Australian Government
Australian Customs and Border Protection Service

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5 Constitution Avenue
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Dear Mr Gibbs

Productivity Commission Inquiry into Australia's anti-dumping and countervailing regime—Issues Paper

I refer to the request for information and comments set out in the Productivity Commission's (Commission) issues paper[1]. In keeping with Customs and Border Protection's role in providing information to the Commission to assist its inquiry, the following comments are provided on some of the issues raised in the Commission's issues paper.

This commentary is in two parts. The first part provides an overview of:

- the origins and principal objectives of the current legislative framework; and
- changes to the administration of Australia's anti-dumping and countervailing system.

The second part contains commentary on certain issues raised in the Commission's issues paper.

Short history

Legislative measures to counter dumping have operated since early this century. Australia's legislation dates from the *Industries Preservation Act 1906*.

[1] *Australia's Anti-dumping and Countervailing System*, Productivity Commission, 2009

Internationally, no accepted rules operated to deal with dumping until the formation of the *General Agreement on Tariffs and Trade* (GATT), which came into force on 1 January 1948. Article VI of GATT permitted the imposition of anti-dumping or countervailing duty, where *"the effect of the dumping or subsidization….is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."* However, the initial GATT Agreement itself did not specify any procedures for imposing anti-dumping duties and this led to differences in the policies adopted by GATT members.

The start of the modern era in anti-dumping administration came with the Kennedy Round of trade negotiations (1964 – 1967), which produced a negotiated "Anti-Dumping Code" that set out the rules for the application of anti-dumping duties. An essential feature of the Kennedy Round on dumping was the obligation that national legislation be aligned with the requirements of the Code. Australia became a signatory to that Code in 1975.

The Tokyo Round of negotiations (1973 –1979) revised the Anti-Dumping Code and also introduced a "Subsidies and Countervailing Duties Code". Australia became a signatory to the revised Anti-Dumping Code and the new Subsidies Code in 1979 and legislation was amended to reflect the provisions of those Codes.

During this time, Customs alone administered the anti-dumping legislation in Australia. Upon request, the Tariff Board (and later the Industries Assistance Commission) would review Customs' findings. In 1988, following a review of anti-dumping procedures, the Government established the Anti-Dumping Authority (ADA).

The GATT was the only *multilateral* instrument governing international trade from 1948 until the WTO was established in 1995.[2] The GATT 'Uruguay Round' (1986 – 1994) negotiations culminated in the creation of the WTO to replace the GATT in April 1994. On 1 January 1995 the Uruguay Round changes to anti-dumping and countervailing procedures were incorporated into Australian law and administration.

Between 1988 and 1996 there were a number of Government reviews that led to significant changes to the legislation.

The current legislative framework and arrangements for the administration of Australia's system were introduced following the 1996 Willett Review. The main changes included the introduction of statutory time-frames for investigations; a sunset clause limiting the duration of the measures; a new system for the collection of anti-dumping and countervailing duties; a reduction in the investigation period; and simplification of the two stage investigation system with the abolition of the Anti-dumping Authority (ADA) in 1998.

[2] The GATT Years: from Havana to Marrakesh, World Trade Organization

From 24 July 1998, Customs resumed sole responsibility for investigating and reporting on Australia's anti-dumping and countervailing matters. The bifurcated system that preceded the current arrangements was criticised for taking too long, creating duplication, inconsistency, uncertainty and additional cost.[3]

In 2006 the Minister for Justice and Customs and the Minister for Industry, Tourism and Resources agreed to a Joint Study of the administration of the Australian anti-dumping system.[4] Following the acceptance by the Ministers of the *Joint Study Report on the Administration of Australia's Anti-Dumping System* (the Report), on 24 November 2006 a number of changes to the administration of Australia's anti-dumping system were implemented.[5]

WTO agreements and Australian law

As a signatory to the WTO, and in accordance with our rights and obligations, Australia has enacted legislation based upon the WTO Agreement on Implementation of Article VI of the *General Agreement on Tariffs and Trade 1994* (generally referred to as the Anti-Dumping Agreement) and the *Agreement on Subsidies and Countervailing Measures* (the Subsidies Agreement).

Australia's *Customs Act 1901* sets out the general inquiry process and the *Customs Tariff (Anti-Dumping) Act 1975* (CTAD Act) provides for the imposition of anti-dumping and countervailing duties.

The legislation vests certain powers[6] in the Minister and in the Chief Executive Officer of Customs and Border Protection. Where necessary, the powers of the Chief Executive Officer may be delegated.

Customs and Border Protection makes decisions under the legislative framework and in accordance with Australian domestic policies and procedures. Where disputes arise, an aggrieved party has administrative and judicial rights of review.

In addition to the administrative and judicial rights of review available under Australia's legislative framework, where a member country of the WTO considers that actions taken by another member country are not in accordance with the terms of the Anti-dumping Agreement and/or the Subsidies Agreement, specific Dispute Settlement procedures are available under the WTO framework.

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[3] Rocher, *Customs Legislation (Anti-Dumping Amendments) Bill 1998*;Second Reading Speech.

The objectives of timely and efficient resolution of investigations and providing certainty in the market place were reinforced by provisions which conferred power upon decision-makers throughout the investigation or review process to disregard submissions received if there was insufficient time remaining for proper consideration. The limitations on what could be considered on review were also intended to "ensure the outcome of dumping inquiries is decided as quickly as possible,"

[4] Australian Customs Dumping Notice No 2006/02

[5] The Report may be found at http://www.customs.gov.au/site/page.cfm?u=4227

[6] The Minister has the discretion to impose measures (i.e. a dumping duty or a countervailing duty) or accept a price undertaking from an exporter; vary the level of, or revoke, measures following a review or to impose measures following an expedited review for new exporters; to continue measures.

Issues raised by the Productivity Commission

To assist in its assessment of the benefits and costs of Australia's anti-dumping system, the Commission has sought information and commentary on various aspects of usage of the system. In its Issues paper, the Commission has sought submissions on a variety of issues some of which relate to the administration of Australia's anti-dumping and countervailing system.

Decline in the usage of the Australian anti-dumping and countervailing system

The Commission noted in its Issues paper that against three statistical indicators, recourse to the system has declined. These indicators include the number of investigations initiated each year, the number of new measures imposed and the number of measures in force. Using these statistical indicators the Commission has charted the usage of Australia's anti-dumping and countervailing system in *Figure 2 Anti-dumping and countervailing activity 1978-79 to 2007-08.*[7]

In seeking information and commentary on the factors that might explain the declines in usage the Commission has advanced a number of questions focussing on the potential relationship between economic conditions, the composition and nature of industry activity in Australia and aspects of Customs and Border Protection's administration of Australia's anti-dumping and countervailing system. In this context the Commission asked:

Has Customs and Border Protection set higher hurdles for complainants and/or provided better guidance on the sorts of claims that would be unlikely to succeed?[8]

As noted, legislative measures to counter dumping have operated since early this century and Australia's legislation dates from the *Industries Preservation Act 1906*. Australia was an original contracting party to the multilateral GATT 1947; the plurilateral Anti-dumping and Subsidies Codes and, in 1995, the WTO Anti-dumping and Subsidies Agreements.

During the last 20 years, in addition to significant changes to the international framework to which Australia has subscribed, there have been significant variations in prevailing economic conditions (e.g. the 1991 recession, 1997 financial crisis in Asia followed by the buoyant economic conditions prevailing until late 2008). The first two economic downturns were followed by significant increases in anti-dumping activity. The positive economic conditions over the last decade coincided with a resumption of the long term decline in usage of Australia's anti-dumping and countervailing system[9] to a level that the Commission has noted is now more proportionate to Australia's share of world trade.

While there has been a long term declining trend in usage, the amendments to Australia's anti-dumping and countervailing system to align with the WTO Anti-dumping and Subsidies Agreements in 1995 also coincided with an increase in usage of the system which peaked

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[7] Australia's Anti-dumping and Countervailing System, Productivity Commission, page 8

[8] ibid

[9] More recently, there has been a significant increase in anti-dumping and countervailing activity of WTO members reported by the WTO Secretariat (7 May 2009). http://www.wto.org/english/news_e/pres09_e/pr556_e.htm .

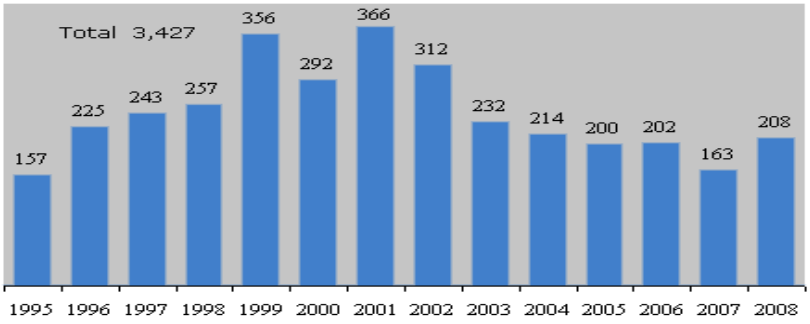
in 1998. This rise in activity was not preceded by a significant deterioration in economic conditions.[10] However, during this period of increasing activity the financial crisis in Asia began (in the second half of 1997) and "the adverse effects on economic activity in the region became more evident in the first half of 1998".[11] The current legislative framework and arrangements for the administration of Australia's system were introduced in 1998.

All of these events have occurred over a period characterised by increasing trade liberalization and structural reform.[12]

The Commission has recognised that a number of initiatives have been introduced, which have been intended to improve understanding and awareness of, and access to, Australia's anti-dumping and countervailing system.[13] The relatively low level of activity over the last 10 years makes it difficult to assess whether these initiatives have impacted, or will impact, usage of Australia's anti-dumping and countervailing system. For similar reasons, it is also difficult to assess whether the variations to China's status for the purposes of anti-dumping and countervailing investigations have impacted, or will impact, usage.[14]

Recent reports confirm increasing anti-dumping activity of WTO members.

Chart 1 ANTI-DUMPING NUMBER OF INVESTIGATIONS INITIATED 1995 — 2008



In line with the international trends, there has been an increase in the number of investigations initiated by Customs and Border Protection since late 2008.

[10] http://www.treasury.gov.au/documents/202/PDF/Article01.pdf

[11] http://www.treasury.gov.au/documents/198/PDF/round3.pdf

[12] Trade Policy Review Body - Trade Policy Review - Report by the Secretariat - Australia – Revision; 01/05/2007; WT/TPR/S/178/Rev.1

[13] Measures to improve access to the system including the introduction of the approved application form, its subsequent revision in 2001, the implementation of 21 of the 22 recommendations of the Joint Study in 2007 including the issue of guidelines to assist applicants.

[14] From centrally planned economy to economy-in-transition to market economy in 2005.

Chart 2 ANTI-DUMPING NUMBER OF FINAL MEASURES 1995 — 2008

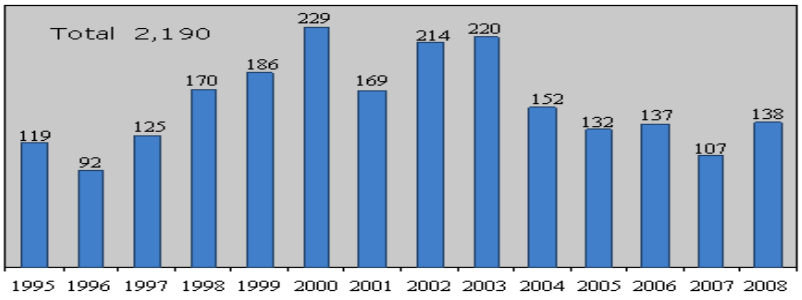


Chart 1 and 2 extracted from the WTO: 2009 PRESS RELEASE PRESS/556 of 7 May 2009 "*Anti-dumping—WTO Secretariat reports increase in new anti-dumping investigations*" http://www.wto.org/english/news_e/pres09_e/pr556_e.htm

Product and country incidence

The Commission noted in its issues paper that the majority of domestic activity applies to a narrow range of industrial chemicals and plastics, metal products and food and beverages and an increasing concentration of initiations and measures against exporters from the Asian region. In relation to both products and country, the domestic trends are consistent with international trends,[15] with China continuing to be the most frequent subject of new investigations and new measures.

Early indications are that Australian anti-dumping and countervailing activity will continue to reflect international trends. In recent domestic activity there appears to be a trend to more complex applications, involving allegations of both dumping and subsidization of exports, some of which are preceded by similar investigations in the USA and Canada.

How does Australia compare internationally

The Commission noted in its issues paper that, while Australia had traditionally been a relatively heavy user of anti-dumping, the current level of activity was more in line with Australia's share of world trade. It sought information and comment on how Australia's anti-dumping and countervailing system compare with other countries and whether there are particular features of Australia's system that are notable in an international context.

While key features of domestic activity align with international trends, there are differences between the policy, practice and processes of WTO members. Traditional major users of anti-dumping and countervailing remedies often compared to Australia are the European Union (EU), Canada, and the USA. The following table summarises the main features of their respective systems and highlights areas of difference with Australia's anti-dumping and countervailing system.

[15] http://www.wto.org/english/news_e/pres09_e/pr556_e.htm .

Table 1: International comparison

	Country			
Issue	Australia	USA	Canada	EU
Bifurcated administration	No	Yes	Yes	No
Authority: Dumping	Australian Customs and Border Protection Service	United States Department of Commerce	Canada Border Services Agency	European Commission
Authority: Injury and Causal Link	Australian Customs and Border Protection Service	United States International Trade Commission	Canadian International Trade Tribunal	European Commission
Investigation Timeframe	155 days	280 days	210 days	365 days
Treatment of China	Market Economy	Non-Market Economy	Economy in Transition	Economy in Transition
National Interest Test	No	No	Yes	Yes
Anti-dumping and countervailing duties	Minimum export price (Ascertained Export Price) and fixed rates of duty (Interim Dumping Duty) for dumping. Fixed rates of duty for countervailing	Ad-Valorem (%) rates of duty for dumping. Fixed rates of duty for countervailing	A floor price is set equal to each cooperating exporter's normal value – duty is paid if export price is less than the floor price. An ad valorem duty is set for all non-cooperating exporters	Fixed and ad-valorem (%) rates of duty for dumping. Fixed rates of duty for countervailing
Decision maker on the imposition of measures	Minister	United States International Trade Commission	Canadian International Trade Tribunal	Council of Ministers
Review	Merit - TMRO Judicial Review	Judicial Review	Judicial Review	Judicial Review
Lesser Duty	Yes	No	Yes	Yes

Administrative agencies

The USA[16] and Canada[17] have bifurcated systems where one agency deals with claims of dumping and/or subsidisation and another addresses material injury and causal link. The bodies dealing with material injury in USA and Canada are semi-judicial agencies having powers of subpoena. Most hearings are public but confidential information may be heard in-camera with only legal representatives present.

Like the EU, Australia has a single agency administering its anti-dumping and countervailing system. Within the European Commission there appears to be a greater degree of specialisation in material injury and dumping analysis compared to Australia.

Investigation Timeframe

Of the four jurisdictions, Australia has the shortest investigation timeframes (155 days) followed by Canada (210 days), USA (280 days), and the EU (365 days).

Policy—treatment of China for anti-dumping and countervailing purposes

The treatment of China varies between jurisdictions. Canada and the EU treat China as an economy in transition; the USA treats China as a non-market economy. Australia treats China as a full market economy.

National Interest

The EU and Canadian systems provide processes for considering the broader national (or community) interest. Information published by the EU and Canadian authorities indicates that these provisions are used infrequently and rarely alter the outcome of an investigation.

Access to confidential information of other interested parties

A significant difference between Canada and USA on the one hand, and Australia and the EU on the other, is the access given to confidential information of other interested parties. In Canada and USA authorised legal representatives may access confidential information of interested parties subject to making declarations to the administering authorities and entering into confidentiality undertakings.

This allows the legal representatives to examine all information of other interested parties and provides the opportunity for parties to test such information in public hearings. One of the consequences is that in the USA and Canada parties usually incur the costs of specialised anti-dumping lawyers. These costs could potentially be a factor affecting the ability of small or medium size enterprises to access the system.

In Australia and the EU, confidential information of a party disclosed to the investigating authority is required to be kept in confidence. Reliance is placed on the verification of confidential information by the investigating authority.

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[16] United States International Trade Commission (USITC), and the Department of Commerce (DoC)

[17] Canadian International Trade Tribunal (CITT), and the Canadian Border Service Agency (CBSA)

Anti-dumping and countervailing measures

The nature of the measures that may be imposed also varies. The USA and EU have more flexibility than Australia in determining the type of duty imposed[18] but often use ad valorem rates of duty (e.g. 5% of actual export price) for dumping and fixed rates of duty for countervailing (e.g. $5/kg).

Canada also has flexibility when imposing duty and may impose other forms of duty such as ad valorem or a combination of ad valorem and fixed rates. Typically, however, their duties are a rate per unit set equal to the normal value of the goods. This gives exporters the option of increasing the price of the goods exported to Canada at a level high enough to eliminate dumping, and when this occurs no duties are collected. Sometimes known as a floor price scheme, this is how Australia's system of duty collection operated for many years prior to the implementation of the Interim Dumping Duty (IDD) scheme in 1993.

Australia's IDD scheme regulates the nature of the dumping duty by linking it to an 'ascertained export price'[19]. The result is that in Australia the majority of dumping duties are a specific rate of duty per unit plus any additional variable duty if the actual invoiced price for the imported goods is lower than the ascertained export price.

The processes for the imposition and collection of the duty also differ in some respects. The USA operates what is known as a retrospective duty collection system (see Article 9.3.1 of the WTO Anti-dumping Agreement). The feature of this system is that when an anti-dumping duty order has been made at the conclusion of the investigation, cash deposits apply on all subsequent imports. In an administrative review 12 months later the actual amount of the anti-dumping duty is assessed on those imports. Australia, Canada and the EU differ from the USA in this respect as they impose a duty at the outset (i.e. it is a prospective application of a duty) (see Article 9.3.2 of the Anti-dumping Agreement).

Each country has procedures to refund any excess cash deposits or duty, as the case may be.

Decision maker

In the USA and Canada, a decision to impose duties is made by the relevant government agency. The decision in the EU is made by a Council of Ministers. In Australia, the decision is made by the relevant Minister, currently the Minister for Home Affairs.

Lesser Duty

Section 8(5A) of the CTAD Act specifies that in imposing interim dumping duty, the Minister must have regard to the desirability of fixing a lesser amount of duty where the non-injurious price (NIP) is less than the normal value. This is the "lesser duty" rule. The USA does not apply a lesser duty provision. Canada may apply it in the context of a public interest inquiry. Australia and the EU consider it in each investigation.

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[18] Article 9 of the WTO AD Agreement provides for the imposition of a duty but does not specify the nature of the duty.

[19] In Australia's CTAD Act an ad valorem duty based on the actual export price is only possible in the case of a countervailing duty.

Predatory behaviour

The Commission noted in its issues paper that the rationale for anti-dumping measures has been widely explored in the economic literature. In a series of questions focussed on seeking information and comment on the various rationales, the Commission asked:

> Has predatory behaviour been an explicit consideration in any recent Australian anti-dumping investigations?

The reference to predatory pricing is taken to refer to a practice of selling a product or service at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new competitors.

Customs and Border Protection examines pricing behaviour by sellers within the Australian market when examining issues of injury and causation. While aggressive selling by importers has been observed on occasion, Customs and Border Protection has not observed any instances of predatory behaviour in recent investigations.

How might the current system be improved

To facilitate input from participants and its own assessments, the Commission has grouped the range of possible options for how the current system might be improved into:

- those involving modifications to key assessment criteria and related concepts within the current system;
- those focussed on improving the administration of the existing system; and
- those involving more fundamental changes to the current policy approach.

Modifications within the existing system

In seeking information and comment on possible modifications within the existing system architecture that might deliver a better balance between the costs and benefits of Australia's anti-dumping and countervailing system, the Commission asked a range of questions on current assessment criteria and concepts including standing, like goods, the investigation period and the methodologies for calculating normal values, threat of injury, profits foregone and/or reduced market share within a growing market, information burden on applicants, calculation of non-injurious prices (NIP), greater use of price undertakings, the operative period for measures and revocation and sunset provisions and sanctions on frivolous applications. In addition, the Commission specifically asked:

> Does the way in which local producers respond to dumping affect the likely success of an anti-dumping complaint? For example, are the outcomes of investigations likely to be the same where a local supplier matches dumped prices and thereby suffers reduced per unit profitability, as distinct from maintaining its prices and thereby suffering a loss of sales?

Some of these are issues of policy, some based on requirements of the WTO Anti-dumping and Subsidies Agreement and some go to the practice of Customs and Border Protection or

issues of interpretation. Customs and Border Protection's current administrative policy and practice in relation to these and other issues are set out in published material.[20]

The injury indicators to be examined are identified within the legislation[21] and include principal indicators (price, volume and profit effects) and other injury factors—capacity utilisation, inventory, return on investment, cash flow, employment, capital investment and research and development. As part of its examination of injury and causation, Customs and Border Protection also examines injury caused by factors other than dumping,[22] including internal domestic competition, changes in demand, export performance and imports of goods that are not dumped. When assessing the issues of material injury and causation, an examination of all the relevant economic indicators and the overall economic performance of the Australian industry is undertaken.

On subsequent investigations of the same commodity, it has been observed that the type of injury caused by dumped imports from the same source may vary.

The potential price and volume responses put forward by the Commission as examples could both lead to profit effects and a finding of material injury.

Improving administration of the existing system

In seeking information and comment on the potential for improving administration of the existing system, the Commission noted that Australia's anti-dumping and countervailing system had been the subject of several reviews over the last two decades including the 2006 Joint Study. It also noted that the "key requirements from an administrative perspective are for arrangements that promote transparency and procedural fairness, while at the same time avoiding unnecessary compliance costs and facilitating timely decision making."

The Commission has asked for information and comment on whether there are other areas to improve administrative and procedural efficiency and effectiveness, in addition to those identified and addressed in the 2006 Joint Study.[23] These questions highlight the balance between the objectives of transparency, procedural fairness and timely decision making and cost.

The current system provides for an investigation phase, release of a SEF and a period for parties to make submissions in response to the SEF before a report and recommendations are made to the Minister. Submission of evidence late in the investigation can be disregarded. Confidentiality is required to be maintained by the administrator and interested parties are reliant on timely placement of non-confidential versions of Customs and Border Protection verification reports on the public file. While the introduction of an electronic public file has facilitated access to reports, there can be delays in gaining affected parties approval of non-confidential versions.

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[20] http://www.customs.gov.au/site/page.cfm?u=4289

[21] s.269TAE(1) of the *Customs Act*

[22] s.269TAE(2) of the *Customs Act*

[23] *Australia's Anti-dumping and Countervailing System*, Productivity Commission, page 18

While the existing system addresses issues of transparency and procedural fairness, timely decision making and commercial certainty are given primacy. There are alternative approaches that would also address these issues—the relative complexity, costs of access and administration could vary.

The amount of time required for an investigation is dependent on many factors including the number of interested parties, number of countries involved, complexity of issues (including whether there is a simultaneous dumping and countervailing application) and available resources—an issue that may affect Customs and Border Protection and interested parties. In the period July 1999 to May 2009 Customs and Border Protection undertook 69 investigations. Of these 28 were completed within the 155-day timeframe. The remaining 41 were extended by an average of 57 days.

The Minister's discretion to extend the reporting date for the SEF usually enables the timeframe to be managed for issues to be properly investigated. The Minister cannot grant more than one extension. Once the discretion is exercised or the SEF is issued, late emerging evidence may not be able to be considered in the time remaining. This is consistent with the provisions that allow for such material to be disregarded and also with the objective of promoting procedural fairness for all parties.

The current system does accommodate changes in circumstances by providing for accelerated reviews for new exporters, review of variable factors on application, and, in exceptional circumstances, at the discretion of the Minister. While there could be greater flexibility, this could also impact on timely decision making, commercial certainty and compliance costs.

Customs and Border Protection will continue to provide information in response to additional requests for information made by the Commission that may suggest areas of potential improvement.

Yours sincerely

P M Bridge
A/g National Manager
Trade Measures Branch

16 July 2009