaire. However, due to their commercial interests, it is to be expected the exporter would refrain from making a detailed submission on normal value and export prices, and only submit the information if a positive preliminary injury finding had been made.

This proposal is similar in its treatment of injury to the US model, where the International Trade Commission (ITC) determines injury within 45 days of receiving a petition or 25 days after initiation, and – if affirmative – the import administration can then make a preliminary determination on dumping 65 days after initiation. For a positive preliminary finding to be made it needs both a positive injury and dumping finding, and will be dropped after 45 days from receipt of the petition if the preliminary injury determination is negative. This approach reduces any unnecessary impact on the respondents.

The Canadian model also addresses injury in the first part of the inquiry, with the Canadian International Trade Tribunal reaching its decision on injury within 60 days of the initiation of the complaint. The Canadian administration reaches a preliminary dumping finding within 90 to 135 days of the initiation and it takes between 210 and 255 days to reach a final finding in relation to injurious dumping.

The current Australian process takes approximately 155 days for the ACS to finalise its report to the Minister. However, what is important is the time when provisional measures can be taken. These have the same effect as duty imposition, but are refundable where further investigation results in a negative final finding on injurious dumping. The proposed approach allows for provisional measures to be imposed at 135 days after initiation and provides for another 65 days where further clarification can be made before the publication of a final finding.

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<sup>34</sup> Antidumping and Countervailing Duty Proceedings: Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order 19 CFR 351 Sub-part C. <http://ia.ita.doc.gov/apo/aporule.htm>

Apart from increased administrative efficiency of this proposed approach, the additional 45 days to reach a final finding allows for a more detailed examination of the information. There is very little difference in the date of effect of the measures, as provisional duty collection occurs at 135 days from initiation of the complaint, or at 60 days if there is evidence of continued dumping or there is serious injury to the domestic industry.<sup>35</sup> In practice in 2004-05, in the 10 cases where there was an extension of time, it took the ACS on average 41 days longer to complete its report than the statutory timeframe.<sup>36</sup>

This means the proposed overall time to complete the final report is favourably comparable to the current arrangements, especially when the Minister is removed from the equation. The principal advantage is that the injury decision must be made earlier in the investigation, obviating the need for resources to be deployed in the verification of dumping in a significant number of cases.

**Proposal 8:** Adopt a process similar to that outlined in **Appendix 1**, where a Preliminary Injury finding can be made early in the investigation, followed by a Preliminary Dumping determination, a Final Dumping and Injury Finding, and a separation of the expert teams responsible for dumping and injury assessment.

## ***Monitoring outcomes***

### ***Maintenance of conditions for investment and employment in industry***

The implementation of the above process would allow for a greater emphasis on the economics effect of anti-dumping measures, including both on investment and on employment. It would allow for analysis of issues before the administering authority to be resolved with some certainty.

For example, there is some unease expressed in the submissions by exporter/importer representatives, with the use of market prices for the internal transfer of an intermediate product or its sales to related parties. There is a move to exclude production for internal use in vertically integrated industries from the Australian production affected by the dumped imports.

It is not clear what economic rationale underpins this reduction in the Australian production of like goods affected by the alleged dumping. It appears to be argued that a vertically-integrated manufacturer would not be materially affected by dumped intermediate goods, and not be forced to disinvest in the production of the intermediate good where the dumped imports were significantly cheaper than the manufacturer could produce in Australia.

This is the type of issue that the ACCC would be well equipped to decide in its role as the administering authority.

The ACCC would also be able to advise the Executive on economic and legal policy issues underlying the application of the anti-dumping legislation as part of the continuous policy review process of Government. One such issue raised in submission to the Joint Review was the consideration of raw agricultural products as like products to the

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<sup>35</sup> Article 7 and 10 *WTO Anti-Dumping Agreement* 1994.

<sup>36</sup> ACS Annual Report 2004-05 p.93 – There are provisions in Australia and other jurisdictions that allow for the extension of the sated investigation time, usually based on the complexity of the investigation.  
[http://www.customs.gov.au/webdata/resources/files/ACSannualReport0405\\_S2PerfRep.pdf](http://www.customs.gov.au/webdata/resources/files/ACSannualReport0405_S2PerfRep.pdf)

imported processed agricultural goods. A fuller discussion of this issue is at **Appendix 5** on Close Processed Agricultural Goods.

**Proposal 9:** That the anti-dumping authority has responsibility to clarify and make known its operational policy, and that this be in accordance with Australian domestic law, and where there is ambiguity, that it be consistent with Australia's international agreements.

### ***Effective monitoring of measures once the anti-dumping measures are imposed***

Under the present system, there are marketing staff and consultants for both domestic industry and exporter interests, who monitor the performance of the measures once imposed. This demonstrates implicit demand for the ACS to disclose or at least confirm information about the effects of its decisions.

The party affected can then have the ACS take remedial action through a request for revised normal values or a termination application. Both Orica and the HSS Industry submissions advocate regular liaison between the ACS and industry as part of the monitoring process.<sup>37</sup> A closer association was also recommended in the *Review of the Australian Customs Service* in 1993, but such a practice has not been included by the ACS as part of the monitoring process as described in the ACS Manual Volume 22 on Dumping and Subsidy administration.<sup>38</sup>

The difficulty with any close association of the administering authority with industry interests is that there is opportunity for some degree of favouritism in information flows to the parties concerned. Any favouritism will affect the relative commercial position of the parties.

For example, it is difficult for a member of the general public to obtain **normal value information** (see **Glossary of terms**). Lack of disclosure of normal values and dumping margins limits the ability of potential importers to shop around for the best deal from overseas suppliers, while those with access to normal value information have an additional benchmark they can use in their consideration of foreign purchases. To summarise - the lack of disclosure of this information has the effect of lessening competition.

However, there are arguments in favour of more active intervention by the administration on detecting possible breaches of the anti-dumping measures imposed.

This is already part of the continual import audit process that is applied by the ACS, which may be the result of commercial intelligence or risk analysis of import entry behaviour. This is an enforcement matter, which is an area in which the ACS has considerable expertise.

**Proposal 10 a:** That in its role as primary government service provider in the border environment, the ACS continue to monitor and audit imports subject to anti-dumping and countervailing measures, subject to an interagency agreement with the ACCC and while being mindful of the need for strict confidentiality in information flows to interested parties.

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<sup>37</sup> Orica and HSS Industry submissions to the ACS Joint Study, submission nos 16 p.6 and 24 p.4.  
[http://www.customs.gov.au/webdata/resources/files/ADJS\\_sub26.pdf](http://www.customs.gov.au/webdata/resources/files/ADJS_sub26.pdf) and  
[http://www.customs.gov.au/webdata/resources/files/ADJSsub\\_16.pdf](http://www.customs.gov.au/webdata/resources/files/ADJSsub_16.pdf)

<sup>38</sup> <http://www.customs.gov.au/webdata/resources/files/volume22.pdf>

**Proposal 10 b:** Where there is an inquiry and dumping duties are imposed or reviewed, the information on normal values, non-injurious prices and determined export prices should be publicly available on completion.

### ***Consistency in the application of WTO or bilateral treaties***

The changes proposed would not affect our treaty obligations.

Australia's anti-dumping process would benefit by having the government policy input occur in the initiation panel at the earliest stage, as it would assist Department of Foreign Affairs and Trade (DFAT) in the explanation of Australia's trade policy position to the affected member states.

At present, and particularly in comparison with a US-style Commerce department, there is a real disconnect between the goals of furthering market access and furthering industry development. DFAT and the Trade Minister would be required to take an active interest in the anti-dumping area in order to represent Australia's interests, with the assistance of the administering body in any anti-dumping/countervailing measure government to government negotiations.

This would allow Anti-Dumping Policy to become more attuned to, and integrated with, Australia's overall trade policy. There is evidence to suggest that – on a global scale – Anti-Dumping rules are replacing made-to-measure tariff protections.<sup>39</sup> This could indicate that it may be appropriate to create a greater synergy between anti-dumping policy and general trade and competition policy. This way Australia is not unnecessarily exposed to retaliatory action by other nations.

**Proposal 11:** Give DFAT and, where necessary, the Trade Minister the lead in any discussions or negotiations with affected member states on matters arising during an investigation, from the initiation stage to the final determination and review.

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<sup>39</sup> Horlick (1989) expresses this view as practicing United States trade lawyer. See also Jackson (1989) p 218. Spinanger, D. (2002). A Summary of Key Findings in Misuse of Anti-Dumping Measures and Non-Tariff Barriers: A threat to APEC and WTO Liberalization/Market Access Goals - A background paper for the ABAC APMC. Kiel, Kiel Institute for World Economics.

## List of proposals

**Proposal 1:** That the provision of advice on applications for anti-dumping measures, particularly to SMEs, be the responsibility of AusIndustry, and AusIndustry be given access for its own reference to relevant import statistics by way of a confidentiality undertaking.

**Proposal 2:** That AusIndustry provide expert guidance to SMEs through their case from starting the complaint to its finalisation.

**Proposal 3:** That the administering authority provide a web site directory which integrates the public and available private sites providing specific information on anti-dumping and anti-subsidy matters

**Proposal 4:** That the screening and initiation of the case be the responsibility of a panel appointed by the Minister for Industry, Tourism and Resources; the Minister for Trade; and the Treasurer, where public policy and international relations issues can also be considered.

**Proposal 5a:** That, on initiation, the investigation be conducted by the ACCC and with any appeal on the merits of its findings to be made to the Australian Competition Tribunal. The findings of these bodies on the merits to be conclusive.

**Proposal 5b:** That the Minister be removed from the decision making process.

**Proposal 6:** A comprehensive Web based information source for anti-dumping matters is required. This should include all the information on the public file, and be updated in a timely manner.

**Proposal 7:** That the lawyers for the parties and expert advisers be allowed to:

- a) access the confidential information submitted to the investigators under a non-disclosure order; and
- b) access to a detailed statement of reasons for their findings under a non-disclosure order.

**Proposal 8:** Adopt a process similar to that outlined in **Appendix 1**, where a Preliminary Injury finding can be made early in the investigation, followed by a Preliminary Dumping determination, a Final Dumping and Injury Finding, and a separation of the expert teams responsible for dumping and injury assessment.

**Proposal 9:** That the anti-dumping authority has responsibility to clarify and make known its operational policy, and that this be in accordance with Australian domestic law, and where there is ambiguity, that it be consistent with Australia's international agreements.

**Proposal 10a:** That in its role as primary government service provider in the border environment, the ACS continue to monitor and audit imports subject anti-dumping and countervailing measures, subject to an interagency agreement with the ACCC and while being mindful of the need for strict confidentiality in information flows to interested parties.

**Proposal 10b:** Where there is an inquiry and dumping duties are imposed or reviewed, the information on normal values, non-injurious prices and determined export prices should be publicly available on completion.

**Proposal 11:** Give DFAT and, where necessary, the Trade Minister the lead in any discussions or negotiations with affected member states on matters arising during an investigation, from the initiation stage to the final determination and review.

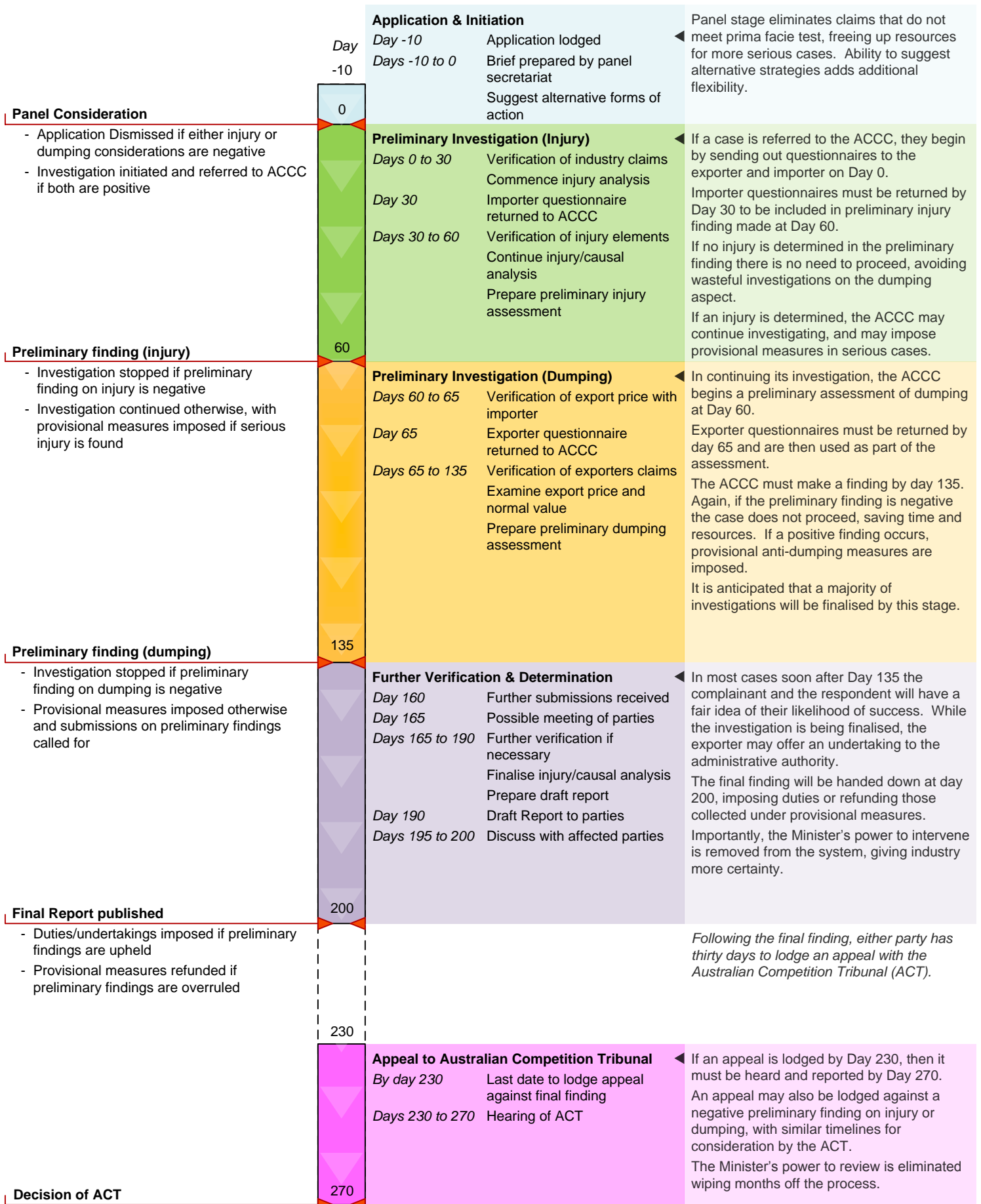


## Glossary of Terms

<b>AusIndustry</b>	<a href="http://www.ausindustry.gov.au">www.ausindustry.gov.au</a>
<b>ACCC</b>	Australian Competition and Consumer Commission. <a href="http://www.accc.gov.au">www.accc.gov.au</a>
<b>ACT</b>	Australian Competition Tribunal. Established under the <i>Trade Practices Act 1974</i> , the Tribunal hears applications for the review of certain decisions of the ACCC.
<b>ASIC</b>	Australian Securities and Investment Commission. <a href="http://www.asic.gov.au">www.asic.gov.au</a>
<b>ITC</b>	International Trade Commission. <a href="http://www.usitc.gov">www.usitc.gov</a>
<b>Normal Value</b>	The normal price prevailing in the domestic market of the exporting country
<b>SME</b>	Small-to-Medium sized Enterprise
<b>PC</b>	Productivity Commission. <a href="http://www.pc.gov.au">www.pc.gov.au</a>
<b>WTO</b>	World Trade Organisation. <a href="http://www.wto.gov">www.wto.gov</a>

# APPENDICES

# Appendix 1 - Labor's proposed timetable for anti-dumping investigations



## **Appendix 2 - International Policy Context**

Anti-dumping and countervailing (anti-subsidy) measures are about the regulation of international trade. These measures are directed at what are considered internationally as unfair trading practices. They target dumped or subsidised exports, which are in direct competition with the production of an importing country.

Viner (1923) one of the earlier contributors centred the debate around the concept of price discrimination between national markets.<sup>41</sup> Kindleberger (1968) in his classic text on international economics picks-up the Viner thesis, and refers to dumping as the charging of different prices in different markets.<sup>42</sup> This reflects the general thesis that dumping is simply a form of international price discrimination.<sup>43</sup> Kindleberger further maintains that it takes place where demand abroad is more elastic than demand at home, and results from monopolistic elements in the home market.<sup>44</sup>

Subsidisation is said to occur, however, where the government supports production either directly through the budget or indirectly by concessional arrangements. Some typical examples of subsidies are the transfer to producers of funds by way of grants; loans; equity infusions; loan guarantees; fiscal incentives; provision of goods and services; and income or price support arrangements.<sup>45</sup>

Where either of these practices causes injury to an industry in an importing country, anti-dumping or countervailing measures are commonly imposed under the relevant domestic law of the importing country.

A significant area of international trade law covers unfair trading practices between nation states. This is mainly concerned with Articles VI and XVI of the GATT and the specific provisions of the WTO implementation agreements.<sup>46</sup> Australia's domestic law on anti-dumping and countervailing measures is framed to be consistent with these GATT provisions. These laws include provisions to prevent the misuse of application anti-dumping measures.

Anti-dumping measures are, nonetheless, prevalent throughout the world and some argue that they have taken the place of made to measure tariffs on imported goods. According to Horlick (1989) the application of anti-dumping and/or countervailing remedies is now the first choice for industries seeking protection.<sup>47</sup>

Sprinanger (2002) expressed the view that 'Anti-dumping laws have now become a central part of industry protection throughout the world, replacing the made-to-measure industry tariff protection which was wound back during the GATT and WTO negotiating rounds'.<sup>48</sup> This prevalence can be best illustrated from WTO statistics which show that from 2001 to 2005 there were on average 177 new anti-dumping measures each year imposed by importing countries on like goods sourced from exporting countries.

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<sup>41</sup> Viner (1923) p 3.

<sup>42</sup> Kindleberger (1968) p 155.

<sup>43</sup> There are a number of economic texts which support this view eg. Viner (1923), Caves (1993) p 247 and Lloyd (1973) p 60.

<sup>44</sup> Also see Krugman & Brander (1983) for a discussion of this definition.

<sup>45</sup> Article 1 of the *GATT Agreement on Subsidies and Countervailing Measures 1994* provides a definition of a subsidy.

<sup>46</sup> [www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm) and [www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm)

<sup>47</sup> Horlick (1989) expresses this view as practicing United States trade lawyer. See also Jackson (1989) p 218.

<sup>48</sup> Spinanger, D. (2002). A Summary of Key Findings in Misuse of Anti-Dumping Measures and Non-Tariff Barriers: A threat to APEC and WTO Liberalization/Market Access Goals - A background paper for the ABAC APMC. Kiel, Kiel Institute for World Economics.

## New Anti-dumping Measures Imposed by Reporting Member 2001 to 2005

Reporting Member	2001	2002	2003	2004	2005	Totals	%	% Cum
<b>India</b>	38	64	53	29	17	201	23	23
<b>United States</b>	33	25	12	14	18	102	12	34
<b>European Community</b>	13	25	2	10	21	71	8	42
<b>Argentina</b>	15	24	19	1	8	67	8	50
<b>South Africa</b>	5	15	1	4	0	25	3	53
<b>Turkey</b>	2	11	28	16	9	66	7	60
<b>Canada</b>	19	0	5	8	4	36	4	64
<b>Mexico</b>	3	4	7	7	8	29	3	67
<b>China, P.R.</b>	0	5	33	14	16	68	8	75
<b>Australia</b>	10	9	10	4	3	36	4	79
<b>Brazil</b>	13	5	2	5	3	28	3	82
<b>Other</b>	15	29	49	39	24	156	18	100
<b>Totals</b>	166	216	221	151	131	885	100	

Source: WTO - [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_stattab7\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/adp_stattab7_e.xls)

Of interest is that India now tops the list of countries imposing anti-dumping measures, and that China has also become a significant user post its accession to the WTO. This is indicative of a replacement of one import barrier by another, with the reduction in quantitative restrictions in the Uruguay Round and in the subsequent accession conditions for China. Australia is ranked tenth amongst WTO reporting members in applying anti-dumping measures, who account collectively for over 80 percent of all anti-dumping measures imposed.

It could be argued that some affected industries need a buffer to unbridled competition. A series of economists while recognising the benefits of the open market approach in trade, support the need for some intervention in the market by government. Bhagwati (1988), for example, sees the need for observance of the rules as important for the continuation of free trade.<sup>49</sup> Reich, from a political economic approach, tends to favour an interventionist positive sum negotiating approach to policy development.<sup>50</sup>

Even Porter (1990), who advocates concentrating on pursuing an open market approach, is a strong supporter of governments encouraging rivalry in the domestic economy as distinct from unbridled competition.<sup>51</sup> The persistent dumping of imported products can affect investment in import competing industries, and cause significant losses of highly skilled employees in industry. This is, in essence, the case for an anti-dumping mechanism in import competing industries, although there are also many who would advocate against this position.

In the export arena there are not only anti-dumping measures facing Australian exporters, but an array of trade restrictive measures that they have to deal with if they are to be

<sup>49</sup> Bhagwati, J. (1988), *Protectionism, The Ohlin Lectures*, MIT Press, p.35

<sup>50</sup> Reich, R.B. (1993), *The Work of Nations*, New York, Alfred A Knoff, pp.312-313

<sup>51</sup> Porter, M. (1990), *Comparative Advantage of Nations*, New York, Free Press. There is no assertion that Porter's view is being used to support any form of industry assistance, but rather that the economic dynamics within society work best where there is a condition of rivalry between organisations within an industry.

successful in overseas markets. This is best illustrated by the high level of energy being put into bilateral and regional trading agreements between countries around the world.

In addition to the ongoing vigilance of trade officials ensuring that Australia's trading partners comply with their WTO and bilateral treaty obligations, Australia, like other countries, offers a range of exporter finance and insurance facilities.

These include the provision by the Export Finance and Insurance Commission of direct loans attached to export sales, export finance guarantees, bonding facilities and political risk insurance.<sup>52</sup> Even though these facilities are designed to encourage exporters gaining access to overseas markets, they are not regarded as countervailable subsidies. It is important that Australia ensures that there are adequate international fair trading rules and to ensure our trading partners comply with these in dealing with Australian exports entering their markets. That is, it is important that the international trade rules are applied consistently and are not one sided.

Moving now to the application of anti-dumping measures, any significant change in the incidence of these measures is likely to affect trade policy outcomes. An increase in the incidence of these measures providing assistance to Australian producers by means of an import tariff may also burden those who produce for export. For instance, exporters are directly affected where a rise in import tariffs increases the cost of imports used as inputs in their production process, thus directly reducing the returns to these exporters.

More generally the impact of increases in import tariffs is to make imported goods more expensive. This decreases the purchasing power of consumers of the product directly, or alternatively through the indirect effect of the increase in the price of an input into the product they consume.

Applying these principles in the context of change in anti-dumping administration, both access to the anti-dumping system and the time taken by the anti-dumping administration to reach a decision to impose an anti-dumping measure, are two examples of where a change in the administrative process affects the level of assistance provided to domestic manufacturers.

There is a fine line to be drawn between the rights of those Australian producers who produce for the domestic market and those who produce for export. Any anti-dumping administration needs to be mindful of the economic affects that the imposition of a dumping duty can have on the Australian industry when considered as a whole. For example, in the construction of a large infrastructure project, the question would arise as to whether Australia would have the production capacity to supply requirements at the quantity and quality required and at a competitive price?

If these factors were not considered, the construction of the infrastructure project critical to other downstream using industries could be curtailed, leading to a potential loss for the Australian economy as a whole.

Although it is a legitimate aim to encourage productive investment in Australian industry, market intervention is not costless as there are administrative, lobbying and professional support costs, and the risk of a reduction in consumption through the higher cost of imports.

The Productivity Commission, for example, is concerned that anti-dumping measures 'may also serve to restrict competition and, through higher prices, penalise consumers and user industries.' A review of the anti-dumping laws was scheduled to take place under National Competition Policy, but was postponed pending implementation of the

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<sup>52</sup> <http://www.efic.gov.au>

recommendations of the Willett Review.<sup>53</sup> Despite the fact that those recommendations were implemented some years ago, the anti-dumping law review is yet to take place.

Anti-dumping is a sensitive area for Australian manufacturers, particularly in light of the negotiations now underway on a possible Australia-China free trade agreement. While their concerns were unfounded, the manufacturing industry claimed that granting China market economy status would undermine Australia's anti-dumping regime. In response, the Government made some minor changes to anti-dumping rules that apply to all trading partners but are essentially directed at Chinese imports.

The Closer Economic Relations Free Trade Agreement with New Zealand eliminated anti-dumping actions, as they were considered an inappropriate trade barrier. Concerns about anti-dumping action are now dealt with under changes to the predatory pricing rules of the *Trade Practices Act 1974*. This approach is said to be a move away from the one-sided domestic producer view of trade taken in anti-dumping actions, and is said to consider the net benefits across the whole economy and the national interest.

However, regardless of the arguments concerning the nexus between the freeing of trade and the goal of economic efficiency, many practitioners would assert that the purpose behind the anti-dumping law is to ensure that there is 'fair trade' or as some may call it a 'level playing field'.<sup>54</sup>

Behind these administrative interventions is the notion of a need for a framework which will provide an element of fairness for our industries in their dealings in world markets. This is best done by providing institutional intervention free from political interference wherever possible. That is, a rules based system needs to be used for settling disputes either through administering institutions, the national courts, or through the WTO or another third party mediating body.

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<sup>53</sup> Willett, L (1996), Review of Australia's Anti-dumping and Countervailing Duty Administration ISBN 064225899 6

<sup>54</sup> Low, P. (1993), *Trading Free – The GATT and US Trade Policy*, New York, Mathew Bender, p.28.

### **Appendix 3 - Anti-dumping and Countervailing Procedures - International Comparisons**

The timing for anti-dumping processes varies widely according to the individual case and the jurisdiction. All World Trade Organization (WTO) member states incorporate the [Agreement on Implementation of Article VI of the GATT 1994 \(Anti-Dumping Agreement\)](#) into domestic legislation. How international treaties, and consequently the Anti-Dumping Agreement, are incorporated into domestic legislation depends upon the constitutional law of the particular member.

However, the nature of all anti-dumping investigations is basically the same. Investigation seeks to prove (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two.<sup>55</sup> According to the WTO Handbook on Anti-Dumping:

*...the process focuses on (i) establishing a “normal value” of the product when sold in the domestic market of the exporting country; (ii) establishing the export price of the product; (iii) comparing the export price with the normal value established; and (iv) ascertaining whether the domestic industry of the importing country is suffering injury as a result of the dumped imports. The rules of the multilateral trading system require that anti-dumping investigations be conducted with due cognizance taken of the principles of “due process,” that is, that anti-dumping investigations have to be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests.<sup>56</sup>*

How the investigation is undertaken depends to a large degree on the institutional framework. The Anti-Dumping Agreement does not provide guidance or requirements with respect to the institutional framework for investigations. Some countries utilise a bifurcated system, in which the dumping and the injury investigations are undertaken by two different bodies, such as in the United States (Department of Commerce, International Trade Commission) and Canada (Canada Border Services Agency, International Trade Tribunal). Other countries utilise a unitary system, where both aspects of the investigation are covered by a single government body, such as in the European Union (European Commission) and New Zealand (Ministry of Economic Development).

Member states may streamline certain processes or emphasise particular aspects (dependent upon the institutional framework), within the confines of the Anti-Dumping Agreement. The common decision points in anti-dumping investigation processes are:

- Petition from industry complainant
- Initiation of investigation/Rejection of petition
- Provisional measures able to be imposed
- Definitive measures able to be imposed

The table below provides a simple comparison based upon these decision points, utilising a hypothetical case that is (1) accepted for investigation, (2) found in the affirmative after preliminary investigation, that is, provisional measures are able to be imposed, and (3) found affirmative in the definitive investigation, that is, definitive measures are able to be

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<sup>55</sup> WTO, ‘Basic Principles’, online resource [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm), accessed 20 September 2006

<sup>56</sup> Judith Czako, Johann Human and Jorge Miranda, *A handbook on anti-dumping investigations*, Cambridge University Press, Cambridge 2003.



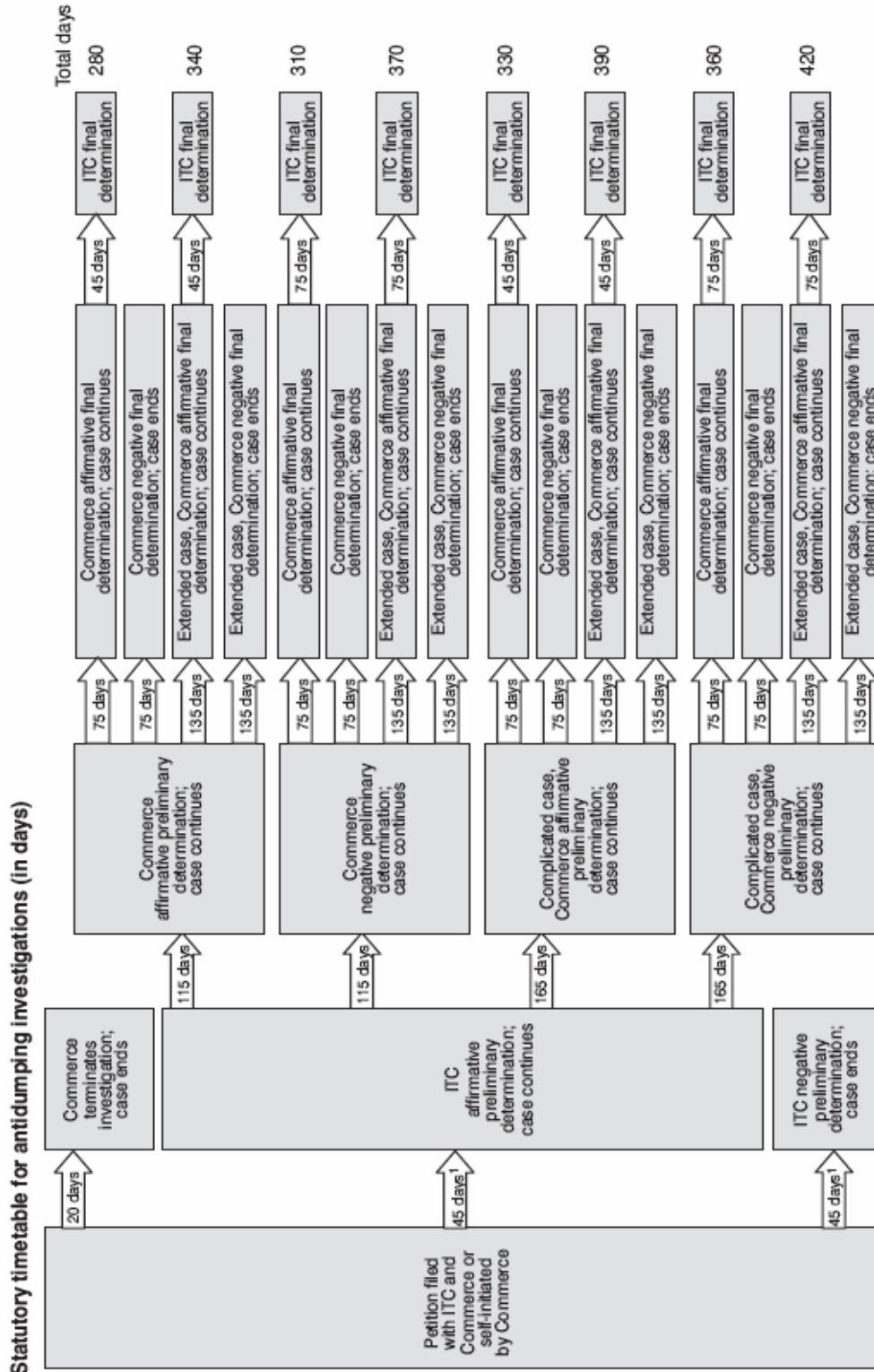
imposed. All processes are considered to be completed within the shortest timeframe possible.

	<b>Australia</b>	<b>Canada</b>	<b>United States</b>	<b>European Union</b>
Petition from industry complainant	0 days	0 days	0 days	0 days
Initiation of investigation <sup>57</sup> or rejection of petition	20 days	30 days	45 days	45 days
Provisional measures imposed	60 days	60 days	115 days	60 days
Definitive measures imposed	95 days	90 days (public hearings) 30 days (duties imposed)	75 days (Commerce decision) 45 days (ITC decision)	120 days
<b>Total Days</b>	<b>175</b>	<b>210</b>	<b>280</b>	<b>225</b>

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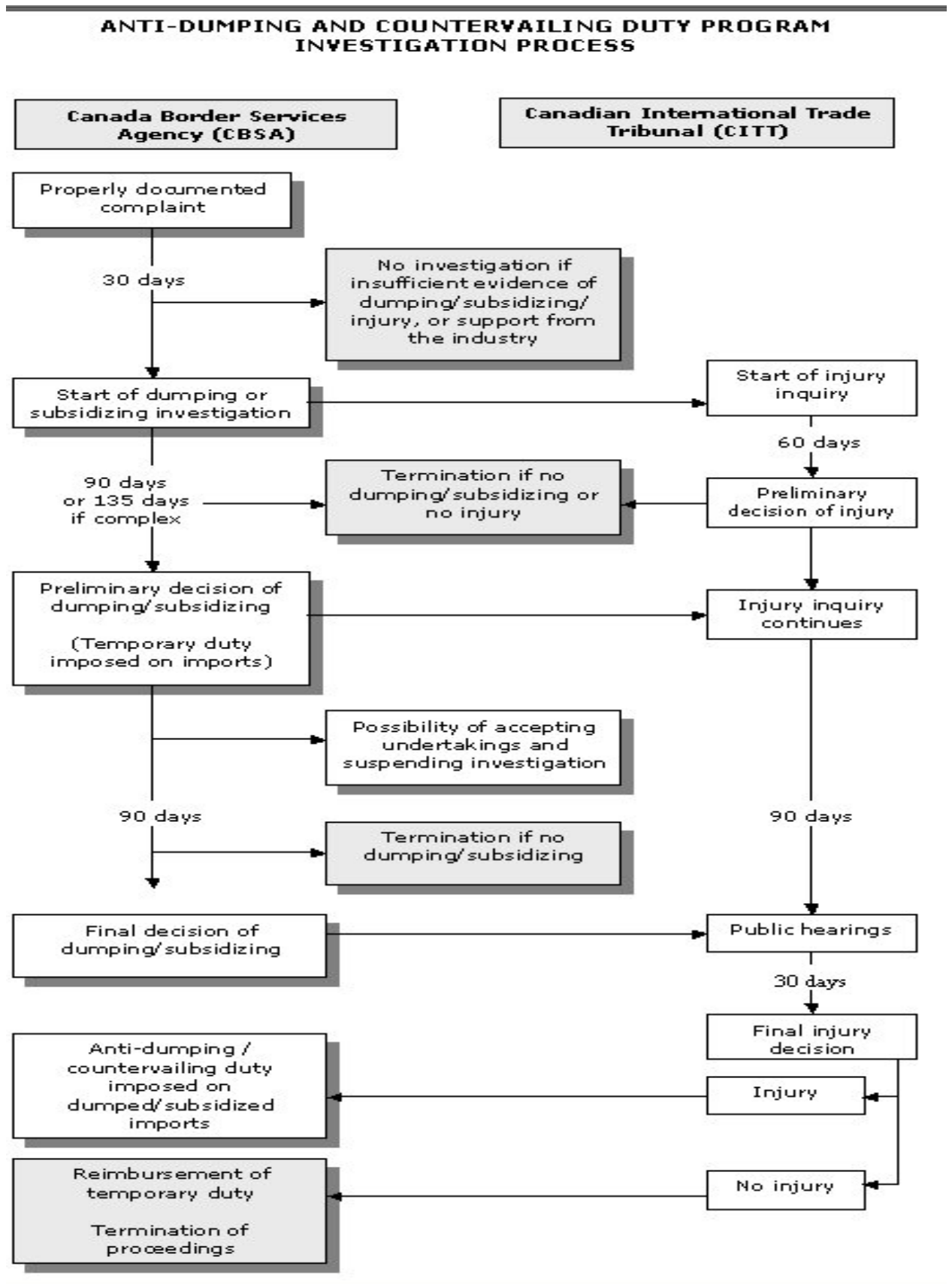
<sup>57</sup> The Anti-Dumping Agreement requires that all investigations be undertaken within 12 months and in any event in less than 18 months.

# Attachment A: United States Anti-Dumping Investigation Timetable



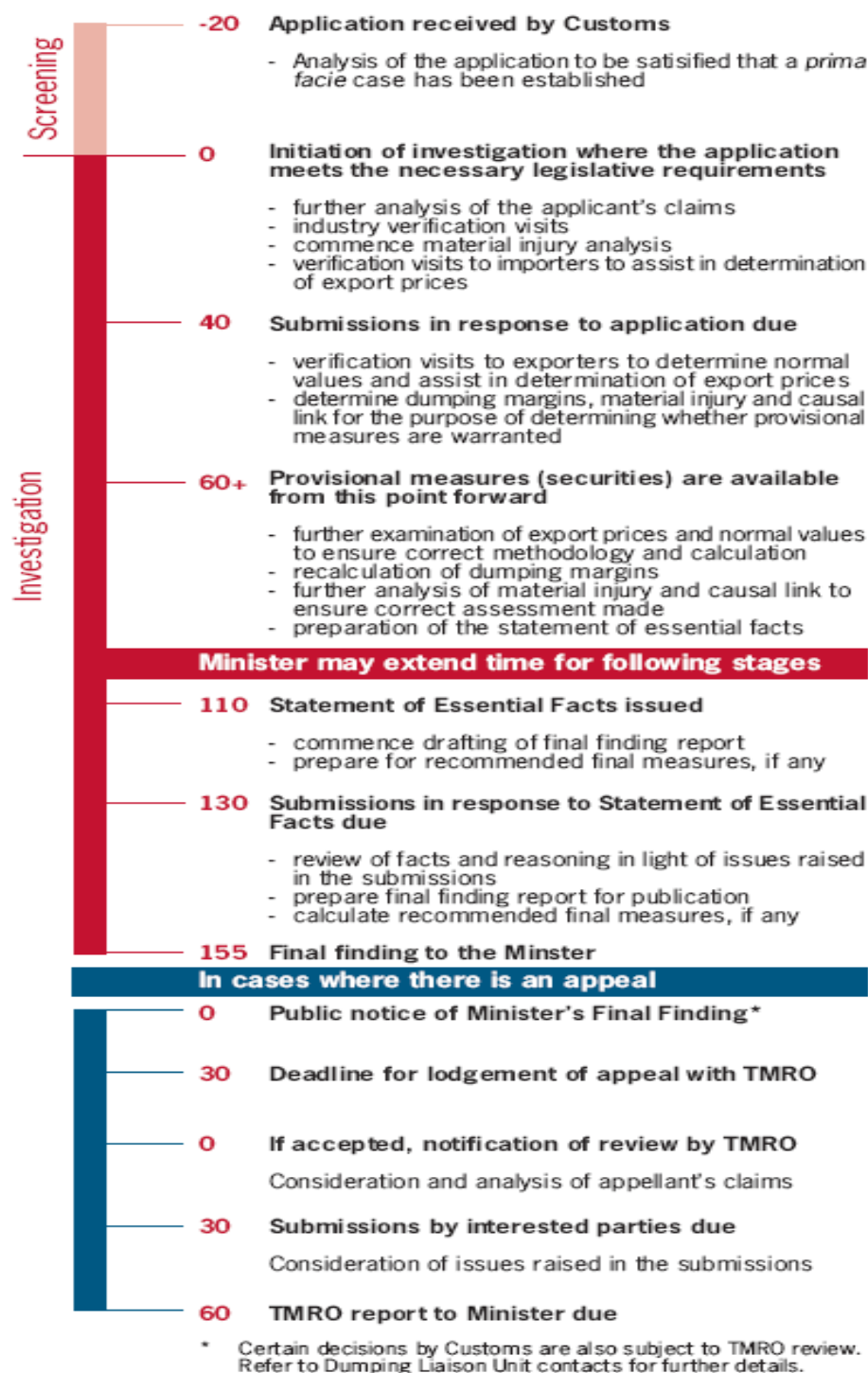
<sup>1</sup> Normal case. ITC may extend the time allowed for it to initiate an investigation from 20 days to up to 40 days after a petition is filed if the extra time is needed to determine industry support for the petition. In the event of such an extension, the deadline for the ITC's preliminary determination and all following dates would be increased by the amount of the extension.

## Attachment B: Canada Anti-Dumping Investigation Timetable



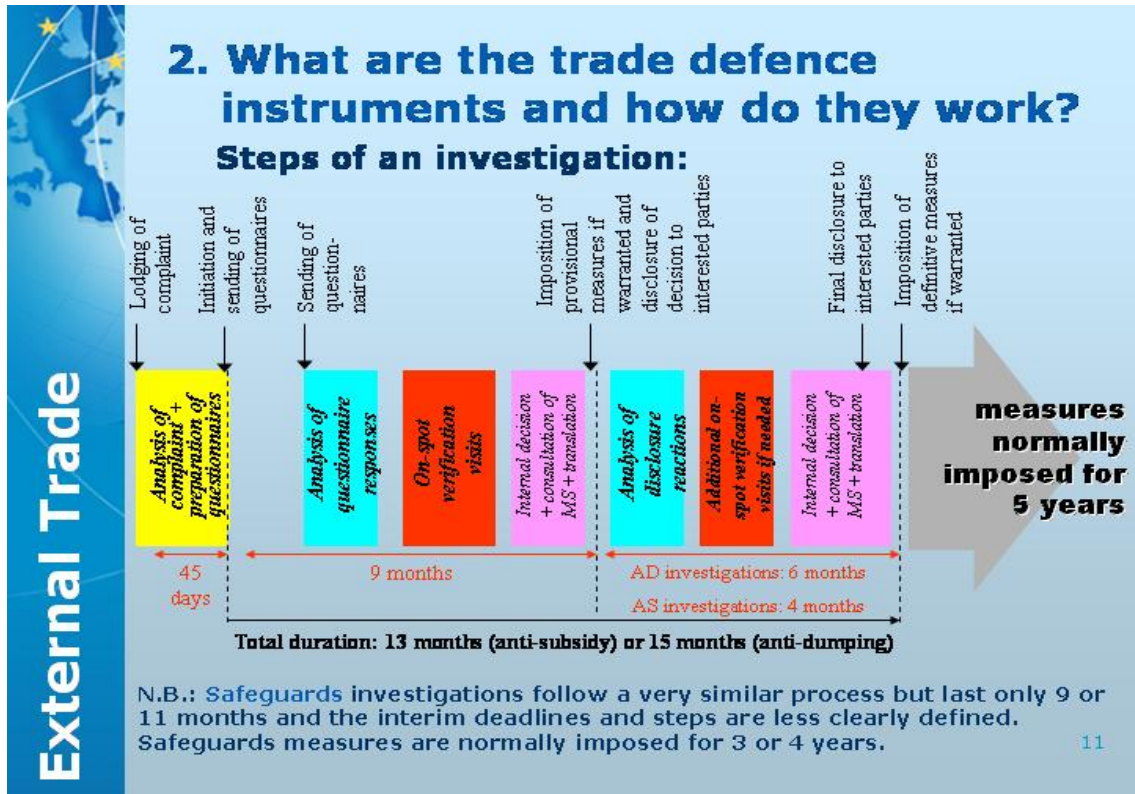
## Attachment C - Australian Anti-Dumping Timetable

### TIMELINE - ANTI-DUMPING AND COUNTERVAILING INVESTIGATION PROCESS



For information on any Customs matters, contact the Customs Information and Support Centre on 1300 363 263 or email [information@customs.gov.au](mailto:information@customs.gov.au) or browse the website [www.customs.gov.au](http://www.customs.gov.au)

Attachment D: EU Timetable



#### ***Appendix 4 – Background comment on some recent administrative changes affecting the administration of anti-dumping measures***

The ACS has traditionally been the organisation in Australia responsible for dumping investigations.

There have been a number of reports into the administration of the anti-dumping measures with various proposals for the relocation of the function to another administrative body.

Of particular interest was the Government's response to the Gruen Report, where it decided to create a separate statutory review body the Anti-Dumping Authority. This body reviewed the preliminary findings of the ACS, seeking further evidence where needed to reach a final determination and make a recommendation to the industry minister for decision. This split in function led to considerable confusion in the administration of the anti-dumping measures, and produced more disputation rather than less, largely defeating the objective for its establishment.<sup>58</sup>

In 1996 the Government decided to again review the administration of the anti-dumping administration in Australia. This review advocated that the administration be brought back to the ACS, and the review function by the Anti-Dumping Authority be discontinued, and that authority be abolished.<sup>59</sup>

To replace the review function, it was proposed there would be a review body which would, on appeal, look at the question of legal compliance in the findings of the report supporting the ACS recommendations to the Minister. The review body known as the Trade Measures Review Officer reports to the Minister on any inconsistencies in the ACS report which needed to be remedied either by changing the finding or re-investigation by the ACS.

This is essentially the current situation which is the subject of this review.

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<sup>58</sup> See Whitwell, R (1997) Chapter 5.2.4 for a detailed discussion of the failures of this policy <http://adt.lib.uts.edu.au/public/adt-NTSM20061107.124616/index.html>.

<sup>59</sup> Willett, L (1996), Review of Australia's Anti-dumping and Countervailing Duty Administration ISBN 064225899 6

## **Appendix 5 – Background Brief on Close Processed Agricultural Goods**

In determining injury, the *Customs Act 1901* extends the application of what is considered to be "like goods" to include the suppliers of raw materials (primary producers) as part of the industry producing the processed product.

The incorporation of this principle into the Act followed a number of complaints from primary producers about their exclusion from Australian industry, when there was injurious dumping or subsidisation of downstream products for example, orange growers not being included as part of the frozen orange juice concentrate industry where this latter product was the subject of a complaint. In these cases it is possible for, on the one hand, the *processor* not to be injured, while the *producer* of the primary product (which is subject to the processing), may be injured.<sup>60</sup>

The amending legislation introduced the concept of "close processed agricultural goods",<sup>61</sup> which is now incorporated into the definition of "like goods" to include primary producers in the injury assessment. While this is consistent with legislative provisions in both Canada and the United States, both of these countries' provisions have been the subject of *GATT* dispute panels.

The first dispute concerned an amendment by § 612(a)(1) of the United States *Trade Act* which provided for the domestic producers of grapes, the principal raw agricultural product in wine, to be included in the wine and grape industry as like products. The second dispute concerned the inclusion of cattle producers in the manufacturing beef industry, as the production of cattle was not a like product to manufacturing beef.

The *GATT* dispute panels found against the definition of "domestic industry" in the United States legislation and against the Canadian interpretation of producer. As a result, the US *Trade Act of 1988* extended the industry to that producing processed agricultural products of a generic kind. . Neither of the reports of the dispute panels have been adopted by the Committee on Subsidies and Countervailing Measures, and are unlikely to be adopted.<sup>62</sup> The provisions introduced by the United States *Trade Act of 1988* amendment are still in force. Australia has been a supporter of both Canada and the United States on this issue and has been subject to the deliberations of the Code Committee on its legislative changes, which became effective from 26 June 1991.

Since that date the then Anti-Dumping Authority reported on two complaints concerning close processed agricultural products. One report related to *Glace Cherries* from France

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<sup>60</sup>Australian Senate (1991): Standing Committee on Industry, Science and Technology - *Inquiry into Australia's Anti-Dumping and Countervailing Legislation* p 9.

<sup>61</sup>s 269T(4A) of the *Customs Act 1901*.

<sup>62</sup>These cases were considered under the *Anti-Dumping Code 1979*, where the practice is to require consensus for adoption of panel findings. This made the panel review process ineffectual in dumping and subsidy cases.

and Italy<sup>63</sup> and the other to *Canned Tomatoes* from Italy, Spain, Thailand and the Peoples Republic of China.<sup>64</sup> In each of these reports the injury to the upstream producers was a significant element in the injury finding. An adverse panel finding has not been made against Australia with respect to either of these measures.

However, such cases involving close processed agricultural goods are not without their difficulties. S.269T(4B) *Customs Act* 1901 is quite specific about what constitutes "close processed agricultural goods":

*(4B) For the purposes of subsection (4A), processed agricultural goods derived from raw agricultural goods are not to be taken to be close processed agricultural goods unless the Minister is satisfied that:*

*(a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods; and*

*(b) the processed agricultural goods are derived substantially or completely from the raw agricultural goods; and*

*(c) either:*

*(i) there is a close relationship between the price of the processed agricultural goods and the price of the raw agricultural goods; or*

*(ii) a significant part of the production cost of the processed agricultural goods, whether or not there is a market in Australia for those goods, is, or would be, constituted by the cost to the producer of those goods of the raw agricultural goods.*

Local producers can readily satisfy sub-paragraphs (b) and (c), as processed agricultural goods are substantially derived from raw agricultural goods, and these are a significant part of the production costs of the processed goods. However, the stumbling block is the requirement in sub-paragraph (a) that requires the raw agricultural goods to be substantially devoted to the processed agricultural goods.

In the case of *Pineapple Prepared or Preserved in Containers* exported from the People's Republic of China and the Philippines, growers were excluded from the industry on the grounds that they did not satisfy the requirement of sub-paragraph (a) as the raw agricultural goods (raw pineapple) were "...sold fresh and also used in the manufacture of a variety of other products including juice and juice concentrate, cordial, fruit mixes and baby food."

In context, this means that growers who provide raw agricultural goods to a number of markets, including to the processor, will not be part of the industry producing close

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<sup>63</sup>Anti-Dumping Authority Report No 64 *Glace Cherries from France and Italy* March 1992.

<sup>64</sup>Anti-Dumping Authority Report No 68 *Canned Tomatoes from Italy, Spain, Thailand and the Peoples Republic of China* April 1992.



processed agricultural goods. The obvious argument in support of this policy is that the degree of injury inflicted on diversified producers of raw agricultural products, cannot be the same as for non-diversified producers who are substantially reliant on the processor for the sale of raw agricultural goods. It could also be argued restriction of the definition of industry to include only those directly affected increases the probability of a positive injury outcome for that industry. In other words, the wider the industry the weaker the injury effect.

This argument in support of sub-paragraph (a) is weak. There is already an injury test and in essence the injury inquiry should be directing its attention to those processors and growers who are adversely affected. Those not affected may be insulated due to different market opportunities in the importing country (i.e. Australia). Article 4.1(ii) *WTO Agreement on the Implementation of Article VI of the General Agreement* allows for market segmentation in exceptional circumstances, which should be further explored for dealing with industries that are in practice close process agricultural industries, but which are excluded from the industry through the effect of s269T(4B)(a) *Customs Act 1901*. Even though there are restrictions on the application of the *WTO* exceptional circumstance clause, a revision of the *Customs Act* as it applies to close processed agricultural goods needs consideration.

The other factor that can inhibit the prosecution of an anti-dumping case involving close processed agricultural goods, is the reluctance of the processor to support the case of the growers. The decision of the processor not to support a case can be for purely commercial reasons. However, there is no bar on the administering authority (currently the Minister) to initiate a case on behalf of the growers. Section 269TAG of the *Customs Act 1901* specifically allows the Minister to do so. It is simply the reluctance of the administering authority to intervene on behalf of the growers that restrains this approach. This should also be investigated to see if the administering authority could take on this public interest role.

In summary, the current provisions generally make it difficult to take action against processed agricultural goods where the injury case is reliant on damage to the growers. There may be an opportunity to revisit the legislation and rely on an exception for market segmentation allowed under the *WTO Dumping Agreement*. . This needs urgent consideration.