DEPARTMENT OF INDUSTRY AND SCIENCE

SUBMISSION TO SENATE ECONOMICS LEGISLATION COMMITTEE

INQUIRY INTO THE CUSTOMS AMENDMENT (ANTI-DUMPING MEASURES) BILL (NO. 1) 2015 AND CUSTOMS TARIFF (ANTI-DUMPING) AMENDMENT BILL 2015

15 APRIL 2015

Contents

Introduction 3
Australia's anti-dumping system 3
- Anti-dumping 3
- Administration of Australia's anti-dumping system 4
- How is an anti-dumping investigation conducted? 5
- Other features of Australia's anti-dumping system 6

Overview of the amendments 7
- Summary 7
- Anti-Dumping Review Panel 8
- International Trade Remedies Forum 11
- Reverse onus of proof 13

Attachment A – Anti-dumping investigation process and timeframes 14
Attachment B – Review fee – Draft legislative instrument 15
Attachment C – Minor and technical amendments 17
- Minor amendments 17
- Technical amendments 19

Introduction

1. The Department of Industry and Science ('the department') is providing information in response to the inquiry into the Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 and Customs Tariff (Anti-Dumping) Amendment Bill 2015 by the Senate Economics Legislation Committee ('the Committee').

2. This submission provides an overview and detailed description of the amendments. It also provides additional background on the anti-dumping system, and addresses some specific issues raised during the legislative debate.

Australia's anti-dumping system

Anti-dumping

What is dumping?

3. Dumping occurs when goods exported to Australia are priced lower than their 'normal value', which is usually the comparable price in the ordinary course of trade in the exporter's domestic market. Where the price in the ordinary course of trade is unsuitable, normal value may also be determined using comparable prices of exports to a third country or the cost of production plus selling, general and administrative expenses and profit.

4. Dumping is not illegal, nor is it a prohibited practice under the World Trade Organization ('WTO') agreements: *General Agreement on Tariffs and Trade 1994*, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and *Agreement on Subsidies and Countervailing Measures*.

5. Rather, the WTO agreements permit remedial action to be taken, usually in the form of duties. The imposition of anti-dumping duties is permitted when dumping causes, or threatens to cause, material injury to an Australian industry.

What is a subsidy?

6. A subsidy is any financial contribution (or income or price support) by a government that confers a benefit, either directly or indirectly, to an exporter of the goods to Australia. If the subsidy causes, or threatens to cause, material injury to an Australian industry, remedial action may be taken.

What is material injury?

7. Injury to an Australian industry is demonstrated through all relevant indices and factors that reflect the state of that industry. Material injury is typically demonstrated through prices, volume and/or profit indicators and is usually reflected by the Australian industry suffering a material reduction in selling prices, profit or market share. Material injury is considered to be above the normal ebb and flow of business.

8. Injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation.

What is anti-dumping action?

9. Anti-dumping action is the imposition of additional duties (usually referred to as 'measures'), by the Australian Government, on imports to remedy material injury to Australian manufacturers caused by dumping. Countervailing action is the imposition of duties to remedy material injury caused by a subsidy. The additional duties usually have the effect of raising the price of the imported goods in the Australian market. A 'price undertaking' is another lesser used form of anti-dumping action.

10. The Australian industry concerned must provide enough evidence to indicate that there is dumping or subsidisation, and that the industry has suffered material injury as a result.

11. Where it is established that dumped or subsidised goods have caused material injury to an Australian industry producing like goods, anti-dumping or countervailing duties may be imposed. The relevant Minister decides whether duties should be imposed and, if so, the Minister publishes a dumping duty notice or countervailing duty notice.

Administration of Australia's anti-dumping system

The Anti-Dumping Commission

12. The Anti-Dumping Commission ('the Commission') administers Australia's anti-dumping and countervailing system. Upon application by the Australian industry, setting out prima facie evidence of the dumping or subsidy and material injury, the Commission commences an investigation and reports to the relevant Minister on whether or not anti-dumping/countervailing duties should be imposed on goods from the countries named in the application.

13. On 27 March 2014, the Commission was transferred from the Australian Customs and Border Protection Service to the department to give effect to machinery of government changes announced following the federal election in September 2013.

14. The Commission is headed by a statutorily appointed Anti-Dumping Commissioner ('the Commissioner').

World Trade Organization and the domestic legislative framework

15. Australia's anti-dumping legislation is based upon the WTO agreements.

16. The Commission administers Australia's anti-dumping and countervailing system under the following federal legislation:
    - *Customs Act 1901* ('the Customs Act'), particularly Parts XVB and XVC*;*
    - *Customs Tariff (Anti-Dumping) Act 1975* ('the Dumping Duty Act')*;*
    - *Customs Administration Act 1985;*
    - *Customs Regulation 2015;*
    - *Customs (International Obligations) Regulation 2015;* and
    - *Customs Tariff (Anti-Dumping) Regulation 2013.*

17. In December 2013, the Minister for Industry and Science ('the Minister') delegated responsibility for decision-making on operational matters under Parts XVB and XVC of the Customs Act and

other anti-dumping legislation to the Parliamentary Secretary to the Minister for Industry and Science ('the Parliamentary Secretary')[1].

How is an anti-dumping investigation conducted?

General

18. The Commission's investigation process generally starts with an application from an Australian industry producing 'like goods' to those which the applicant alleges are being dumped and/or subsidised. The Australian industry concerned must demonstrate not only that dumping or subsidisation is occurring, but also that the industry has suffered material injury as a result.

19. Once an application is lodged, the Commission has up to 20 days to determine whether there is an Australian industry producing like goods to the allegedly dumped or subsidised goods, and whether there are reasonable grounds for the publication of a dumping or countervailing duty notice. If there are reasonable grounds, the Commission will commence an investigation.

20. The Commission has up to 155 days to complete its investigation and report to the Minister, unless the Minister approves an extended deadline. A flowchart highlighting the investigation process and associated timeframes forms **Attachment A**.

21. The Commission will publicise the initiation of an investigation and will request necessary information, including information on relevant import and export transactions, within a period of not more than 40 days of the commencement of the investigation. As part of the investigation, the Commission may visit the premises of the Australian industry, importers and exporters to verify the information provided.

22. Submissions from importers, exporters and any other interested parties are required within a period of not more than 40 days from the commencement of the investigation. Interested parties include businesses, industry groups, academics or others who have an interest in the investigation and wish to make a comment or argument about the investigation.

Provisional measures

23. From day 60 of the investigation, provisional duties may be imposed in the form of securities on imports. This will only occur once the Commissioner makes a Preliminary Affirmative Determination. After a Preliminary Affirmative Determination has been made, securities may be taken if the Commissioner is satisfied that it is necessary to prevent material injury to an Australian industry occurring while the investigation continues.

Statement of essential facts and final report to the Minister

24. On or before day 110 of the investigation, the Commissioner must issue a 'Statement of Essential Facts' on which the Commissioner proposes to base final recommendations to the Minister. Interested parties will then have 20 days to respond and lodge submissions in response to the Statement of Essential Facts.

25. After considering the submissions, the Commissioner produces a final report including conclusions and recommendations to the Minister by day 155. The Minister must make a decision

[1] For the purposes of this submission, references to the Minister also refer to the Parliamentary Secretary.

on the final report within 30 days, including whether or not to impose anti-dumping and/or countervailing duties.

Termination

26. Under certain circumstances, the Commissioner must terminate all or part of an investigation. These include circumstances where there are findings of negligible dumping margins, negligible countervailable subsidisation, negligible import volumes or negligible injury caused by dumping or subsidisation.

Review

27. Certain decisions of the Minister and the Commissioner are reviewable by the Anti-Dumping Review Panel ('the Review Panel'). These include, for example, the decision to reject an application for an investigation, the decision to terminate an investigation and the decision to impose duties. The Review Panel conducts merits review in accordance with the provisions in the Customs Act and reports to the Minister.

Other features of Australia's anti-dumping system

28. After an investigation results in the imposition of anti-dumping or countervailing duties, there are a number of other investigative processes that can occur. These are:
    - reviews of measures – that see if the amount of duty should be adjusted;
    - revocation reviews of measures – that see if the duty should be removed;
    - continuation inquiries – that examine if duties should be continued for longer than five years;
    - accelerated reviews – that allow new exporters to seek an individual duty rate;
    - duty assessments – that examine if duties were overpaid and if the importer is eligible for a refund;
    - anti-circumvention inquiries – that examine if parties are seeking to avoid the payment or effect of duties;
    - exemption inquiries – that consider if certain goods should be made exempt from duties; and
    - reinvestigations – that reconsider findings as directed by the Review Panel.

Overview of the amendments

Summary

29. The purpose of the Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 and Customs Tariff (Anti-Dumping) Amendment Bill 2015 ('the Bills'), is to amend the Customs Act and the Dumping Duty Act to strengthen various aspects of Australia's anti-dumping system. Specifically the Bills will:
    - tighten the rules for submission of information in anti-dumping and countervailing duty investigations;
    - simplify and modernise publication provisions for anti-dumping notices;
    - consolidate lodgement provisions for anti-dumping applications and submissions;
    - clarify the length of the investigation period in anti-dumping matters;
    - clarify the cumulative assessment of injury;
    - clarify normal value provisions;
    - clarify the calculation of the dumping margin;
    - clarify material injury determinations;
    - clarify effective notice periods;
    - clarify the definition of a subsidy;
    - amend provisions dealing with new exporters;
    - clarify provisions regarding consideration of the lesser duty rule;
    - streamline the processes and implement a higher procedural and legal threshold for review to be undertaken by the Review Panel;
    - introduce a fee for applicants seeking merits review by the Review Panel; and
    - allow the Government to replace the statutory International Trade Remedies Forum with more flexible consultation arrangements.

30. The Government set out its anti-dumping policies in *'The Coalition Policy to Boost the Competitiveness of Australian Manufacturing',* released in August 2013. These Bills implement the first of these policies, to strengthen Australia's anti-dumping system by introducing more stringent deadlines for the submission of information to dumping and subsidisation investigations. To complement the election commitment, a range of reforms introduced by the Bills will further strengthen Australia's anti-dumping system. In broad terms, these additional changes make complementary amendments such as: changes to the document lodgement and publication requirements, and a number of technical changes to address specific issues identified within the anti-dumping legislation. To assist the Committee's inquiry, these are outlined in **Attachment C**.

Anti-Dumping Review Panel

Overview of changes

31. The Review Panel is the body that provides merits review of certain decisions made by the Commissioner or the responsible Minister in anti-dumping matters. The Review Panel and the merits review process are established under the Customs Act. The Review Panel commenced in mid-2013, replacing the previous Trade Measures Review Officer.

32. The Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 ('the Customs Act Bill') makes four improvements to the merits review process: introducing a fee for review; including the Commissioner as a party eligible to make submissions to a review; introducing a conference mechanism; and raising the procedural and legal threshold for review.

33. The Bills do not affect the ability of parties to apply for a judicial review of anti-dumping decisions to the Federal Court.

Introduce a fee for review

34. Merits review is not explicitly required under the WTO agreements, and has become problematic for stakeholders and administrators because it is free to access and may consequently be 'gamed'. Indeed, the high frequency of appeals against decisions by the Minister to impose anti-dumping or countervailing duties suggests the fee-free nature of the Review Panel has encouraged dissatisfied parties to apply for review regardless of the relative merit of their complaints.

35. The high number of applications for review erodes confidence in the decisions of the Government and the Commission, and increases timeframes and uncertainty in the marketplace.

36. The Government recognises that it is important for genuinely aggrieved parties to have access to review mechanisms, but access should be reasonable. That is why a fee is being introduced. The aim of the fee is to ensure that businesses seriously consider the merits of their appeal before applying for review and help to offset the cost of administering the merits review function. Fees for merits review are a standard feature in other government systems.

37. The Government has indicated that it intends large businesses and foreign governments seeking a review to be subject to a $10,000 fee, whilst all other parties (such as small and medium sized businesses) will be eligible for a reduced fee of $1,000. Applicants will be eligible for a full or partial refund for the full withdrawal of an application to the Review Panel before a review has commenced, depending on when the application is withdrawn.

38. The scale of the fees would be established via a legislative instrument. A draft of the proposed legislative instrument is at **Attachment B**.

Include the Commissioner as a party to review

39. The decisions of the Review Panel have sometimes been controversial for stakeholders. This partly reflects the complex, technical nature of the anti-dumping system. The Customs Act does not permit the Commissioner to formally make submissions to the Review Panel during a review. This does not enable all necessary information, from the appellant, interested parties and the Commissioner, to be made available to the Review Panel during the course of a review.

40. Amending the Customs Act to include the Commissioner as a party eligible to make submissions to the Review Panel would allow the Review Panel to access the expertise of the Commissioner in a transparent manner. This will assist the Review Panel's consideration of an application, and should lead to better informed and less controversial recommendations and outcomes from the review process.

Introduce a conference mechanism to the review process

41. Applications for review are often submitted with a 'scatter-gun' approach. That is, an application generally includes a large number of possible grounds as to why the reviewable decision is not the "correct or preferable" decision, with limited explanation/evidence in support of each grievance.

42. The test applied by the Review Panel in determining whether to accept an application is to determine whether the ultimate and operative decision (that is, the reviewable decision) was the "correct or preferable" decision.

43. The orthodox legal approach to this formulation is that the test to determine whether a decision was "correct" is to be applied to nondiscretionary decisions, whereas the test to determine whether a decision was the "preferable" decision is to be applied to discretionary decisions.

44. Interested parties to a review may also make submissions to the review, to put their views forward. These interested parties may expend additional, unnecessary effort refuting invalid grounds when making their own submissions to a review.

45. To improve the information available to the Review Panel, the Bill will amend the Customs Act to empower the Review Panel to hold a conference for the purpose of obtaining further information. This would include the ability to hold a conference prior to commencing a review in order to obtain further information from the applicant and the Commissioner.

46. This will provide an opportunity for the aggrieved parties to discuss particular aspects of the reviewable decision and better understand the decision-making involved. This may avoid the need for review altogether, if the applicant decides to withdraw its application (with the benefit of a partial refund as mentioned above). It may also reduce the scope of the review if the applicant decides to withdraw a number of grounds for review after gaining further insight at the conference, subsequently reducing the workload on the Review Panel (ie fewer grounds to review) and interested parties making submissions concerning the grounds. In addition, a conference will allow the Review Panel to have all the necessary information available to assess whether to accept an application.

47. Consistent with the purpose of increasing information available to the Review Panel, should an applicant be invited to a conference prior to the commencement of a review and then fail to attend, the Review Panel may reject the application. For the purposes of transparency and procedural fairness, non-confidential summaries of any conferences held in relation to reviews of decisions of the Minister, or decisions of the Commissioner, to terminate an investigation will be included on the public record. Public records are not maintained for reviews of other reviewable decisions; hence a summary of any conference held in relation to reviews of those decisions would not be placed on a public record.

Raise the procedural and legal threshold for review

48. One of the reasons for the frequency of both appeals and acceptance of application for review is that the procedural and legal threshold for accepting an application for review is relatively low.

49. In addition, the Review Panel considers that the legislation requires that if any ground is accepted for review then the Review Panel must address all grounds in its review, regardless of whether some of the grounds were invalid or insufficiently supported.

50. Interested parties may also spend additional, unnecessary effort refuting invalid grounds when making their own submissions to a review.

51. The Bill would increase the procedural and legal thresholds for applying for review by introducing requirements that an application must set out the grounds for review, set out the decision the applicant considered should have been made, and set out how the grounds support the making of the applicant's proposed decision. The applicant must also set out how their proposed (or 'preferred') decision is materially different from the decision under review.

52. Where the Review Panel is not satisfied that the applicant has put forward reasonable grounds for the reviewable decision not being the correct or preferable decision, that the grounds support the making of the applicant's proposed decision, and that the proposed decision is materially different from the reviewable decision, the Review Panel may reject the application.

53. The Bill will also give the Review Panel the ability to accept and reject specific grounds of an application.

54. These amendments would improve the quality of information provided at the application stage of a review, ensure the Review Panel is only considering serious and meritorious reviews, and ensure that interested parties are not wasting time addressing invalid grounds in their submissions to the review.

International Trade Remedies Forum

Background

55. The International Trade Remedies Forum ('the Forum') was part of the *Streamlining Australia's Anti-Dumping System* reforms ('Streamlining reforms'), introduced by the previous Government. The Forum comprised a range of Australian businesses, industry bodies and trade unions. The Forum was initially established without legislation, and started meeting in 2011. The Forum's membership, and other features, was legislated in mid-2013 by the *Customs Amendment (Anti-Dumping Improvements) Act (No.1) 2012*. A number of working groups were also established, administratively, under the aegis of the Forum. The Forum met a total of six times between August 2011 and March 2013. Working groups also met during this period; and produced two reports. The Forum's last plenary meeting was in March 2013.

56. The Government believes that the central role of the Forum has been fulfilled. A significant number of the Streamlining reforms were 'high-level', and the Forum's main function was to provide advice on the practical implementation of those reforms. From 2011-2013, the Forum appears to have exhaustively discussed the Streamlining reforms and related issues including: access to import data, provisions to assist agricultural producers, Australia's 'market situation' provisions, use of experts in investigations, and circumvention. Given the Streamlining reforms have been implemented, the Government believes that there is no longer a need for a large regulated body such as the Forum (which at last count had over 20 members, excluding government agencies). Additionally, the Government believes that its reforms are well-defined and, consequently, their implementation does not require the same level of additional input.

57. Further, the Government considers that the current format of the Forum - largely prescribed by legislation – works against the provision of timely advice to the Government on the current operation of the anti-dumping system or future reforms. While the Forum proved to be a useful avenue for raising and ventilating issues, the legislated requirements of the Forum tended to work against tangible outcomes: the large number of members, coupled with differing capacities to participate and a wide range of diverging interests, made it difficult to achieve agreed outcomes. Additionally, the plenary meeting, mandated by legislation, tended to work against open or detailed discussions, with smaller working groups proving to be a more effective way of exploring and resolving issues. The meetings also required significant resources from both members and the secretariat, which can be better used elsewhere in the anti-dumping system.

58. The Government believes that more flexible, targeted consultative arrangements are a better fit for the emerging challenges faced by today's anti-dumping system.

59. The Government will replace the Forum with a smaller standing body. The Government is currently considering establishing an 'anti-dumping consultative group'. This consultative group could be established administratively and comprise a small number of members (approximately five) which will represent a spectrum of industry interests, for example, manufacturers, producers, fabricators, importers, industry bodies and trade unions. The consultative group would be the Government's first port of call for feedback on anti-dumping issues, but not an exclusive source of advice.

60. Upon establishment, the Minister would need to expand and clarify the functions and specific objectives of the anti-dumping consultative group in a way which is clear to all stakeholders in the anti-dumping system. In line with current practice, the Minister would appoint members; and the Minister would also have responsibility for convening and chairing the meetings of the consultative group.

61. Additionally, the Minister can establish working groups, which can be convened as needed and focussed on specific issues or sectors. The Minister would be responsible for setting the functions and objectives of any working groups.

62. The Minister can delegate some of these responsibilities where, or when, it is considered appropriate.

63. The Government believes that less rigid consultative arrangements have already proven to be effective. Over the two years since the last Forum meeting, anti-dumping stakeholders have continued to be involved in the design of anti-dumping system reforms, and provide feedback and suggestions for reform to the Government and the anti-dumping system administrators. Overall, these less prescriptive/more flexible arrangements have proved effective and have freed-up resources for both stakeholders and the Government. The Government believes that removing the Forum from the Customs Act will allow greater flexibility around the scope of work and frequency of stakeholder consultations.

Amending existing provisions

64. The Forum is established by provisions set out in the Customs Act. In summary, those provisions state that:
    - the Forum should advise the Government on improvements to, and operation of, the anti-dumping legislation;
    - the Forum's membership comprise at least 16 members (namely, 11 members drawn from manufacturers, producers, industry bodies, importers and others; four trade unions; and the Commissioner);
    - the Forum meets at least twice a year; and
    - the Commissioner convene and chair those meetings.

65. There is no reference to working groups, outcomes or reports, government representatives or the conduct of the meetings.

66. The Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 (Part 15) will repeal the legislation that establishes the Forum. The amendments respond to the difficulties and challenges created by the existing arrangements, and advance the Government's deregulation agenda by reducing red tape and unnecessary legislation.

Reverse onus of proof

67. *'The Coalition Policy to Boost the Competitiveness of Australian Manufacturing'* was released in August 2013, prior to the 2013 federal election. In that document, the then Opposition set out its anti-dumping policy, including reversing the onus of proof in anti-dumping investigations in line with practices in other international jurisdictions.

What is 'reversing the onus of proof'?

68. In the context of anti-dumping, 'reversing the onus of proof' refers to where a member of an Australian industry may make an allegation that a foreign exporter is dumping a particular product into Australia without having to provide substantiation. In such a scenario, the onus of proof falls on the foreign exporter to prove that it is not dumping.

69. While it is often cited that the United States and Canada place a reverse onus of proof on foreign exporters of dumped goods, this is not true. No other international jurisdiction has a practice or legislation which allows unsubstantiated allegations to be made or requires foreign exporters to prove they are not dumping. To do so would be a breach of WTO rules.

70. A breach of WTO rules would potentially harm Australian industry. If dumping or countervailing duties were imposed in a way that breaches the WTO agreements, it could allow other countries to challenge those duties under the WTO dispute settlement system which could result in the removal of the duties. The Government's election commitment was conscious of the need to remain compliant with international obligations and the WTO rules.

Greater onus on foreign exporters

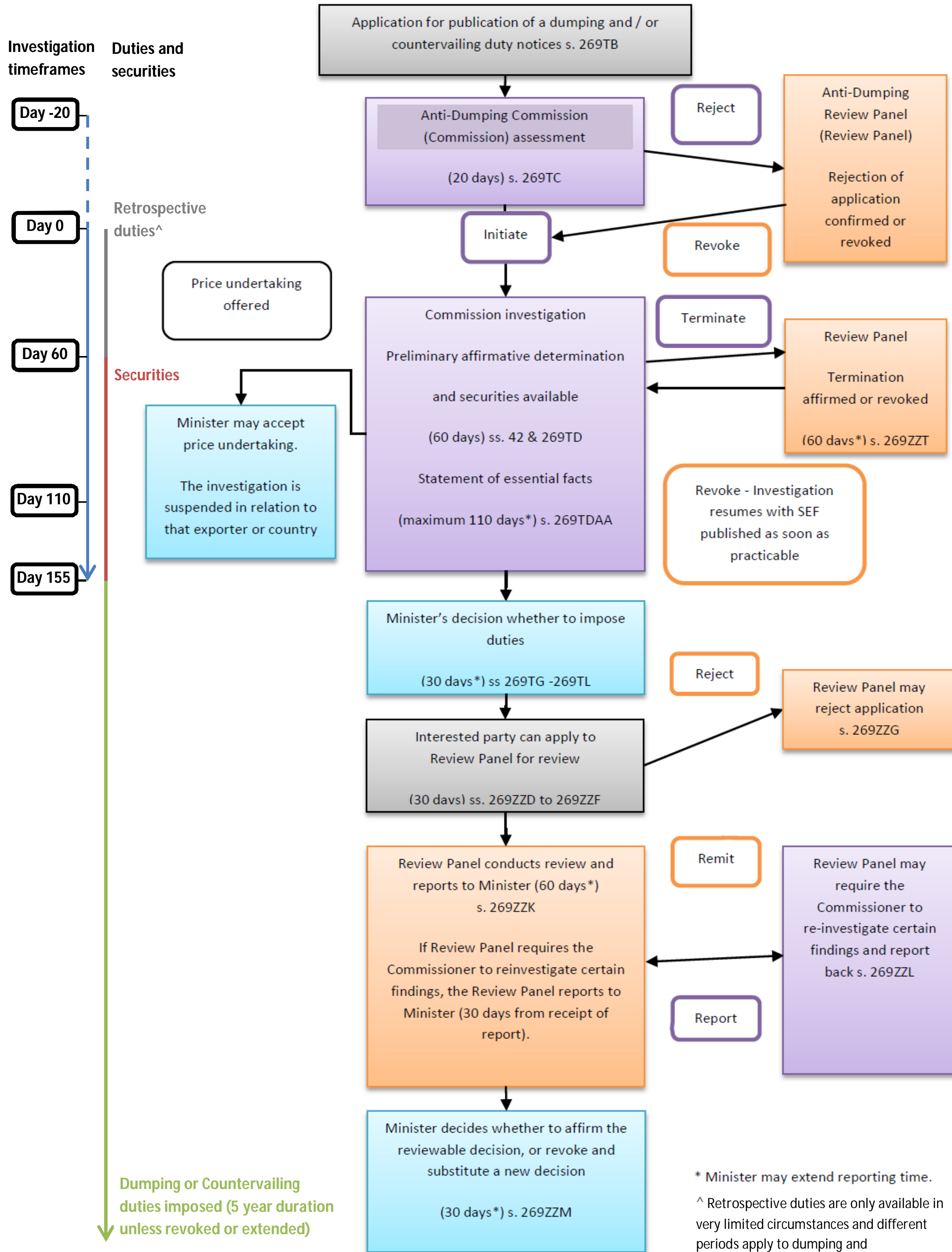
71. The Government is implementing reforms to achieve the overall intent of the commitment, to change the anti-dumping system to place a greater onus on foreign exporters to cooperate in anti-dumping investigations.

72. Foreign exporters will be under a heavier onus to cooperate with anti-dumping investigations more quickly and comprehensively, or risk being subject to higher duties as a result of the investigation. The Minister will direct the Anti-Dumping Commissioner that, wherever possible, provisional measures be imposed at day 60 of an investigation. This is the earliest time in an investigation that provisional measures can be considered.

73. This will be achieved through amendments which minimise the time permitted to provide information to investigators (a reduction from 40 days to 37 days). Additionally, formal directions will be issued by the Minister requiring the Commissioner to be more stringent when considering granting extensions of time to provide information; and outlining circumstances when the Minister will consider parties are not cooperating with the investigation.

74. Implementing the election commitment in this way will ensure the reform is consistent with the requirements of the WTO agreements.

Attachment A – Anti-dumping investigation process and timeframes



* Minister may extend reporting time.

^ Retrospective duties are only available in very limited circumstances and different periods apply to dumping and countervailing duties.

Attachment B – Review fee – Draft legislative instrument

COMMONWEALTH OF AUSTRALIA

Customs Act 1901

Customs (Anti-Dumping Review Panel fee) Determination 2015

I, Ian Macfarlane, Minister for Industry and Science, make this determination under sections 269ZZE and 269ZZQ of the *Customs Act 1901*.

Dated 2015

Ian Macfarlane
Minister for Industry and Science

DRAFT

Part 1 Preliminary

1. Name

This instrument is the *Customs (Anti-Dumping Review Panel fee) Determination 2015*.

2. Authority

This instrument is made under sections 269ZZE and 269ZZQ of the *Customs Act 1901* for the purposes of prescribing a fee for application under Division 9 of the *Customs Act 1901*.

3. Commencement

This instrument commences on commencement of the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015.*

Part 2 Prescribed fee

(1) A fee is payable for lodging an application with the Anti-Dumping Review Panel (Review Panel) under subdivision B or C of Division 9 of the *Customs Act 1901* (the Act), of:
   (a) $1,000; or
   (b) $10,000 if the applicant is a foreign government or large business.

(2) For the purpose of this instrument, large business means a business with 200 or more full time equivalent staff.

(3) The fee for lodging an application is payable at the same time the application is made.

(4) A refund (the ***refund amount***) of the fee will be available if:
   (a) the application is withdrawn within the application period referred to under sections 269ZZD or 269ZZP of the Act; or
   (b) the application is withdrawn before the Review Panel begins to conduct the review.

(5) The refund amount is:
   (a) if the application is withdrawn within the application period referred to under sections 269ZZD or 269ZZP of the Act - the application fee; and
   (b) if the application is withdrawn before the Review Panel begins to conduct the review – 85 per cent of the application fee.

DRAFT

Attachment C – Minor and technical amendments

Minor amendments

Submission deadlines

1. In anti-dumping investigations (and other anti-dumping system processes) stakeholders are invited to make submissions, and answer questionnaires, that provide information to the anti-dumping investigators.

2. These Bills will reduce the period that the Commissioner can set for the lodgement of submissions from 40 days to 37 days in relation to the initiation of an investigation, review of measures, continuation inquiry or anti-circumvention inquiry. This change is being made to implement the Government's election commitment set out in the policy document, *'The Coalition Policy to Boost the Competitiveness of Australian Manufacturing',* released in August 2013.

3. This will place a greater focus on the requirement for submissions to be submitted promptly and align with the minimum timeframes established under the relevant WTO agreements. It will also allow information to be considered earlier by the Commissioner when deciding whether a preliminary affirmative determination can be made.

4. Consistent with our WTO obligations, the Commissioner retains the ability to grant extensions for submissions where appropriate.

Publication provisions

5. To modernise and simplify the publication of notices related to anti-dumping processes and decisions, provisions of the Customs Act and the Dumping Duty Act will be amended to require that notices be published electronically. Presently public notices of anti-dumping matters made by the Minister and Commissioner under Divisions 1 to 7 of Part XVB of the Customs Act and the Dumping Duty Act are required to be published in the Gazette and a newspaper circulating in each State and Territory. The amendments will require such notices to be published on the Commission's website instead. These decisions are already published on the Commission website which is the principal source of information for dumping matters and the changes will cause negligible impact on stakeholders. Public notices made by the Minister and Review Panel under Division 9 of Part XVB of the Customs Act in relation to reviews would also be required to be published on the Review Panel's website.

Lodgement and withdrawal provisions

6. Provisions of the Customs Act related to the lodgement and withdrawal of applications will be amended to consolidate the stipulations regarding lodgement and withdrawal. Presently, the Customs Act has multiple provisions setting out where certain documents must be sent in order to lodge or withdraw anti-dumping process applications. The current legislation is both confusing for stakeholders, and difficult to update when the lodgement address changes, for example, when the Commission moves to new operating premises.

7. The amendments in the Bills will allow the Commissioner to approve the manner of lodging and withdrawing applications under Divisions 1 to 7 of Part XVB of the Customs Act. The amendments will apply to applications, withdrawals and public notices made after the commencement of the amendments.

Technical amendments

Overview

8. There are a number of ambiguous or unclear provisions in the Customs Act, which have caused, or have the potential to cause, uncertainty for Australian businesses or risk Australia breaching its WTO obligations. A range of technical amendments to the system will simplify and clarify certain aspects of anti-dumping investigative processes whilst improving Australia's consistency with the WTO agreements.

Length of investigation period

9. The Customs Act requires that the Commissioner conduct an investigation into whether certain goods exported to Australia have been dumped or subsidised and whether, because of that, injury was caused to the Australian industry producing like goods. The period which the Commissioner is required to examine and determine whether dumping or countervailing has occurred, for the purposes of making a final recommendation to the Minister, is called the 'investigation period'. The investigation period occurs before the date on which the investigation was initiated.

10. The Commissioner specifies the exact investigation period in a public notice that is issued when the investigation is initiated. For the majority of investigations, the investigation period is 12 months. Under the Customs Act, it is unclear whether the Commissioner may vary – or be required to vary – the length of the investigation period after that notice has been published. This uncertainty is problematic for stakeholders, because varying the length of the investigation period can have a significant impact on the Commissioner's findings on dumping or subsidies. Additionally, if the investigation period could be changed during the investigation, this could cause significant delays and, consequently, impose significant burdens on participating companies (both domestic and foreign), which would be required to provide revised information.

11. The Bills will amend the Customs Act to clarify that the length of the investigation period of an anti-dumping and countervailing investigation cannot be varied after it is established by the Commissioner's public notice. This change will provide certainty to all stakeholders, and aligns with the Commission's current, long-standing practice of not varying the investigation period.

Cumulative assessment of injury or hindrance

12. The Customs Act specifies a number of circumstances in which an investigation must be terminated by the Commissioner. This includes situations where the export of goods from a particular country has caused (or may cause) negligible injury to the Australian industry.

13. If the investigation is not terminated, the Minister is required, at the conclusion of the investigation, to decide whether or not to impose anti-dumping or countervailing duties. The Minister must be satisfied that, among other things, material injury has been caused (or may be caused) to the Australian industry. In making this determination, the Minister may make a 'cumulative assessment of injury'. In essence, the Minister considers whether the cumulative impact of exports from two or more countries subject to the investigation is causing material injury to Australian industry.

14. The provisions setting out the issues about which the Commissioner must be satisfied, when terminating an investigation because of negligible injury, do not presently permit the Commissioner to conduct a similar cumulative assessment of injury. However, the WTO

agreements that underpin the Australian anti-dumping system do allow for such an assessment. This could result in the premature termination of an otherwise legitimate investigation.

15. The Bills will amend the Customs Act so that the Commissioner can make a cumulative assessment of any injury that has been caused (or may be caused) to Australian industry when deciding if an investigation should be terminated due to negligible injury.

16. These amendments will ensure consistency between the matters considered by the Commissioner in terminating an investigation and the matters considered by the Minister when imposing anti-dumping or countervailing duties, and better aligns Australia's anti-dumping legislation with the WTO agreements.

Normal value of goods

17. The Customs Act requires the Commissioner to determine the 'normal value' of allegedly dumped goods that are exported to Australia. The normal value is then compared to the export price to determine if dumping has occurred. There are a number of methods set out in the legislation to calculate the normal value: two of which are the 'construction' method and 'third country prices' method (where the prices paid to export the goods to an appropriate third country are used).

18. When resorting to one of these two methods, it is unclear whether the current provisions require the Commissioner to first make use of the third country prices method before resorting to the construction method. The WTO agreements, on which the Australian anti-dumping system is based, do not require one to be used before the other.

19. The Bills will amend the normal value provisions to clarify that there is no specific hierarchy, or order, for the use of various methods for determining normal value. The amendments will remove doubt that the Commissioner can calculate normal value on the basis of the construction method, without first having regarded the use of third country prices. This clarification takes advantage of flexibility permitted under the WTO agreements and thereby improves the alignment of Australia's provisions with those of the WTO agreements.

Dumping periods

20. The Customs Act requires the Commissioner to determine whether or not dumping has occurred by reference to the 'investigation period'; a period which occurs before the investigation commences. Several methods are set out in the legislation for calculating the dumping margin for the investigation period, and some of these methods allow the Commissioner to split the investigation period into parts and use different calculation methods for each part. Currently, each part of the investigation period must be two months long or more. From an investigatory perspective, a minimum period of two months can be restrictive and, for example, would limit the ability of investigators to accurately determine dumping where there are erratic movements in costs and/or prices over shorter periods.

21. The Bills will amend the legislation to allow the Commissioner to split the investigation period into one month periods when calculating the dumping margin to ensure a fair comparison is made between export price and normal value.

Definition of subsidy

22. 'Subsidy' is defined in the Customs Act. In essence, a 'subsidy' is a financial contribution made by a government, or certain bodies, which confers a benefit in relation to the goods exported to Australia. Presently, the Customs Act deems a benefit to be conferred in relation to certain direct financial payments by governments and certain bodies. This may restrict the Minister's ability to have regard to all relevant information, and have regard to a range of legislated guidelines, when determining if a benefit has been conferred.

23. The Bills will amend the definition of subsidy in the Customs Act so that the receipt of a financial contribution by a government or certain bodies does not, of itself, confer a benefit. Instead the amendments will establish that a financial contribution is taken to confer a benefit if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market. This aligns the Customs Act with the WTO agreements. In making such a determination, the Minister will be able to have full regard to all relevant information and the legislated guidelines.

Accelerated review

24. If anti-dumping or countervailing duties are imposed on imported goods, the Customs Act allows certain new exporters to apply for an 'accelerated review'.

25. When conducting an accelerated review, the Commissioner examines the particular exporter to determine an individual dumping margin (or amount of subsidy) in order that a rate of duty specific to that exporter can be applied. An individual duty rate is usually beneficial to new exporters, because it means they are not then subject to the 'all other and non-cooperative' exporters rate - which is the highest rate of duty.

26. The Bill makes amendments to the accelerated review provisions by increasing the range of exporters who may apply for an accelerated review, and removing the possibility that no duties will apply to the exporter. It also corrects a drafting error (see below).

Changing the 'new exporter' definition

27. Presently, in the accelerated review provisions, 'new exporter' is defined as an exporter who did *not* export the goods to Australia between the start of the investigation period and the day before the 'statement of essential facts' was published, which is conventionally around day 110 of the investigation. This means exporters which have exported goods during that period are unable to apply for an accelerated review, because they are not considered new exporters. However, exporters that only make exports to Australia *after the end* of the investigation period and before the statement of essential facts is published are generally not able to participate in the investigation because of the late timing of their exports (relative to the investigation timeframe). Consequently, this last mentioned category of exporters may be inadvertently subjected to the 'all other exporters' rate, which is the highest possible duty rate.

28. The Bills will amend the definition of new exporter so that it applies to exporters who have only exported goods after the investigation period. In practice, these exporters have not had an opportunity to participate in the original investigation and have an individual duty rate applied.

Restricting the outcome of accelerated reviews

29. If an accelerated review is completed (rather than terminated or rejected), the Minister may declare that:
    - the anti-dumping or countervailing duty notice ('the notice') may remain unchanged,
    - the notice applies to the applicant as if different variable factors had been specified (resulting in a new individual duty rate for that exporter), or
    - the notice no longer applies to the exporter.

30. The last outcome, that the notice (and by extension anti-dumping or countervailing duties) no longer applies to the exporter, is not required by the WTO agreements that underpin the Australian anti-dumping system. The Bill will amend the Customs Act so that this outcome is not available at the conclusion of an accelerated review.

Drafting error

31. The amendments also correct a drafting error in the 'accelerated review' provisions: During an accelerated review, duties are not collected on goods imported from the exporter which is being reviewed. Securities are collected instead. The current provisions state that "no interim duty can be collected from the applicant". In accelerated reviews, the applicant is an exporter. This is an error given that duties are only ever paid by the Australian *importer* of dumped or subsidised goods.

32. The Bills will amend the provision to clarify that, in this situation, no duties are to be collected from an importer.

Period during which notices remain in force

33. Anti-dumping remedial action may take the form of anti-dumping duties and also 'price undertakings'. A price undertaking is an offer by an exporter to sell goods in Australia at a minimum price that does not cause injury to the Australian industry, instead of anti-dumping duties being imposed. Both price undertakings and duties last for five years from the time they are imposed, in line with the WTO agreements.

34. If a price undertaking is accepted but subsequently breached by the exporter, the investigation against the exporter is resumed. This may result in duties being imposed to prevent injury to the Australian industry. The current legislation requires that the new duties, imposed to replace the undertaking, last for five years from the date those duties are imposed. This means that the period during which the undertaking was in force is disregarded.

35. The WTO agreements state that anti-dumping remedial action, regardless of its form, remains in force for a maximum of five years after the conclusion of an investigation. Australia's current legislation leaves open the possibility that, where an undertaking is subsequently replaced by duties, remedial action will be in force longer than five years.

36. The Bills will make amendments to the Customs Act to align it with the WTO agreements by requiring that where an undertaking converts to a duty, the duty expires five years after the undertaking was accepted, unless terminated earlier.

Dumping findings

37. The Customs Act provides that, when undertaking an injury analysis, the Commissioner may examine periods before the investigation period for the purposes of determining material injury. This allows the Commissioner to compare the performance of the industry before the investigation period with the performance of the industry during the investigation period, for the purpose of determining if material injury occurred. The provision was not intended to allow injury occurring before the investigation period to be causally linked to dumping taking place in the investigation period, nor for a conclusion to be drawn that dumping occurred prior to the investigation period.

38. The amendments will clarify that although periods prior to the investigation period can be examined for the purpose of determining whether material injury has been caused, a determination that dumping has occurred prior to the investigation period is not permitted. This will eliminate uncertainty about the operation of the provisions and better align Australia's anti-dumping legislation with the WTO agreements.

Notification of subsidies

39. Prior to amendments made in 2013, the Minister was required to consider applying the 'lesser duty rule' (that is, consider fixing a lesser amount of duty than the full dumping or subsidy margin, where the imposition of that lesser amount was adequate to remove injury to the Australian Industry). In 2013, amendments to the Customs Act and the Dumping Duty Act removed mandatory consideration of applying the lesser duty rule in certain circumstances.

40. One of those circumstances occurs where the country involved in a countervailing investigation has not submitted a WTO subsidy notification during a determined compliance period. This period comprises the two most recent biennial periods, ending before the date the countervailing investigation commenced.

41. As currently drafted, the provisions of the Customs Act are unclear on whether a subsidy notification within the compliance period qualifies as a circumstance where the Minister may not have to consider the application of the lesser duty rule.

42. Amendments to the Customs Act will clarify that the Minister is not required to have regard to the lesser duty rule when considering the imposition of countervailing duties if the relevant country has not submitted any notification of its subsidies in the compliance period.