



Australian Government
Productivity Commission

Developments in Anti-Dumping Arrangements

Productivity Commission
Research Paper

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Foreword

In 2009, the Productivity Commission conducted a ‘roots and branch’ inquiry into Australia’s anti-dumping system — the first such inquiry in more than two decades. Though recommending that a system be retained, the Commission proposed various changes to make the system less protectionist and thereby reduce its detrimental impact on the wider community.

As it has transpired, the multitude of changes introduced since then have moved the system in the opposite direction. While many of these changes are yet to fully take effect, their collective intent is to make it easier for local industries to secure anti-dumping protection and to increase the likely magnitude of the protection that is provided. Recently, further changes have been flagged to ‘strengthen’ the system.

This research study provides an economic stocktake of recent anti-dumping activity and the changes to Australia’s anti-dumping system since the Commission’s 2009 report. Amongst other things, it looks at the reasons for the recent increase in the usage of anti-dumping measures, analyses key recent changes to system requirements, and discusses the implications for the future evolution of the system.

It is hard to reconcile the recent policy emphasis in this area with the market and trade liberalisation objectives that have underpinned Australia’s broader microeconomic reform program in past decades. The idea that the system is justified as a safety valve for an otherwise-progressive liberalisation program is specifically examined and found wanting. This study canvasses some options for a less protectionist structure, notes it is not obligatory to have an anti-dumping system, and expresses reservations about its retention in the longer term.

The research study was overseen by Commissioner Melinda Cilento.

Peter Harris
Chair

22 February 2016

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OVERVIEW

Key points

- Recent changes to Australia's anti-dumping system have increased its protectionist impact.
- Generally soft economic conditions in the wake of the Global Financial Crisis, a supply glut in the global steel industry and the recent changes to the system have contributed to an upswing in cases initiated, new measures imposed and measures in force.
 - Usage of anti-dumping and countervailing measures is concentrated in several capital-intensive industries producing mainly intermediate goods. Steel products accounted for 86 per cent of new investigations during 2014-15 and now make up over 60 per cent of all measures in force.
 - The average dumping and countervailing duty currently in place in Australia is 17 per cent, more than three times greater than the general tariff rate of 5 per cent.
 - Some measures have been in place for more than 15 years.
- Australia ostensibly has an anti-dumping system because WTO rules allow it. However, there is no compelling economic rationale for doing so and it is clear that current anti-dumping arrangements are making Australia, on a national welfare basis, worse off.
 - There is little to distinguish anti-dumping protection from other trade restrictions. As such, the benefits for recipients of protection are outweighed by the costs for industries using the protected goods, consumers and the broader economy.
 - Arguments that the system provides other benefits to the community that would eliminate this net cost are not credible.
- This state of affairs reflects deficient policy processes — and, in particular, inadequate reporting on system outcomes, and limited attention to the detriment to the community of anti-dumping protection in policy evaluation and development.
 - The current environment is one in which policy is being driven by the interests of a small group of local industries.
- The weight of evidence indicates that an anti-dumping policy based on informed consideration of its net impacts would lead at a minimum to heavy modification of the system to reduce its costs.
- The costs of the system could be significantly reduced by increasing the thresholds for accepting anti-dumping and countervailing applications (the *de minimis* margins), instituting provisions that would allow measures to not be applied if they would be disproportionately costly for the community and putting a finite limit on the duration of measures.
- However, such a 'harm minimisation' approach would have drawbacks and risks, as experience since the Commission's inquiry in 2009 shows. Accordingly, as part of a rethink of policy in this area, serious consideration as to whether it is in Australia's interests to retain an anti-dumping system at all is warranted.

Overview

Australia's anti-dumping and countervailing system (hereafter the anti-dumping system) provides some Australian industries with protection additional to that available through the general tariff regime. Such protection — usually in the form of special customs duties — can be granted when:

- either the export price of a good to Australia is lower than the price in the overseas supplier's home market; or the supplier has received any of a specified group of subsidies from its government, and
- the 'dumped' or subsidised imports cause, or threaten to cause, 'material injury' to a local producer of 'like goods'.

Most countries have anti-dumping systems, but the merits of such protection have long been questioned. Like other forms of trade protection, anti-dumping duties protect some industries at the expense of other industries and consumers who use the imported goods concerned. And, like other trade protection, such duties give rise to broader economic costs by distorting consumption and investment decisions, muting the incentives of the protected industries to improve their competitiveness and deterring trade. As such, the central question has been how anti-dumping protection could be beneficial when it is widely accepted that trade barriers are harmful to both the country taking action and the global trading system more broadly.

Australia's anti-dumping system is based on internationally agreed rules and procedures under the auspices of the World Trade Organization (WTO), but those rules do not endorse anti-dumping protection. Indeed, they do not oblige governments to take action against dumped or subsidised imports, nor prohibit dumping or most types of subsidisation. Rather, the WTO rules seek to place bounds on any anti-dumping or countervailing actions by member countries and are essentially an attempt to limit the scope and stringency of protection and therefore the economic harm that it imposes.

Why this study?

Reporting on the effects of Australia's anti-dumping system and the efficacy of industry assistance is not a new endeavour for the Commission. In addition to undertaking a formal public inquiry into the system in 2009, it has monitored developments in the system as part of its statutory role to report annually on assistance provided to Australian industries.

Since the Commission's 2009 inquiry, the degree of assistance provided by the system to claimants has risen.

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- Part of this rise reflects increased calls made on the system by industries facing difficult economic conditions in the wake of the Global Financial Crisis and, in the case of the steel industry, the predominant user of anti-dumping protection, a continuing supply glut.
 - There have also been a significant number of changes to the system that have sought to make it more favourable for industry applicants.

In view of these developments, this study provides an update on recent anti-dumping and countervailing activity and assesses recent policy changes from an economy-wide perspective. This assessment indicates that a system that has always been problematic is now clearly working in a way that is inimical to Australia's interests. Moreover, more policy changes of a protectionist nature are in prospect.

A snapshot of the Australian system

How does it work?

Protection provided through Australia's anti-dumping system is triggered by applications from local industries. The investigation process, undertaken by the Anti-Dumping Commission (ADC), goes through several stages (mostly time-limited) and includes appeal rights.

By virtue of the WTO rules, the system does not apply to services and its coverage in relation to goods is limited by the 'like goods' test (goods that are identical or substantially similar to the imported good). It is therefore a highly selective form of industry support.

Also, an industry can seek protection even when it services only a very small share of the domestic market. Hence, disproportionality between the benefits of protecting a small local industry and the costs of imposing duties on a much larger quantum of imports is not a consideration in whether an investigation should proceed.

Rather, the core questions for the investigation process are whether dumping or subsidisation has occurred and whether this has caused, or threatened, material injury to the applicant industry. The degree to which the price of the import is deemed to have been reduced below its 'normal' level in the supplier's home market (the dumping margin), or the extent to which government subsidies have enabled an overseas supplier to charge a lower price, provides the basis for the level of duties imposed. Resolution of these matters is far from straightforward and requires the ADC to exercise considerable discretion. For instance:

- The methodology for calculating whether the export price of a good alleged to be dumped is below its normal value depends on the circumstances. Some methodologies are likely to be more favourable to the applicant than others.

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- ‘Material injury’ is not defined in the legislation. Rather, it has been taken to mean ‘not immaterial or insignificant and greater than that likely to occur in the normal ebb and flow of business’. Various WTO and Australian-specific guidance on the particular factors that should be considered then comes into play. And distinguishing the contribution of dumping or subsidisation to injury to a domestic industry from the contribution of other sources of competitive pressure is based on qualitative judgments.

Where the ADC finds that there has been dumping or subsidisation, and that it has caused material injury to the applicant industry, the responsible Minister may impose remedial import duties (or accept an undertaking from the exporter to increase its prices).

Once in place, anti-dumping and/or countervailing measures typically remain in place for five years, with scope for continuation for additional five-year periods, following further review. Measures may be continued if the ADC judges (and the Minister accepts) that, in the absence of the measures, injurious dumping or subsidisation would recur. The test for continuation is necessarily less demanding than for initial investigations because, with remedial measures in place, it is not possible to directly test for injury and causality in their absence.

While in general terms Australia’s anti-dumping system is the same as those in other countries, the WTO rules provide for considerable flexibility in relation to detailed system design. This means that the overall stringency or ‘protectiveness’ of individual country systems varies.

In recent decades, Australia’s anti-dumping system has sat in the middle of the range in terms of the checks and balances it contains on protection conferred on Australian industry. For instance, while unlike some other countries there is no direct consideration of whether the imposition of measures would be in the public interest, the system has embodied a ‘lesser duty’ rule intended to limit protection to the minimum level required to remediate injury to the local industry.

However, changes to the system since 2009 have made it more favourable for user industries and increased its protective impact (box 1). It will still be some time before the full effects of these changes are seen, but it is clear their intent is either to make it more likely that applications will lead to the imposition of measures or to increase the level of those measures. These changes were made with little regard to their resulting impacts on non-recipient industries, consumers, or the wider community.

Box 1 **The growing protectiveness of Australia's anti-dumping system**

In its 2009 inquiry report, the Commission recommended changes to reduce the protectiveness of the system (see later). Most of the significant changes to the system made since then have, however, moved the system in the opposite direction. For example:

- The scope to use proxy or constructed normal values in dumping cases has been widened. Typically, these methodologies will be more likely to lead to a finding of dumping than the previous default methodology based on prices in the exporter's home market.
- The Anti-Dumping Commission (ADC) has, for the first time, employed 'zeroing' in calculating a dumping margin. The practice, which has attracted a number of adverse findings from the WTO Dispute Resolution Body, involves attaching a zero weight to any sales of un-dumped goods within an overall bundle of sales that is examined to determine whether dumping has occurred. Zeroing increases the likelihood of finding that there has been dumping, the estimated average dumping margin and the size of the duty subsequently imposed.
- The basis for assessments of whether dumping or subsidisation has caused material injury is now more favourable to applicant industries. For instance, a reduced share of a growing market may be deemed as injury, even if the local suppliers' total profits have risen. Also, the ADC has been explicitly directed to have regard to a greater likelihood of injury from dumping or subsidisation in a market that has been weakened by unrelated events.
- There are now exceptions to the mandatory consideration of the lesser duty rule where actionable dumping or subsidisation has occurred. This means that, in some circumstances, a local industry may receive more protection than is needed to remediate injury.
- New compliance provisions mean that overseas exporters deemed to be 'uncooperative' are now likely to face higher duties.
- The ADC has been directed to impose provisional measures at the earliest allowable date wherever possible (day 60 in an investigation). Moreover, if provisional duties are not imposed at this time, the ADC has been directed to publish its reasons 'so as to signal what information petitioners could further provide to help advance the investigation'.

In addition:

- Australia has implemented a suite of measures designed to prevent the circumvention of anti-dumping measures. Though there is so far only limited practical experience on how these provisions will work in, there is potential for non-circumvention activity to be inadvertently captured.
- Australia has enshrined in legislation an industry body (the International Trade Remedies Forum) to advise the government on system operation and further potential reforms. Most current members represent beneficiary industries, or their employees. The government has also provided greater resources to the International Trade Remedies Advisory Service, which primarily aims to help businesses access the anti-dumping system.

What has been happening to system usage?

For a number of decades now, global anti-dumping activity has been trending up as more developing and emerging economies have become integrated into global markets and trade

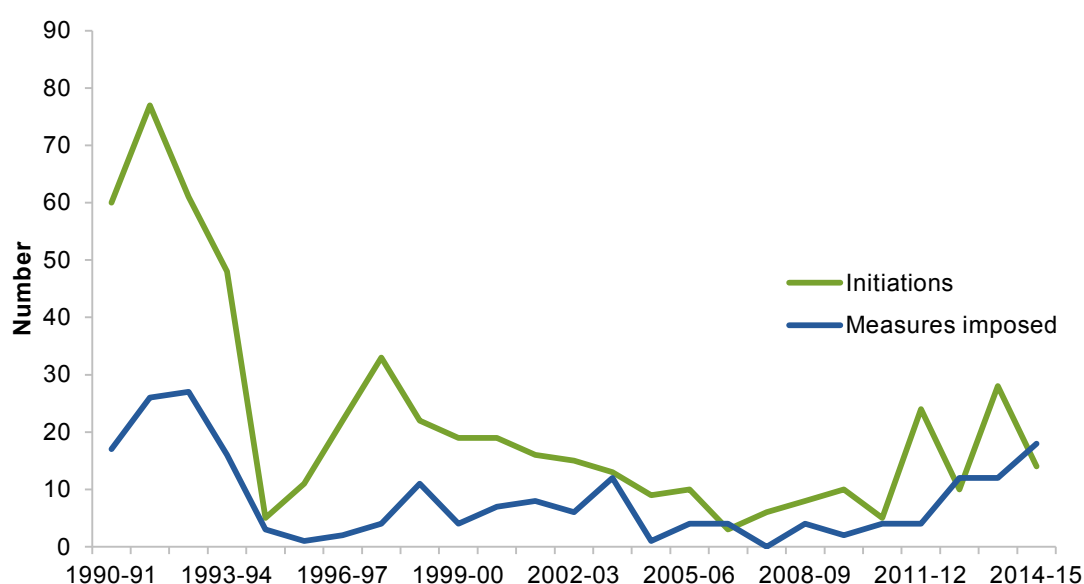
has grown. In fact, the majority of anti-dumping action is now taken by, and against, developing and emerging economies. Nevertheless, several advanced economies, including Australia (at tenth, about twice as high as Australia's overall economic ranking in purchasing power parity terms), still remain among the top users.

As in other countries, anti-dumping and countervailing activity in Australia has increased post the Global Financial Crisis, though not to the level of previous peaks. Comparing outcomes over the period 2010-11 to 2014-15 with those in the preceding five years, the average number of new investigations initiated annually increased from 7 to 16, and the average number of new measures imposed each year increased from 3 to 10 (figure 1). The ADC reports that there are currently 65 anti-dumping and countervailing measures in force in Australia, up from 23 in June 2010.

Upswings in system usage in softer economic conditions have frequently been observed in both Australia and overseas. Put simply, the incentive to seek relief through the system has been greater when economic conditions have been tough.

As the ADC has observed, the recent changes to Australian anti-dumping arrangements are likely to have also contributed to the recent upswing in system usage.

Figure 1 Australian anti-dumping and countervailing activity
1990-91 to 2014-15



System activity continues to be concentrated in a handful of industries producing mainly intermediate products, including steel and other metals, paper and plastics (figure 2). Like the similar concentration of system usage that is observed in other countries, the usage pattern in Australia appears to reflect factors such as system criteria and the

capital-intensive nature of production in these industries. The former means that the system is, in practice, easier for some industries to access than others. The latter means both that the pricing concepts underpinning the anti-dumping system may conflict with commonly employed pricing approaches in such industries (box 2), and that during times of excess supply, price competition can be particularly intense.

The steel sector is a case in point. Much of the growth in Australian anti-dumping activity has been concentrated in the steel sector, which has experienced particularly intense price competition in recent years. While cyclical pressures explain a part of this price pressure, a prolonged global supply glut has been a major contributing factor. The upshot of this intense price competition has been that steel products accounted for 86 per cent of anti-dumping and countervailing investigations and 60 per cent of all of the measures imposed in 2014-15. Measures on steel products currently make up 60 per cent of all measures in force.

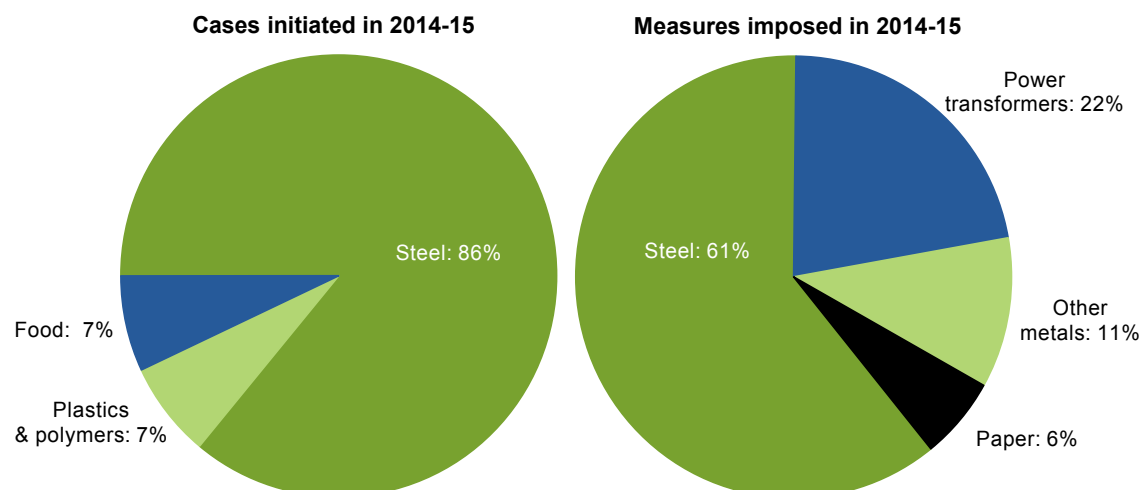
Most of the steel measures were on products from Asia. There has similarly been growth in measures in other traditional steel-producing economies, including the United States and the European Union.

However, the recurrent nature of supply gluts in the steel industry, and longer-term competitive pressures from the emergence of China as a major global steel producer, indicate that greater recourse to anti-dumping protection by Australian and other traditional steel producers has also been a means to counter broader structural pressures. Indeed, securing anti-dumping protection has become an explicit priority for parts of the local steel industry. Thus, Arrium recently advised its shareholders that 65 per cent of its sales base was subject to anti-dumping investigations and that it was examining whether further applications were appropriate (Smedley 2014).

The Australian paper and processed tomato industries are other examples of small producers in global terms that have sought anti-dumping protection.

In Australia, as in other countries, the majority of measures are imposed on exports from emerging and developing countries — particularly, from Asia. In the ten years to 2014-15, 84 per cent of all measures imposed were against products from Asia. Measures on Asian products accounted for 86 per cent of all measures in force as at January 2016, with almost one third of those measures applying to products from China.

Figure 2 Australian anti-dumping and countervailing initiations and measures imposed by industry, 2014-15



How much protection is provided?

In Australia, the average dumping duty imposed between 2009 and 2015 in percentage terms was 17 per cent, which is more than three times Australia's maximum scheduled tariff rate of 5 per cent. The median duty was 11 per cent. These figures do not take into account additional duties that may sometimes be collected when there is a reduction in the export price subsequent to a measure being imposed. Also, for most of the current measures, rates were set under rules that were less favourable to recipient industries than those that now prevail.

The value of protection available to local industries is a function of the duration of measures as well as their magnitude. The available data support the notion that the continuation hurdle is a relatively low one, meaning that a significant proportion of measures will be extended beyond their initial term. For example, of the 29 measures that were eligible for renewal between 2008-09 and 2014-15, 60 per cent were continued.

In a few cases, protection has been provided for very long periods. Notable examples include imports of ammonium nitrate from Russia and Estonia (15 years), brandy from France (applied with some breaks from 1995 to 2012) and polyvinyl chloride homopolymer resin from the United States and Japan (23 years).

To date, anti-dumping measures have covered a small proportion of trade, which has contained the costs of protection to the broader community. Available data indicate that, in 2011, measures applied to imports worth some \$900 million, equivalent to around 0.4 per

cent of the total value of Australia's (non-oil) imports on a trade-weighted basis. However, this is four times the coverage in 2004.

Moreover, in light of the direction in which the Australian system has been moving, it is important to recognise that the WTO rules have not precluded more pervasive and economically harmful systems elsewhere. For example, nearly 4 per cent of US imports (on a trade-weighted basis) were covered by anti-dumping measures in 2011. And Commission analysis of World Bank data suggests that, in recent years, average duty levels in the United States have increased significantly from the already high average level of 40 per cent reported in previous studies.

The system makes us worse, not better, off

The costs of imposing measures exceed the benefits for recipients

As noted, anti-dumping protection — like other trade protection — reduces the competitiveness of the imports concerned and thereby helps to support activity, employment and investment in recipient local industries (and their suppliers). Especially when these industries have been under significant competitive pressure, such positive impacts may be highly visible.

But there are offsetting activity, employment and investment effects — including for locally based importers and for downstream industries using the goods concerned. Anti-dumping measures also result in higher prices for consumers, whether felt directly as a tax on imports purchased, or indirectly via higher input costs for some goods and services, or the higher price levels permitted by reduced competition.

Importantly, though often diffuse, the costs imposed on the community by anti-dumping protection will exceed the benefits for recipient industries. This net cost arises from, among other things, less efficient resource use and muted incentives for protected industries to innovate or otherwise improve their competitiveness. In fact, the economic costs of anti-dumping protection will generally be higher than the costs of 'comparable' tariff protection:

- The highly technical, applications-based nature of the system means that the administrative and compliance costs are proportionately greater than for tariff protection.
- As well as directly increasing the price of some goods, the system, as noted, will inevitably cause some other overseas suppliers to compete less aggressively on price.
- More generally, the channels of influence are more explicit under an administered protection law than under a conventional tariff regime. This suggests that the potential for gaming of the system — a matter explored extensively in the literature — will be commensurately higher.

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- Where the government accepts an undertaking in lieu of imposing a duty, revenue that would otherwise have accrued to taxpayers is retained overseas.

By increasing access to, and the scope of, protection offered to eligible industries, the recent changes to the anti-dumping system almost certainly have increased, or will increase when they come into full effect, the net cost of the anti-dumping system for the Australian community.

Yet the harm arising from Australia's anti-dumping policy is largely ignored in deliberations as to whether measures should be imposed and in current policy development processes.

There is no cogent reason for anti-dumping protection

Since the inception of anti-dumping protection more than a century ago, an array of explanations has been advanced in support of its retention.

Objective assessment of rationales has often been sidetracked by the emotive terminology and concepts employed in the system's architecture (box 2). Putting terminology aside, almost all of the arguments put forward to justify this type of protection lack credibility.

- The arguments suggesting a potential economic efficiency benefit are highly theoretical and of little practical relevance.
 - In a globalised trading environment, it is hard to conceive of circumstances that would enable an overseas supplier to successfully deploy a predatory dumping strategy. For a supplier to exercise other than transitory market power, there would have to be no third supplier of those goods and no prospect of other suppliers entering the market. In globalised markets with few regulatory barriers to entry, this is unrealistic. Indeed, the focus on predation as a rationale in anti-dumping systems disappeared by the 1920s and is now widely acknowledged to be irrelevant.
 - As a small country, Australia's countervailing arrangements are likely to have minimal, if any, impact on the global incidence of trade-distorting subsidies. In these circumstances, countervailing measures simply act as a tax on imports.
- The system is poorly designed and targeted if its intent is to aid structural adjustment.
 - There is no requirement or expectation that recipients of anti-dumping protection implement strategies to improve their competitiveness. Indeed, because the hurdle for continuing measures beyond the initial five year period is low, measures can morph into long-term protective instruments that dull adjustment incentives. To suggest that measures in place for a decade or more were promoting adjustment is plainly stretching credulity.
 - Duties can be triggered by price shocks that are small in the context of the multitude of other pressures that import-competing firms may face. For example, in contrast to the sizable appreciation in Australia's exchange rate during the mining boom, a

subsidy margin equivalent to just 1 per cent of the price charged by an overseas supplier can result in countervailing duties being imposed. The provision of assistance in such circumstances is in stark contrast to the general expectation of good public policy that governments will only step in when pressures are particularly acute and disruptive, and where there is a genuine prospect of sustainable employment and investment. Businesses are otherwise expected to respond to changing market circumstances without relying on public assistance.

- The material injury test simply requires that injury is not immaterial and, as a result of recent changes to the test, can now be met even when an industry is profitable and its sales are growing (albeit below the market rate).
- ‘Fairness’ arguments ignore outcomes for anyone other than those who benefit from anti-dumping protection. This includes, as noted earlier, users of the protected imports and the community as a whole. Notably, following the Christchurch earthquake in 2011, the New Zealand Government temporarily exempted various construction materials from the coverage of its anti-dumping system to avoid increasing rebuilding costs for people already experiencing significant hardship.
 - Further, system criteria, together with significant application costs for those seeking measures, have meant that access to the system has effectively been limited to a relatively small group of Australian industries. The bulk of Australian industries have therefore been required to deal with much the same competitive pressures without a protective leg up.
 - The bulk of Australia’s anti-dumping measures are imposed on products from countries that are less well off than Australia. Hence, from an international perspective, the fairness of the system is also open to question.
 - The argument that countries discouraged from trading ‘unfairly’ in other markets will target Australia if it does not have an anti-dumping system mistakenly presumes that unilateral market opening is harmful rather than beneficial. As both trade theory and empirical studies demonstrate, the gains for a country from reducing protection do not depend on reductions elsewhere. Commission modelling in 2010 suggested that the benefit to Australia from a unilateral removal of its remaining import tariffs would be 1.5 times greater than the benefit it would receive were every other country in the world to remove their tariffs.

Box 2 **Looking beyond terminology**

The anti-dumping policy area is characterised by emotive or suggestive terminology. This has hindered balanced consideration and debate on the impacts of anti-dumping measures on those directly affected and the broader community.

The use of the term 'dumped' to describe the sale of goods at a lower price than in the supplier's home market implies undesirability. Yet it is only one manifestation of the very common practice of varying prices across markets, or the customer base within a market, to take account of differences in the price sensitivity of demand. For example:

- Discounting in price sensitive markets will often help firms to reduce an excessive build-up in inventory.
- Similarly, discounting is a common strategy for firms with long-lived assets to better utilise their production capacity in periods of excess supply (such as that which has characterised the steel industry for a number of years).
- Retailers will often use loss leaders to entice more price-sensitive customers into their stores.
- Airlines and hotels frequently sell cheap seats/rooms in order to fill surplus capacity.

Attempting to deter such pricing behaviour through imposing taxes whenever it was observed would clearly be nonsensical. Indeed, Blonigen and Prusa (2015, p. 4) portray the pricing concept that underlies the anti-dumping system as '... convict[ing] a foreign firm for not making enough economic profit from a country's consumers.' Were anti-dumping pricing principles extended more broadly, large numbers of Australian businesses would face the risk of regulatory action to prevent them charging lower prices to those less able or willing to pay. The pricing concept also stands in contrast to the 'beachhead pricing' strategy (sacrificing early margins) that has been endorsed by Austrade (2015) for Australian exporters as a means to break into new export markets.

Another illustration of the terminology issue is the concept of 'injury' caused by a dumped or subsidised product. In practical terms, such injury may be little different from the loss of sales or profits that a local producer may experience for a range of other market-related reasons, or simply by virtue of the fact that there is a foreign competitor in the market. Through the link to the practice of dumping or subsidisation, however, such injury assumes a special policy significance.

More broadly, the concept of 'fairness' which features prominently in anti-dumping discussions is emotionally charged and subject to selective interpretation (see text).

In recent years, the case for the system has increasingly fallen on the so-called 'system preservation' argument. In this case, the contention is that anti-dumping protection satisfies a political need to act against adverse effects of foreign competition for some import-competing industries and, as such, may act as a safety valve that preserves the wider system for progressing trade liberalisation. In essence, this is saying that the costs of anti-dumping protection may be worth incurring to secure greater support for, and benefit from, broader trade liberalisation.

In the Australian context, this argument, too, is very weak. For a range of reasons, including significant trade liberalisation achieved by Australia in past decades, any system

preservation benefits potentially on offer will almost certainly be small. And the costs of securing any such benefits have risen due to the recent changes to increase the stringency and reach of Australia's anti-dumping arrangements. At best, the system preservation argument could only ever justify a much less protectionist and therefore economically less costly mechanism than the one now in place.

The detriment from the system is set to increase

The absence of a robust rationale for anti-dumping protection is not just an issue for Australia's current system. It is evident that the problematic logic that underpins the system in itself has provided reason to increase the system's stringency and reach.

That is, the anti-dumping system focuses exclusively on whether injurious dumping or subsidisation to an import-competing firm has occurred and remedying the perceived injury. However, the weight of studies, including in Australia, suggests that this focus is to the detriment of countries as a whole. The recent changes to Australia's anti-dumping arrangements have given little, if any, recognition to the weak conceptual basis for anti-dumping protection.

The current environment is therefore one in which policy is being driven by the interests of a small group of local industries; and justified by what the WTO rules do not prohibit.

The system has been sustained by a lack of consolidated public reporting on system outcomes and significant gaps in the information that is available on those outcomes (box 3). It is apparent, however, that this lack of information is not just a failure to publish. The procedural apparatus in a system that currently has no regard to the overall benefits and costs for the community is simply not geared towards collecting information of this nature.

In countries where the system's 'logic of permission' has been extended furthest, such as the United States, anti-dumping systems are a significant economic burden (see above). It is concerning that these systems are now frequently being portrayed as the 'gold standard' to which Australia should aspire. For example, as part of the Senate Economics Legislation Committee which examined the Bill to give effect to the 2014 Levelling the Playing Field package, Senator Nick Xenophon said:

... there ought to be a willingness on the part of the government to explore the toughest possible measures to ensure dumping does not occur that does not contravene WTO rules. It seems other countries, particularly the US and European Union, have taken a much more active approach against dumping than successive Australian Governments ... (p. 37)

And the Government has recently signalled its intention to work with stakeholders to further strengthen the anti-dumping system. In this environment, it is naïve to look at the impacts of recent changes in isolation. Rather, they are part of a trend that could see the system become increasingly more protectionist and damaging.

This is not to suggest that the current policy path will necessarily lead to a US-style system. At some point, Australia's general embrace of freer trade and the benefits it brings is likely to exert some constraint on the attenuation of those benefits.

However, that point may be some way off. In the meantime, and absent a fundamental rethink on the basis for, and the operation of, Australia's anti-dumping system, the economic costs of the system could increase considerably.

Box 3 The need for greater transparency

While this research study clearly indicates that the costs of the anti-dumping system outweigh its benefits and that this net cost is growing, the Commission's analysis has been constrained by information gaps. The analysis that has been possible has also been dependent on the Commission assembling information that should already have been readily accessible. For example:

- Neither the Anti-Dumping Commission (ADC), nor the Department of Industry, Innovation and Science, routinely publish consolidated reports on system usage trends (number of measures in force, new cases initiated, new measures imposed). Likewise, there is no consolidated summary of the degree of support provided through extant measures, or on their industry or country coverage. Rather, as the Commission has done, this sort of information must be assembled from the status reports published by the ADC or from World Bank data. As such, both the overall significance of the system, and its focus in terms of beneficiaries and targets, is far from transparent.
- Published ad valorem duties and equivalents are sometimes more an indication than an accurate measure of the level of protection a recipient industry is actually receiving. Also, there is no consolidated information published on the proportion of measures that are continued beyond their initial five-year term. Yet this is central to understanding the degree of protection afforded by the system and, more particularly, the extent to which measures are providing long-term protective support to certain industries.
- There is only limited information available on the numbers of applications that do not proceed to investigation. As well as being relevant to understanding system usage and how this is changing over time, data on unsuccessful applications is one of the few empirical avenues for exploring whether the threat of anti-dumping and countervailing action is being used as a strategic deterrence tool.
- There is no public reporting of the impacts of anti-dumping and countervailing measures on users and the broader economy.

Given WTO rules and commercial-in-confidence considerations, there are limits on the degree to which certain types of detailed information relating to specific parties can be made publicly available. As the report explains, however, there is scope to do more than at present.

Improved reporting on system outcomes would add to administrative costs. If the anti-dumping system is to continue, however, such reporting — and especially the juxtaposition of the benefits and costs for the various stakeholders — is essential.

The central policy choices

While Australia's current anti-dumping policy makes sense from the perspective of the small group of local industries that benefit from the protection that the system provides, it does not for competitors, consumers and the community more broadly.

As indicated above, this state of affairs has been underpinned by deficient policy making processes — and, in particular, the sidelining of the adverse effects of anti-dumping protection. This contravenes generally accepted good policy-making practice and would cause significant economic harm were it to occur more broadly. Indeed, the whole basis for the gains that have ensued from Australia's microeconomic reforms over past decades was recognition that the community had paid a collectively high price for the benefits afforded to particular groups from various restrictions on trade and competition.

This and other studies point to where a rethink of policy based on a balanced consideration of costs as well as benefits would lead. (More data on the system would help reveal the magnitude of the net costs, but would not change the qualitative conclusion). Fundamentally, the choice will be between a system heavily modified to reduce its costs, or exiting the system altogether.

With this as the core policy choice, further changes to the system to make it more favourable for applicant industries would evidently be unhelpful.

Some options to reduce harm to the community

If Australia is to retain a system, the costs it imposes on the wider community could be reduced in various ways.

One way would be to make multiple changes to detailed aspects of the system. This risks, however, validating and reinforcing the arcane and complex decision-making architecture that governs its operation. Notwithstanding the scheme's ostensibly simple intent and relatively limited reach, its implementation requires more than 200 hundred pages of enabling legislation, a close to 200 page manual of procedures and a variety of Ministerial Directives, as well as consideration of WTO rules and jurisprudence.

A preferable way forward would be to make a relatively small number of 'cut through' changes that could significantly reduce the costs of the system (while still providing some opportunity for users to seek protection). The menu of options for such changes might reasonably include the following.

An increase in the *de minimis* margins

Dumping and countervailing investigations are automatically terminated when the calculated dumping or subsidy margins are deemed *de minimis*. The current *de minimis*

margins are 2 per cent for dumping cases and between 1 and 3 per cent for countervailing cases (depending on the exporting country). The intent of the *de minimis* provisions is to rule out what might be regarded as insignificant or nuisance claims.

Increasing these margins would be a practical and easily implementable way of achieving a collective reduction in the costs of the system, while still providing protection against significant instances of dumping or subsidisation. (Elsewhere there have already been some modest moves in this direction. For example, in the New Zealand-Singapore Free Trade Agreement, the *de minimis* dumping margin is 5 per cent (IMF 2015).

As table 1 indicates, a margin of 20 per cent — as proposed by noted trade economist Jagdish Bhagwati — would rule out some 70 per cent of the measures currently in place in Australia. Yet as the table also indicates, a lesser increase in the margins to just 5 per cent would rule out around one quarter of current measures. These are measures that might be viewed as problematic both in terms of the computational uncertainties attaching to the calculation of margins, and on the basis that industries might reasonably be expected to deal with competitive pressures of this magnitude without support from government.

Table 1 How would a higher *de minimis* margin affect the number of measures imposed between 2009 to 2015? ^a

	<i>Current de minimis margins</i>	<i>5 per cent</i>	<i>10 per cent</i>	<i>15 per cent</i>	<i>20 per cent</i>
Number of measures	184	136	105	79	53
Percentage reduction	Not applicable	26	43	57	71

^a Many of the current anti-dumping and countervailing measures provide for several exporter-specific duty rates.

Not applying measures in certain circumstances

As a complement or, less desirably, an alternative, to a higher *de minimis* margin, Australia's anti-dumping system could incorporate provision to suspend the imposition of (i.e. not apply) measures that would be unreasonably costly for the wider community or ineffectual in remediating injury. Such a provision would be akin to the 'bounded public interest test' proposed by the Commission in its 2009 inquiry that would likewise have precluded action against injurious dumping or subsidisation in certain circumstances.

This proposal was criticised on the basis that it would add complexity and subjectivity into the decision-making process. But of themselves, additional complexity or the need for judgements are not good reasons to ignore impacts. That is, simple decisions that ignore important effects are unlikely to be good ones from the community's point of view.

In any event, the application of the criteria for preclusion of measures similar to that proposed by the Commission in 2009 (box 6.6 of this report) would involve no more, and quite possibly less, subjectivity than is entailed in applying aspects of the current system. The subjectivity involved in assessments of material injury and causality are cases in point. Moreover, the criteria in the Commission's 2009 proposal were considerably less open ended than the public interest criteria employed in other systems, such as those in the European Union and Canada.

Obviously, the costs and impact of a suspension mechanism will depend on how the criteria are calibrated. Nonetheless, the fact that several other jurisdictions employ suspension provisions in the public interest indicates that such tests can be designed to be practical means to account for at least some of the wider costs that attach to anti-dumping protection.

Reducing the duration of measures

The default five-year term for anti-dumping and countervailing measures in Australia is the maximum allowed under the WTO rules. A shorter term, such as reverting to the three-year default term that applied between 1988 and 1991, would reduce the detriment attaching to those measures that are not continued.

This would not, however, address the absence of any time limit on the total duration of protection. As noted, measures can be extended for further five-year periods and there are no limits on the number of continuations. The longer anti-dumping and countervailing measures are in place, the more closely they resemble conventional trade protection.

Though multiple continuations are permitted under the WTO rules, trying to counteract pricing practices (or subsidies) that are a perennial part of an industry's operating environment is likely to be an expensive, and ultimately futile, exercise. The national interest, as well as the more direct interests of downstream industries and consumers, would be better served by accepting market realities and adjusting to them.

The merits of an automatic termination provision therefore warrant serious consideration. Though such a provision could be configured in various ways, its core feature would be to specify a limit of one continuation for a period of no more, and possibly less, than the default term.

The exit alternative

The sorts of options canvassed above could significantly reduce the harm caused by Australia's anti-dumping system. This was the thrust of the Commission's approach in its 2009 inquiry.

However, a ‘harm minimisation’ approach has some important drawbacks and risks, as the experience since 2009 demonstrates. Accordingly, as part of a fundamental rethink of policy in this area, serious consideration as to whether it is in Australia’s interests to retain any anti-dumping system appears warranted.

The WTO does not require us to have a system

It is clear that user industries regard access to anti-dumping protection as an entitlement inherent in the WTO rules of engagement, which should be available irrespective of the costs imposed on others in the community.

But as noted earlier, there is nothing in those rules that requires countries to take action against dumped or subsidised imports. The decision on whether to have an anti-dumping system is therefore one for individual countries based on their unilateral assessment of benefits and costs.

Even with significant modification the system would still be detrimental

Without its almost complete emasculation, the costs imposed by the anti-dumping system would still almost certainly exceed the benefits. Once the very limited scope of any system preservation benefits is recognised, there is little in principle to distinguish anti-dumping protection from conventional trade protection. And, as noted, the system’s complex administrative arrangements, its potential to deter price competition and the opportunity it provides for overseas entities to appropriate duty revenue that would otherwise flow to taxpayers, means that it is a more costly form of trade protection than tariffs.

Viewed in these terms, it is hard to reconcile the recent policy emphasis in this area with the market and trade liberalisation objectives that have underpinned Australia’s broader microeconomic reform program over recent decades. As is widely recognised, Australia’s reform program — including a variety of initiatives to unilaterally reduce or eliminate barriers to trade — has provided a significant boost to productivity and growth and to the adaptability and resilience of the Australian economy. As such, the program and the objectives underlying it have played a key role in enhancing our economic prosperity.

Considering exit

There is a substantive case for Australia to, over time, exit the anti-dumping system. Beneficiaries of the system, understandably, may oppose this proposal — or any significant reforms that would reduce its protectionist impact. However, a willingness to seriously contemplate exit options would provide an important signal that anti-dumping policy was no longer a ‘no go’ area for the sort of robust analysis — founded on promoting community interest — that has driven the bulk of economic reform in Australia.

1 About this report

1.1 What is the policy concern?

Goods are considered to be ‘dumped’ when an overseas supplier exports a good to Australia at a price below its ‘normal’ value in the supplier’s home market. If dumping causes, or threatens to cause, ‘material injury’ to a local producer of ‘like goods’, the Australian Government may take remedial action against the goods concerned. Typically, the Government imposes special customs duties on the imported goods concerned but, in some cases, it accepts price undertakings from the overseas supplier to cease exporting at dumped prices. Similarly, countervailing duties can be imposed on (or undertakings accepted for) imports that benefit from any of a specified group of government subsidies which cause or threaten material injury to a local industry producing like goods.

Australia’s anti-dumping system is based on internationally agreed rules and procedures under the auspices of the World Trade Organization (WTO). Reflecting the genesis of anti-dumping protection more than a century ago — well before the establishment of the international trading system — the relevant WTO agreements cover trade in goods only. Nearly all other developed, and increasingly, many developing, countries have anti-dumping regimes, though usage and design varies widely.

Although the WTO permits the imposition of anti-dumping and countervailing measures, the conceptual basis for anti-dumping measures continues to be questioned. Most notably, the dumping component of the system targets pricing behaviour that in other contexts is regarded as reasonable and generally efficient.

In Australia and overseas, there have also been longstanding concerns about the lack of consideration of the wider impacts of anti-dumping measures.

- The focus of the system is exclusively on boosting the competitiveness of recipient industries against overseas production, thereby sustaining activity, employment and investment in those industries at higher levels than would otherwise be the case.
- There is little recognition of the costs imposed on industries using the imported goods and the suppression of their activity, employment and investment as a result of higher costs of production.
- The costs for final consumers are not considered in decisions to impose anti-dumping measures.

While many of these benefits and costs represent transfers between different parties, the most likely outcome is a net cost to the community and to Australia's overall economic performance. Specifically, similar to the effects of tariffs (a tax on imports):

- resources that are retained in an industry as a result of anti-dumping protection will generally provide a lower return to the community than if used elsewhere
- anti-dumping measures may mute incentives for recipient industries to innovate or otherwise improve their competitiveness, leading to 'dynamic' efficiency costs for the economy
- they distort consumer choices.

Over the years, there have been various reasons advanced as to why anti-dumping protection may nonetheless be desirable. As explained in chapter 4, however, all of these are without merit or highly problematic. Hence, the conceptual platform for this form of protection has always been very weak. Given this, and the wider costs imposed on the community, it is important that the operation and effects of Australia's anti-dumping system are regularly reviewed to test the size and nature of its impacts.

1.2 The purpose of this research study

In 2009, the Commission conducted a 'roots and branch' inquiry into the anti-dumping system — the first such inquiry in more than two decades. It gave the system the 'benefit of the doubt', concluding that some sort of anti-dumping system should be retained provided that it was significantly modified to reduce its costs to the wider community. Recommended changes included the introduction of a public interest test to take account of wider impacts and prevent the imposition of measures that would be disproportionately costly, and limiting the duration of measures to a maximum of eight years.

As it transpired, these and several of the Commission's other recommendations were not accepted. In fact, since that report, there have been a significant number of changes, including those introduced under the 2011 'Streamlining' package, the 2012 'Strengthening' package and the 2014 'Levelling the Playing Field' package. Collectively, the changes almost certainly have increased, rather than reduced, the net costs for the community as a whole of Australia's anti-dumping regime. While it will be some time before the effects of these changes can be fully divined, their broad impact is to make it more likely that dumping and countervailing investigations will result in the imposition of measures and to increase the average magnitude of those measures. It remains the case that costs to other industries and the wider community are not considered in these deliberations.

These changes have been introduced against the backdrop of a weak global economy and more intense global price competition in some sectors, including the steel sector due to a global supply glut. This has led to an increase in the level of anti-dumping activity (applications, investigations and measures imposed) from the lows at the time of the 2009 inquiry. The situation now prevailing is therefore one of increased demand for

protection and an Australian system more likely to deliver it, at higher levels than previously.

Against this backdrop, this research study is intended to provide an economic stocktake of the changes to Australia's anti-dumping system since the Commission's 2009 report. As such, it examines:

- recent usage of the system and how this compares with what has happened in other countries
- the nature of the main changes made to the system since 2009
- the way in which the overall benefit-cost balance of Australia's anti-dumping system has moved since 2009
- the implications of this analysis for the future evolution of the system.

1.3 How has the Commission approached its task?

This study differs from a formal Commission inquiry in several ways. It has not been underpinned by a terms of reference from the Government seeking advice on specific matters. It has not involved a multi-stage consultation process, including the publication of a draft report. And the Commission has not sought to produce detailed policy recommendations. (Also, unlike the 2009 inquiry, this study has not been concerned with system administration, except insofar as administrative practices have had ramifications for broad system outcomes.)

Nonetheless, the Commission sought to ensure that key stakeholders have had the opportunity to contribute to the study. During the course of the study, the Commission met with over 25 stakeholders, and 21 organisations and individuals responded to an invitation to provide written input. (Further details are provided in appendix A).

The Commission also drew on other available quantitative and qualitative information including:

- publicly available material underpinning recent changes to Australia's anti-dumping system (including Parliamentary committee reports and submissions, regulatory impact analyses, explanatory memoranda of proposed legislative changes, and Ministerial notices)
- Australian dumping data and case history records
- WTO data on the global anti-dumping regime and analyses of dumping-related policy issues
- academic literature on the basis for, and effects of, anti-dumping protection.

While not making specific policy recommendations, the Commission has canvassed some ways to improve policy making in this area. To assist that policy making process, it has

also canvassed a small number of changes that it considers could significantly improve outcomes for the community.

1.4 A road map to the rest of the report

The remainder of this report is structured as follows.

- Chapter 2 looks at the key elements of anti-dumping systems around the world, the role of WTO agreements and rules in disciplining the operation of individual country systems, and some important features of Australia's system. (Details of the Australian system are provided in appendix B.)
- Chapter 3 examines anti-dumping activity in Australia and globally with a view to highlighting, among other things: the continued concentration of usage in a relatively small number of industries; the correlation between usage and the competitive pressures facing those industries; and the level and duration of anti-dumping measures.
- Chapter 4 updates the analysis in the Commission's 2009 report on the various rationales advanced for anti-dumping systems and explains why these rationales lack credibility.
- Chapter 5 analyses the broad effects of the changes made to Australia's system since 2009 and explains why these have almost certainly increased its costs. In conjunction with the discussion of rationales in the previous chapter, this analysis provides the basis for the Commission's conclusion that the benefit-cost balance of the system has worsened since 2009.
- Chapter 6 considers policy-making practices in this area and canvasses some options that could significantly reduce the costs of Australia's anti-dumping system without the need to make multiple changes to the system's many constituent components. It also considers some of the matters relevant to deciding whether Australia should retain an anti-dumping system over the longer term.

2 How the anti-dumping system works

Key points

- Anti-dumping systems around the world are based on the WTO *Anti-Dumping* and *Countervailing Measures* agreements. These agreements set out the rules and principles that government must follow if they wish to grant protections to counter the effects of dumping or subsidies.
- The WTO rules do not prohibit dumping or most types of subsidisation of domestic production. Nor do those rules require governments to take action against such (injurious) dumping or subsidisation. Rather, though recognising that governments may want to protect their domestic industries if dumping or subsidisation occurs, the rules seek to discipline how they do so in order to limit the adverse impacts.
- While the WTO rules provide a detailed framework for the operation of anti-dumping systems, countries have considerable discretion in interpreting and implementing the rules. Further, the rules do not embody an explicit rationale for anti-dumping measures. As a consequence, anti-dumping systems around the world differ and can produce different outcomes depending on the particular implementation of dumping laws.
- Anti-dumping investigations involve a multistage process. The concepts involved in judging whether injurious dumping or subsidisation has occurred are complex and involve considerable judgment by administering authorities.
- At the time of the Commission's last review (2009), Australia's anti-dumping system appeared to sit in the middle of the range globally in terms of the checks and balances it contained on the protection conferred to Australian industry. In recent years, however, changes to the Australian system (as detailed in chapter 5) have made it easier for import-competing industries to access measures, at increased levels of protection.
 - This has shifted Australia's system closer to the more protectionist systems adopted by countries such as the United States.

As noted in chapter 1, Australia's anti-dumping system seeks to remedy the injurious effects of 'dumped' or subsidised imported goods on local industries producing products identical, or substantially similar to, those goods. This chapter outlines how anti-dumping arrangements, as established by internationally agreed rules, work and features of the global anti-dumping policy framework within which Australia's system sits.

2.1 Anti-dumping policy framework

Australia's anti-dumping system is based on internationally agreed rules under the auspices of the WTO. However, provisions for anti-dumping measures in Australia existed long before the implementation of the global rules framework governing international trade

(dating back to the *Australian Industries Preservation Act 1906* Cwlth). Along with countries including Canada, New Zealand and the United States, Australia was one of the earliest users of anti-dumping protection. The number of countries with anti-dumping or countervailing laws has significantly increased over the past few decades, reflecting, in particular, the integration of developing economies into global markets (chapter 3). Most WTO member countries now have anti-dumping systems, although many do not make significant use their systems.¹

Anti-dumping and countervailing measures are among the few forms of temporary trade restrictions permitted in the WTO rules, with the other significant measure being ‘safeguards’ (in response to import surges, see below). These so-called ‘contingency’ trade protections only apply to trade in goods — they do not cover trade in services.

World Trade Organization rules

The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (also known as the Anti-Dumping Agreement) and the *Agreement on Subsidies and Countervailing Measures* (also known as the Countervailing Measures Agreement) set out the rules and principles that countries must follow if they grant protections to counter the effects of dumping or subsidies (box 2.1). As a member of the WTO, Australia is obliged to ensure that its approach complies with the Agreements.

Neither the WTO antidumping and countervailing agreements nor Australian anti-dumping laws explicitly state the underlying rationale for such measures. More general advisory material from the WTO indicates that the rules are intended to discourage the provision of subsidies or selling of goods at lower costs to ‘unfairly’ gain market share (WTO nd).

Exceptions aside, the WTO trade rules work towards (among other things) the lowering of tariffs and other trade barriers, non-discriminatory conduct by member countries in relation to their trading partners and between their own and foreign products, and predictability, such that trade barriers are not raised arbitrarily. As they pose tensions with these principles, provisions for anti-dumping and countervailing measures have long engendered debate on whether and how they serve the strategic goals of the WTO.

¹ Available information indicates that at least 110 WTO member countries had anti-dumping systems by the early 2000s (Blonigen and Prusa 2015). WTO statistics, which are compiled from country self-reporting, show that around 50 countries initiated anti-dumping investigations from 1995 to 2014 (WTO 2016). About half of those reporting averaged fewer than one case per year.

Box 2.1 WTO Anti-Dumping and Countervailing Measures Agreements

The WTO is responsible for determining and administering the rules of trade between member nations. Its overarching aim is to 'ensure that trade flows as smoothly, predictably and freely as possible'.

The WTO sets the basic rules for anti-dumping systems, as well as for providing a dispute settlement mechanism. Article VI of the General Agreement on Tariffs and Trade allows countries to take action against dumping. The Anti-Dumping Agreement clarifies and expands this article, in particular setting out detailed procedures on: how anti-dumping investigations are to be initiated; how investigations are to be conducted; the conditions for ensuring that interested parties are given an opportunity to present evidence; and how past determinations should be reviewed.

The Countervailing Subsidies Agreement disciplines the use of subsidies and regulates the actions countries can take to counter material injury caused to their domestic industries by foreign subsidies. The procedural investigation requirements are similar to those in the Anti-Dumping Agreement.

'Dumping' and most types of subsidisation of domestic production are not prohibited under WTO rules. Further, the Anti-Dumping and Countervailing Measures agreements do not require member countries to take action against dumped or subsidised imports that cause (or threaten to cause) material injury to a local industry. Rather, the agreements seek to place a discipline on how governments react.

Anti-dumping laws vary across countries as the WTO Agreements provide flexibility for countries to tailor systems to their particular requirements. The Agreements provide guidance mainly in the form of principles, rather than prescriptive regulations for implementation, which require interpretation. For example, how countries should define and assess dumping and injury are not clear-cut. In addition, administering authorities necessarily exercise some discretion in undertaking their investigations.

Given the degree of discretion afforded to countries, anti-dumping systems around the world can differ considerably, and lead to different outcomes. For example, a firm pricing identically in two export markets may be deemed to be dumping in one country, but found not to have dumped by the second country (Blonigen and Prusa 2015). Section 2.2 describes further how anti-dumping systems around the world differ.

2.2 How do anti-dumping systems work?

Notwithstanding differences across countries, the central questions of concern for all anti-dumping systems are first, whether dumping or subsidisation of goods has occurred, and second, whether it has caused (or threatened) injury to the domestic competing industry (or prevented the establishment of a domestic industry). If an investigation finds that these circumstances exist, and relevant materiality thresholds are met, remedial duties

may be imposed on the imported good to raise its price. Alternatively, the exporter may be required to give an undertaking to increase the (export) price of the good concerned by an ‘equivalent’ amount.²

The focus on injury to domestic competing industries is in keeping with the specific requirements in the WTO Agreements. However, the WTO Agreements do not preclude consideration of the wider impacts of anti-dumping protections on users of the imported products and the broader economy. As noted later, several countries have explicit arrangements in place to consider these impacts. This section outlines the broad steps and concepts involved in anti-dumping investigations and how anti-dumping systems around the world differ.

Steps and concepts involved in anti-dumping investigations

Anti-dumping and countervailing investigations commence on the filing of an application by, or on behalf of, the affected domestic industry. Upon receiving the application, authorities must determine whether the application meets criteria for justifying the initiation of an investigation. These criteria include whether the application is supported by a sufficient proportion of the industry, the basis for the alleged existence of dumping or subsidisation is plausible, and the nature of the injury is adequately explained.

The imported good concerned must be identical or substantially similar to (‘like’) the goods produced by the domestic industry.

Applications must be rejected or an investigation terminated if:

- the dumping margin or subsidy level is *de minimis* — a dumping margin less than two per cent of the export price of the goods concerned or a subsidy margin less than one per cent (higher for developing countries) is considered to be *de minimis*
- the volume of dumped goods is negligible (in the case of a single country, the dumped goods account for less than three per cent of total imports of the like goods; in the case of multiple countries, they collectively represent less than seven per cent), or
- the injury is judged to be negligible.

Countervailing duties can only be applied in cases involving subsidies that are ‘specific’ — available to a particular, or groups of, enterprise or industry (rather than all enterprises or all industries). Forms of subsidy can include, among others, grants, tax concessions, loans and input subsidies. Countervailing action cannot be taken against subsidies provided for adapting facilities to new environmental requirements, or to support industrial research and development, pro-competitive activity or disadvantaged regions.

² In countervailing cases, a foreign government can also give an undertaking to cease provision of the subsidy concerned.

The WTO rules require authorities to keep applications confidential because of a concern that knowledge of their existence, prior to proceeding to formal investigation, may unduly deter trade (see further discussion in chapter 6). However, authorities must notify the government of the exporter concerned before proceeding with an investigation. There are no restrictions on companies making the existence of applications known, nor on authorities making existence known after the fact.

Once investigations have been initiated, they proceed according to defined timetables that vary across countries. The WTO rules require investigations, except in special circumstances, to be concluded within one year, and in no case more than 18 months after their initiation.

Establishing dumping/subsidisation and injury

The WTO rules specify that two key criteria must be met in order for an anti-dumping measure to be applied — the presence of dumping or subsidisation and consequent injury or threat of injury to a competing local industry.

Dumping is defined to occur when an overseas supplier exports a good to Australia at a price below its ‘normal value’. In the first instance, the ‘normal value’ is taken to be the comparable price, in the ordinary course of trade, for the product in the exporter’s own market. But, where there are no, or an insufficient volume of, relevant sales in the country of export, or local sales are deemed to be not determined by a competitive market (the latter is deemed to signal ‘a situation in the market’), alternative methodologies are used to estimate the normal value — such as sales to a third country or a constructed average total cost.

It is notable that pricing methods that result in a finding of ‘dumping’ under WTO rules have little connection to commercial rules for pricing. In other markets, the pricing of goods at lower than ‘normal’ values — other than in situations of predation — is a common and legitimate form of price differentiation to improve financial performance or managing inventory where overstocking has occurred (this matter is discussed further in chapter 4).

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

The second criterion is evidence that dumping or subsidisation, if found, has caused or threatens to cause ‘material’ injury to the domestic industry. The WTO rules do not define ‘material’ injury but provide a list of indicators. These indicators apply only to the product market under investigation and include, among others: declines in sales, profits, market share, productivity or capacity utilisation; factors affecting domestic prices; effects on wages and employment; and the ability to raise capital.

Dumping or subsidisation need not be the sole cause of injury to industry, but injury caused by other factors must not be attributed to dumping or subsidisation. That said, the rules contain little guidance on how to distinguish injury caused by dumping or subsidisation from other factors that may have caused an industry to experience hardship. This is left to authorities. Many studies of anti-dumping laws have found that such distinction is, in practice, often difficult (see, for example, WTO NGR 2005; WTO 2009; Zhou 2015).

Imposition of duties

If material injury is found and deemed to have been caused by dumping or subsidisation, remedial action can be taken against the imported goods concerned.

In the case of dumping, the difference between the normal value and the export price (the dumping margin) provides the basis for the level of any anti-dumping measure. Authorities are encouraged, however, to apply a duty less than the dumping margin if this would be adequate to remove the injury to the domestic industry (the so called ‘lesser duty’ principle). If duties are levied, they are paid by the importer, not the exporter.

As noted above, an alternative to the imposition of duties is the acceptance of an undertaking by the exporter to raise its export price by an equivalent amount (which similarly is subject to ‘lesser duty’ provisions).

In countervailing cases, where the concept of normal value does not apply, any measures (duties or undertakings) are based on the assessed value of the subsidy (ies) to the exporter.

The WTO Agreements provide for the application of provisional measures and hence quicker intervention if a preliminary finding has been made of dumping and consequent injury to a domestic industry. Provisional duties will be refunded or amended depending on whether the final determination on the dumping margin is lower or higher than the provisionally-determined margin.

Duration and review of measures

Under WTO rules, anti-dumping duties are intended to apply only for as long and to the extent necessary to counteract any injurious dumping. In any event, they must terminate five years after their imposition unless, upon review, they are continued. There is no limit to the number of extensions that can be granted.

Decisions on continuation are based on a judgment as to whether the continued imposition of the duty is necessary to offset dumping, and/or whether the injury would be likely to continue or recur if the duty were removed or varied. These are necessarily speculative as the presence of existing measures makes it more difficult to test directly for injury caused by dumping.

Evidence, appeal and dispute resolution

Authorities are required to provide all interested parties ‘full opportunity’ to defend their interests throughout the course of investigations. This includes giving parties the opportunity to comment on the essential facts that the authority proposes be the basis for the final decision on any anti-dumping measures. Interested parties are expected to provide information necessary for authorities to undertake their investigations.

Countries are required to provide for review of administrative actions relating to cases. Countries can challenge another country’s implementation of the agreement and individual cases through the WTO Dispute Settlement Body. In addition, a WTO Committee on Anti-dumping Practices monitors member countries’ anti-dumping actions and systems.

How anti-dumping systems differ

As noted, member countries have considerable flexibility in implementing the WTO anti-dumping rules. This flexibility has also provided for, in some cases, the adoption of complementary policies where they have been deemed to be consistent with, or at least to not contravene, WTO agreements. As a result, anti-dumping systems (laws and practice) around the world differ considerably. This may affect the likelihood, magnitude and duration of measures (as well as administrative and compliance costs).

Important respects in which systems may differ include:

- the assessment of material injury and causation
- whether they take into account the costs of measures (including through the uptake of the lesser duty rule and public interest tests)
- the treatment of non-market economies and economies in transition when calculating dumping margins
- the stringency of anti-circumvention measures, which provide for additional action where exporters or importers are judged to have taken steps to avoid the intended effect of the original measure
- administrative arrangements, including the number of agencies involved in administering the anti-dumping system, the time taken to complete investigations and the sequence of investigative tasks, and the breadth and nature of appeals processes.

Even where countries have similar rules, implementation may vary widely. For example, most countries have five-year durations for measures with scope for continuation, but the processes and criteria attaching to those continuations are far from uniform. Also, some countries discriminate in the application of rules, reflecting preferential trade agreements with particular countries. For example, Singapore and New Zealand’s agreement adopts a *de minimis* dumping margin of five per cent, while the agreements of Chile and Canada, and Australia and New Zealand, prohibit anti-dumping action against each other’s exports.

As a result of such differences, the overall stringency of individual country systems varies considerably. The United States' system is commonly considered to be among the most protectionist and costly in the world. Its features include, among others:

- the use of 'zeroing' when calculating dumping margins involving sales over a period of time. Zeroing refers to the practice of disregarding in the calculation of the dumping margin any sales where the export price is higher than the normal value. The practice results in higher average dumping margins and is highly controversial among WTO members
- no use of the lesser duty rule, which is used in at least some situations by many other countries (including Australia)
- no provision through a public interest test or similar mechanism to directly take into account the costs of imposing anti-dumping measures. Mechanisms of this nature apply in the European Union, Canada, Brazil, China, and New Zealand (prospectively)
- the early adoption of anti-circumvention provisions, which have provided the basis for similar regimes in some other countries (including Australia).

At the other end of the protectionist spectrum, Chile only imposes anti-dumping measures for one year and does not permit measures to be renewed. And in Japan, greater administrative disciplines — including the conduct of investigations by teams of relevant officials from a cross section of economic, finance and industry portfolios rather than by a standing anti-dumping agency — has seemingly contributed to very limited use of anti-dumping measures in that country.

WTO rules remain under review

The disparate application of anti-dumping laws has led to a longstanding attempt by the WTO (since the Doha round of trade negotiations in 2001) to clarify and improve disciplines under the Anti-Dumping and Countervailing Measures agreements. The agreements remain unchanged, however, since their last major amendment in 1994. This reflects, in part, differences in views about the role of anti-dumping protection and the balance to be struck between countries' commitments and flexibility.

There is also pressure to amend the rules in light of increasing use of anti-dumping measures around the world in recent years (chapter 3) and concerns about their potential misuse. For example, several members of the WTO Negotiating Group on Rules (the so-called 'Friends of Anti-Dumping Negotiations' (FANs)) have stated that anti-dumping measures 'in many cases' are being used for protectionist purposes to prevent legitimate competition in the marketplace (WTO NGR 2015).³ Australia has not been a part of this group.

³ The 15 members of the informal FANS group are: Brazil, Chile, China, Columbia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Switzerland, Taipei, Thailand and Turkey.

Anti-dumping and countervailing matters constitute the single most frequently disputed area under WTO supervision, comprising about 30 per cent of around 480 disputes between 1995 and 2015.

The matters under debate by WTO member countries include areas that have been the subject of policy change or discussion in Australia in recent years. These include whether there should be specific anti-circumvention rules and mandatory adoption of a lesser duty rule, and whether decisions to impose duties should take into account the wider public interest. More broadly, there has also been debate about the merits or otherwise of countries using the flexibility in the rules framework to move unilaterally on anti-dumping policy rather than as part of a multilateral agreement.

Australia's anti-dumping system

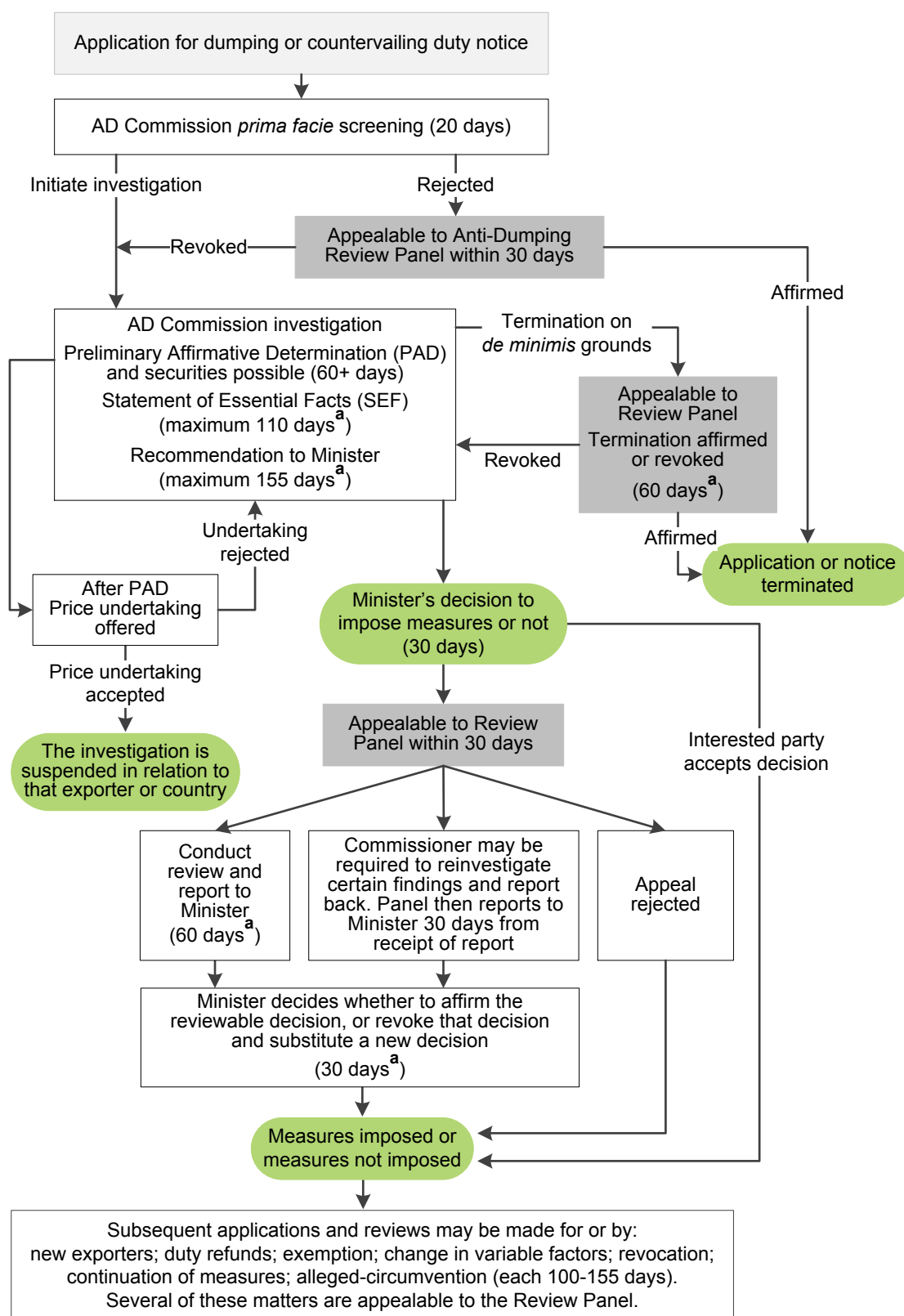
The Anti-Dumping Commission (ADC) is responsible for administering the anti-dumping system. It undertakes investigations and makes recommendations to the responsible Minister (currently the Assistant Minister for Science) on whether duties should be imposed, and gives effect to the Minister's decisions.

The main steps involved in Australia's anti-dumping and countervailing processes are set out in the *Customs Act 1921* Cwlth (figure 2.1 and appendix B). In addition, the Dumping and Subsidy Manual sets out the principles and practices that the ADC normally applies to investigations. The processes prescribed in the Customs Act and the Manual are extensive, complex and require the exercise of considerable judgment.

At the time of the Productivity Commission's last review, Australia's anti-dumping system seemed to sit in the middle of the range in terms of the 'checks and balances' it contained on protections conferred to Australian industry. In particular, Australia's system does not include a public interest test in decisions on whether to impose measures. It does, however, have other measures to limit the extent of protections offered, including the option of applying a 'lesser duty' rule.

In addition, Australia is among a few countries that have granted China 'market economy' status. This means that in dumping cases involving exports from China, Australia considers, in the first instance, the Chinese domestic price to be the normal value of the goods concerned rather than adopting alternative (often more subjective) methodologies for constructing normal values.

Figure 2.1 How do anti-dumping investigations proceed?



^a Minister may extend these timeframes.

Data source: Commission analysis.

While the Australian system has aspects that seek to limit the protection afforded by anti-dumping measures, changes in recent years have eroded these disciplines and made it easier for import-competing industries to access measures, at increased levels of protection (chapter 5). For example:

- it is no longer mandatory that the lesser duty rule be applied in certain circumstances
- the factors that should be taken into account in determining ‘material injury’ to industry have been broadened
- rules have been relaxed to allow greater departure from using market values in estimating normal values
- the ADC has employed ‘zeroing’ for the first time
- Australia has recently adopted anti-circumvention laws.

As noted earlier, several of these areas are subject to continuing debate by WTO members.

Australia has one of the shortest statutory investigation timeframes in the world, at 155 days (around 5 months). In comparison, the scheduled timeframes are 6 months in New Zealand, 7 months in Canada, 9 months in the USA, 12 months in India and 15 months in the European Union. In practice, investigation timeframes in Australia are often extended.

The merit of recent changes and implications for the anti-dumping system as a whole is one of the main reasons for this study. Chapter 5 analyses the more significant policy changes and related system features.

Other temporary trade protections

Besides anti-dumping and countervailing measures, the WTO also provides for ‘safeguards’ as a temporary trade remedy. Safeguards are an emergency measure in the form of tariffs or quotas in response to a sudden surge in imports that seriously injures, or threatens to cause serious injury to, a domestic industry.

Safeguards are subject to higher hurdles for action than anti-dumping and countervailing measures. For example, the level of injury or threatened injury must be ‘serious’, rather than ‘material’; safeguards cannot target imports from a particular country or individual suppliers within a country; and the decision to grant a safeguards measure must include consideration of whether it is in the public interest. Further, when a country restricts imports in order to safeguard its domestic producers, it must give something back in return — such as concessions in other sectors. Safeguards imposed for more than one year must be progressively liberalised and are not permitted to last more than four years. However, measures can be extended once following a review. Safeguards have been used infrequently in Australia.

3 Recent anti-dumping activity

Key points

- There has been a trend increase in global anti-dumping activity in recent decades as more developing and emerging economies have integrated into global markets and adopted anti-dumping laws. The majority of anti-dumping action is taken by, and against, these countries.
 - Some advanced economies, including the United States, the European Union and Australia, nevertheless remain among the most prominent users of this form of protection.
 - In the wake of the Global Financial Crisis, the cyclical upswing in usage of the system that typically occurs during softer economic conditions has again been evident in both Australia and overseas.
- Globally, anti-dumping activity is concentrated in a few sectors — namely base metals, chemicals, and plastics. This concentration reflects, among other things, system criteria and the capital-intensive nature of these sectors.
 - The latter means that these sectors can be subject to very intense periods of price competition and that efficient pricing methods may conflict with the pricing principles that underlie the anti-dumping system.
- In Australia, recent growth in anti-dumping activity has been concentrated in the steel sector, with most of the measures being applied to steel products from Asia. There has been similar growth in other traditional steel-producing countries, including the United States and the European Union.
 - Some of the recent increase in steel sector activity has almost certainly been cyclical.
 - However, recurrent supply gluts and longer-term competitive pressures arising from the emergence of China as a major global steel producer indicate that greater recourse to anti-dumping protection by Australia and other traditional steel producers has been a means to counter broader structural pressures in the sector.
- Information on the outcomes, including protective impact, of Australia's anti-dumping system is sparse. Available data indicate that:
 - measures encompass a small, but increasing, share of overall imports
 - the ad valorem equivalent of the measures currently in place in Australia is 17 per cent, more than three times greater than the general tariff rate of 5 per cent
 - measures are frequently extended and some have been in place for 15 years or more.
- Noteworthy in the context of recent changes to Australia's system to make it more favourable for users (chapter 5) is that more protectionist regimes in other countries apply measures to a much greater value of imports and impose significantly higher duties.

Despite being a very long-standing means of providing protection to certain Australian industries, information on the outcomes of Australia's anti-dumping system is sparse. Some basic usage indicators can be assembled from information published by the Anti-Dumping Commission (ADC) and previous entities responsible for administering the system, as well as from statistics and research undertaken by overseas entities, including the World Bank. Some additional information was made available to this study by the ADC. Nonetheless, as chapter 6 elaborates, there are significant information gaps in this area — and particularly information on the impacts of the system for downstream industries, consumers and the broader economy.

The following picture of recent anti-dumping 'activity' in Australia is therefore necessarily high level in nature. It does, however, highlight some core features and trends in activity and the commonalities of recent experiences in Australia with those in many of the other countries that operate anti-dumping systems.

3.1 The global backdrop

Anti-dumping measures are the most frequently used of the temporary trade remedies available under the WTO rules framework (the other main remedy is safeguards).

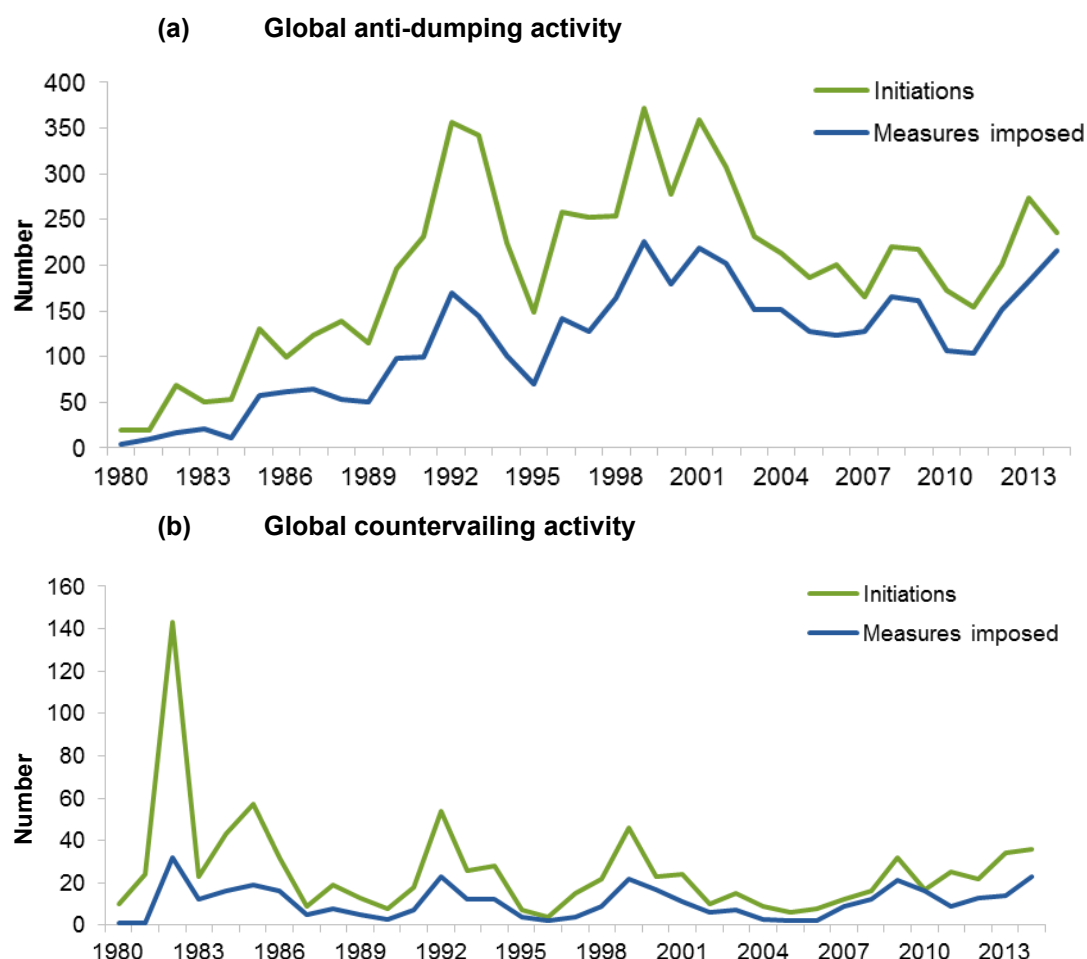
There has been a trend increase in global actions against dumping (number of investigations initiated and measures imposed) over the past few decades (figure 3.1, panel a). Part of this increase reflects the fact that, as trade has become more globalised, a growing number of developing and emerging economies have introduced anti-dumping systems (see below). Other drivers include:

- the political pressures on governments to act against perceived adverse effects from broader trade liberalisation
- trade growth which, in a numerical sense, has increased the range of imports potentially subject to anti-dumping action (WTO 2009).

In the wake of the Global Financial Crisis, the cyclical upswing in action against dumping that has typically occurred during softer economic conditions has again been evident (for example, previous peaks in activity were observed during 1991-92 (economic contraction and the Iraq war), 1997-98 (Asian Financial Crisis), 2001-02 (bursting of the dotcom bubble and September 11). In developed countries, strong currencies, which can reduce the competitiveness of import-competing industries, have also been positively correlated with increased actions (Blonigen and Prusa 2015).

Global countervailing activity has likewise had a significant cyclical dimension, though without an underlying trend upwards, and at much lower overall levels than actions against dumping (figure 3.1, panel b). Hence in both developed and developing countries, system activity continues to be heavily focused on the latter.

Figure 3.1 **Global anti-dumping and countervailing activity, 1980 to 2014^a**



^a Year indicates the year the investigation was initiated. Data are preliminary for measures imposed in 2014.

Data source: Commission analysis of World Bank data (2015).

Country and industry incidence of measures

Developing and emerging countries are the main users and targets

Up until the mid-1980s, traditional, developed country users of anti-dumping measures — including Australia, Canada, the European Union and the United States — accounted for more than 95 per cent of all anti-dumping initiations (Prusa 2001). But since then, the growing use of anti-dumping protection by developing and emerging countries has seen this group of countries come to predominate in global usage statistics. By the number of measures imposed, the most frequent user between 1995 and 2013 was India. Even so, several advanced economies, including Australia (at tenth, which is about twice as high as

Australia's global economic ranking in Purchasing Power Parity terms (IMF 2015)) still remain among the top ten users (table 3.1).

Table 3.1 Countries that most frequently impose and are targeted by anti-dumping measures, 2011^a

<i>Top users</i>	<i>Case count^b</i>	<i>Imports (% covered)</i>		<i>Top targets</i>	<i>Case count</i>
		Count ^c	Trade weighted ^d		
India	519	6.9	5.8	China	719
United States	323	5.8	3.9	South Korea	201
European Union	297	3.1	1.7	Taiwan	162
Argentina	219	3.3	2.5	United States	150
Brazil	165	1.9	1.7	Japan	126
China	164	1.4	3.2	Thailand	121
Turkey	154	6.9	2.6	Indonesia	110
South Africa	131	0.6	0.3	Russia	105
Canada	113	1.1	0.7	India	103
Australia	108	0.7	0.4	Brazil	86

^a Action against dumped imports only — excludes countervailing. ^b 1995 to 2013. ^c Harmonised System Tariff Line 6 digit Temporary Trade Barrier coverage (2011). ^d Harmonised System Tariff Line anti-dumping coverage (2011).

Source: Blonigen and Prusa (2015).

Developing and emerging economies are also the main targets of anti-dumping protection (although the United States and Japan remain among the top ten country targets).

The largest number of measures are on Chinese exports, reflecting that country's rapid growth and increasing prominence in world trade. By value of exports affected, China had almost ten times more exports subject to temporary trade remedies (\$100 billion in 2013) than the second-most affected exporter, South Korea (about \$14 billion) and the third-most affected exporter, the United States (\$12.6 billion) (Bown and Crowley 2015). As noted in the Commission's 2009 report, the prevalence of measures against Asian exports reflects, at least in part, the relocation of manufacturing to, and growth in, manufacturing investment within Asia, and the attendant shift in trade patterns (PC 2009).

Anti-dumping activity is concentrated in a few industries

System activity tends to be concentrated in a handful of industries producing mainly intermediate products. In the past two decades, the top five sectors globally have been, in order: metals and metal products; chemical products; plastic and rubber products; machinery and electrical appliances, and textiles and textile articles. Over 60 per cent of activity occurred in the first three of these sectors between 1995 and 2013 (Blonigen and Prusa 2015).

A number of factors appear to contribute to this concentration. These include system criteria, which limits its coverage to those goods with ‘like’ characteristics; and that production in these types of industries is often capital-intensive.

- In practice, the ‘like goods’ test (chapter 2) may make it easier to secure measures on only minimally or moderately transformed goods than on elaborately transformed, and therefore more differentiated, products.
- The price basis for anti-dumping action may conflict with commonly employed pricing approaches in capital-intensive industries (box 4.2). And during often extended periods of excess supply in such industries, price competition can be particularly intense.

That said, there is still considerable cross-country variation in the industry incidence of measures, reflecting different patterns of production (Bown and Crowley 2015).

3.2 Australian anti-dumping activity

Levels of activity

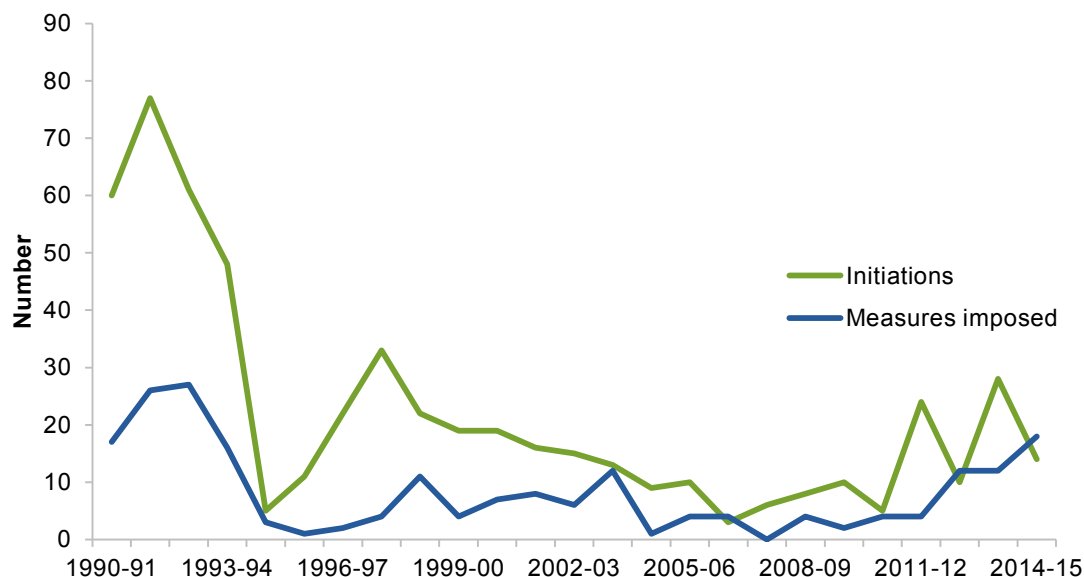
As in other countries, anti-dumping and countervailing activity in Australia has increased post the Global Financial Crisis, though not to the level of previous peaks. Comparing outcomes over the period 2010-11 to 2014-15 with those in the preceding five years, the average number of new investigations initiated annually increased from 7 to 16, and the average number of new measures imposed each year increased from three to ten (figure 3.2). The ADC reports that, in June 2010, there were 23 anti-dumping and countervailing measures in force in Australia. There are currently 65 measures in force⁴ (62 in June 2015).

As has always been the case, measures against dumping account for the bulk of this total. However, countervailing cases, once rare, have been increasing since 2009, and are becoming successful more often. Between 1995-96 and 2014-15, there were 22 countervailing investigations initiated and ten countervailing measures imposed.⁵ Eight of these measures were imposed during or after 2009-10.

⁴ As at 31 January 2016.

⁵ At the time of writing, three countervailing investigations were awaiting determination.

Figure 3.2 Australian anti-dumping and countervailing activity
1990-91 to 2014-15



Data sources: Commission analysis of World Bank data (2015), ADC (2015) for 2014-15 data.

A further perspective on recent usage is provided by data on applications for measures (as indicated in chapter 2, not all applications lead to case initiations and therefore investigations). Notably, most data on applications is not published (box 6.4). However, information supplied to the Commission by the ADC (2015, unpublished) on overall numbers of applications indicates that:

- On average, 25 applications a year were lodged between 2009 and 2015 compared to 21 a year between 2002 and 2008.
- The proportion of applications resulting in an investigation also increased. Between 2009 and 2015, about 75 per cent of applications were initiated, compared to around 50 per cent between 2002 and 2008.

While cyclical pressures explain a possibly significant part of the recent increase in applications, initiations and measures, other factors have also been at play. As in a number of other countries, a supply glut in the steel industry has seen the Australian steel industry increasingly seeking relief from intense price competition through the anti-dumping system (see below).

Also, as explained in chapter 5, recent changes to Australia's system have made protection more accessible for its clients (as well as increasing the likely magnitude of that protection). Little information is available on the significance of these impacts, many of which are yet to take full effect. Nonetheless, the ADC (2015, unpublished) has suggested that the recent changes are likely to have contributed to the increase in the number of

applications — and, by implication, the number of measures in place. Indeed, this is one of their intended effects (chapter 5).

Country focus

In line with the greater orientation of Australian trade towards Asia and with global trends in anti-dumping activity, Australia's measures have become increasingly focused on products from that region — particularly China, but also South Korea, Thailand, Japan, Malaysia, Taiwan and Vietnam. Over the period 1995-96 to 2004-05, 57 per cent of measures were imposed on products from Asia (11 per cent on Chinese products). Over the subsequent period 2005-06 to 2014-15, this proportion increased to more than 84 per cent; with measures imposed against Chinese products tripling their share to 34 per cent.

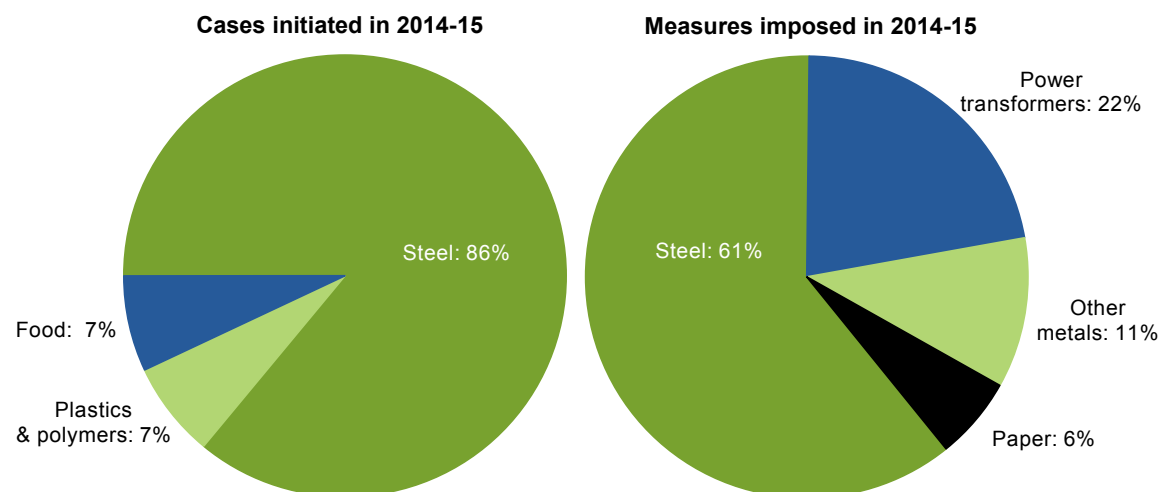
The ADC reports that measures on Asian products accounted for 86 per cent of all measures in force in January 2016.

Industry incidence

Australia's current measures are mainly on base metals, paper and wood and plastics and polymers products. While such concentration of measures is observed in many other countries (see above), what is notable about Australia's experience is the predominance of the steel sector.

- The ADC reports that measures on steel products accounted for about 60 per cent (39 out of 65) of all measures in force in January 2016.
- In 2014-15, the steel industry accounted for 86 per cent of initiations and over 60 per cent of all measures imposed (figure 3.3).

Figure 3.3 Australian anti-dumping and countervailing initiations and measures imposed, by industry, 2014-15



Data sources: Commission analysis of World Bank (2015) and ADC (2015) data.

Moreover, the rapid rise in the number of measures on steel products accounts for the bulk of the total increase in Australian measures in recent years. Between 2010-11 and 2014-15, 32 out of the 50 measures imposed during this time were on steel products, compared to just 2 out of the 14 measures imposed in the preceding five-year period. The majority of the current steel measures are on products from Asia.

Soft economic conditions coupled with a global supply glut have contributed to the recent growth in the steel sector's recourse to the anti-dumping system.

However, such supply gluts have been endemic in this sector. And, like other smaller steel producers, Australian producers have been facing longer-term competitive pressures from the emergence of China as a major global steel producer (box 3.1).

Box 3.1 **Market factors affecting the Australian steel industry**

Once steel capacity is in place, it is usually commercially prudent for companies to keep producing in conditions of soft demand as long as they can cover at least their marginal costs. Also, productive capacity often has a long economic life and typically comes on stream over time (box 4.2). In combination, these market features mean that the steel sector is prone to periodic supply gluts.

For example, from the mid-1970s to about 2000, steel consumption slowed (in part due to the oil shocks, the collapse of the Soviet Union, and economic crises in Asia, Latin America and Russia). Overcapacity in the global steel market was ‘rampant’ (estimated to be about 25 per cent between 1992 and 2001). The OECD established a working group during this period to deal with this overcapacity (Deforche et al. 2007; Ruiz, Somerville and Szamosszegi 2015; World Steel Association 2014).

In the early 2000s, a booming Chinese economy saw its demand for steel grow at 25 per cent a year. By the mid-2000s, China was the largest steel consumer in the world.

Mainly to meet its domestic demand, China’s steel production more than doubled between 2002 and 2006 (Deforche et al. 2007; DTF WA 2005; Tang 2010). And new production facilities also came on stream in other countries, such that global steelmaking capacity also more than doubled in the first half of the 2000s (OECD 2015).

Demand for steel softened in the wake of the Global Financial Crisis (Holloway, Roberts and Rush 2010). In 2014, global demand grew just 0.6 per cent. This softening of demand has led to another supply glut — one participant to this study estimated global steel oversupply to be 93 million tonnes, or 5 per cent of global production in 2015 (Arrium, comm. 2). The inevitable result has been lower prices for steel products — prices in 2015 declined to a 30-year low (Lian and Stanway 2015; Sekiguchi 2015). As noted in the text, the global steel glut and falling prices have seemingly been a major reason for the increase in anti-dumping activity in the sector in Australia and other jurisdictions, such as the United States and the European Union.

In Australia, the effect of global oversupply was initially exacerbated by the relatively high value of the Australian dollar. Moreover, some stakeholders have indicated that, given the scale of current global over-capacity, the more recent depreciation in the dollar has given only limited relief to local producers (BlueScope Steel, comm. 1, Arrium, comm. 2).

Over the past two decades, Australia’s share of world steel production has shrunk by 80 per cent (from 1 per cent of global production in 1996 to 0.2 per cent in 2014). Over this same period, China’s share of global production increased from 13 per cent to almost 50 per cent (World Steel Association 2014, 2015). Declines in market shares in other traditional steel-producing countries such as the United States have similarly led to more anti-dumping measures, especially against steel from China (Bown and Crowley 2015).

Both Australian producers, Arrium and BlueScope Steel, have restructured their businesses to improve their viability and have also sought explicit structural adjustment assistance to help them accommodate ongoing competitive pressures. For example, both companies received significant contributions from the South Australian and New South Wales governments in the form of temporary payroll tax concessions and royalty contribution waivers. The value of these is likely to exceed \$60 million by each state government (Binsted 2015; Patty and Binsted 2015). Nonetheless, securing anti-dumping protection

appears to have become a strategic business priority for parts of the local steel industry (chapter 6).

The Australian processed tomato (box 3.2) and paper industries are other examples of small producers in global terms that have sought anti-dumping protection. Indeed, Australian Paper argued (comm. 7, p. 3) that access to anti-dumping protection for globally small industries is important because:

In the Australian market, which is not a large scale market for many manufactured goods, achieving the status of a globally efficient producer is difficult if not impossible ...

Box 3.2 Anti-dumping action by the processed tomatoes industry

The Australian processed tomato industry is small by world standards. Australian growers produced 184 000 tonnes of tomatoes in 2012. In the same year, US growers produced 11.9 million tonnes, Italian growers produced 4.5 million tonnes, and Chinese growers produced 3.2 million tonnes. The sales and market share of SPC Australia (SPCA), now Australia's only processed tomato producer, have been decreasing over time.

In 2013, SPCA applied for both a dumping and a safeguards measure. The safeguards application was denied (PC 2013), but the anti-dumping application was accepted in respect of all but two exporters (resulting in duties being applied to 40 per cent of competing imported goods from Italy). Following this decision, SPCA announced that it would make a \$100 million investment in a tomato processing plant in regional Victoria (\$22 million of this was invested by the Victorian Government (Australian Manufacturing 2014)).

In 2015, SPCA brought another case against the two exporters against whom the application for dumping measures had been dismissed (the remaining 60 per cent of competing goods from Italy). SPCA received a favourable final decision on its application in February 2016 (ADC 2016–13). The ADC found that, while SPCA's sales increased over the investigation period, dumped imports had likely suppressed the company's prices and profitability.

3.3 Some outcomes

Coverage of imports

The value of imports affected by Australia's anti-dumping measures is low in an overall sense — though, consequent on the recent growth in measures, that value has increased. Available data indicates that, in 2011, measures applied to imports worth some \$900 million, equivalent to around 0.4 per cent of the total value of Australia's (non-oil) imports on a trade-weighted basis. This is four times the previously estimated coverage for 2004 (ABS 2015; Blonigen and Prusa 2015; Bown 2013).

Also noteworthy in the context of recent changes to Australia's system to make it more favourable for users (chapter 5) are the much higher shares of imports subject to measures in the more protectionist systems of some other jurisdictions. For example, in 2011, nearly 4 per cent of US imports, and 1.7 per cent of European Union imports (on a trade-weighted

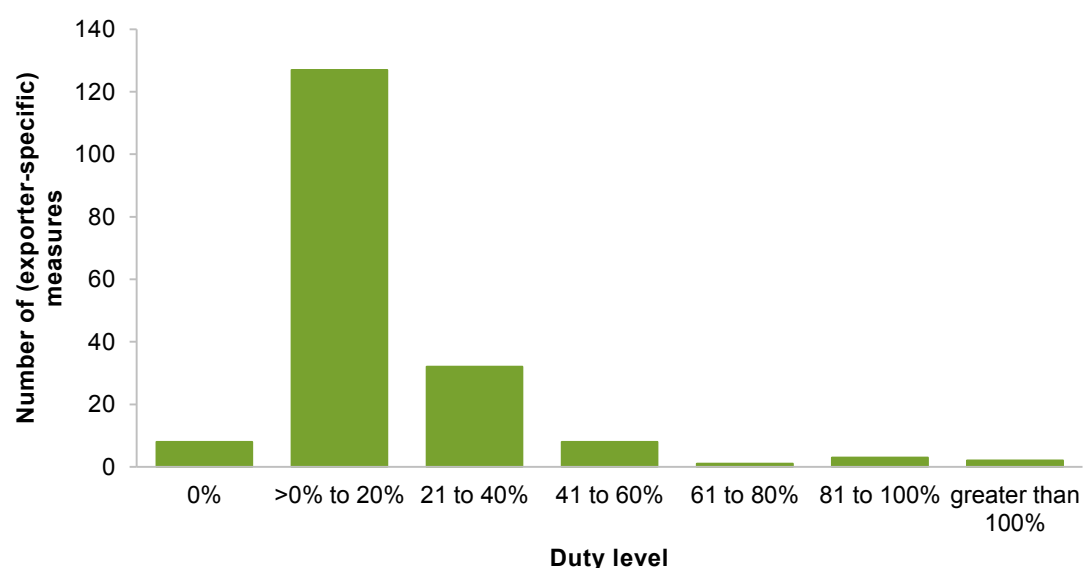
basis), were covered by anti-dumping measures (table 3.1) — ten times and four times the current Australian level, respectively.

Levels of protection

For anti-dumping measures imposed in Australia between 2009 and 2015, the average ad valorem duty rate, or equivalent, was almost 17 per cent⁶. This is more than three times Australia's maximum scheduled tariff rate of 5 per cent, four times Australia's average non-agricultural trade-weighted tariff, and more than five times Australia's simple average most-favoured nation tariff rate.⁷

Reflecting the fact that some 75 per cent of measures imposed during the period were at ad valorem rates (or equivalents) of 20 per cent or less, the median rate was somewhat lower at 11 per cent. But this is still well above the other duty benchmarks referred to above. And at the other end of the duty spectrum, some measures exceeded 100 per cent in ad valorem terms (figure 3.4).

Figure 3.4 **Levels of anti-dumping duties imposed, Australia**
2009 to 2015^{a,b,c}



^a *Ad valorem* equivalent. Final exporter-specific measures as imposed. A zero rate of duty is effectively a floor price, with a zero fixed rate of duty and an undetermined variable component (chapter 5). ^b The data do not take into account any revisions to duty rates/changes to the measures after the conclusion of the initial investigation — for example, due to review, or to subsequent changes in the export price (chapter 5).

^c Excludes 21 exporters who were exempt or for which the duty rate was not published.

Data source: ADC (2015, unpublished).

⁶ The data do not include the duty equivalents of price undertakings accepted between 2009 and 2015.

⁷ Australia's average trade-weighted tariff was 4.2 per cent in 2013 for non-agricultural products, and the simple average MFN applied tariff rate was 3 per cent in 2014 for non-agricultural products (WTO 2015).

Australia's duty experience is similar to that in many other countries. In particular, average anti-dumping duties (or duty equivalents) are generally considerably higher than average tariff rates. Amongst the advanced economies, the United States has tended to impose the highest duties. The high US average of 41 per cent reported in table 3.2 covers the period 1980 to 2005 but Commission analysis of World Bank data suggests that, in recent years, average duty levels in the United States have increased significantly from that rate. It is notable that the propensity of the United States to impose larger anti-dumping duties than Australia continues to be referenced by local industry interests. (See, for example, HOR SCAI 2015, para. 4.48).

Table 3.2 Anti-dumping duties versus tariff rates^a, selected countries

<i>Country users</i>	<i>Average anti-dumping duties (1980–2005)^b</i>	<i>Average applied MFN tariff rates (all products, 1996–2007)^b</i>
	%	%
Advanced		
Canada	12.1	4.2
EC	17.6	6.4
United States	41.4	5.2
Emerging and developing		
China	21.4	13.8
Mexico	89.5	15.8
Indonesia	21.5	8.5
South Korea	27.4	12.6
Peru	30.9	10.9
South Africa	29.1	7.0
Turkey	29.1	12.9

^a Ad valorem equivalents of measures, excluding undertakings. ^b MFN stands for most-favoured nation. Pre-1996, global most-favoured nation tariff rates were generally higher than in the period 1996 to 2007, meaning that the extent of their divergence with average dumping duties would have been somewhat less than a comparison of the two columns would suggest.

Source: Blonigen and Prusa (2015).

Lesser duty rule

As explained in chapter 2, Australia's lesser duty rule provides the opportunity to impose a duty less than the dumping or countervailing margin when this lower duty would be sufficient to remediate injury suffered by the local industry concerned.

In 2009, the Commission reported that the lesser duty rule had been applied to nearly half the measures in force as at May 2009. The average reduction in duties as a result of the application of the lesser duty rule was 15 per cent, but was as high as 45 per cent in some cases (expressed as a reduction in the duty on a dollar per unit basis) (PC 2009).

Since 2009, the lesser duty rule has been applied much less frequently. Despite the mandatory requirement to consider its application to cases until 2013 (chapter 5), the Commission understands that it was applied in only four cases between 2009 and 2015.⁸ The Commission did not have access to information on the extent to which duties were reduced in these four cases.

Duration of measures

In Australia, anti-dumping measures are imposed for an initial period of five years, but this can be extended for further periods if the ADC is satisfied that the expiration of the measures would lead, or be likely to lead, to a continuation or recurrence of the injurious dumping (or subsidisation) and the material injury that the measures were intended to prevent.

The likelihood that any individual measure will be continued depends, of course, on the particular circumstances.

There is no consolidated information published on the proportion of measures that are continued beyond their initial five-year term. However, the available data support the notion that the continuation hurdle is a relatively low one, meaning that a significant proportion of measures will be extended beyond their initial term. For example, of the 29 measures that were eligible for renewal between 2008-09 and 2014-15, 60 per cent were continued.

Several measures have, over the years, been extended multiple times — for example, ammonium nitrate from Russia and Estonia (15 years), pineapple (consumer) from Thailand (15 years), dichlorophenoxy-acetic acid from China (15 years), French brandy (which applied with some breaks from 1995 to 2012), and polyvinyl chloride homopolymer resin (PVC) from the United States and Japan (continuously in place for 23 years and due to expire in 2017).⁹

Again, Australian outcomes are similar to those in other countries. Around the world, extensions are commonplace. For instance, data reported by Rovegno and Vandembussche (2011), indicate that between 1995 and 2005, 75 per cent of US measures were extended on at least one occasion, while in the European Union this figure was 44 per cent.

⁸ Applied to one or more exporters in the aluminium extrusions, hollow structural sections, hot rolled coil steel, and quenched and tempered steel plate cases.

⁹ In September 2015, Australian Vinyls announced that it will close Australia's last remaining PVC resin plant in Laverton, Victoria, in early 2016 (Australian Vinyls 2015). At the time of writing, the ADC was considering a revocation application for these measures.

Missing elements of the protective outcome

The above coverage, duty level and duration of measures information, based on the relatively limited data that is available, do not provide complete picture of the protective ‘reach’ of anti-dumping protection. In particular:

- The data do not include price undertakings. While not involving the imposition of an import duty, undertakings effectively set a floor price for the imported goods concerned. Comprehensive data on undertakings were not available to the Commission.
- One of the purposes/effects of the anti-dumping regime is to deter foreign suppliers from supplying their products to Australia at low prices (chapter 4). The extent of this ‘silent policeman’ effect cannot be easily imputed from import data.

As explained in chapter 4, such uncounted protective effects are amongst the reasons why the efficiency costs of anti-dumping protection are higher than for comparable tariff protection.

Some other aspects of system outcomes

Appeals and reviews

Australia’s anti-dumping system contains a variety of appeal rights — rights which are frequently taken up.

- Between 2005-06 and 2013-14, 41 of the Minister’s initial decisions on applications for the granting of measures were appealed to the Anti-Dumping Review Panel and its predecessor the Trade Measures Review Officer. In about two-thirds of cases, the Minister’s decision was affirmed.
- Between 2009-10 and 2014-15, there were 46 applications for revocation of measures or for changes to the ‘variable factors’ determining the magnitude of particular measures. About 60 per cent of the 37 review applications finalised over that period led to changes, mainly to variable factors.

Between 2009-10 and 2014-15 there were also 59 applications for ‘accelerated reviews’, covering the imposition of measures on new exporters of a good from a country that is already subject to a dumping or countervailing duty notice. The Commission has not been privy to information on the overall outcomes of these reviews.

Duty exemptions

Australia’s system provides for specific exemptions for goods that have inadvertently been covered by anti-dumping or countervailing measures. These provisions are applications-based. In the two years 2013-14 and 2014-15, there were 105 exemption applications, mainly from the steel industry. (Data for earlier years are not available.) Of the 72 exemption cases finalised by the ADC over this period, 35 went in favour of the applicant.

4 In search of a rationale

Key points

- Like tariffs, anti-dumping measures help to support activity, employment and investment in recipient industries, but impose greater costs on user industries, consumers and the broader economy.
 - Thus, unless the anti-dumping system addresses some sort of ‘market failure’, or provides some other wider benefit, it will reduce community wellbeing.
- Consideration of rationales for the system is often side-tracked by the emotive terminology that characterises the system architecture.
 - Indeed, while the term ‘dumping’ itself implies undesirability, the sale of goods at a lower price in an export market may be no more than a manifestation of the common and generally desirable practice of varying prices to take account of differences in the price sensitivity of customer demand.
- However, a dispassionate assessment shows that almost all of the postulated rationales lack credibility.
 - The efficiency arguments are highly theoretical and of little practical relevance. For example, in a globalised trading environment, it is hard to conceive of circumstances that would enable an overseas supplier to successfully deploy a predatory dumping strategy.
 - As a small country, Australia’s countervailing arrangements are likely to have minimal impact on the global incidence of trade-distorting subsidies.
 - More often than not, anti-dumping protection will frustrate rather than encourage structural adjustment in an industry.
 - ‘Fairness’ arguments ignore the fairness of outcomes for anyone other than those who benefit from anti-dumping protection and are therefore inherently self-serving.
- The argument that anti-dumping protection provides a ‘safety valve’ that allows governments to manage protectionist sentiment, and thereby more readily pursue broader trade liberalisation goals is very weak.
 - For various reasons, including significant trade liberalisation already achieved by Australia in past decades, any ‘system preservation’ benefits will almost certainly be small. Moreover, the costs of securing any such benefits have risen due to the recent changes to increase the stringency and reach of Australia’s anti-dumping arrangements.
 - At best, the system preservation argument could only ever justify a much less permissive and hence less costly anti-dumping mechanism than the one now in place in Australia.

4.1 What is at issue?

The basis for anti-dumping protection — and the likelihood of a net benefit for the community as a whole — has long been questioned.

Like other trade restrictions, anti-dumping measures reduce the competitiveness of the imports concerned and thereby help to support activity, employment and investment in recipient local industries (and their suppliers). Especially when these industries have been under significant competitive pressure, such impacts may be highly visible.

But there are offsetting detrimental activity, employment and investment effects — including for locally based importers and for those downstream industries using the goods concerned. Where measures are imposed on final goods, consumers will be directly penalised by higher prices. And even when anti-dumping protection does not apply to a final good, its costs nevertheless reverberate throughout the economy, indirectly raising the prices consumers pay for some goods and services.

Importantly, the collective costs imposed on the community will generally exceed the benefits for recipient industries. Like tariffs, anti-dumping measures have allocative efficiency costs stemming from reduced usage/consumption of goods subject to those measures and the replacement of imports by higher cost local production. Also like tariffs, anti-dumping measures may mute incentives for recipient industries to innovate or otherwise improve their competitiveness, leading to ‘dynamic’ efficiency costs.

Indeed, for several reasons, the overall cost of anti-dumping protection will almost certainly be higher than that of ‘comparable’ tariff protection.

- The complex, applications-based, nature of the anti-dumping system means that the administrative and compliance cost burdens are proportionately greater than for tariff protection.
- Anti-dumping systems are intended to deter dumping and subsidisation as well as remediate their effects (see, for example, the explanatory memorandum to the Customs Amendment (Anti-Dumping Improvements) Bill (No. 2) 2011 Cwlth). To the extent that Australia’s system serves as a deterrent, it must cause some overseas suppliers to the Australian market to compete less aggressively on price (though the extent of this ‘silent policeman’ effect has been debated (PC 2009, box 4.6)).
- More generally, as Blonigen and Prusa (2015) observe, the ‘channels of influence’ are much more explicit under an administered protection law than under a conventional tariff regime. This suggests that the potential for gaming of the system — again a matter explored extensively in the literature (PC 2009, box 4.4) — will be commensurately higher.
- Where the remedy for dumping or subsidisation takes the form of an undertaking from an overseas supplier not to export below a non-injurious price (chapter 2), revenue that would otherwise have accrued to the Australian Government is retained overseas. The same is also true where duty revenue is subsequently refunded because the overseas

supplier raised its price above the level applying when the measure was imposed. (Further information on benefits and costs of anti-dumping protection is provided in box 4.1).

However, the overarching message is that unless the anti-dumping system addresses some sort of ‘market failure’, or provides some other wider benefit, it will be inimical to the interests of the broader community.

As explained below, all of the rationales that have been advanced in this context are without merit or highly problematic. It is also noteworthy that, over time, the rationales have changed considerably, with new or modified arguments replacing those shown to have been flawed. In other words, the conceptual foundation for the system is, and always has been, very weak.

The absence of a robust rationale for anti-dumping protection is not just an issue for Australia’s current system. The problematic logic that underpins the system also provides a reason to increase its stringency and reach, even though this will lead to higher overall costs for the community. Indeed as explained in chapter 5, the recent changes to Australia’s system have moved it closer to the more overtly protectionist and costly systems operated by countries such as the United States. The absence of a sound rationale for the system is therefore a growing policy concern.

4.2 An array of problematic justifications

Objective assessment of the rationales for anti-dumping protection is made more difficult by the terminology and concepts that characterise the anti-dumping architecture. For example:

- The use of the term ‘dumped’ to describe the sale of goods at a lower price than in the supplier’s home market automatically implies undesirability. Yet it may be no more than a manifestation of the very common and generally desirable strategy of varying prices to take account of differences in the price sensitivity of customer demand within or across markets. Extending the approach taken in dumping to other market situations would lead to nonsensical outcomes (box 4.2).
- ‘Circumvention’ likewise implies misconduct, even though it may sometimes involve no more than an overseas supplier making a commercial decision to absorb all, or part of, the additional cost of an import duty.
- ‘Injury’ from a dumped or subsidised product may in, practical terms, be little different from the loss of sales or profits that a local producer may experience for a range of other market-related reasons, or simply by virtue of the fact that there is a foreign competitor in the market. Through the link to the practice of dumping or subsidisation, however, such injury assumes a policy significance of its own and requires those charged with administering the system to engage in inevitably uncertain analysis to apportion causality.

Box 4.1 **More on the benefits and costs of anti-dumping protection**

Like tariffs, anti-dumping measures may affect the availability of goods as well as their prices. However, as the Commission explained in its 2009 report (PC 2009, pp. 36–37), price effects are likely to predominate. This is because the like goods test means that, where measures are imposed, there must be a closely substitutable local product. Also, for the sorts of products that are subject to measures, there are typically multiple sources of overseas supply.

As indicated in the text, higher prices for imports subject to anti-dumping measures improve the competitiveness of competing local producers (and their suppliers). Commenting on the benefits that flow from this improvement, Wilson Transformer Company (comm. 12, p. 1) said that:

... the Australian anti-dumping system and laws are crucial to support our very significant investment in our people, highly advanced manufacturing systems and operations, and world class and highly productive processes.

More specifically, in 2013, following the imposition of anti-dumping duties on 40 per cent of imported Italian canned tomatoes, SPC Australia announced a \$100 million investment in a tomato processing plant in regional Victoria (box 3.2).

That said, the SPC example also highlights the difficulties of separating the impacts of anti-dumping protection from other influences on firm performance. In addition to dumping duties, more than 20 per cent of the cost of the new plant will be met by the Victorian Government.

Moreover, as discussed in the text, the higher prices that underpin the benefits for recipient industries will simultaneously penalise those using the goods concerned.

Sometimes, user industries/consumers may avoid price penalties by substituting into lower quality, and therefore cheaper, product variants. But this move down market will still have a cost and with little benefit for the industry that sought relief from dumping or subsidisation. In this regard, Commercial Metals (comm. 3, p. 5) said that successful anti-dumping actions by Onesteel had ‘... opened the door for lower quality, lower cost producers to supply the Australian market to the detriment of all stakeholders’. (The Productivity Commission was also told that such substitution raises safety concerns — though this is a regulatory standards issue, not a matter for the anti-dumping system.)

By supporting the viability of local production, anti-dumping protection might, in some cases, enhance security of supply for downstream industries. However, as explained in section 4.2, any such benefits could only ever partially compensate for the added costs involved. There are also administration and compliance costs to consider.

- The Anti-Dumping Commission now does not publicly report its operating costs, but they were close to \$9 million in 2013–14 (DIIS 2014a). In 2009, the Productivity Commission (2009, p. 43) reported that single complex investigations could cost \$1 million. There are also various departmental costs — including for the International Trade Remedies Advisory Service; and costs attaching to the activities of the International Trade Remedies Forum and to appeal processes, including for cases that are appealed to the Federal Court.
- In 2009, the Productivity Commission (2009, p. 43) reported that the cost of a case for applicants generally appeared to be between \$100 000 and \$250 000, but had been as high as \$400 000 for some cases. There are similarly expenses for defendants — including Australian-based importers — that have reportedly been as high as \$1 million (DIIS 2012b, p. 13); as well as costs for those seeking refunds of overpaid interim duty.

Also relevant in a benefit–cost context are the foregone duty revenues resulting from the use of undertakings or the duty refund system and various dynamic efficiency costs (see text).

Box 4.2 **Why do suppliers vary prices across the customer base?**

Varying prices within or across markets is a widely practiced commercial strategy. Rarely is it predatory in nature (box 4.3). Rather, it is typically a means for suppliers to tap into differences in the price sensitivity of customer demand. For example:

- Retailers often use loss leaders to entice more price sensitive customers into their stores.
- Airlines and hotels frequently sell cheap seats/rooms in order to fill surplus capacity and also often vary prices across the week to reflect different mixes of business and leisure travellers.
- A business may sell at a discount to break into a new market where customers have not been exposed to its product offering.
- Discounting in more price sensitive markets may be a means to address an unwanted buildup in inventory, or to more generally maximise usage of installed production capacity.

Importantly, such price differentiation can simultaneously benefit suppliers and promote better outcomes for the community. For suppliers, the clear motivation is to improve profitability. But because this improved profitability comes from attracting more (price sensitive) customers into the market, price differentiation will typically enhance allocative efficiency.

The incentive and scope for such price differentiation will of course depend on the specific circumstances of the market concerned. Amongst other things, variations in prices across the customer base (beyond those attributable to differences in things like transport costs) will only be sustainable where the supplier has some degree of market power.

Of particular relevance in a dumping context — a form of inter-country price differentiation — is transitory market power stemming from high sunk investment costs. The sorts of goods that have provided the bulk of business for anti-dumping systems tend to require initially large investments, but can then be supplied by incumbent producers at relatively low additional cost. Such productive capacity often has a long economic life and typically comes on stream over time. In combination, these market features mean that supply gluts can be significant and long lasting; and that in such industries:

- sustained periods of (differential) price discounting may be a perennial part of the competitive environment — the steel industry being a case in point (see chapter 3)
- dumping as defined in WTO rules will often be at odds with efficient use of installed capacity and, more specifically, will limit the pricing strategies open to suppliers when competition is particularly intense and/or when market demand is soft.

More generally, taking action against dumping will deny the importing country the opportunity to benefit from its more price sensitive demand. Or in the words of Blonigen and Prusa (2003, p. 4), the pricing principles that underlie the anti-dumping system ‘... convict a foreign firm for not making enough economic profit from a country’s consumers’.

It is also worth contemplating what would happen were the anti-dumping pricing principles extended more broadly. As is evident from the examples of every-day price differentiation noted above, large numbers of Australian businesses would face the risk of regulatory action to prevent them charging lower prices to those less able or willing to pay. And Australian exporters would no longer be able to employ the Austrade-endorsed (2015) strategy of ‘beachhead pricing’ — sacrificing early margins as a means to build new export markets.

More broadly, the whole concept of ‘fairness’ which features prominently in the anti-dumping debate (see below) is emotionally charged and subject to selective interpretation.

Any robust analysis of rationales must put emotion to one side and consider whether there is any basis to believe that taking action against dumped or subsidised imports will improve the wellbeing of the community as a whole.

This issue has been extensively explored in the economic literature (see WTO 2009 for a useful synthesis), and was also discussed at some length in the Commission's 2009 inquiry report (PC 2009, chapter 4 and appendix D). In what follows, the Commission has sought to distil the essence of the plethora of efficiency and fairness arguments, rather than analyse each and every 'variant on a theme' in detail.

Efficiency-related arguments for taking action

Unilaterally focused arguments

Over the years, economic theoreticians have identified particular market circumstances where action against dumped or subsidised imports could conceivably improve efficiency and community wellbeing in the country concerned.

The early focus was on the potential for action to counter predatory dumping — that is, dumping explicitly aimed at driving competing local producers out of business to create a market monopoly that would then allow the overseas supplier to charge a much higher price for the good concerned. Attention later shifted to such things as the possibility of securing terms of trade benefits and discouraging counterproductive reciprocal dumping (WTO 2009, pp. 65–102).

However, the practical relevance of such arguments seems very limited. For example, in a globalised trading environment, it is hard to conceive of circumstances that would enable the successful deployment of a predatory dumping strategy (box 4.3).

The terms of trade argument is equally unlikely to be relevant to Australia. Specifically, it requires that:

- a country is large enough for changes in its demand to influence the world price of the good concerned
- the fall in the world price of the good ensuing from the imposition of an anti-dumping measure by that country (and the consequent reduction in its demand) is sufficiently large to deliver it a benefit that outweighs the standard allocative efficiency costs (see section 4.1).

For a small country like Australia, the first of these requirements all but rules out the possibility of such a benefit. Even for a larger country, the costs of anti-dumping measures would likely make this outcome a remote possibility.

Box 4.3 **Countering predatory behaviour**

As noted in the text, early arguments for anti-dumping protection centred on its potential to counteract predatory dumping. Specifically, the contention was that a remedy was required to stop exporters discounting prices in order to drive local producers out of business and then reap monopoly profits.

While a theoretical case can be made for such ‘strategic predation’, evidence suggests that this could not be given practical effect. For almost all products subject to anti-dumping measures in Australia in recent years, there have been multiple sources of imported supply, close local or overseas substitutes, and no significant regulatory barriers that would prevent subsequent entry by competitors were exit of an existing domestic supplier to give rise to the potential for monopoly profits. And in some cases, conditions in downstream markets (for example, where customers have significant buying power) would further reduce the prospects of successfully employing a predatory pricing strategy.

For these sorts of reasons, the early focus on predation as a rationale for anti-dumping protection had in fact disappeared by the 1920s. While the strategic trade theories of the 1980s raised the possibility that government support for exporters might be motivated by ‘strategic predation’ goals (PC 2009, p. 193), predatory arguments are now widely acknowledged to be irrelevant. Thus, in the Commission’s 2009 inquiry (2009, p. 191), many of those who had taken anti-dumping action — and also the body then tasked with administering the system — considered that the behaviour of overseas suppliers was not motivated by predatory intent.

In any event, the architecture of the anti-dumping system does not focus on predation — the WTO rules permit actions to be initiated when the market share of the imports is little more than negligible.

Indeed, a notable and unifying feature of this theoretical work is the lack of validating evidence. In commenting on the large number of strategic interaction models spawned in the anti-dumping literature, the WTO (2009, p. 69) observed that there had been little serious empirical evaluation of many of them. In general equilibrium modelling of the impacts of anti-dumping protection, efforts to better capture real world market dynamics have seen the projected economy-wide costs increase rather than decline (for example, Ruhl 2014).

A second notable feature of these efficiency theories is that the sorts of market circumstances they refer to are not even loosely targeted by the WTO rules framework and the anti-dumping systems created under its auspices. As discussed in chapter 2, a much less sophisticated and mechanical set of considerations determine when measures may be imposed.

Finally, many of these arguments for anti-dumping protection are little different from arguments for import protection per se; with some very closely related to now discredited strategic (‘optimal tariff-type’) trade theories. In commenting on the merits of the latter in its 2009 report, the Commission observed that:

As several of those outlining an ‘in principle’ case for strategic trade interventions have acknowledged, the circumstances in which there could in practice be a benefit are very limited ... And for the most part, the theories ignore the likelihood of retaliation by other

countries which could see attempts to employ strategic trade interventions degenerate into a costly exercise for all involved ... The global proliferation of anti-dumping regimes and the marked increase in the number of anti-dumping measures implemented, particularly in developing countries ... are noteworthy in this context. (PC 2009, p. 193)

A global efficiency argument for countervailing action

While a case for countervailing measures could not reasonably be mounted using the sorts of unilaterally focused arguments canvassed above, it is sometimes argued that the countervailing component of anti-dumping systems can help to eliminate trade distorting subsidies and thereby enhance global welfare. (See, for example, WTO 2009, p. xviii.)

The argument sits at odds with the otherwise unilateral focus and goals of anti-dumping protection (and the efficiency rationales canvassed in the previous section). That is, like other trade barriers, the system advances some domestic interests at the expense not only of others in the country concerned, but also of those in the country's trading partners.

In any case, though it is conceivable that the scope for countries to take countervailing action against subsidised exports might individually and collectively help to discourage the practice¹⁰, the materiality of such deterrent effects is questionable. *Prima facie*, this might seem surprising — if one of the costs of the anti-dumping system is its potential to deter aggressive pricing behaviour by overseas suppliers for fear of precipitating anti-dumping actions (see earlier), then that same system should also deter subsidisation. Yet there are good reasons to believe that, at least for a small country like Australia, the deterrent to dumping will be much stronger than to subsidisation.

- Overseas suppliers control the price relativities between their domestic and export markets and can therefore make pricing adjustments that will largely preclude any possibility of anti-dumping actions.
- But it is governments, not recipient overseas suppliers, that control the provision of actionable subsidies. And these subsidies are not generally ones provided selectively to promote a recipient's competitiveness in export markets. That is, the production and input subsidies that are the main targets of countervailing action benefit all of a recipient's production, including that sold in its domestic market. It seems highly unlikely that an overseas government intent on providing such subsidies would withdraw them in response to a threat of countervailing action in the very small Australian market.

More broadly, several trade economists, including Snape (2002), have argued that production and input subsidies will mostly have relatively benign effects on international

¹⁰ In a dumping case, the provision of subsidy support to an exporter may provide the basis for a 'market situation' (chapter 5) to be found, leading to the use of an alternative or constructed, rather than a market-based, normal value. To the extent that constructed normal values tend to be less favourable to those defending countervailing cases, then the dumping component of the system might also (indirectly) discourage subsidisation.

trade. And any deterrent-related benefits that Australia's system contributes to the global economy have to be balanced against the costs for the Australian community of imposing countervailing measures (section 4.1). Given the growing number of countervailing actions under the Australian system these costs are similarly increasing.

A further consideration is that the recent focus of countervailing action in Australia (as in many other countries) has been on exports from China; a country with whom Australia's economic fortunes are closely intertwined and where Australia's interests clearly lie in maintaining a harmonious trading relationship. Yet as Snape (2002, p. 283) has observed:

... attempts to define, detect, and counter lesser subsidies, and in particular domestic subsidies, have had a negative effect on international trading relations.

In sum, this is an argument for Australia to act against its own, immediate, interests in pursuit of an uncertain, and most likely negligible, improvement in global economic efficiency. Rather than providing a cogent basis for the countervailing component of Australia's anti-dumping system, it reinforces why the focus in the subsidies area should be on multilateral action — for example, ensuring that the list of subsidies proscribed under the WTO is appropriately targeted.

Encouraging structural adjustment

In competitive markets, businesses are generally expected to respond to changing market circumstances in an effective and sustainable way, without reliance on government protection or other forms of assistance.

In instances where adjustment pressures are particularly acute and disruptive, governments may step in to ameliorate those pressures. In this context, the competitive 'breathing space' provided by anti-dumping protection might help some recipients to make changes to improve their competitiveness and viability over the longer term.

But mounting a general argument for anti-dumping protection as a welfare-improving adjustment mechanism is difficult. Simply, the basis for the system, and the nature of the protection provided, mean that it would be a poorly designed and targeted instrument for promoting structural adjustment.

- There is no requirement or expectation that recipients of anti-dumping protection implement strategies to improve their competitiveness (or use the competitive breathing space to exit the market in a more orderly fashion). Indeed, because the hurdle for continuing measures beyond the initial 5-year period is low (chapter 5), measures can morph into long-term protective instruments that dull adjustment incentives. To suggest that measures in place for a decade or more were effectively promoting adjustment is plainly stretching credulity. Further, while the anti-dumping system is not intended to mute adjustments to longer-term changes in the exchange rate, as box 4.4 outlines, the mechanics of the system can have exactly this effect.

- Anti-dumping and countervailing duties can be triggered by price shocks that are small in the context of the multitude of pressures that import-competing firms may face. For example, in juxtaposition to the sizable appreciation in Australia's exchange rate during the mining boom, countervailing duties can be imposed when a subsidy margin is equivalent to just 1 per cent of the price charged by an overseas supplier.
- The material injury test simply requires that injury is not immaterial and, as a result of recent changes to the test (chapter 5), can now be met even when a local industry's sales of the good concerned are growing.

Box 4.4 How does the anti-dumping system mask exchange rate signals?

The international competitiveness of many Australian industries is significantly influenced by the value of the Australian dollar. While the nature and level of activity in some industries may not be greatly influenced by short-term fluctuations in the exchange rate, changes in the rate that are expected to endure over the medium to longer-term may precipitate significant adjustments within and across industries. It is obviously desirable that other policy settings do not unduly work against such adjustment.

But in at least two ways, the anti-dumping system can operate to mask exchange rate signals — and, more particularly, offset increased competitive pressure from a stronger exchange rate.

First, for some types of dumping duties, reductions in the price of the overseas good that result from an appreciation in the exchange rate will lead to a matching increase in duty collections. Hence, the competitive impact of the exchange rate appreciation will be offset. And though this offsetting effect may be subsequently unwound by the duty refund provisions, this is an after-the-event restoration of the exchange rate signal and one which itself may be muted by the costs for the importer of applying for a refund. This matter is discussed further in chapter 5.

Second, when the dollar is strong and import competition correspondingly more intense, dumping and subsidisation are seemingly more likely to be found to have caused material injury. In this regard, the 2012 Ministerial Directive on material injury (ACBPS 2012) makes it clear that general economic conditions in an industry are relevant to whether dumping or subsidisation causes injury — and, more specifically, that such behaviour is more likely to cause injury in an otherwise weakened market. The Productivity Commission's presumption is that more intense import competition ensuing from a stronger Australian dollar would satisfy this weakened market concept.

As a means to respond to significant trade-related adjustment pressures, anti-dumping protection therefore rates poorly compared to the separate safeguards regime (chapter 2). Under that regime, remedies against sudden surges in imports are only available where injury, or threatened injury, is 'serious'. And those remedies are time limited.

It also the case that significant trade-related adjustment pressures can be ameliorated by general budgetary support to the industry concerned. (As discussed in chapter 3, some such support has recently been provided to the steel and tomato industries.)

Such budgetary support is less common than in the past — in part, due to recognition that it, too, may dull adjustment incentives. That said, an advantage of budget-funded support is that its value to the community is regularly scrutinised, both in a general sense, and compared to the benefits from spending the funds involved in other ways. In contrast, support provided through the anti-dumping system is largely hidden from public view and does not necessitate regular scrutiny within government.

Promoting fair trade

Promoting ‘fairer’ trading outcomes is perhaps the most frequently cited argument for anti-dumping protection. As noted in chapter 2, WTO advisory material indicates that its rules framework is intended to discourage the sale of goods at lower cost to ‘unfairly’ gain market share. The Regulation Impact Statement for the second tranche of recent reforms to the Australian system (DIIS 2012b) was titled ‘Australia’s Trade Remedies System: Mechanisms to address the negative impacts of *unfair* trading activities by overseas companies on Australian industries’ (emphasis added). And the foreword to the Brumby Review argued that:

The measures are remedies for ... unfair practices; levellers, critical to a fair and balanced open market, and can be a final lifeline to affected businesses or whole industries. (2012, p. 5)

This concept of fairness is sometimes further extended to argue that because other countries have anti-dumping systems, it is only fair that Australia does so as well (see later).

Fairness, however, is an imprecise and ethical concept, and one which calls for detailed assessment of when and to whom the concept should apply. In contrast, the sort of fairness rationale enunciated above is based on a simplistic — and one-sided — notion of fairness. For example:

- It looks only at what is collectively ‘fair’ for recipient industries and their employees. But better outcomes for this sub-group of the community come at the expense of others, including downstream user industries and their employees and consumers (section 4.1). It is notable that, following the Christchurch earthquake, the New Zealand Government temporarily exempted various construction materials from the coverage of its anti-dumping system to avoid increasing rebuilding costs for people already experiencing significant hardship.
- System criteria, together with the significant application costs that result from the system’s design, have meant that access to anti-dumping measures has effectively been limited to a relatively small group of Australian industries. The bulk of Australian industries have therefore been required to deal with much the same competitive pressures without a protective leg up.

It is therefore far from clear that the anti-dumping system promotes fairer outcomes within the Australian community. Indeed, a system predicated on taking action when a particular

industry is negatively affected by a very specific and narrow price shock would be an inherently problematic way of pursuing greater fairness across the community as a whole.

It is also the case that the bulk of Australia's anti-dumping measures are imposed on products from countries that are less well-off than Australia (chapter 3). Hence, from an international perspective, the fairness of the system is similarly open to question.

System preservation arguments

As the benefits of a more liberal global trading order have highlighted the costs of anti-dumping protection and its weak conceptual foundations, the case for continuing the system has increasingly fallen on the so-called 'system preservation' argument. The contention is that anti-dumping protection satisfies a political need to act against adverse effects of foreign competition for some import-competing industries and, as such, may act as a safety valve that preserves the wider system for progressing trade liberalisation (see, for example, WTO 2009). In essence, this is saying that the costs of anti-dumping protection may be worth incurring to secure greater support for, and benefit from, broader trade liberalisation.

This is very much an after-the-event rationale and is problematic in several ways.

- It is hard to test whether the system has served this alleged purpose given that the degree to which trade liberalisation would have proceeded absent the system is unknown (the counterfactual problem).
- The endorsement of a 'beggar thy neighbour' approach in some circumstances might more generally undermine global cooperation to remove trade barriers.
- Governments do not, as a matter of course, have to appease particular interest groups to introduce worthwhile reforms. And giving legitimacy to a need to do so simply encourages rent seeking.

In any case, to the extent that the system preservation concept has any force, the benefits are unlikely to be material in the Australian context. In reaching this same conclusion in its 2009 report, the Productivity Commission (2009, p. 50) pointed to:

- the impact of past trade liberalisation in reducing the potential system preservation benefits on offer
- the absence of specific examples of recent liberalisation initiatives that had been aided by the presence of the anti-dumping 'safety valve'.

The experience since 2009 reinforces this conclusion.

- There is nothing to indicate that the availability of anti-dumping protection has led to greater ambition in the Preferential Trading Agreements Australia has negotiated since 2009.

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- At a time when usage of the anti-dumping system has increased, Australia's general tariff rate has remained at 5 per cent — with the only non-preferential tariff reductions being pre-programmed changes to motor vehicle and textiles clothing and footwear tariffs.
 - Access to anti-dumping measures (and the general tariff) has not prevented requests for, and the granting of, other forms of assistance in recent years (for example, the aforementioned budgetary support provided to the processed tomato and steel industries).

Also, since 2009, the cost of 'buying' any system preservation benefits has grown as a result of increased usage of anti-dumping protection and the changes to the system that have increased its stringency and reach. This higher cost means that the system preservation argument is now even weaker than in 2009, when, on a benefit of the doubt basis, it underpinned the Commission's recommendation that Australia retain an anti-dumping mechanism.

Furthermore, the Commission's recommendation was contingent on there being significant modification of system requirements to reduce the costs imposed on the community. The implication was, and is, that system preservation benefits could at best only ever justify a mechanism in which the access hurdles were considerably tougher; and which did not give rise to the possibility of significant protection continuing for extended periods.

What else?

Enhancing security of supply

In the course of this research study, several parties have contended that anti-dumping protection may benefit not only recipient industries but also their customers — including by encouraging stable prices, supporting local distribution and customer support networks and promoting innovation.

That customers may benefit from price and supply stability, and any innovation and network development that this in turn may support, is not in dispute.

But customers who value such attributes can, and do, enter into long-term contracts and relationships with suppliers. Indeed, these attributes form part of the value proposition of any business and its customers — anti-dumping measures should not, in the Commission's view, be needed to secure them. In most situations, customers form their own views about the trade-offs they are prepared to make between such attributes and price. In contrast, by effectively mandating payment of higher average prices to sustain the domestic supply base, anti-dumping measures superimpose a particular trade-off. This is unlikely to deliver a better outcome for customers.

Regional development

Some local industries that have benefited from anti-dumping measures are significant contributors to regional economic activity. It is therefore not surprising that regional development has recently assumed greater prominence in Australia's anti-dumping system. Specifically, consequent on the 2012 Ministerial Directive on matters that should be considered in material injury analysis, the Anti-Dumping Commission must explicitly look at implications in specific regions even if there has not been material injury to the rest of the Australian industry concerned (ACBPS 2012).

However, while strong and vibrant regional economies can make a significant contribution to overall community wellbeing, the anti-dumping system was never intended to serve explicitly as a regional development mechanism. Some measures may temporarily help to reduce structural pressures in regional areas, but the system would, fundamentally, be a poorly targeted and uncertain mechanism for supporting regional communities. There is a direct parallel here with the long discredited argument for employing tariffs for regional development purposes.

The WTO allows us to do it

As is apparent from submissions to this research study and supporting documentation for recent changes to Australia's system (for example, DIIS 2011, p. 1), there is a widespread view that the permission in the WTO rules for countries to operate anti-dumping systems provides a sufficient justification for doing so.

Implicit in this view, however, is the false notion that the WTO rules are predicated on giving effect to a welfare-improving set of trade remedies. As discussed in chapter 2, rather than an endorsement of anti-dumping protection, those rules are primarily a recognition of its potentially pernicious effects — and thereby the need to limit its scope and reach.

A second related contention is that if Australia does not exploit the permission in the WTO rules to take action against dumping and subsidisation, then those precluded from trading 'unfairly' in other markets will target the unprotected Australian market. (See, for example, the commentary from manufacturing interests reported in Brumby 2012, p. 32.)

But the premise for this argument is that unilateral market opening in the broad is harmful rather than beneficial. Exactly the same argument could be applied to unilateral tariff reform. As both trade theory and empirical work undertaken by the Productivity Commission and others demonstrate, however, the gains for a country from reducing protection do not depend on reductions elsewhere. In fact, modelling undertaken by the Commission in 2010 suggested that the benefit to Australia from a unilateral removal of its remaining import tariffs would be 1.5 times greater than the benefit it would receive were every other country in the world to remove their tariffs (PC 2010, table 12.1).

In sum, neither permission in the WTO rules for countries to operate anti-dumping systems, nor the fact that many countries have chosen to do, provide a reason for Australia to follow suit. Rather, Australia's decision on whether or not to have a system should be determined by the particular benefits and costs that attach to it.

Summing up

Once the emotive terminology is stripped away, any general distinction between anti-dumping protection and conventional tariff protection is a fine one. Like tariffs, anti-dumping measures:

- benefit recipient industries, but impose larger costs on other industries, consumers and the broader economy (the allocative efficiency dimension)
- reduce the need for recipient industries to innovate in order to remain competitive and to adjust to changing market conditions more generally (the dynamic efficiency dimension).

If anything, anti-dumping measures lead to worse outcomes for the community than 'comparable' tariff protection — the accompanying administrative and compliance costs are (proportionately) much higher, there are hidden trade deterrence costs and there is scope for overseas suppliers to appropriate duty revenue.

The postulated role of anti-dumping protection in helping governments to manage protectionist sentiment, and thereby more readily pursue broader trade liberalisation goals, does marginally differentiate this form of protection from standard industry protection measures.

But this is not a very plausible argument. As discussed in chapter 6, the Productivity Commission therefore considers that serious consideration needs to be given to whether continued retention of Australia's anti-dumping system is desirable. Moreover, even if retention of a system were judged to be worthwhile, this would still not provide a basis for carte blanche action to ameliorate and deter dumping and subsidisation. The extent and nature of action should be linked to the strength of the rationale for action. If, as the above analysis suggests, the rationale for anti-dumping protection is very weak and the potential benefits for the community therefore minimal, operating a stringent and costly system would not be sensible. In other words, even with a rationale of sorts — or if the need for a rationale is simply ignored — the configuration and application of any anti-dumping system should still be grounded in a benefit-cost framework.

While the need to employ a benefit-cost framework should be obvious, anti-dumping policy making in Australia and elsewhere has largely eschewed this approach. Rather, policy has primarily been driven by what the WTO rules framework permits and, more particularly, what it does not prohibit. As the analysis in the next chapter of recent changes to Australia's system shows, this logic of permission is predisposed towards iteration of the system in ways that progressively increase its overall costs for the community.

5 Key system changes

Key points

- Recent changes to Australia's anti-dumping system have collectively made the system easier for local industries to access, and increased the likely level of protection when measures are imposed.
- Changes that have increased the likelihood that measures will be imposed include:
 - widening of the definition of material injury to encompass circumstances such as a slowdown in the rate of an industry's *growth*
 - cumulation of injury across countries, meaning that measures can be imposed on imports from an individual country even if the injury attributable to imports from that country is negligible
 - a reduced onus on the Anti-Dumping Commission to use methodologies for calculating 'normal values' for goods from market economies that are based on actual market prices.
- Changes that have increased the likely level of measures include:
 - the weakening of the lesser duty rule (which provides for reduced levels of protection when this would be sufficient to remediate injury for a local industry)
 - an opening of the door to the use of 'zeroing' in some circumstances — disregarding individual transactions where the dumping margin is negative — when calculating an 'average' dumping margin.
- In addition:
 - The new anti-circumvention framework will almost inevitably lead to some unwarranted extension of measures — as well as unduly constraining importers' pricing flexibility.
 - Reductions in aspects of the investigation timeframe appear to have shifted the investigative balance in favour of applicants for measures.
 - The new duty penalty provisions for non-cooperative exporters or importers will ultimately be a burden on the economy as a whole.
- As a result of these changes, the costs of the system for the wider community have risen — and will almost certainly rise further in the future as the new arrangements take full effect.
- And it is naïve to look at the impacts of recent changes in isolation. Rather, they are part of a trend that could see the system become increasingly protectionist over time.

In its 2009 inquiry, the Commission recommended significant changes to Australia's anti-dumping system. While many of these changes were directed at improving administrative processes, enhancing appeal rights and reporting on system outcomes, the key proposals were designed to substantially reduce the detriment for the community from the system.

In response to that inquiry, and to subsequent representations from industry interests, a raft of changes have since been made to the anti-dumping system's requirements. Given that many have only been in place for a short time, they have not had time to take full effect. And the scope to analyse their impacts is further diminished by the paucity of published information on system outcomes (chapter 6).

Nonetheless, it is clear that the changes have collectively, and intentionally, made the system easier for local industries to access and increased the likely level of protection when measures are imposed. As a result, the costs of the system for the wider community have risen — and will almost certainly rise further in the future as the new arrangements take full effect.

This chapter examines the intent and impacts of some of the more problematic changes made to the system since the Commission's 2009 inquiry. (A list of all changes is at appendix B.)

5.1 A progressive strengthening of the system

Changes to the anti-dumping system since the Commission's 2009 inquiry include those instituted through the Streamlining Australia's Anti-Dumping System (June 2011), Strengthening Australia's Anti-dumping System (December 2012) and Levelling the Playing Field (December 2014) packages (box 5.1).

As the supporting documentation for these changes make clear, their overarching intent has been to make the system work better for beneficiary industries. In addition to changes that directly affect the scope of protections offered (below), there have been several institutional and administrative changes to give greater prominence to the program. These include:

- creation of a standalone Anti-Dumping Commission (ADC) and the position of an Anti-Dumping Commissioner as its statutorily-appointed head (administration of policy was previously in the Customs portfolio)
- greater resourcing of an advisory service that assists businesses to participate in the anti-dumping system (now known as the International Trade Remedies Advisory Service)
- the enshrining of the International Trade Remedies Forum in legislation — this group, predominantly comprising representatives or interests of user industries, advises the Government on the operation of, and potential reforms to, the anti-dumping system.

Moreover, changes to decision-making timeframes and compliance requirements have served to further shift the system in favour of applicants.

Box 5.1 Reform packages

2011 Streamlining package — This package contained the Australian Government's response to the Commission's 2009 inquiry recommendations, as well as changes arising from other consultation and parliamentary committee processes.

While the package incorporated several of the Commission's recommendations, it did not include the most important of these; namely, the introduction of a bounded public interest test as part of decisions on whether to impose anti-dumping measures (box 6.6), and limits on the number of extensions allowed for measures. The *Streamlining* changes were characterised as:

... improving the timeliness of antidumping investigations, boosting resources to ensure compliance with the system, improving decision making, providing small and medium sized businesses with better access to the system, and ensuring closer alignment between Australia's system and antidumping and countervailing arrangements in other countries (DIIS 2012a).

2012 Strengthening package — This package emanated from subsequent consultation and review processes, including the Prime Minister's Manufacturing Taskforce and the Brumby Review. The package sought to 'further improve the responsiveness, efficiency and effectiveness of the antidumping system and reduce its cost and complexity' (DIIS 2012a).

2014 Levelling the Playing Field package — This package gave effect to commitments given in the 2013 election by the then Coalition opposition. The announced measures were described as '... strengthening Australia' antidumping rules, reducing red tape and improving certainty for businesses accessing the system' (DIIS 2014b).

This is not to suggest that all of the recent changes have been intended to promote the interests of the system's users. For instance, the appeals process has been strengthened through the creation of the Anti-Dumping Review Panel (replacing the Trade Measures Review Officer within the Attorney General's Department); and the range of appealable decisions widened (in accordance with one of the recommendations in the Commission's 2009 review). Also, there have been some improvements in disclosure of information on system outcomes. For example, the ADC now publishes the ad valorem duty levels, or equivalents, of measures imposed, and the number of applications rejected.

That said, none of the recent changes have directly reduced the costs of the system for the community and thereby offset any of the changes working in the opposite direction.

It is notable that many of the changes favouring system users have been portrayed as minor clarifications, or simply as giving better effect to the intent of provisions. As such, the impression conveyed is that they are relatively benign in nature.

However, as the analysis below illustrates, this may be far from the case. In any event, what matters from the community's point of view is the cumulative effect of the changes. Given the large number of individual changes that have advanced the interests of beneficiary industries at the expense of users of the imported goods and the wider community, the cumulative effect is unlikely to be immaterial.

5.2 Examples of the shifting balance of the system

Changes affecting the likelihood of measures being imposed

The rules that govern the identification of dumping and subsidisation and the existence of ‘material’ injury play a crucial role in determining whether an application for measures will be successful. The rules governing when measures are deemed to have been avoided also affect the ‘reach’ of the system. In these regards, the following changes are of particular note.

Finding of material injury

Two changes have broadened the material injury test, making it more likely that duties will be imposed if it is established that the injury experienced by an industry is linked to dumping.

First, in 2012, new Ministerial guidance (Dumping Notice No. 2012/24) broadened what can constitute material injury (ACBPS 2012). The ADC may now count as injury circumstances in which the rate of an industry’s growth has slowed, without it contracting; or an industry suffers a loss of market share in a growing market, without a decline in profits. Ostensibly, this means that what many would regard as an industry in a healthy state — profitable and with growing sales (albeit at less than the overall market rate) — could be eligible for protection through the system.

In addition, the 2012 Guidance directed the ADC to look favourably at circumstances where a domestic industry has, where it would not have previously, been affected by dumping or subsidisation due to unrelated events such as economic downturns. While the system is not intended to shield businesses from normal business pressures (injury must be ‘greater than that likely to occur in the normal ebb and flow of business’), on its face, the new guidance could lead to exactly this outcome.

Second, since 2015, the ADC has been able to assess injury cumulatively across imports from multiple countries. Specifically, where a dumping application is lodged for a good imported from a number of countries (and the investigation periods substantially overlap), measures can be imposed against each country if the dumping margin is greater than 2 per cent and the cumulative injury is deemed material, even if the injury caused by the imports from each of the countries is individually negligible. This increases the likelihood of a positive finding that dumped imports have caused injury to a domestic industry and therefore the likelihood that measures will be imposed.

Cumulation is used in a number of other jurisdictions, including the United States, the European Union and Canada (Rovegno and Vandenbussche 2011). In the United States, its introduction reportedly led to a significant increase in positive dumping determinations (Hansen and Prusa 1996; Tharakan, Greenaway and Tharakan 1998).

Determination of normal value

As noted in chapter 2, dumping is defined as the sale of goods at a price below their ‘normal value’. In general, the price of the goods in the overseas supplier’s home market is used to estimate this normal value. However, where the ADC determines that the market value is not an appropriate basis for the calculation (for instance, where sales are not at arm’s length (between unrelated parties), or there is a ‘situation in the market’¹¹), the ADC is able to employ an alternative methodology.

Until 2015, in these situations, the ADC applied a hierarchy of methodologies for proxying the normal value for market economies. In order, these were: 1) using the prices of other sellers’ domestic sales (in the country of export); 2) constructing a price based on the cost to make and sell the goods in the exporting country; 3) using the price charged by the exporter for sales of a like good to a third country; and 4) constructing a price based on the costs to make and sell in ‘surrogate’ countries — this may include Australia.

In 2015, legislative changes removed this hierarchy and, in turn, the need for the ADC to first refer to observed values or costs in markets closest to the exporter before resorting to inevitably less precise methods for estimating normal values. To the extent that this change provides for greater use of what was previously the last resort methodology (basing estimates on a local industry’s costs), it increases the likelihood of dumping being found.

New anti-circumvention provisions

In June 2013, Australia introduced legislation to address situations where exporters and importers have taken apparent action to avoid the full payment, or intended effect, of dumping duties. Where the ADC finds that ‘circumvention’ has occurred, the Minister has the power to alter the original anti-dumping notice so as to address the behaviour concerned. The following are specified to be circumvention activities:

- making slight modifications to a good so it is no longer covered by the duty
- absorption of duty by an importer such that the price of the good does not increase commensurately with the level of the duty
- changing the country where goods are assembled
- diverting imports through a third country (‘country-hopping’) or to an exporter not subject to duties, or subject to lesser duties.

¹¹ In considering whether sales are not suitable for use in determining a normal value because of the situation in the market of the country of export, the ADC may have regard to factors such as: whether the prices are artificially low; or whether there are other conditions in the market which render sales in that market not suitable for use in determining prices. Government influence on prices or costs could be one cause of artificially low pricing — the ADC will investigate whether the impact of the government’s involvement in the domestic market has materially distorted competitive conditions (ADC 2013b).

To date, there have been four anti-circumvention cases brought before the ADC, involving aluminium extrusions, quenched and tempered steel plate, hollow structural steel sections and zinc-coated (galvanised) steel. One was concluded in favour of the applicant, another was initiated but later revoked, and two were ongoing at the time of writing.

The issues that arise here do not relate to taking action to address circumvention as such. Even though, in the Commission's view, the overall system is heavily weighted in favour of user industries, ignoring blatant circumvention of anti-dumping laws would (while such laws exist) not be tenable.

Rather, the concerns with the new circumvention regime stem from its operational features and, allied to this, the failure to account for the additional costs that circumvention action can impose on the community. In other words, the general case for upholding the rules does not obviate the need to assess the worth of specific circumvention initiatives in a benefit–cost framework.

More specifically, in taking steps to address circumvention, the more stringent the rules, the greater the risk that decisions by importers not motivated by circumvention will be inadvertently captured.

In this regard, the shifting patterns of global production, technological advancements and global value chains (where different stages of the production process are located across different countries) provide an environment where the sorts of changes to supply arrangements targeted by the new circumvention regime can occur for a whole range of other reasons. An early illustration of the sorts of uncertainties that can arise is provided by the hollow structural sections and galvanised steel cases (ADC 2015/58; ADC 2015/55), where there has been considerable debate about the motivation for the practice of adding boron to steel (the final product thus avoiding the 'like goods' test). While some have argued that this modification has occurred solely to avoid dumping duties, others have contended that it is a genuine, commercially–driven innovation that has delivered a stronger product that can be stored for longer.

A similar issue arises in relation to the preclusion on the absorption of an anti–dumping duty by the importer. For example, an importer may not raise prices to reflect the full amount of a dumping duty due to longstanding relationships with suppliers.

The extent to which the anti–circumvention framework will expand the coverage of measures to goods that do not warrant them — or unreasonably constrain importers' pricing flexibility — remains to be seen. But it is hard to escape the conclusion that there will inevitably be some effects of this nature, leading to further costs for the community. Reflecting on these matters, in a submission to the recent House of Representatives Standing Committee on Agriculture and Industry's inquiry into circumvention (HOR SCAI 2015), the Law Council of Australia said that it believed:

... that none of the prescribed circumvention activities can be easily characterised as illegitimate activities with the intention to circumvent existing anti–dumping and/or countervailing measures. (2014, p. 10)

Changes affecting the calculation of duties

Changes made to the way that duties are calculated include a scaling back of the application of the lesser duty rule, a move towards using ‘zeroing’, and expansion of the duty methods available.

Weakening of the lesser duty rule

The dumping or subsidy margin sets the maximum rate of any anti-dumping measure. However, the lesser duty rule provides scope for the Minister to set a lower duty if this would be sufficient to remove injury for the Australian industry concerned.

While consideration of the scope to apply a lesser duty was previously mandatory, recent changes mean the Minister is no longer required to do so where one or more of the following applies:

- the normal value is not based on market values in the exporter’s domestic market due to a ‘situation in the market’ (for dumping cases only)
- the Australian industry producing the goods under investigation consists of at least two small to medium enterprises (for both dumping and countervailing cases)
- if a countervailable subsidy has been received in respect of the goods, and the country in question has not complied with its notification requirements under the WTO Agreement on Subsidies and Countervailing Measures for the compliance period (for countervailing cases only).

There were two stated reasons for the decision to reduce the scope of the lesser duty rule — to make it easier for smaller producers to access remedies (DIIS 2012b); and to avoid further delaying relief for local industries in complex investigations. ‘Complex’ investigations include those where a market situation has been claimed — which requires the ADC to explore alternative methodologies for determining dumping margins (see above) — and those involving concurrent claims of dumping and subsidisation.

Though the direct costs of the higher duties that will result from this weakening of the lesser duty rule may not be particularly great, the change is concerning for two reasons.

First, it represents a departure from the principle of matching the level of protection granted to the injury suffered and has diluted the only current mechanism in Australia’s system that directly recognises the costs of measures for the community.

Second, the change was made in an environment of strong advocacy by system users to remove or limit the lesser duty rule on the basis that measures did not provide adequate protection to Australian industry (DIIS 2012b). As such, the change is illustrative of what would seem to be a captured policy process (chapter 6).

Zeroing

To determine whether dumping exists and its magnitude, administering authorities must typically analyse multiple transactions over time — including sales in the exporter's domestic market and the prices paid by importers in the country where dumping is alleged to have occurred. In this multiple transaction environment, dumping margins can be estimated in several ways; for example, by using weighted averages or comparing prices on a transaction-by-transaction basis. When an authority uses 'zeroing', any sales where the export price is higher than the normal value are disregarded and not included in the analysis (that is, they are given a zero weighting). This increases the likelihood of finding that there has been dumping, the magnitude of the dumping margin and the size of the duty subsequently imposed.

The use of zeroing is one of the most contentious issues in anti-dumping and there have been a number of WTO Dispute Resolution findings that have found against cases involving zeroing.¹²

Australia has historically had a longstanding practice of not 'zeroing' in calculating dumping margins. The Australian Government affirmed this position in 2011 (Australian Government 2011). But the ADC recently parted from this position in a case involving power transformers imported from Vietnam and Thailand (ADC 2014/32, p. 62). The ADC's use of zeroing in this case was based on there being no explicit prohibition on the practice in Australian law, and no WTO rulings involving the specific zeroing methodology (the 'weighted average to transaction method') used in the case.

This case was overturned on appeal for other reasons. However, the Anti-Dumping Review Panel did not dismiss the practice of zeroing in its findings (ADRP Report No. 2015/24, at [75]), stating if zeroing is not explicitly prohibited by the *Customs Act*, then it is not appropriate for the Review Panel to declare that it should not be adopted. The door is therefore seemingly still open to an approach which clearly increases the potential scope of protection.

Expansion of duty methods

In 2013, changes were made to give the Minister greater flexibility to use different forms of duty to respond to different circumstances. The duty methods now available are:

- an *ad valorem duty*: the duty is imposed as a percentage of the export price of the good concerned
- a *fixed dollar duty*: a fixed amount of duty regardless of the export price (for example, \$10 per tonne)
- a *floor price duty*: a variable duty equal to the dollar difference between the normal value and the actual export price (where the latter is lower than the normal value)

¹² For example, EU (DS294 — Zeroing 1); (DS350 — Continued Zeroing).

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- a *combination duty*: comprising a fixed and a variable duty element
 - the fixed duty is the same on all importations (for example, \$10 per tonne)
 - a variable duty is collected as the difference between the actual export price and the ‘ascertained’ export price, when the actual export price is lower than the ascertained price.

Before the 2013 changes, the combination duty method was the only method available.¹³

As the ADC (2013a) has detailed, the various duty methods have different compliance attributes and also different protective impacts when export prices change subsequent to the imposition of measures — as they will almost inevitably do. Appendix B, table B.1 provides a stylised illustration of this.

Determining the precise extent of these differential effects is complicated by the duty refund system which provides the opportunity for importers to seek a refund when they consider that the duty they have paid on a consignment of goods exceeds the operative dumping or subsidy margin (appendix B). And adding further to the complexity of the final duty outcome are the costs of applying for refunds, and uncertainty attaching to the outcomes of those applications. Hence, not all of those potentially eligible for a refund will actually seek one.

But what is broadly clear is that when export prices fall as a result of, say, an appreciation in the exchange rate, or a reduction in overseas production costs, only under the *ad valorem* duty method will the price-raising impact of a measure remain constant in percentage terms. Under the other three methods, the protective cushion will increase — in percentage terms for a fixed dollar duty, and in both absolute and percentage terms for floor price and combination duties (table B.1). In consequence, a decline in the local industry’s competitiveness unrelated to dumping or subsidisation will be partly or wholly offset.

Viewed in this light, the *ad valorem* approach has much to recommend it. Quite simply, the purpose of the anti-dumping system is not to compensate industries for reductions in their underlying competitiveness. Notably, a concern to avoid the same sort of compensatory assistance was the reason why, in the 1980s, Australia converted quantitative import restrictions applying in industries such as motor vehicles and textiles, clothing and footwear, to *ad valorem* tariffs.

Since the change in the rules, the ADC has taken the opportunity to employ the *ad valorem* duty method in several cases.

However, there is already pressure to unwind one of the relatively few beneficial architectural changes made to the system in recent years. For example, industry

¹³ The combination duty method was used between 1992 and 2013. Before 1992, a floor price duty method was used.

submissions to the inquiry on circumvention by the House of Representatives Standing Committee on Agriculture and Industry (HOR SCAI 2015) claimed that ad valorem duties encourage duty circumvention through the lowering of the export price. As elaborated in the next chapter (box 6.1), that inquiry supported industry arguments for a return to the default use of combination of duties. And these arguments were repeated in submissions to this review (for example, Arrium Mining and Materials, comm. 2; Arrowcrest, comm. 5; Wilson Transformer Company, comm. 12).

The claims about the link between the use of ad valorem duties and circumvention remain to be explored — though the mathematics are seemingly against them. For the current median anti-dumping duty of around 10 per cent (chapter 3), an exporter lowering prices to avoid duty would sacrifice \$10 per unit of revenue for every dollar per unit of duty saved.

Here again, therefore, the debate is essentially about whose interests should prevail. For the industries seeking protection, a return of the former protective cushion against downturns in their underlying competitiveness may be highly attractive. But from a broader economic perspective, this would be a poor outcome.

Other notable changes

Earlier access to remedies

The Government has reduced the timeframes for preliminary affirmative determinations (PADs). This allows the ADC to impose preliminary measures at an earlier stage, providing earlier relief to applicant industries while it continues its investigations.

- Revisions to the *Dumping and Subsidy Manual* in 2011 directed the ADC to consider imposing a PAD ‘when it has adequate information, without necessarily waiting to verify all data’ (Australian Government 2011, p. 12).
- In 2015, the Minister directed the ADC to either impose a PAD at the earliest point allowable under the WTO rules (day 60 in an investigation), or provide reasons why this was not done (DIIS 2015).

Similarly, new provisions for ‘avoidance of intended effect’ anti-circumvention investigations are now subject to accelerated timeframes (100 days compared to 155 days for other investigations), with no requirement for the ADC to release a Statement of Essential Facts (that is, a draft decision) (ADC 2014).

These changes appear to have been instituted in response to concerns about the time taken to complete investigations and/or individual steps within those investigations (CSR Limited, comm. 8; MTA, comm. 17; BOSMA, comm. 16; Norske Skog, comm. 13; Orica, comm. 9). This is despite the fact that Australia has one of the shortest legislated investigation timeframes in the world (chapter 2) — and that those timeframes have frequently proved difficult to meet.

This push for greater speed has arguably reduced the scope to properly consider evidence from overseas exporters and importers (see, for example, CMC, comm. 3; BestBar, comm. 6) and thereby shifted the investigative balance in favour of applicant industries. Indeed, the ultimate goal of the changes seems to be more rapid protection for local industries rather than faster conclusion of investigations as such. Illustrating this is another requirement in the 2015 Ministerial Direction on PADs — that if the ADC does not impose provisional duties at the earliest allowable time, it must publish its reasons ‘so as to signal what information petitioners could further provide to help advance the investigation’ (emphasis added) (DIIS 2015, p. 2).

Other changes to the compliance framework

The Government has introduced new measures to encourage importers and exporters to cooperate with investigations and comply with duty notices. In some cases, this encouragement comes from the provision for imposition of higher duties when cooperation is not forthcoming.

While these changes are consistent with the policy intent of the system, some have argued that they are suggestive of a desire to ‘punish’ importers and exporters involved in anti-dumping investigations and do not adequately take into account the costs involved for exporters in participating in investigations (for example, ABB Australia 2014, p. 4).

But whatever the motivation for these changes, they are yet another way in which the costs of the system for the community have been increased. And, given that measures will typically remain in force for at least five years, such duty penalties would seem to be a costly way of addressing any cooperation problem.

5.3 Moving down a costly path

Collectively, the changes to Australia’s anti-dumping system since the Commission’s 2009 inquiry have served to increase access to, and the scope of, protections offered to user industries. Hence, they almost certainly have increased, or will increase when they come into full effect, the net cost of the anti-dumping system for the Australian community.

As indicated in chapter 4, the changes are, in some senses, consistent with the ‘logic’ of the permissions in the WTO rules. While those rules aim to discipline the use of anti-dumping protection — and do not require countries to provide it — in an operational sense, the rules focus simply on determining whether injurious dumping or subsidisation has occurred, and if it has, how the assessed injury is to be remedied.

However, the weight of studies, including in Australia (PC 2009, and appendix B), suggest that this focus is to the detriment of economies and countries as a whole. Like the system itself, the recent changes have ignored the weak conceptual basis for anti-dumping

protection and the costs for the community that are entailed. They have been premised simply on advancing the interests of one, relatively small, group within the community.

Notably, most of the changes appear to draw their inspiration from approaches in other systems that are generally recognised to be more stringent and encompassing in their reach, including the much more protectionist system in place in the United States. It is perhaps not surprising that proponents of anti-dumping protection are increasingly referencing approaches in countries where the system's 'logic' has been extended furthest as an exemplar for Australia to follow. For example, as part of the Senate Economics Legislation Committee which examined the Bill to give effect to the *Levelling the Playing Field* package, Senator Nick Xenophon said:

... there ought to be a willingness on the part of the government to explore the toughest possible measures to ensure dumping does not occur that does not contravene WTO rules. It seems other countries, particularly the US and European Union, have taken a much more active approach against dumping than successive Australian Governments ... (SELC 2015, p. 37)

... the proposed changes [to the lesser duty rule] make the application of the rule slightly better than is currently the case, but are still behind the best practice of other countries. (SELC 2015, p. 39)

Likewise, the recent House of Representatives Standing Committee on Agriculture and Industry's inquiry on circumvention (HOR SCAI 2015, p. 38) both welcomed the fact that Australia's circumvention regime compares favourably with the regimes in place in countries like the United States, and expressed concern about the inconsistency of dumping and countervailing duties across jurisdictions. The implication of the latter was that Australia should impose higher duties, not that other jurisdictions should reduce theirs. Participants to this study have also cited the United States as a desirable model (for example, Wilson Transformer Company, comm. 12; BlueScope Steel, comm. 1).

In this environment, it is naïve to look at the impacts of recent changes in isolation. Rather, they are part of a trend that could see the system become increasingly costly over time. Indeed, in their announcement on the commencement of the latest legislative amendments, the Minister for Industry, Innovation and Science, and the Assistant Minister for Science stated '... the Government is committed to working with stakeholders over the coming months to identify future reform opportunities to further strengthen our anti-dumping and countervailing system' (Pyne and Andrews 2015).

The Commission is not suggesting that the end point of this trend will necessarily be a US-style system. It may be the case that Australians' general embrace of freer trade and the benefits it brings would preclude attenuation of those benefits to the extent that occurs in the United States.

Equally, to the extent that small overall costs in an economy-wide sense have previously been a reason to 'wave the system through', recent developments have rendered this a much more problematic and risky strategy. The Commission considers that there is now a need for a fundamental re-think of the basis for, and operation of, the anti-dumping system.

6 Where next?

Key points

- The anti-dumping system exists to provide protection to a narrow range of Australian industries rather than to advance the interests of the community as a whole.
 - Decisions to impose anti-dumping measures largely ignore the resulting costs, and therefore harm, for downstream user industries, consumers and the wider economy.
 - Relatively little information is provided on system outcomes, meaning that those costs are largely hidden from public view.
 - As a result of recent changes to make the system more favourable for user industries, its costs have been growing. And more changes of this nature are in prospect.
- A fundamental rethink of the system is required. An immediate priority is to address the deficient policy processes that characterise this area.
 - Key here is a commitment to regular and transparent reporting on system outcomes, and building the information base necessary to support such reporting.
- It is clear, however, where a policy rethink based on a balanced consideration of costs as well as benefits would lead. Fundamentally, the choice will be between a system heavily modified to reduce its costs, or exiting the system altogether.
 - With this as the core policy choice, further changes that would make the system more favourable for user industries would evidently be unhelpful.
- The best strategy for reducing the costs, and therefore harm, of the system would be to make a handful of 'cut through' changes. The menu of options here might reasonably include:
 - an increase in the *de minimis* dumping/countervailing margins
 - scope to not apply measures that would be unduly costly for the community, or ineffectual in remediating injury to the industry concerned
 - shortening the average duration of anti-dumping measures through a reduction in the current 5-year default term and/or the introduction of an automatic termination provision that would preclude multiple continuations of measures after that.
- Serious consideration should also be given to whether it is in Australia's best interests to retain any anti-dumping system.
 - The WTO does not require a system — the decision on whether to have one is for individual countries based on their unilateral assessment of benefits and costs.
 - While significant modification to the system could reduce the degree of detriment for the community, it would not eliminate it.
 - It is hard to reconcile continuation of the system with the broader objectives of competition and market and trade liberalisation and the extensive microeconomic reforms that they have prompted. As is widely recognised, those reforms have provided significant benefits for Australia.

6.1 The current system is not serving Australia well

This research study has documented and assessed developments in Australia's anti-dumping system since the last comprehensive review of the system by the Productivity Commission in 2009.

That assessment — together with a re-examination of the arguments used to justify anti-dumping protection — suggests that a system that has always been problematic is now clearly inimical to the best interests of Australia as a whole.

- As explained in chapter 4, virtually all of the efficiency and fairness arguments advanced in support of anti-dumping protection lack credibility. And the contention that access to such protection may act as a salve for protectionist sentiment that could otherwise frustrate broader tariff and other trade-related reforms is very weak.
- The raft of recent changes to the system intended to make it more favourable for users mean that its net costs to the community are now higher than at the time of the 2009 review.

More concerning is the fact that the legitimacy of these changes is premised simply on the fact that the WTO rules do not prohibit actions against injurious dumping and subsidisation. This basis for policy action makes sense from the perspective of industries that benefit from anti-dumping protection, but not for competitors, consumers and the community more broadly. As outcomes in more stringent overseas systems illustrate, if this 'we are allowed to' basis for action continues to prevail, there can be no guarantee that the currently modest overall costs of Australia's system will remain so in the future.

In the Commission's view, a fundamental rethink on anti-dumping policy in Australia is required. This chapter outlines where such a rethink might lead — including the need for serious consideration of whether Australia should continue to operate an anti-dumping system. To facilitate such a rethink, an immediate task should be to improve policy making processes in this area.

6.2 Encouraging more robust policy making

The growing overall cost of Australia's anti-dumping system has been underpinned by policy making processes that are at odds with those applying, or expected to apply, in many other policy areas.

In the first instance, the aforementioned 'logic of permission' has meant that in promulgating the recent changes to the system, all of the focus has been on the benefits for the relatively small group of recipient industries. Costs for other industries, consumers and the wider economy have been largely ignored. Had these costs been recognised, many of the post-2009 changes almost certainly would not have proceeded. Rather, in keeping with the thrust of key proposals in the Commission's 2009 inquiry report, there would have

been pressure to make the system much less favourable for the system's clients and hence less costly for the community as a whole.

Such sidelining of costs — which contravenes generally accepted good policy making practice — would evidently cause significant economic harm were it to occur more broadly. Indeed, the whole basis for the gains that have ensued from Australia's microeconomic reforms over past decades was recognition that the community had paid a collectively high price for the benefits afforded to particular groups from restrictions on trade and competition.

There are also other shortcomings in the policy making process in the anti-dumping area.

- Putting to one side the failure to question the rationales underpinning anti-dumping protection and to consider its costs for the community, some recent analysis has been unconvincing (box 6.1).
- Stakeholder engagement is heavily oriented towards those whose interests lie in securing protection from the system.
 - The responsible Minister recently observed that, as a result of the recent strengthening of the system, it 'now addresses many of the concerns raised by Australian industry' (Pyne and Andrews 2015). And, as noted in chapter 5, the Government has made a commitment to 'further strengthen' the system in consultation with stakeholders.
 - As part of the changes made to the system in 2011, the 'International Trade Remedies Forum' has been given a legislatively backed role in providing market intelligence to support the application and iteration of the system. Some 70 per cent of the Forum's 20 members are either past or present recipients of anti-dumping protection, or entities otherwise strongly in favour of the system.
 - Even in policy forums that are notionally open to a cross section of views, those opposed to the direction in which the system has been iterating have sometimes found it difficult to be heard (box 6.1).

Also, the pressure on administering entities to deliver more favourable outcomes for user industries has likely elevated the risk of 'discretionary' shifts in the policy goal posts. The recent first use in Australia of the practice of 'zeroing' in the power transformers case (chapter 5) is indicative of the potential for such shifts in the current environment.

Box 6.1 Policy analysis in the anti-dumping area

As part of this study, the Productivity Commission examined a number of the publicly available analyses underpinning recent changes to make the anti-dumping system more favourable for user industries — or advocating further changes of this nature. A feature of most of these (for example, the Regulatory Impact Statements for the 2011 Streamlining and 2012 Strengthening packages (DIIS 2011, 2012b) and the Brumby Review (2012)) is that, with little contemplation, they accept the problematic basis for the system and the need to make it work more effectively for its clients.

A good general illustration of the need for improvement in policy analysis in this area is the report by the House of Representatives Standing Committee on Agriculture and Industry (HOR SCAI 2015) on circumvention. This report was frequently cited in submissions to this study by those seeking further strengthening of the anti-circumvention framework.

As the Committee noted (2015, para. 4.121), the purpose of the inquiry was not to debate the existence of anti-dumping, or even the merits of anti-circumvention action as such. Rather, it was an investigative exercise that started from the presumption that both were desirable; and that effectively limited consideration of any further changes to those that would extend the reach or stringency of the existing anti-circumvention regime. Hence, in explaining the genesis for the report, the Committee Chair said that:

Following numerous approaches from *affected industries* to the Australian Government and to me as Chair of the Standing Committee on Agriculture and Industry, the Minister for Industry and Science, Ian Macfarlane asked the Committee to investigate the prevalence of circumvention activity, whether recent changes to the anti-dumping regulations are effective and if anything further could be done (2015, p. viii, emphasis added).

Given this starting point, the report does not employ a conventional benefit-cost framework and therefore does not recognise that the anti-circumvention regime has potential efficiency costs (chapter 5). Nor does the report test the claims of system users about the impacts of alleged circumvention relative to other influences on market outcomes. Such claims, and by implication the benefits of taking strong anti-circumvention action, are simply presented and accepted at face value. Notably, while the views of system users are well represented in the report, there is no reference to dissenting views put to the Committee (for example, by the Law Council of Australia and Sanwa Pty Ltd).

The Committee's reasoning for some key conclusions was also unclear. For instance, though noting the Anti-Dumping Commissioner's explanation of why the current range of duty measures was adequate and consistent with WTO principles, it concluded that a combination duty should be the default approach with little explanation. This was the preferred position of user industries (HOR SCAI 2015, paras. 4.35 to 4.41).

The importance of information on system outcomes

In seeking to promote better policy making in the anti-dumping area, one possible avenue would be a 'managerial approach' focused on improving protocols and the capabilities of decision makers. In this context, shaping decision making with cogent overarching objectives could be useful (box 6.2). There might be scope to improve the resources available to, or skills of, those entities undertaking regulatory impact analyses — including through greater reliance on external expertise. And there are changes that could be made to

inject greater balance into stakeholder engagement — including rebalancing the membership of the International Trade Remedies Forum to render it a more neutral player (This option was also raised by the Brumby Review (2012, p. 12)).

Box 6.2 Cost-reflective objectives

The legislation giving effect to Australia's anti-dumping system contains no overarching objective for taking action against dumped or subsidised imports, or any explicit constraint on the imposition of measures that would be disproportionately costly for the community. Rather, consistent with the permissions in the WTO for countries to take action against injurious dumping and subsidisation, the implicit objective has simply been to do so in a manner not inconsistent with the WTO rules. While it obviously is important that Australia's anti-dumping requirements do not breach specific WTO rules in this area, as explained in chapter 4, the broad WTO permissions do not provide a cogent reason for anti-dumping systems or a justification to ignore the costs of taking action.

Hence, if an anti-dumping system is to continue, high-level recognition in the system architecture of the need to have regard to costs as well as benefits would be desirable. More specifically, an objective or statement of intent emphasising that costs matter, and are to be taken into account, could:

- reinforce the notion that anti-dumping and countervailing protection cannot sensibly be provided on a 'blank cheque' basis; and therefore that there should be cost-related constraints on the implementation of measures
- provide the imprimatur for more specific mechanisms to help achieve a better benefit-cost balance than at present (section 6.3)
- help ensure that the inevitable discretionary element in decision making promotes, rather than frustrates, this goal.

There are reasons for scepticism, however, about the extent of the improvement in policy making that could be achieved through such means alone. For example, though recent regulatory impact analyses have had some important deficiencies (box 6.1), those deficiencies may have much more to do with the basic environment in which policy making occurs than with the capabilities of the staff responsible for them. Indeed, in the Productivity Commission's view, it is this environment that is at the heart of the policy making problem.

- The anti-dumping system caters for the interests of a narrow segment of Australian industry and, in recent years, has become increasingly captured by the industry interests concerned.
- This captured system has, in turn, been sustained by the lack of consolidated public reporting on system outcomes and significant gaps in the information that is available on those outcomes.

An essential part of changing the policy making dynamic is therefore a commitment to regular, transparent reporting on overall system outcomes; and building the information base necessary to support such reporting. Only when the costs to the community of this

form of industry support are more clearly apparent is there likely to be impetus for policy makers to require the sort of benefit–cost framework that has underpinned policy making in most other areas.

At the same time, only when comprehensive information on system outcomes is routinely collected will there be ready capacity to undertake a detailed benefit–cost assessment. Hence, while the analysis in this research study clearly indicates that the costs of the system outweigh its benefits and that the detriment to the community is growing, in various ways the precision of this analysis has been constrained by information gaps. And in other cases, analysis has been dependent on the Productivity Commission assembling information that should already have been in the public domain (see below).

Better information on system outcomes coupled with cost–reflective policy objectives could also provide added discipline on those applying system requirements to exercise their discretion in a balanced way (box 6.3), and discourage gaming of the system.

In short, action to improve the information base and reporting on system outcomes is essential.

Where is more light required?

Since the Commission’s 2009 inquiry, there have been some improvements in the provision of information. In particular, in keeping with recommendations by the Commission in that inquiry, when an anti–dumping or countervailing duty is imposed, its ad valorem rate or equivalent is now publicly advised.

Nonetheless, important pieces of outcomes information are not routinely available. For example:

- Neither the Anti–Dumping Commission (ADC), nor the Department of Industry, Innovation and Science (the Department), publish an historical time series of overall usage of the system (number of measures in force; new cases initiated, new measures imposed). Likewise, there is no consolidated summary of the degree of support provided through extant measures, or on their industry or country coverage. Rather, this sort of information must be assembled either from the status reports published by the ADC, or from World Bank data (chapter 3). As such, both the overall significance of the system, and its focus in terms of beneficiaries and targets, is far from transparent.
- There is only limited information available on the numbers of applications that do not proceed to investigation. As well as being relevant to understanding system usage and how this is changing over time, data on unsuccessful applications is one of the few empirical avenues for exploring whether the threat of anti–dumping actions is being used as a strategic deterrence tool.

Box 6.3 **Guarding against inappropriate use of discretion**

As discussed in chapter 2, a number of key concepts in the anti-dumping system are not precisely defined, or may be given effect differently depending on the circumstances. ‘Material injury’, the linkage of such injury to dumping or subsidisation (causality) and the ‘normal’ value of a good alleged to be dumped or subsidised, are cases in point. Application of the rules therefore entails considerable judgment; with this, in turn, meaning that administering bodies must be given significant discretion in aspects of the application task.

Trying to eliminate, or even significantly reduce, the degree of discretion in the system would add substantially to the complexity of an already complex and arcane set of rules and processes. Such efforts would therefore likely be counterproductive.

But discretion brings risks. Most obviously, the quality of decision making becomes contingent on the skills and experience of decision makers. And in an environment where there has been considerable external pressure to make the system more favourable for user industries, the discretionary element potentially opens the door to extensions of protection that would be detrimental to the interests of the wider community.

In guarding against these risks, it is important not only that decision makers are appropriately skilled and experienced, but also that they have the resources to assemble the information necessary to make well-informed judgements. And as noted in box 6.2, specifying in anti-dumping laws that decision makers should consider the costs of measures as well as the benefits might also help to ensure that discretion is used in a balanced way.

However, from a system architecture perspective, probably the most important discipline on any inappropriate use of discretion will be transparency about outcomes. That is, comprehensive published information on system outcomes can help to ensure that the consequences of discretionary choices are plain to see.

- Published ad valorem duties and equivalents do not always accurately reflect the level of protection a recipient industry is actually receiving. For instance, where floor price or combination duties are used, the published *ad valorem* equivalent will not reflect the higher duty that is collected if there is a subsequent reduction in the export price (table B.1). There is no after-the-event public reporting of the extent or significance of such duty changes. Also, duty equivalents for price undertakings are not publicly available.
- There is no consolidated information published on the proportion of measures that are continued beyond their initial five-year term. Yet this is central to understanding the degree of protection afforded by the system and, more particularly, the extent to which measures are providing a long-term protective crutch to certain industries.
- There is no reporting on the impacts of anti-dumping measures on user industries, consumers and the broader economy.

Indeed, the Commission’s interactions with the ADC on data issues highlight that the problem is not simply a failure to publish available information on overall system outcomes. Because the system itself currently has no regard to relative benefits and costs, the procedural apparatus is simply not geared towards collecting information of this nature.

Given WTO rules and commercial-in-confidence considerations, there are limits on the degree to which certain types of detailed information relating to specific parties can be made publicly available. That said, as the discussion in box 6.4 on unsuccessful applications data illustrates, there is seemingly scope to do more than at present. Another example would be publication of estimates of the total dollar value of support provided to recipients of anti-dumping protection. This would deliver the same sort of transparency that attaches to budgetary support — including that which has recently been provided to some recipients of anti-dumping protection (chapter 3).

Box 6.4 Revealing more about unsuccessful applications

WTO rules preclude authorities from publicising applications for anti-dumping or countervailing measures, unless a decision has been made to initiate an investigation. The objective of this preclusion is ostensibly to discourage ‘non-meritorious’ applications for measures made solely to deter an existing overseas supplier from fully deploying a competitive market advantage, or to discourage new overseas suppliers from entering a market. In countervailing cases, keeping the issue out of the public spotlight may also facilitate more productive discussions with the government alleged to have provided an actionable subsidy.

While these objectives are not unreasonable, the effectiveness of the preclusion is open to question. Indeed, it is ironic that while authorities are prevented from publicising an application until they have established that it meets the hurdles for formal investigation, applicants for measures can, and sometimes do, advise the markets that they have, or are intending to, seek measures. For example, the steel producer Arrium previously advised the markets that 65 per cent of its sales base was subject to anti-dumping investigations and that it was examining whether further applications were appropriate (Smedley 2014, p. 14).

Moreover, in Australia (and elsewhere), the WTO rules have not only been applied at the time applications are made, but have been used to justify providing only very limited information on unsuccessful applications after the event. As a result, it is not currently possible to develop a complete picture of how extensively the system is being used, and by whom it is being used.

Yet as the Commission argued in its 2009 report (PC 2009, pp. 148–49), it is hard to see that a prohibition on publicising ‘real time’ applications would preclude consolidated, *after-the-event*, reporting of applications data. Indeed the Regulatory Impact Statement for the Streamlining package of changes (DIIS 2011, p. 56) acknowledged as much through a commitment to future publication of information on numbers of unsuccessful applications. Since publishing this information is possible under the WTO rules, then disaggregating those unsuccessful applications on a country or industry basis would seemingly also be possible. The Regulatory Impact Statement did not explain why one set of after-the-event information would be permissible, but the other not.

Improved reporting of information on system outcomes would add to administrative costs. If the anti-dumping system is to continue, however, the Commission considers that such reporting — and especially the juxtaposition of the benefits and costs for the various stakeholders — should be regarded as a non-negotiable overhead. As indicated above, it may be one of the few mechanisms able to operate as a counterweight to pressures to make the system ever more favourable for its users despite the detriment for the broader community. Preparing regular, consolidated, reports on system outcomes is a reasonable

task for the Department as part of its responsibilities for overseeing the operation and iteration of the system.

Informing the core policy choices

In 2011, the then-Government committed to review the changes to Australia's anti-dumping system that ensued from the Commission's 2009 inquiry and a subsequent stakeholder consultation process (DIIS 2011, p. 28). (The Government indicated that the review would take place once the package had been in operation for five years.)

Better information on system outcomes would clearly facilitate such a review. But given the collective breadth of the changes made in recent years, and their interaction with other elements of the system, the next review would need to encompass the entire system. And to deliver a good outcome for the community, that review would need to look at the costs of the system as well as its benefits.

That said, it is already clear from currently available information where an independent review of anti-dumping policy, based on an informed consideration of costs as well as benefits, would lead. Put simply, the choice will be between a system heavily modified to reduce its costs, or exiting the system altogether. In turn, the importance of better data on system outcomes lies not in informing the decision on whether there should be a reversal in current policy, but rather in helping to determine precisely how big that reversal should be.

With this as the core policy issue, any further changes to the system to make it more favourable for users would evidently be unhelpful.

6.3 Some cost-reduction approaches

If Australia is to retain an anti-dumping system, the costs it imposes on the community could be reduced in various ways. Some of these are the same as, or similar to, approaches that the Commission put forward in its 2009 inquiry. While the Government chose not to implement them at that time, the net costs of the system are now higher. This makes the *prima facie* case for such approaches now stronger.

The advantages of a 'cut through' approach

Given the many decision-making points in the system and the various considerations that apply to each of these, there is no shortage of cost-reduction levers that could be pulled.

But making multiple changes to detailed aspects of the system would risk validating and reinforcing the arcane and complex decision making-architecture that governs its operation. Notwithstanding the scheme's ostensibly simple intent and relatively limited reach, its implementation requires more than 200 hundred pages of enabling legislation, a

close to 200 page manual of procedures and a variety of Ministerial Directives; as well as reference to WTO rules and jurisprudence.

A preferable way forward would be to make a relatively small number of ‘cut through’ changes that could significantly reduce the costs of the system (while still providing some opportunity for local industries to seek protection against dumping or subsidisation).

As is evident from the discussion below, such changes would involve drawing lines in the sand, potentially raising concerns about arbitrariness.

However, the lack of precision in many of the anti-dumping system’s key concepts — and hence the need for those charged with its application to exercise discretion — means that current outcomes are inherently uncertain and, in many senses, arbitrary. Subtleties in the interpretation of requirements and concepts may be influential in whether dumping is, or is not, found to be occurring; or may impact on the magnitude of calculated dumping margins and therefore duties imposed. The issues that arise in giving effect to concepts like ‘injury’ and ‘market situation’ are cases in point.

Viewed in this light, ‘line in the sand’ approaches intended to significantly reduce the system’s costs would arguably be no more arbitrary in nature. In fact, aspects of the current system involve exactly this sort of line drawing approach. Examples include the *de minimis* dumping margin threshold; the list of actionable subsidies in countervailing cases; some of the triggers that determine when consideration of the lesser duty rule may be suspended; and the industry ‘standing’ requirements that specify levels of industry support required to bring a case. And as existing measures would not be immediately affected, the impacts on user industries would be cushioned (box 6.5).

An increase in the *de minimis* margins

Dumping and countervailing investigations are automatically terminated when the calculated dumping or subsidy margins are deemed *de minimis*. The current *de minimis* margins are 2 per cent for dumping cases and between 1 and 3 per cent for countervailing cases (depending on the exporting country). The intent of the *de minimis* provisions is to rule out what might be regarded as insignificant or nuisance claims.

Box 6.5 Transitional issues

As alluded to in the text, the five-year duration of anti-dumping measures means that most cost reduction initiatives could not be given immediate effect without violating the non-retrospectivity principle. Such initiatives would therefore have to be introduced on a prospective basis; giving recipient industries a potentially lengthy period to make the necessary adjustments to their activities.

Even so, where an industry has become heavily reliant on longer-term anti-dumping or countervailing protection to sustain its activities, any initiatives that made the system significantly less favourable for recipients could involve more substantial adjustment pressures.

As stressed in this report, anti-dumping protection should not be a mechanism that frustrates adjustment to changing market realities. Indeed, it would be unfortunate if in a decade's time an anti-dumping system was still protecting the same group of industries from the same types of market pressures.

Moreover, were the adjustment pressures for a particular industry emanating from cost-reducing changes to the system to be viewed as unreasonable, it would be open to government to ameliorate those pressures through more transparent budget assistance (chapter 4). Notably, Australia's major steel producers already receive significant budgetary assistance from the New South Wales and South Australian Governments in the form of waivers of royalty contributions and payroll tax concessions (chapter 3) — though this support is additional to anti-dumping protection, not instead of it.

That said, deferred introduction of genuine reforms to Australia's anti-dumping system would be better than no introduction. In the current environment, any commitment from the Government to future changes that would materially reduce the costs of the system would be a welcome development.

From time to time, there have been proposals to increase the *de minimis* margins. One justification would be that the current very narrow margins presume an unrealistic degree of computational accuracy — especially given that they are often based on problematic or incomplete price data and are highly sensitive to methodological assumptions.

As noted trade economist Jagdish Bhagwati (2002) has pointed out, significantly higher *de minimis* margins could also be used explicitly to limit the detriment from anti-dumping protection.¹⁴

Prima facie, this would be a practical and easily implementable way of achieving a collective reduction in the costs of the Australian system, while still providing protection against significant instances of dumping or subsidisation. (Elsewhere, there have already been some modest moves in this direction. For example, in the New Zealand–Singapore Free Trade Agreement, the *de minimis* dumping margin is 5 per cent (Teh, Prusa and Budetta 2007)).

¹⁴ Interestingly, Bhagwati (1988, p. 35) was also one of the first to enunciate the system preservation argument for some form of anti-dumping protection.

As table 6.1 indicates, the 20 per cent margin proposed by Bhagwati (2002) would rule out some 70 per cent of the measures currently in place in Australia. Yet as the table also indicates, an increase in the margins to just 5 per cent would rule out around one quarter of current measures — measures which might be viewed as problematic both in terms of the aforementioned computational uncertainties, and on the basis that industries might reasonably be expected to deal with competitive pressures of this magnitude without support from government. Notable in this latter context is that Australian industries have been exposed to much larger movements in Australia's exchange rate (up and down) in recent years.

Table 6.1 How would a higher *de minimis* margin affect the number of measures imposed between 2009 to 2015?

	Current <i>de minimis</i> margins ^a	5 per cent	10 per cent	15 per cent	20 per cent
Number of measures	184 ^b	136	105	79	53
Percentage reduction ^c	Not applicable	26	43	57	71

^a 2 per cent for dumping actions; and 1 per cent (developed countries), 2 per cent (developing countries) or 3 per cent (special developing countries) for countervailing actions. ^b Many of the current anti-dumping and countervailing measures provide for several exporter-specific duty rates. ^c The reduction is calculated on the basis of the assessed dumping and countervailing margins, not the imposed duty, which may be lower than the assessed margin due to the application of the lesser duty rule. However, the lesser duty rule affects only 4 cases in the sample.

Source: Commission estimates based on information provided by the Anti-Dumping Commission (2015, unpublished).

Not applying measures in certain circumstances

As a complement, or less desirably, an alternative, to a higher *de minimis* margin, Australia's anti-dumping system could also incorporate provision to suspend the imposition of measures that would be unreasonably costly for the wider community or ineffectual in remediating injury. Such a provision would be akin to the 'bounded public interest test' proposed by the Commission in its 2009 inquiry that would likewise have precluded action against injurious dumping or subsidisation in certain circumstances (box 6.6).

A common reaction to the Commission's 2009 proposal, reiterated in submissions to this research study, was that introducing explicit consideration of costs for the wider community would axiomatically reduce the objectiveness of decision making. For example, SPC Ardmona said that:

... implementation of [a public interest] test would introduce subjectivity and discrimination on top of a process that relies on objective assessment of the evidence. (comm. 14, p. 3)

Of themselves, additional complexity or the need for judgment are not good reasons to ignore impacts that materially affect outcomes for the community as a whole. Simple decisions are not necessarily good ones.

Box 6.6 The 2009 ‘bounded public interest test’ proposal

In its 2009 public inquiry into the anti-dumping system, the Productivity Commission proposed that the general presumption in favour of measures where injurious dumping or subsidisation has occurred be overturned when:

- the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule
- the price of the imported goods after the imposition of measures would still be significantly below competing local suppliers’ costs to make and sell
- un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods
- prior to the commencement of injurious dumping or subsidisation, the local industry’s share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed
- the large majority of the overseas supplier’s output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier’s fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies) (PC 2009, p. xxviii).

Notably, those criteria are considerably less open-ended, and therefore more operationally precise, than the public interest criteria employed within some other systems. For instance:

- while the EU system (PC 2009, box 5.2) references various circumstances where measures may not be in the public interest that are akin to the circumstances that were captured explicitly in the Commission’s proposed criteria, the formal determinant is disproportional costs relative to benefits
- the formal determinant in the Canadian requirements (PC 2009, box 5.3) is simply a judgment that it would be in the public interest to impose a lesser (or no) duty.

There is similarly less precision in the bounded public interest test that is soon to be embodied in New Zealand’s anti-dumping system. Like the EU test, it will simply refer to factors that should be considered in assessing public interest outcomes, including the effects of measures on product prices, the degree of choice for consumers, effectiveness in ensuring the viability of the applicant industry and the availability of alternative sources of supply (NZ Government 2014, pp. 18–19). And also like the EU test, the presumption in favour of measures will seemingly rely almost exclusively on the requirement that, for measures not to be imposed, the costs for downstream users and consumers must *materially* exceed the benefits to domestic producers of the product concerned.

Moreover, the particular application of the criteria for preclusion of measures proposed by the Commission in 2009 would have involved no more, and quite possibly less, subjectivity than is entailed in applying aspects of the current system. The subjectivity surrounding assessments of material injury and causality are cases in point — as evidenced

by the volume of explanation of these concepts in the anti-dumping manual of procedures and elsewhere. Indeed, were a suspension provision based on the second, third and fourth of the criteria proposed by the Commission in 2009 (box 6.6), it would become largely mechanistic and draw on information central to the rest of the investigation process.

Obviously, the impact of a suspension mechanism will depend on how the criteria are calibrated. In 2009, the Commission suggested a calibration that would have seen measures precluded infrequently — leading some to suggest that the resulting benefits for the community might well have been less than the costs of applying the test in each and every case (DIIS 2011, p. 12). However criteria like ‘low local industry market share’ could be calibrated to have a greater effect — and therefore to give more emphasis to reducing costs for the community — than envisaged in the Commission’s 2009 proposal. Given the now greater detriment from the system, a more stringent suspension provision might be seen as a reasonable *quid pro quo*.

The fact that other jurisdictions — including the European Union, Canada, Brazil, China and, soon, New Zealand — employ suspension provisions in the public interest, lends further weight to the argument that it would be a practical means to reduce the costs of Australia’s anti-dumping system.

Reducing the duration of measures

As detailed in chapter 2, under Australia’s anti-dumping system, measures are typically imposed for five years — the maximum allowed under the WTO rules. The default term was increased from three years in 1991 following a Senate Committee report on means to facilitate access to anti-dumping protection (SSCIST 1991). Few measures have been revoked before term. Also, as permitted under the WTO rules, measures can be extended for further periods of five years if a continuation review finds a case for doing so. There are no limits on the number of continuations.

In looking at ways to reduce the overall costs of Australia’s anti-dumping system, an obvious option would be to shorten the default period of protection, such as by reversion to the previous three-year term. This would reduce the costs attaching to those measures that are not continued.

Reducing the default term would not, however, address the absence of any time limit on the total duration of protection. Importantly, the requirements governing the continuation of measures are necessarily less demanding than for initial investigations. With remedial measures already in place, the ADC cannot directly test for injurious dumping or subsidisation. Rather, it has to judge whether actionable circumstances would recur if measures were allowed to expire. This means that measures could, in theory, continue in perpetuity without any explicit re-testing of the considerations that underpinned their initial imposition.

In the face of this lower hurdle it is unsurprising that measures are frequently extended (chapter 3). And some measures have remained in force for very long periods. Most notably, measures on polyvinyl chloride homopolymer resin — which are currently the subject of a revocation review following the cessation of local production — have been continually in place since 1992.

The longer anti-dumping and countervailing measures are in place, the more closely they resemble conventional trade protection — protection that is now widely accepted as being inimical to Australia's interests and which successive Australian governments have sought to reduce or eliminate. Access to such non-time limited protection also stands in contrast to the eight-year time limit in Australia's Safeguards provisions that enable protection to be given to industries injured by a 'surge' in imports.

Concerns about the potential for anti-dumping and countervailing measures to morph into more general long-term industry protection have frequently been raised within the WTO (PC 2009, p. 186). Also, the New Zealand Government (MBIE 2015) released a paper canvassing the possibility of complementing its bounded public interest test with an automatic termination provision — though apparently a decision has since been made not to proceed with such a provision at this time.

Debate in Australia on the merits of an automatic termination provision has typically been narrowly focused.

- A perennial argument is that terminating measures in circumstances when dumping or subsidisation is likely to recur would be unfair and arbitrary.
- Some have argued that an automatic termination provision would see the anti-dumping system become more of an adjustment mechanism and, in that sense, duplicate the Safeguards provisions.
- Yet others have maintained that Australia should not do anything in this area until the WTO has come to a position on the matter.

And even some of those in favour of an automatic termination provision have predicated their case on the more speculative nature of continuation reviews (see above), rather than on the more fundamental problem of affording protection for very long periods.

As the last of these points illustrates, the problem with these narrow perspectives is that they effectively take the case for anti-dumping protection as given. Once the weak rationale for such protection, and the case for substantially reducing the damage of any system that continues to operate, are recognised, the considerations that should govern policy choices in this area are much broader.

Irrespective of whether multiple continuations are permitted under WTO rules, trying to counteract pricing practices (or subsidies) that are a perennial part of an industry's operating environment is likely to be an expensive, and ultimately futile, exercise. The national interest, as well as the more direct interests of downstream industries and consumers, would be best served by accepting market realities and adjusting to them. It is

also important to reiterate that the WTO rules do not require Australia to make provision for continuations, or even to maintain an anti-dumping system. Arguing that Australia should not take steps in this area until the WTO moves therefore misses the point that policy decisions should be guided by what is in the national interest.

Along with consideration of the case for a reduction in the default term of anti-dumping measures, the merit of an automatic termination provision warrants serious assessment. Though such a provision could be configured in various ways (PC 2009, pp. 111–16), its core feature would be to specify a limit of one continuation for a period of no more, and possibly less than, the default term.

Are any more targeted cost reduction options worth considering?

The preceding approaches would not directly tackle some of the more problematic cost-increasing changes made to Australia's anti-dumping system in recent years — in particular, the weakening of the lesser duty rule; the softening of past opposition to 'zeroing' when calculating dumping margins; and the widening array of measures to tackle circumvention of duties.

As indicated above, the Productivity Commission considers that making a small number of changes that would offset the collective cost-raising impacts of multiple individual features of the current system would be preferable to addressing each one of those individual features.

That said, the three aforementioned changes are exemplars of the concerning direction in which Australia's anti-dumping system has been moving.

- As user industries themselves have acknowledged (PC 2009, pp. 63–4), the lesser duty rule is virtually the only mechanism in the system that recognises, and seeks to contain, the costs imposed on the community.
- While the circumstances surrounding the recent first use of the practice of zeroing by the ADC continue to be debated, the general effect of disregarding any transactions with negative dumping margins is to increase the likelihood of discovering dumping and the magnitude of the duty imposed if injury is found.
- At the new frontier of anti-dumping policy in Australia — circumvention — the growing suite of measures has correspondingly increased the risk of inadvertent and inappropriate 'coverage creep', with attendant costs for the community (chapter 5).

Accordingly, there are grounds to consider whether the sorts of cut-through cost reduction approaches outlined above could usefully be complemented by specific initiatives to reverse recent changes in these areas — or, in the case of circumvention, to at least reduce the risk of unintended effects.

6.4 The exit alternative

The sorts of options canvassed in the previous section could significantly reduce the harm caused by Australia's anti-dumping system. This was the thrust of the Commission's approach in its 2009 inquiry.

However, a 'harm minimisation' approach has some important drawbacks and risks, as the experience since 2009 demonstrates. Accordingly, as part of a fundamental rethink of policy in this area, serious consideration of whether it is in Australia's best interests to retain any anti-dumping system is warranted.

The WTO does not require us to have a system

Based on stakeholder input to this exercise, it is clear that user industries regard access to anti-dumping protection as an entitlement inherent in the WTO rules of engagement, which should be available irrespective of the costs imposed on others in the community.

But as noted above, there is nothing in those rules that requires countries to take action against dumped or subsidised imports. The relevant WTO Agreements simply seek to discipline any such action by member countries. As such, they are effectively recognition of the potentially pernicious effects of anti-dumping protection rather than an endorsement of it. The decision on whether to have an anti-dumping system is therefore one for individual countries based on their unilateral assessment of benefits and costs.

Even with significant modification the system would still be detrimental

While the sorts of changes canvassed in section 6.3 could significantly reduce the costs of Australia's anti-dumping system, without its almost complete emasculation, those costs would still almost certainly exceed the benefits. In essence, once the very limited scope of any system preservation benefits is recognised, there is little in principle to distinguish anti-dumping protection from conventional trade protection. And the system's complex administrative arrangements, its potential to deter price competition, and the opportunity it provides for overseas entities to appropriate duty revenue that would otherwise flow to taxpayers, mean that, in practice, it is a more costly form of trade protection than tariffs.

Viewed in these terms, it is hard to reconcile continuation of the system with the broader objectives of competition and market and trade liberalisation, and the extensive microeconomic reforms that they have produced. As is widely recognised, Australia's reform program over past decades — including a variety of initiatives to reduce or eliminate barriers to trade — has provided a significant boost to productivity and growth and to the adaptability and resilience of the Australian economy. As such, the program and the objectives underlying it have played a key role in enhancing our economic prosperity.

Exit options should be on the table

In light of the above, there is a substantive case for Australia to, over time, exit the anti-dumping system.

Beneficiaries of the system, understandably, may oppose this proposal — or any significant reforms that would reduce the system's protectionist impact. However, a willingness to seriously contemplate exit options would provide an important signal that anti-dumping policy was no longer a 'no go' area for the sort of robust analysis — founded on promoting community interest — that has driven the bulk of economic reform in Australia.

A Conduct of the study

In preparing this research paper, the Commission received 21 written comments from participants (table A.1). The Commission also held meetings with a range of companies, individuals, industry bodies and government agencies (table A.2). The Commission is grateful for the input stakeholders provided throughout this study.

Table A.1 Written participant comments

<i>Participants</i>	<i>Comment no.</i>
Arrium	2
Arrowcrest	5
Australian Food and Grocery Council	11
Australian Paper	7
Australian Steel Association Inc.	18
AUSVEG	4
BestBar	6
BlueScope Steel	1
Bureau of Steel Manufacturers of Australian Limited	16
Capral Aluminium	15
Commercial Metals	3
CSR Limited	8
David Roberts	10
Manufacturers Trade Alliance	17
Norske Skog	13
Orica	9
Plastics and Chemicals Industries Association	20
Qenos	21
SPC Ardmona Operations Ltd.	14
Wilson Transformer	12
Name withheld	19

Table A.2 **Meetings**

Anti-Dumping Commission
Arrium (One Steel)
Australian Competition and Consumer Commission
Australian Council of Trade Unions
Australian Government Department of Foreign Affairs and Trade
Australian Government Department of Immigration and Border Protection
Australian Government Department of Industry and Science
Australian Industry Group (Trade Remedies Task Force)
Australian Paper
Australian Steel Association
Australian Steel Institute
Casselle Commercial Services Pty Ltd
CFMEU
Food and Beverage Importers Association
Gadens Lawyers
JELD-WEN
John Heslop
Law Council of Australia
Manufacturing Australia (represented by Capral, Bluescope Steel and CSR Limited)
Moulis Legal
National Farmers' Federation
New Zealand Ministry of Business, Innovation and Employment
Orica
Sanwa Holdings
SPC Ardmona
Wilsons' Transformer Company

B How the Australian anti-dumping system works

B.1 Legislative framework and system administration

The *Customs Act 1901* is Australia's main legislation governing claims for anti-dumping and countervailing measures. The *Customs Tariff (Anti-Dumping) Act 1975* and the *Customs Tariff (Anti-Dumping) Regulation 2013*, which deal further with duties, give additional effect to the system.

Since the Commission's inquiry into anti-dumping arrangements in 2009, there have been a number of changes to administrative responsibilities. The Anti-Dumping Commission (ADC) (created in mid-2013 with a transfer of functions from the then Australian Customs and Border Protection Service) is responsible for administering Australia's anti-dumping system. Following investigations, the ADC makes recommendations to the responsible Minister and also gives effect to the Minister's decisions. The ADC is headed by a statutorily-appointed Anti-Dumping Commissioner.

Many of the decisions resulting from the ADC's investigative and the Minister's decision-making processes are reviewable by the Anti-Dumping Review Panel (this panel replaced the former Trade Measures Review Officer located within the Attorney General's Department in 2011). The Australian Department of Immigration and Border Protection is responsible for collecting duties as part of import clearance.

Two bodies manage the Australian Government's relationships with, and assist, industry. The Trade Remedies Advisory Service offers advice on how the anti-dumping system operates and on how to prepare applications or submissions to investigations, and also seeks to facilitate cooperation between small-medium enterprises. The International Trade Remedies Forum is a body comprised mainly of those representing local industry interests, with a legislated role to advise the Government on the operation of, and potential improvements to, the anti-dumping system.

Under the *Closer Economic Relations* agreement, anti-dumping measures do not apply to goods originating from New Zealand, but countervailing action can be applied. With respect to other trade agreements that Australia has negotiated (such as the Trans-Pacific Partnership and with China, Japan and Korea), parties have agreed to retain their WTO rights to take anti-dumping and countervailing action. Except in the case of the agreement with Japan, parties have also agreed to greater consultation to ensure they afford each other

fair and transparent treatment and, in the case of Korea, to confirm the application of certain current practices.

B.2 Key steps in investigations

This section provides an overview of the key steps involved in Australian anti-dumping investigations (figure 2.1, chapter 2) and recent changes (table B.2).

Initiation of investigations and timeframes

Anti-dumping actions commence with the filing of an application by, or on behalf, of an industry.

The ADC has 20 days to undertake a preliminary screening to determine whether or not there is sufficient evidence, and thresholds are met, to initiate a formal investigation. These include assessing whether there is an Australian industry producing goods identical or closely resembling the imported goods under consideration ('like' goods), whether the application has sufficient support from Australian producers, and whether the thresholds for automatic termination of an investigation apply.

As per WTO rules, applications are rejected or an investigation is terminated if the dumping margin does not exceed *de minimis* thresholds or the volume of dumped imports or the injury is negligible.

If an application is accepted, the ADC notifies the public that an investigation is commencing and invites submissions from interested parties. The 'investigation period', or the period over which the ADC must determine whether dumping has occurred, is included in the public notice and is usually 12 months preceding the initiation date. Submissions from interested parties are required within 37 days of initiation of the investigation. The deadline for submissions was reduced from 40 to 37 days in 2015.

The process for countervailing applications is, for the most part, the same, but the ADC will, in advising the foreign government concerned of the nature of the complaint, offer the government the opportunity for consultation with the aim of arriving at an agreed solution to the matter. If this consultation process does not resolve the matter, the initiation process applying to anti-dumping cases takes effect.

The investigation stage includes analysis and verification of submissions from interested parties. The ADC works in particular with exporters to establish whether dumping or a subsidy exists and with importers to gather information on the imported product. It may undertake site visits to gather and verify information.

From 60 days after the investigation has been initiated, the ADC is able to make a 'preliminary affirmative determination', and impose provisional measures (in the form of

securities) if it considers this necessary to prevent material injury occurring to the Australian industry while the investigation continues. Historically, provisional measures have rarely been issued until the draft decision (the Statement of Essential Facts) is released. In October 2015, the responsible Minister directed the ADC to impose provisional measures at day 60 of an investigation wherever possible, to promptly address injury and encourage parties to provide prompt and full submissions. If provisional measures are not imposed at day 60, the ADC is required to publish its reasons.

A Statement of Essential Facts is required to be published within 110 days of the initiation of an investigation (though extensions are common). These set out the facts on which the ADC proposes to base its recommendations to the Minister, excluding commercial in confidence matters, and provide an opportunity for interested parties to make submissions before a final decision is made. Parties have 20 days to comment.

The ADC must complete a Final Report setting out its recommendation to the Minister within 155 days of initiating the investigation, subject to any extensions. This is relatively short by global standards, with the WTO requiring standard investigations to be concluded within one year.

Establishing dumping margins or subsidisation

In order to find that dumping has occurred, the export price of the imported goods must be below the ‘normal value’ of goods in the exporter’s home country. Specifically, the *Customs Act* defines the ‘normal value’ as:

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

The Act further specifies that sales ‘in the ordinary course of trade’ do not include ‘sales at a loss’ if they account for 20 per cent or more of total volume and if the individual selling price of a transaction is below the weighted average total costs for the whole investigation period. Sales are considered to be ‘arms-length’ if they are between unrelated parties and do not involve any additional payments between the parties beyond the sale price.

Where there are no, or an insufficient volume of, relevant sales in the country of export, or local sales are deemed to be not determined by a competitive market (the latter is deemed to signal ‘a situation in the market’), alternative methodologies are used to estimate the normal value. Until recently, the use of these alternative methodologies was subject to a hierarchy of preferred use, involving, in order:

- using other sellers’ domestic sales (in the country of export)
- constructing a price based on the cost to make and sell the goods in the country of export, or based on the price charged by the exporter for its sales of a like good to a third country

-
- constructing a price based on the costs to make and sell in ‘surrogate’ countries, including in Australia.

In 2015, the hierarchy was removed.

The difference between the normal value and the export price (the dumping margin) provides the basis for the level of any anti-dumping measure. In practice, there are a number of factors that determine whether, and what, sales in the country of export are used to determine ‘normal value’ (box B.1). Many adjustments are made to the raw price data before the comparison is made.

The existence of dumping and the size of dumping margin are established and calculated for individual exporters. However, if the number of exporters from a particular country is so large as to make it impractical to make individual calculations for all, the ADC can use a sample of exporters.

In the case of applications for countervailing measures, this stage of the assessment process focuses on how the subsidy enables an overseas supplier to charge a lower price for its products.

Box B.1 Estimating normal value in an anti-dumping investigation

There are a number of methodological ‘levers’ that can affect estimates of normal value.

For example, sales can be discounted and not used to estimate ‘normal value’ where they are not in the ‘ordinary course of trade’ or ‘arms-length’. Further, the Act prescribes that normal value cannot be ascertained where the volume of relevant sales is negligible, or where sales are deemed unsuitable because of a ‘situation in the market’ of the country of export.

These provisions provide a number of levers, and choice of methodologies, that can affect the final estimated normal value. As a result there is often considerable effort made by all stakeholders to argue for particular methodological approaches to be used and for the inclusion/exclusion of particular sales when estimating normal value.

For example, in order to determine which sales were conducted in the ordinary course of trade an estimate of the ‘costs to make and sell’ is made and compared with the price of the good to determine whether sales were made at a loss. Only ‘profitable sales’ are considered when estimating normal value. The Anti-Dumping Commission constructs an estimate where there are insufficient suitable sales to determine normal value.

In the 2010 aluminium extrusions case against Chinese exporters, a large portion of sales for all exporters were deemed to be ‘non recoverable’ (as estimated ‘costs to make and sell’ were greater than the sale price) and these sales were disregarded. In many instances, there was a negligible number of remaining sales from each exporter and as a result normal value was constructed.

Sources: ACBPS (2010); ADC (2013b).

Finding that material injury has occurred due to dumping or subsidisation

In both dumping and countervailing cases, action can only be taken if the dumping or subsidisation has caused material injury to a domestic industry. ‘Material injury’ is not defined in the WTO Agreements or the *Customs Act*, but a Ministerial Direction (Dumping Notice No. 2012–24) states that injury must be greater than that likely to occur in the normal ebb and flow of business and must not be ‘immaterial, insubstantial or insignificant’. Identification of material injury depends on the circumstances of each case.

The WTO Agreements and the *Customs Act* set out factors that must be taken into account when evaluating whether a domestic industry has experienced material injury, including a decline in sales, profits, market share, capacity utilisation, ability to raise capital and employment.

A new Ministerial Direction in 2012 (ACBPS 2012) included additional relevant considerations in determining material injury: a slowdown in the rate of an industry’s growth; the loss of market share by an industry in an expanding market without a decline in profits; regional dumping; and the greater impact of dumping during economic downturns.

The ADC must consider whether factors other than the presence of dumped or subsidised goods are causing material injury. Dumping or subsidisation does not need to be the sole cause of the injury, but injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation.

Decision to impose an anti-dumping measure and calculating the level of duty

If dumping is found and assessed to be causing material injury to a domestic industry, the ADC can recommend to the Minister that duties be imposed up to the level of the assessed dumping margin. The Minister is required to make a decision within 30 days of receiving the ADC’s report.

The forms of duty include: a fixed duty; an ad valorem duty (a percentage of the export price); a combination of a fixed and variable duty; and a floor price. Prior to 2013, the only method available was the combination method. The choice of duty method can have a significant impact on the duty payable when actual export prices change (table B.1).

An alternative to the imposition of duties is the acceptance by the Minister of an undertaking by the exporter to raise its export prices and/or lower its export volumes. The process for acceptance of an undertaking typically follows the making of a preliminary affirmative determination, and, if accepted, results in suspension of the investigation. The investigation will be resumed if the exporter breaches the terms of their undertaking.

Table B.1 Anticipated price effects of each duty method^a

<i>Ascertained factors</i>	<i>Ascertained Normal Value (ANV)</i>	\$100			
	<i>Ascertained Export Price (AEP)</i>	\$80			
Duty Methods	Formula and ad valorem equivalent rate	Year 1	Year 2	Year 3	Year 4
	Actual Export Price (DXP)	\$70	\$90	\$130	\$60
<i>Ad Valorem</i>	Total duty (DXP x 25%)	\$17.50	\$22.50	\$32.50	\$15
	<i>Ad valorem rate</i>	25%	25%	25%	25%
Fixed Duty	Total duty (ANV-AEP)	\$20	\$20	\$20	\$20
	<i>Ad valorem equivalent rate</i>	29%	22%	15%	33%
Floor Price	Total duty (ANV-DXP)	\$30	\$10	\$0	\$40
	<i>Ad valorem equivalent rate</i>	43%	11%	0%	67%
Combination Duty Method 1 (fixed specific component + variable difference component) ^b	Total duty (ANV-AEP)+(AEP-DXP; if positive)	\$30	\$20	\$20	\$40
	<i>Ad valorem equivalent rate</i>	43%	22%	15%	67%
Combination Duty Method 2 (fixed component as a percentage of the higher of DXP or AEP, plus a variable difference component) ^b	Total duty (Higher of DXP or AEP x 25%) + (AEP-DXP, if positive) ^b	\$30	\$22.50	\$32.50	\$40
	<i>Ad valorem equivalent rate</i>	43%	25%	25%	67%

^a These calculations abstract from any subsequent refund to importers of 'overpaid' interim duties (see text). ^b Reworded from the original source.

Source: ADC (2013a).

In imposing a duty, the Minister must consider the desirability of fixing a level that would be no more than necessary to remove injury to the domestic industry (the 'lesser duty rule'). In 2013, legislation was amended to provide that the Minister is not required to have regard to the lesser duty rule in certain circumstances. These include where, in dumping cases, there is a 'situation in the market' of the country of export that means that domestic sales are not suitable for use in determining a normal value and where, in joint dumping and subsidy cases, there are at least two small-medium enterprises in the industry. In 2015, circumstances were expanded to include subsidy cases in which the country of export fails to notify the WTO of its subsidies at least once in the two preceding reporting years.

The Minister's decision on whether anti-dumping measures will be imposed is announced on the ADC's website in the form of an Australian Dumping Notice. The Minister has broad discretion to exempt goods from duty. Unless revoked earlier or extended, duty notices remain in force for five years.

The absolute dollar amount of a duty is not published. The Dumping Notice only reveals the duty method and the *ad valorem* rate or equivalent (the duty as a percentage of the

established normal value, or the lower non-injurious export price, if the lesser duty rule was applied).

Dumping duties are individual to the export company for which calculations were made. If sampling was necessary in the calculation stage, all residual (unsampled) companies attract the same single duty (calculated on the basis of the weighted average normal price and export price of the sample exporter). In 2013, a new class of ‘uncooperative’ exporter was established, referring to those exporters that fail to provide requested information or who are deemed to have impeded the investigation process. The ‘assessed’ normal value and export price for uncooperative exporters is determined ‘having regard to all relevant information’.

New exporters that become subject to the single rate of duty for the ‘all other exporters’ may apply for an ‘accelerated review’ of their circumstances.

Subsequent reviews of measures

An affected party (producer, exporter or importer) can seek a review of a measure after 12 months from publication of a dumping duty notice (and annually thereafter), or the Minister can initiate one. A review may concern the ‘variable factors’ (for example, the normal value, export price, non-injurious price, or the amount of subsidy) that determine the magnitude of the measure, or a claim that the measure is no longer warranted (revocation review).

Applicants or persons representing the whole, or a portion, of Australian industry producing relevant goods may apply for continuation of protections in the lead up to the expiry of protections. The criteria applied to the continuation of protections are necessarily somewhat different from those applying in an initial investigation, given the ongoing influence of protections in place. In particular, continuation reviews focus on whether expiration of protections is *likely* to lead to a continuation of, or *recurrence* of, the injury that the protections were intended to prevent. The ‘prospective’ recurrence test for continuation was clarified in 2011 in response to the Federal Court finding in *Siam*.¹⁵ In continuation reviews, the ADC does not recalculate the dumping or subsidy margin, or re-examine the issue of causation. Extensions may be for a maximum period of five years, and there is no limit to the number of extensions that may be sought.

Similar to new investigations, the ADC has 155 days to make its recommendations on whether protections should be varied, revoked or continued.

An importer can apply for a duty refund assessment (at six monthly intervals) where they consider that the duty that they paid on a consignment of goods exceeds the actual dumping margin. This situation may arise, for example, where the actual export price exceeds the normal value or non-injurious price that was determined when the measures

¹⁵ *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* FCAFC 86 (13 July 2010).

were first imposed, or last adjusted following a review of measures. However, any changes do not carry forward to subsequent consignments and the extent of re-examination is dependent on the amount of duty involved.

A further type of review available is accelerated reviews. Accelerated reviews are available to new exporters exporting goods from a country already subject to a dumping or countervailing duty notice.

Appeal arrangements

Many of the decisions made by the ADC and the Minister are subject to merits review by the Anti-Dumping Review Panel, including:

- decisions of the Minister to impose or not impose duties and in relation to reviews of variable factors, continuation and alleged circumvention
- decisions of the Anti-Dumping Commissioner to: reject an application for dumping or countervailing measures, or terminate an investigation; reject or terminate examination of an application for duty assessment; and recommend the refund of interim duty less than the amount sought, or waiver of an amount over the interim duty paid.

Appealable decisions were expanded in 2012 to include decisions of the Minister on review and continuation inquiries.

Legislative provisions relating to appeals were amended in 2015 to allow the introduction of application fees and increase procedural and legal thresholds to ensure that the Review Panel only considers ‘serious and meritorious reviews’. Parties may apply to the Federal Court for review of anti-dumping decisions on points of law.

Compliance

Australia introduced an anti-circumvention framework in 2013. Circumvention is defined as a strategy used by exporters and/or importers of products to avoid the full payment, or intended effect, of dumping or countervailing duties (House of Representatives Standing Committee on Agriculture and Industry 2015). Where circumvention is found the Minister has the power to alter the original anti-dumping notice. The notice can be changed in regards to the specification of certain factors — including the goods, countries, exporters and variable factors — that are the subject of the original notice.

Circumvention can take different forms and there are a number of activities prescribed in the Customs Act that may constitute circumvention. The Act also gives the Minister power to add circumvention activities to respond to emerging circumvention practices. Current activities deemed to be circumvention activities include avoiding the payment of duty by importing a good (that is subject to duty) in parts and assembling it in Australia, or slightly modifying a good so that it comes under a different tariff code.

Table B.2 **Legislative and administrative changes**

Commenced October 2011

Provision for a revocation test in the context of continuation reviews (High Court *Siam* case response)

Commenced October 2011 (Tranche 1) (Streamlining Statement)

Imposed a 30 day time limit on Ministerial decision making

Broadened what may constitute Material Injury (by Ministerial Directive)

Allowed consideration of no longer exempted subsidies under WTO Rules

Parties with a clear interest in antidumping matters are expressly given an opportunity to participate in investigations

Established the International Trade Remedies Advisory Service to assist business with applications and investigations (administrative change; an advisory service with a similar role previously existed)

Commenced June 2013 (Tranche 2) (Streamlining Statement)

Established the new appeal body and process (Anti-Dumping Review Panel)

Established the International Trade Remedies Forum in legislation

Allowed the Minister multiple opportunities to extend investigation/review/inquiry/assessment timeframes

Commenced June 2013 (Tranche 3) (Streamlining Statement)

Clarified the power to take all facts into account when determining whether a countervailable subsidy has been received if parties fail to provide all relevant information within a reasonable time

Allowed Minister to amend the form and level of measures at the conclusion of a continuation inquiry

Allowed inclusion of profit when constructing normal value in some previously excluded circumstances, such as when there is a 'market situation'

Allowed the Minister to utilise additional forms of duty (a fixed duty, an ad valorem duty or floor price) beyond the single form that was originally available (a combination duty with fixed and variable components)

Commenced June 2013 (Tranche 4) (Streamlining Statement)

Amended the provisions dealing with countervailing subsidies to reflect WTO definitions and operative provisions

Introduced Circumvention inquiry provisions (assembly of parts in Australia, assembly of parts in third countries; export of goods through one or more third countries; arrangements between exporters)

Created new classes of exporters ('cooperative', 'non-cooperative' and 'cooperative but not selected') in the sampling provisions of the Act

Extended the definition of interested parties to include trade unions and downstream manufacturers and other users of the good subject to investigation

Commenced July 2013 (Tranche 5) (Strengthening Statement)

Established the Anti-Dumping Commission and the Anti-Dumping Commissioner

Commenced January 2014 (Tranche 6) (Strengthening Statement)

Removed mandatory consideration of the lesser duty rule (in three scenarios)

Clarified the application of retrospective duties

Introduced a new type of anti-circumvention inquiry to address 'sales at a loss'

Commenced March 2014 (Machinery of Government)

Transferred the ADC to the Department of Industry, Innovation and Science

Increased penalties for false statements

Commenced March 2015 (Level the Playing Field Statement)

Introduced a new circumvention inquiry to address slight modifications of goods (Ministerial regulation)

Greater onus on overseas businesses to cooperate with investigations, including more rigorous enforcement of information deadlines

(continued next page)

Table B.1 (continued)

Commenced November 2015 (Level the Playing Field Statement)

Allowed wherever possible, provisional measures to be imposed at day 60 of an investigation. If not, publication of reasons for not imposing (so as to signal what information petitioners could further provide to help advance the investigation)

Reduced deadline for the submission of information at the start of investigations from 40 days to 37 days

Ministerial Directive on uncooperative exporters with accompanying heavier penalties

Modernised and simplified the publication of notices such as single lodgements including through electronic means

The investigation period cannot be varied once the period has been specified in a Notice

Cumulative injury from multiple sources can be considered in termination decisions

Where domestic selling prices in the export country are not suitable for calculating normal value, there is no requirement to consider third country prices before resorting to construction of costs

The minimum dumping period can be reduced from 2 months to one month for calculation purposes

Provided access to accelerated review for 'new' exporters (those that did not export during the investigation period)

Provided scope for the Minister to introduce fees for appeal applications

Raised the legal threshold for applications for appeal

Establishment of the Anti-Dumping Information Service, a central hotline and expansion of the International Trade Remedies Advisory Service

Commissioner to formally participate in Review Panel cases

Stronger stance in WTO on transparency of foreign subsidies

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