



Law Council  
OF AUSTRALIA

# Proposed Amendments to the Dumping and Subsidy Manual

Anti-Dumping Commission

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# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Ms Fiona McLeod SC, President
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- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

# Executive Summary

1. The Anti-Dumping Commission ('ADC') has sought comments on proposed changes to the Dumping and Subsidy Manual ('The Manual')
2. The Manual explains the practices used by the ADC in administering the anti-dumping and countervailing system and aims to promote a consistent approach in work undertaken by the ADC.
3. A number of amendments have been proposed to the Manual which focus on explaining and clarifying a number of key areas of the ADC's current policy and practice.
4. In response to the call for comments, the International Law Section's International Trade and Business Law Committee (ITBLC) has provided a number of suggestions regarding the proposed amendments, including:
  - a. Clarification of the difference between the headings of "Context" and "Policy" throughout the document;
  - b. Inclusion of a statement which notes that the description of the goods in the application must be an accurate description of the goods actually being imported, not the range of goods that may be produced by the applicant;
  - c. Notice that tariff classification will not be determinative of whether any goods are "like goods" but may indicate that they are "like goods" (an alternative assessment is further proposed at page 12);
  - d. Removal of the addition of the word "appears" in Section 5.3;
  - e. Removal of the term "immediate" in Section 24; and
  - f. Inclusion of reference to section 269TG and section 269TJ of *Customs Act 1901* (Cth) in the amendment to Section 29.1.
5. In addition, the ITBLC has also chosen to comment on some more general aspects of the Manual in the latter half of the submission in the hopes that this may be of assistance to the ADC.

# Comments on the Proposed Changes

## Amendments to Section 1 Applying For Anti-Dumping or Countervailing Notices

### General Comments

Given the assumption that policy is enshrined in the legislation, it is submitted that clarification needs to be given to the difference between the headings of "Context" and "Policy." That is, is there a difference between the two and, if so, how and to what extent does "policy" differ from the "legislation." Further, clarification should be given to, pursuant to the rule of law, whether the obligation is to comply with both domestic and international law, as opposed to a "policy."

With regard to the amended paragraph on page 6 of the Dumping and Subsidy Manual Consultation Draft (*The Consultation Draft*)<sup>1</sup>,

*The Commission generally advises applicants that care needs to be taken to ensure the description of the goods is sufficiently accurate. Once an investigation is initiated, it is generally not possible to alter the scope of the inquiry. Should an applicant decide to revise their goods description during the consideration period, this will be treated as new information and the 20 day consideration period will recommence.*

It is submitted that a statement should be included here which notes that the description of the goods in the application must be an accurate description of the goods actually being imported, not the range of goods that may be produced by the applicant. That description should be supported by evidence that demonstrates the accuracy of the description.

## Amendments to Section 2.3

### General Comments

With reference to the amended paragraph:

*Goods which are classed to the same tariff classification will often be physically like goods. However, in some instances the classification covers a very broad range of goods and other indicators of likeness are necessary to identify like goods. It may also be the case that like goods are classified by multiple tariff classifications.<sup>2</sup>*

Accordingly, tariff classification will not be determinative of whether any goods are "like goods" but may indicate that they are "like goods." It is proposed that this may be a starting point for the assessment proposed at page 12 of this submission: *Additional Assessment Rubric for Clarification of Imported Goods*.

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<sup>1</sup>Anti-Dumping Commission, *Dumping And Subsidy Manual Consultation Draft* (at February 2017) 6 (*The Consultation Draft*).

<sup>2</sup> *Ibid* 11.

## Amendments to Section 5.3

### Price “appears to be” influenced by a commercial or other relationship.

The addition of the word “appears” is questionable given the potential existence of evidence that the price has been influenced by a commercial or other relationship. Arguably, this evidence will show whether the price has or has not been influenced. Therefore, adding the words “appears to be” indicates that the Commission does not know whether it has been, but rather, only that it could have been. Whether further investigation is required to determine the issue one way or the other should be expressly stated.

All parties negotiating the sale and purchase of a good have, as a consequence, a commercial relationship and that relationship will affect price depending upon their negotiating strength. The kind of “commercial” relationships being referred to here are not set out. This needs to be clarified and relate to what influence, if any, such has on “price” given that all commercial relationships influence prices depending upon the bargaining strength of the parties, amongst other things e.g. market conditions, etc.).

## Amendment to Section 6.3

### General Comments

In making such a determination, the Minister must comply with the usual administrative law principles as outlined in the forward to this Manual. That is, it cannot simply be some arbitrary amount.

## Amendments to Section 17.3

### Determination of countervailable subsidy—non-cooperation by relevant entities

This should be used as a last resort according to World Trade Organisation (WTO) jurisprudence.<sup>3</sup>

In any event, a subsidy should not be taken to have been received by an un-cooperating exporter when it is clear that the entity would not and could not have received the subsidy. For example, if the subsidy is granted to entities in one region and the un-cooperative exporter is another region, then it is clear that that exporter would not have received that subsidy.

Further, it is current practice for applicants to provide a shopping list of alleged subsidies, for the ADC to determine whether or not they are countervailable, and then for the ADC to attribute all of the subsidies found to be countervailable to all un-cooperating exporters even when it is evident that they would not be eligible for certain subsidies. Further, it is typically the case that exporters who are investigated, which usually are the largest exporters, receive very few of the subsidies on the shopping list, which indicates that few of the subsidies are actually received by anyone. This does not seem to be taken into account with the consequence that subsidy rates for un-cooperative exporters are artificially inflated by the ADC.

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<sup>3</sup> See World Trade Organisation (WTO) Panel and Appellate Body decisions on Article 6.8 of the *Anti-Dumping Agreement* available at the [WTO website](#).

## Amendments to Section 24: Termination of Investigations

### General Comments

It is queried whether the ADC will “immediately terminate” an investigation into an exporter or country of export where one or more the conditions in *The Customs Act 1901*<sup>4</sup> apply. This does not seem to occur in practice. Termination should be immediate when the termination conditions are satisfied. An interested party who disagrees with the termination always has the right to appeal to the Anti-Dumping Review Panel.

### Amendment to Section 29.1

Reference to subsection 269TEB should also include reference to section 269TG and section 269TJ of *Customs Act 1901* (Cth). Interestingly, no primacy has been given to these provisions - that is, an offer of a price under taking can be made under of these provisions. This should be reflected in the Manual.

### Amendment to Section 34.1

If dumping/subsidisation has “continued,” as has the material injury that the anti-dumping measures were intended to prevent, then the measures have been ineffectual and indicate that the injury was caused by other factors unrelated to dumping or subsidisation. There is therefore no reason to continue ineffectual measures. Further, it indicates that not only have the antidumping measures not remedied the injury that dumping/subsidisation has purportedly caused but, more importantly, that any such injury has and is being caused by economic factors other than dumped/subsidised imports. There is no reason or justification to continue the measures in such circumstances.

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<sup>4</sup>*Customs Act 1901* (Cth) s269TDA.

# Additional Comments on the Dumping and Subsidy Manual

## General Comments

### Need for Overview

It is suggested that the Manual would benefit from the inclusion of an Overview, in addition to the Foreword, that sets out:

- price discrimination between domestic and export sales that is neither illegal, unlawful nor unfair - but a remedy - is provided where export prices are less than domestic prices in the country of exports in the form of dumping duties (i.e. tariffs on imports) to offset the injurious effects of dumping;
- similarly, what is a countervailable subsidy - that is, what are the requirements that must be met in order to qualify as a subsidy and when is it countervailable; and
- an outline of each of the Divisions in Part XVB of *The Customs Act 1901* (Cth).

It is submitted that the Manual should include a section that sets out the "standard of proof" in dumping and subsidy investigations. That is, the purpose of a dumping and/or subsidy investigation is to ascertain whether certain facts exist that warrants the imposition of antidumping measures. Those facts should be based on information obtained during the investigation that has been verified by recourse to objective evidence (e.g. source documents, etc.). Speculation, conjecture and unfounded assumptions, along with expressions of opinion unsupported by evidence, should form no part in an investigation, whether it is in accepting an application, issuing a preliminary affirmative determination, publishing a statement of essential facts, or forwarding a report to a Minister.

The only exception to this is when recourse may be had to the so-called "facts available" but, as WTO jurisprudence has held, this should be a last resort.

Findings should be based on facts supported by probative, objective evidence, and must not be based on, or include, expressions of opinion. Statements such as "the Commission considers that," "the Commission is of the view that," are therefore not suitable. The Manual should make it clear that expressions of opinion are not acceptable in dumping and subsidy investigations.

It is submitted that in all statements which refer to facts, for example *the decision is based on facts and not mere conjecture*,<sup>5</sup> it should be clearly stated that these facts must be supported by evidence.

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<sup>5</sup> Anti-Dumping Commission, *Dumping and Subsidy Manual Consultation Draft* (at February 2017) 8.

## Foreword

### Paragraph 3: with reference to the Administrative Decisions (Judicial Review) Act 1977

Dumping and subsidy investigations should be conducted in accordance with all applicable law, including not only the *Administrative Decisions (Judicial Review) Act 1977*, but also the provisions of Part XVB of the *Customs Tariff Act* and associated regulations, the WTO *Anti-Dumping Agreement*,<sup>6</sup> the WTO *SCM Agreement*,<sup>7</sup> and relevant domestic and international jurisprudence. Also, where there is a clear inconsistency or conflict between, for example, a provision of Australia's anti-dumping legislation and that of the *Anti-Dumping Agreement*, the latter should prevail to the extent of the inconsistency or conflict and Australia's anti-dumping regime be amended to provide compliance.

## Section 1 Applying For Anti-Dumping Or Countervailing Notices

### Section 1.3: Practice

Where it is noted that:

*In order to determine whether there is, or may be established, an Australian industry producing like goods, the Commission will identify the imported goods (commonly referred to as the goods under consideration or the goods the subject of the application). It will also establish whether the goods produced by Australian industry are like goods to the imported goods. The like goods analysis is detailed in the "Like Goods" section of this manual.*

It should be clear that what is being identified is the goods actually being imported, and that these need to be described with precision as that is what determines the scope of the investigation. This determines what is the domestic industry which is producing like goods and the like goods sold in the domestic export.

## Section 2: Like Goods

### General Comments:

The essential question here is what is or are the "characteristics" of a good. A good may have different physical and/or chemical properties but still may be used for the same purpose and compete with the import goods which are the subject of the investigation. Arguably such a good does not have "characteristics that closely resemble" the imported good under investigation. Hence, it is submitted that there is a need to set out in the Manual what constitutes a "characteristic" of a good and why.

### Section 2.2: Policy

It is submitted that the reference to the ADC's Policy in the first paragraph be removed. The ADC is under an international legal obligation to refer to international agreements, hence this is not a question of policy. It would also be beneficial to state that if there are

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<sup>6</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Anti-Dumping Agreement*).

<sup>7</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*SCM Agreement*).

"identical goods", then they are the only goods investigated for the purposes outlined above.

Further, it is submitted that the phrase *it is not necessary to further consider other factors such as channels of distribution, process of manufacturing etc.*<sup>8</sup> be reconsidered for clarity.

### **Section 2.3: Practice**

The opening paragraph is arguably unclear. Specifically, the sentence *in many applications differences may be identified between the locally produced goods and the imported goods* does not make sense. Presumably what is intended is that goods produced in Australia or that are sold in the country of export are not identical goods, in which case it needs to be determined whether they have characteristics that closely resemble the imported goods under consideration.

#### *Additional Assessment Rubric for Clarification of Imported Goods*

It is submitted that the following clarification for imported goods is inserted at page 11 of the Manual:

#### Characteristics of the imported goods under consideration

Assess:

- a) what are the physical characteristics of the imported goods under consideration;
- b) what are the functional characteristics; and
- c) etc.

#### Characteristics of the "like goods":

- a) what are the physical characteristics of the goods that may be "like goods";
- b) what are the functional characteristics of those goods; and
- c) etc.

A description of what are the characteristics of the alleged "like goods" that are different from the imported goods under consideration should also be included.

Having regard to the above assessment, the process would be to assess to what extent do the characteristics of the alleged "like goods" closely resemble the imported goods under consideration and to what extent are they different to determine whether the allegedly "like goods" closely resemble the imported goods under consideration.

#### *Commercial Likeness*

While "commercial likeness" may indicate that two goods have characteristics that closely resemble one another, it is not, of itself, a characteristic of the good. Rather, "commercial likeness" is a reflection of market behaviour, which, in turn, is a reflection of the

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<sup>8</sup> Anti-Dumping Commission, *Dumping and Subsidy Manual Consultation Draft* (at February 2017) 10.

characteristics of the good. The current discussion of “commercial likeness” as a characteristic is misleading.

#### *Functional Likeness*

This terminology raises the same concerns as above. While it is agreed that that this may indicate that two goods have characteristics that closely resemble on another, it is not necessarily an indicator of like goods. For example, a Ferrari and Mini Minor are both motor vehicles used to transport people from A to B (i.e. are functionally equivalent), but could not be described as like goods because of the significant physical, technological and other differences between them.

#### *Product Likeness*

How goods are produced is not a characteristic of a good. Different production processes can produce the same good and the same production processes can produce different goods.

This analysis also applies for *other considerations*.

### **Section 3: Investigation Period**

#### **General Comments**

Further clarity could be given to the distinction between the “investigation period” – i.e. usually a 12-month period used to assess whether dumping has been occurring, and the “injury period” being a longer period, usually 5 years, to determine the economic performance of the Australian industry and, consequently, to assess whether dumping is causing the claimed injury during the investigation period or that it is being caused by other factors.

#### **Section 3.1: Context**

With reference to the second paragraph:

*in determining whether material injury has been caused to an industry, the Minister may examine periods prior to the investigation period (subsection 269T(2AD))<sup>9</sup>*

It is suggested that the Minister should also consider periods after the investigation period, particularly if there are extensions granted to the publication of the SEF, which has been occurring in every investigation since the ADC was established.

It is further submitted that the reference to *costs of production and administrative, selling and general costs* should note that these are the costs borne by the Australian industry, exporters and/or importers.

#### **Section 3.2: Policy**

The term *benefit conferred*<sup>10</sup> could be further clarified. There is extensive WTO jurisprudence as to what is a “benefit” and when a “benefit is conferred”.

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<sup>9</sup> Ibid 13

## Section 4: Injury to an Australian Industry

### Section 4.2: Policy

#### *Related Party Transactions*

It is noted in the Manual that costs may also be unreliable where there are integrated production stages owned by related business divisions.<sup>11</sup> In addition, prices between related parties may be manipulated so that profits are made in one entity and not the other or not to the same extent for a variety of reasons, including tax. Prices paid between related parties requires an assessment of the nature of the transaction (e.g. is it between an exporter and importer or between two entities in the same jurisdiction, does it involve transfer pricing, how does it compare with prices to unrelated parties).

## Section 4: Injury to an Australian Industry

### Section 4.3: Practice

Arguably, none of the factors noted in this section are relevant to whether the Australian industry producing like goods has incurred "material injury." Rather, these are relevant to "causation". The two are separate and distinct concepts.

Injury to an industry is to be measured in terms of revenues and profits. Commercial entities are established to earn revenues and make profits. The materiality of any injury must be assessed against the extent by which revenues and profits have fallen, and what has caused that fall in revenues and profits is an issue of "causation." This distinction is reflected in the relevant Articles of the *Anti Dumping Agreement*.

Further, price suppression is not of itself injury but an event that may be occurring in the market that leads to injury. It is a "causation" factor -i.e. it can cause injury (e.g. reduced revenues and profits) but "of itself" it does not constitute injury.

#### *Price Comparisons*<sup>12</sup>

This should arguably be the first step in a "causation" analysis. That is, are imports undercutting the Australian industry's prices on like goods and, if so, to what extent and to what extent is such undercutting due to dumping and/or subsidisation.

Price undercutting, in turn, may cause price suppression and/or price depression, which, in turn, may cause a fall in revenues and profits. The formula for this is:

*Dumping/subsidisation = price undercutting = price depression and/or price suppression and/or loss or reduced sales = reduced revenues = reduced profits = injury*

The remaining question is whether that "injury" is material - i.e. is the reduced revenues/profits material when assessed against the Australian industry as a whole.

In addition, reference to "market share" is irrelevant as this assumes a static market and has no necessary relationship with revenues or profits. Similarly, reduced employment,

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid 17.

<sup>12</sup> Ibid 18.

reduced capacity utilisation, return on investment, etc., are all a function of reduced revenues and profits.

It is suggested that, at current, this section confuses "injury" with "causation" and results in a confused and less than transparent analysis.

Further, it is inappropriate for the ADC to consider an adjustment to import prices. The price at which an import enters the Australian market is the price at which it competes with the local industry, not some adjusted price. That is the point of competition. If the terms and conditions of sale are different, they are factors the purchaser will take into account in deciding which product to purchase and is a relevant consideration. However, imports do not compete with local products on some adjusted import price.

#### *All relevant economic factors and indices*

It is suggested that is also part of the "causation" analysis – i.e. to what extent have other economic factors "caused" the fall in revenues and profits.

#### *Related party transactions*

It is noted that *where an applicant's domestic transactions involve a mix of unrelated and related parties, the preferred method is to benchmark the Australian industry's related party transactions against sales made to unrelated arms length customers.*<sup>13</sup>

However, it is not noted who makes these sales to unrelated parties. If a benchmark price is to be used, then it must be established that the benchmark is properly comparable – i.e. similar production process, cost of raw materials, energy and labour, distribution channels, marketing, selling, general and administrative costs and other factors that affect prices. Otherwise it is not a like-for-like comparison. For example, a "benchmark" selected from costs or prices in one country cannot be used as a "benchmark" for other countries as prevailing economic and other conditions in the other countries are unlikely to the same as the "benchmark" country. Each countries prevailing economic conditions are unique to each country, hence the reason why countries have comparative advantages over other countries.

#### *Market segment analysis*

Currently, the Manual suggests that the ADC might focus injury consideration principally on a market sector where an applicant requests it.<sup>14</sup> It is suggested that be extended to situations where an importer or exporter requests it.

It is agreed that separate regard ought to be had to exports in an injury assessment.<sup>15</sup> Export performance in export markets should be excluded and that includes in the cost to make and sell analysis, etc., so that the injury assessment is confined solely to the Australian industry's domestic economic performance. For example, any economies of scale should be confined to Australian production.

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<sup>13</sup> Ibid 19.

<sup>14</sup> Ibid 20.

<sup>15</sup> Ibid 20.

### *Threat of material injury*

Article 3.7 of the *Anti Dumping Agreement* requires threat of material injury to be based on facts and not merely on allegation, conjecture or remote possibility” and must be “clearly foreseen and imminent”. This should be clearly reflected here.

Further, while it is noted that applicants need only to provide such information as is “reasonably available” to them with respect to the factors relevant to their claims, the threat of material from dumped and/or subsidised imports still must be based on positive evidence and not mere speculation or conjecture and must be reasonably foreseeable.

## **Section 5: Arms Length Transactions**

### **General Comments**

Arguably, this section on arms length transactions is irrelevant if export prices are equal to or higher than normal values. So long as exports are entering the Australian market at export prices that are equal to or higher than normal values, whether the transactions are at arms length would seem irrelevant as there is no dumping. Similarly, as regards subsidisation.

### **Section 5.1: Context**

Where reference is made to the opinion of the Minister, it should be noted that in forming such an opinion, the Minister must have some basis to form that opinion – i. e. evidence that there is a compensatory arrangement. Sales at a loss by an importer is, of itself, not evidence of the existence of a compensatory arrangement. No doubt, the verification process will identify the presence or absence of a compensatory arrangement.

### **Section 5.2 Policy**

It is suggested that the reference to “genuine bargaining”<sup>16</sup> should be clarified in order to outline what constitutes “genuine bargaining” and how it is relevant. The absence of “bargaining”, genuine or otherwise, does not mean that the transactions are not at arms length. For example, it is not unheard of for a supplier to have fixed prices that are not negotiable, but this does not render the transaction as not being at arms length. Further, what constitutes “genuine” bargaining is unclear, especially when the bargaining strengths of each party are not equal.

Further, when considering whether *outcomes are the result of real bargaining*,<sup>17</sup> presumably this requires an assessment of how the related parties arrived at these prices. There are a variety of ways that this can be achieved with the parties still operating at arms length.

### **Section 5.3: Practice**

*Reimbursement, compensation or other benefit in respect of the price*

Where it is stated that the *Commission may rely on evidence such as the contract between the parties, the title of the goods subject to the transaction and the role of third*

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<sup>16</sup> Page 25.

<sup>17</sup> Page 25.

*parties such as selling agents,*<sup>18</sup> there still must be evidence of a compensatory arrangement between the parties, whether set out in a legally binding contract or otherwise. An absence of evidence of a compensatory arrangement would suggest that the transactions could not be held to not be at arms length. That is, the presence of a compensatory arrangement must be established in order for the transaction not to be at arms length.

#### *Factors to determine whether a transaction is the result of real bargaining*

It is again suggested that the term “real bargaining” should be clarified. Again, a supplier with fixed prices does not involve any bargaining or negotiation between the parties. Negotiation of prices, quantities, discounts or rebates are determinative of an arms length transaction but not a necessary part of an arms length transaction. Rather, it is necessary to look at the transaction as a whole.

#### *Sales at a loss by the importer*

If an importer elects to sell at a loss for reasons of its own business in the Australian market, it does not follow that the exporter will compensate the importer for the loss.<sup>19</sup> The exporter may still be selling to the importer at a profit and whether the importer on-sells for a profit or loss is simply a matter for the importer. The ADC cannot unilaterally decide without any evidence that the exporter will compensate the importer for the loss. Loss leaders are a common commercial practice. Again, evidence of a compensatory arrangement is required for transactions to be held not to be at arms length.

The issue of whether there is a compensatory arrangement is whether there is “hidden dumping” through the sales at a loss and the compensatory arrangement. Therefore there is a need to establish the existence and terms compensatory arrangement with the exporter, as without such there is no “hidden dumping”.

## **Section 6: Determining an Export Price**

### **Section 6.1: Context**

The reference to the *beneficial owner* as the one who was entitled to all the benefits associated with ownership even though they may not be the legal owner of the goods<sup>20</sup> is unclear. The current wording suggests that legal title to property (e.g. goods) confers a bundle of legal and equitable rights, but does not specify what rights an entity has if it does not have legal title. If property is held on trust for another, the trustee would hold legal title to the property subject to the trust, and the beneficiary would have certain rights as beneficiary under the trust depending upon the terms of the trust. The trustee would be the legal owner of the property and the beneficiary would only have a beneficial interest in the property on the terms of the trust. Presumably, the trustee would be the owner of the property. This is not clearly dealt with in this sentence, nor how this relates to the definition of “owner” in the *Customs Act 1901* (Cth).

Further, an importer of goods may not need to be the owner of the goods. That is, the person causing the importation of the goods may not need to be the owner. It is necessary to look at the circumstances and arrangements in which the goods were imported into Australia.

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<sup>18</sup> Page 26.

<sup>19</sup> Ibid 27.

<sup>20</sup> Ibid 28.

Overall, it may not be beneficial to focus on who is the “owner” as opposed to who imported the goods into Australia, as this is what the legislation requires.

### Section 6.2: Policy

It is noted that the ADC considers that goods are exported when they leave the country of export.<sup>21</sup> Clarification is required for this requirement. There is case law when goods are exported.<sup>22</sup> The current wording suggested that if goods are loaded on a ship in Port A for export from that country and the ship visits Ports B and C in that country before departing that country, the goods are exported when the ship leaves the territorial waters of the country of export. This is not correct. Rather, it is when the goods are loaded over the ship’s rail.

Further, Article 2.4 of *Anti-Dumping Agreement* states that the comparison between export prices and normal values should “normally” be at the ex-works level. This is not addressed in this Section.

The distinction between exporter and owner is confused in this section. The exporter is the person who causes the goods to be exported to Australia, which need not be the owner. It is further suggested that the exporter does not necessarily need to have been the owner of the goods at one time.<sup>23</sup> The term “responsibility for the goods”<sup>24</sup> could also be further clarified. The phrase *when the goods are produced they may pass through several parties on their way to Australia, some of whom may be vendors in a third country*<sup>25</sup> should also be expanded to cover travel through the country of export.

With regards to the role of the facilitator,<sup>26</sup> that person may also be acting as principal and purchasing goods for a variety of sources from a variety of countries and arranging for their export to Australia. That person is the exporter, not the person who produced the goods as addressed in the following paragraphs and the last paragraph in Section 6.2.

Where reference is made to the roles of the vendor,<sup>27</sup> it is questionable who would be the exporter if not the person with these roles.

## **Section 9: Normal Value Based On Constructed Method**

### Section 9.3: Practice

*Costs; Reasonably reflect competitive market costs; reasonably reflect selling, general and administrative costs*

The definition of “market costs” needs further clarification, including whether there a “market” for “costs” and what renders it a “competitive” market. Further, it is questionable why should these costs reflect so-called “competitive market costs” as opposed to costs

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<sup>21</sup> Ibid 28.

<sup>22</sup> See *Henty v Bainbridge-Hawker (1963) 36 ALJR 354* & *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority (1996) 71 FCR 80* and cases cited therein.

<sup>23</sup> Anti-Dumping Commission, *Dumping And Subsidy Manual Consultation Draft* (at February 2017) 29.

<sup>24</sup> Ibid 29.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid (‘A vendor may arrange the sale; set prices; cover warranty; prepare Customs and other paperwork; make shipping arrangements; pay the freight; but still not be the exporter for determining normal value under these guidelines’)

actually incurred and recorded in the relevant entity's records and are consistent with generally accepted accounting principles ('GAAP').<sup>28</sup>

## Section 13: Normal Value Based On All Relevant Information

### Section 13.1 Context

It is suggested that it be noted that WTO jurisprudence has held that the disregard of unreliable information is an approach of last resort.<sup>29</sup>

## Section 14: Due Allowance

### General Comments

Adjustments to domestic prices should be based on evidence that such domestic prices have been affected by one factor or another, and that unless the adjustment is made a fair comparison between export price and normal value would not be able to be made. In other words, it is evidence-driven to procure a like-for-like comparison.

Speculation that certain costs should have been incurred or are usually incurred in domestic sales or in export sales do not justify an adjustment absent evidence those costs actually have been incurred. For example, if certain costs, such as carrying costs, are not actually incurred in the export transaction but are in the domestic transaction, then an adjustment would be required. However, if no such cost is incurred in either transaction, then no adjustment would be required.

## Section 15: Identifying a Subsidy – Whether a Financial Contribution Exists

### Section 15.1: Context

The interpretation of Article 1 of the *SCM Agreement* is incorrect. There are three elements in the WTO Agreement on Subsidies and Countervailing measures. They are (i) whether a subsidy that satisfies the 'subsidies' in Article 1.1(a)(1) of the *Anti-Dumping Agreement*; (ii) whether those subsidies confer a "benefit" as provided in Article 1.1(a)(2) and Article 14 of the *Anti-Dumping Agreement*; and (iii) whether the subsidy is "specific" as set out in Article 2.2 of the *Anti-Dumping Agreement*. These are reflected in provisions in Part XV B of the *Customs Act 1901*.

The Manual requires amendment to reflect this. It is only dealt with in passing and not comprehensively at the end of this section. It should be given prominence at the outset.

### Section 15.3: Practice

#### *Public Body*<sup>30</sup>

It is queried whether the process should be to identify the subsidy or subsidies in question, whether they confer a benefit and whether they are specific before

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<sup>28</sup> See Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WTO Doc WT/DS473/AB/R/AB-2008-10 (6 October 2008)

<sup>29</sup> Anti-Dumping Commission, *Dumping And Subsidy Manual Consultation Draft* (at February 2017) 59.

<sup>30</sup> *Ibid* 79.

consideration of who provides the subsidy. If one or more of these conditions are not satisfied, then whether a particular entity is a government or public body is irrelevant.

Further, consideration of the dictionary definition of public body would include all kinds of organisations such as charities, political bodies and other similar organisations for example. A public body is a body that exercises government functions or authority and that is simply a question of fact. Consideration of whether the entity pursues public objectives also could apply to entities that are in fact private companies, private individuals, and so on. Most entities will seek to give effect to one or more government policies but that does not make them "public bodies" as any company listed on the ASX would attest.

The reference to the WTO *Appellate Body in United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China - DS379*<sup>31</sup> is incorrect. The Appellate Body is clear on the criteria for what constitutes a public body, whereas the test set out in Section 15.3 is vague and ambiguous and does not reflect the Appellate Body's criteria. In the following two cases it was noted that there must be evidence that supports the fact that the entity in question is exercising governmental authority.

While the ADC may not refer to the word "authority" in the narrow sense - meaning a "public body" has to be an agent of the government<sup>32</sup> - it nevertheless must be a body that is vested with "government authority". The word "government" determines what "authority" must have been vested and by whom. No other form of authority qualifies.

#### *Objectives/Functions*

An entity owned by a government may still operate in its own interests and not necessarily in the interest of the government owner,<sup>33</sup> just as public companies listed on the ASX may operate in the company's interests, which may not be in the interests of all or some of its shareholders. Simply because an entity is owned, in whole or in part by a government or a public body, does not mean that it is not acting independently. That would constitute mere conjecture and speculation based on unfounded assumptions. Evidence would need to be adduced that it was not acting independently but under the direction of the government or public body and to what extent.

Further, while private bodies may carry out public policy objectives but that does not make them public bodies, as clearly established by annual reports of ASX listed companies. For example, locating industries in regional areas of Australia or the employment of indigenous Australians clearly is the carrying out of government policies. There are other examples of other private bodies carrying out government policies and for a variety of reasons including pursuant to regulatory requirements.

Where reference is made to entrustment,<sup>34</sup> it is queried whether the current definition could be construed to include private companies running prisons, hospitals, garbage collection, etc., are "public bodies."

#### *Foregoing or non-collection of revenue*

Consideration of deductions from taxable revenue may imply that all Australians claiming deductions from their income tax are receiving subsidies. Further clarification around the

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<sup>31</sup> Ibid 79.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 80.

<sup>34</sup> Ibid 81.

term “benchmark”<sup>35</sup> and its value should be included, as well as clarification of the term “situation”<sup>36</sup> – what is it, its purpose, and specifically whether there is any likelihood that two taxpayers would be in identical situations.

Consideration of refunds of *customs duties paid on imports of raw materials when an entity exports finished products incorporating those materials and the remission is in excess of those duties*<sup>37</sup> is arguably not a remission or refund of duties paid but a grant because it exceeds the duty paid.

The ADC needs to define what constitutes a “good” or a “service”. For example, making available or supplying land by a government is not the supply of a “good” but of “real property”. This distinction appears not to be well understood as well as what constitutes a “sale” in legal terms. The example of the supply by a government of energy<sup>38</sup> does not distinguish whether this a supply of a good or service or provision of infrastructure,

## Section 16: Identifying A Subsidy - Whether a Benefit is Conferred

### Section 16.1: Context

The Consultation Draft notes that

*This includes the situation where a producer would have to pay more for the ‘inputs’ if there had been no financial contribution from a government to an upstream raw materials supplier.*<sup>39</sup>

It then needs to be shown that this has flown through to the end product and to what extent. Unless this is determined, it cannot be determined what amount of countervailable duty is necessary to offset the subsidy in the end product. The fact that the end product may be at a lower price than might otherwise have been the case does not mean that the subsidy has flown through in full or at all. This needs to be calculated.

### Section 16.2: Policy

If the subsidy is in relation to an upstream input to manufacture, it is questioned whether this requires a determination based on evidence that the supplier of the input to manufacture has passed on the subsidy, in whole or in part, especially if the parties are unrelated. Further, even if the “subsidy” is passed on, “in whole or in part” to the producer of the end-product, it is unclear whether this is a countervailable subsidy in relation to the end-product and, if so, how the extent to which the subsidy has been passed on and flows through to the end-product is determined. This is necessary to ensure that any countervailing duties are necessary only to offset the effects of the presence of the subsidy in the end-product.

The Consultation Draft notes that:

*In calculating the benefit to the recipient, regard will be had to all of the case circumstances, and the Commission will ensure that the benefit calculations are fully outlined in its reports.*<sup>40</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 82.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 83.

<sup>40</sup> Ibid.

It is suggested that clarification of the term *outlined* and examples of these calculations should be included in the Manual.

#### *Allocation to the goods*

It is questioned whether any such allocation would depend upon the nature of the subsidy and how the entity allocates the subsidy within its operations so long as such allocation complies with GAAP. In other words, any allocation should be the recipient's allocation and not some artificial allocation. This should be clarified.

#### *Amortization period*

It should be noted that the total value of the subsidy will be spread over a period which reflects the normal depreciation of the assets in the industry concerned<sup>41</sup> in accordance with GAAP of the country in question.

#### *Addition of interest*

Interest free loans are commercially available. It is queried whether the current interpretation implies that an interest free loan from a government will be considered a subsidy, while one from a commercial entity will not.

#### *Provision of goods and services by the government*

It should be noted that the amount of subsidy where there has been a provision of goods or services by the government is the difference between the price paid by enterprises for the government provided goods or service, and adequate remuneration for the product or service in relation to prevailing market conditions<sup>42</sup> in the country of provision or purchase - see Article 14(d) of the *SCM Agreement*.

#### *Comparison with Private Suppliers*

It is questioned why the amount of subsidy is the difference between the price charged by the government body and the lowest price available from one of the private operators prices. It may be that the government entity is more efficient or has greater economies of scale or due to other factors. It cannot simply be assumed to be a subsidy because of price differences. It is necessary to investigate and obtain evidence on the reason for the difference.

The term company, and what measure is used to determine whether a company is comparable or not, should be clarified.

#### *Government monopoly suppliers*

The current terminology may imply that if a government engages in price discrimination, it is a subsidy, but if a company engages in price discrimination, it is not a subsidy and constitutes "fair" trade, at least in Australia where the price discrimination provisions were removed from the then *Trade Practices Act 1974*.

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<sup>41</sup> Ibid 86.

<sup>42</sup> Ibid 96.

## *Purchase of goods by government*

Governments typically pay higher prices for goods and services because suppliers of the goods and services can extract from governments higher prices. What constitutes “adequate remuneration” and for whom should be further clarified.

### **Section 17: Specificity**

#### **Section 17.1: Context**

Article 2 of the *SCM Agreement* does not refer to “sectors of the economy” but to an “industry or group of enterprises or industries”. Further, “certain enterprises” has not been defined in the Manual.

#### **Section 17.2: Policy**

It is questioned why “prohibited subsidies” are being considered in this Manual when Part XVB of the *Customs Act 1901* (Cth) deals only with countervailable subsidies. It is suggested that a statement be included that notes that the Manual does address prohibited subsidies, as set out in Part II of the *SCM Agreement*, given Part XVB of the *Customs Act 1901* (Cth) deals only with countervailable subsidies.

### **Section 18: Upstream Subsidies**

#### **Section 18.1: Context**

It is questioned whether such subsidies are countervailable in relation to the goods under consideration and, if so, why is this the case given that they may not be passed down to the producer/exporter of the goods under consideration either in whole or in part.

Further, as indicated earlier above, such *pass-through*<sup>43</sup> needs to be established by evidence that it has actually been passed through into the price of the end-product and showing the extent to which it has been passed through. Without establishing this, any countervailable subsidy is likely not to equal the amount of subsidisation contained in the price of the end product, which would be contrary to the provisions of the *SCM Agreement*.

The calculation for whether price of the input product reflects the benefit of the subsidy, in whole or in part<sup>44</sup> should be expressly stated. The upstream producer may simply elect to sell the input to manufacture at a particular price. It does not necessarily follow that the subsidy received is being passed on, in whole or in part, in the price, particularly if the transaction is between unrelated parties.

#### **Section 18.2: Policy**

The Consultation Draft notes that the ADC will compare the purchase price of the subsidised input to the following benchmark prices.<sup>45</sup> This is dangerous. It assumes that all producers of the input to manufacture operate under similar or the same conditions, incur the same costs, employ the same technologies, and so on. If they do not, price variations could be due to causes other than subsidies and the so-called “benchmark” is

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<sup>43</sup> Ibid 111.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

not a benchmark at all. For example, using a Holden Commodore as a benchmark for equivalent models produced by Ford, Toyota or another manufacturer is patently absurd, even though some of their upstream suppliers receive various subsidies.

It is suggested that the considered differences that may affect the benchmark price comparison with the subsidised input price<sup>46</sup> include differences in the costs to make and sell between the goods under consideration and the so-called "benchmark" price. Even commodity prices vary between countries and between commodity and futures exchanges on which they are traded. Benchmarks are inherently unreliable.

### **Section 18.3: Practice**

The term "fair market value" needs further clarification. This is unclear if all suppliers of the input to manufacture receive the subsidy in question and sell to unrelated third parties.

*How far are upstream subsidies examined?*

The issue of pass through of subsidies was thoroughly examined some time ago in a case before Australian Customs involving canned tomatoes exported from Italy, where the subsidy was an "upstream" subsidy, namely, subsidisation of tomato farmers and external expert consultants may have been used to determine whether there was any pass through and, if so, the extent of the pass through.

## **Section 21: Causation of Injury**

### **Section 21.2: Policy**

The first sentence is arguably unnecessary. One would expect the ADC to examine all available evidence and not selectively examine evidence in breach of administrative law requirements.

Once again, it is suggested that "cause" and "effect" has been confused in this section - i.e. as demonstrated earlier above:

*Dumping/subsidisation = price undercutting = price depression and/or price suppression and/or loss or reduced sales = reduced revenues = reduced profits = injury*

In response to the weight given to various casual factors,<sup>47</sup> the effect that dumping/subsidisation is having in terms of price undercutting and then price suppression/depression and reduced sales and ultimately reduced revenues and profits should be self-evident from the evidence and not involve a judgement call (e.g. speculation) on the part of the Commission.

The term "indicator of material injury" should be distinguished from "material injury." The Commission should arguably be investigating whether as a question of fact based on evidence, that the Australian industry has incurred "material injury" (i.e. reduced revenues and profits) as opposed to "indicators of material injury."

Also, the Commission should be investigating other economic factors that may be causing injury both before and after the investigation period, particularly when the Commission is

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<sup>46</sup> Ibid 112.

<sup>47</sup> Ibid 125.

granted extensions of time to publish Statements of Essential Facts and/or to report to the Minister. Analysis and findings need to be current.

### **Section 21.3: Practice**

#### *Causation methodology*

This methodology provides no causal link between the alleged dumping and/or subsidisation and the material injury. It is speculative in nature. It lacks the causal links between dumping/subsidisation and material injury claimed by the applicant as opposed to the methodology outlined earlier above.

The degree by which revenues have fallen or profits have fallen between relevant periods may be useful in assessing the "materiality" of the injury as opposed to what caused it.

It is suggested that evidence needs to be provided to show a causal connection where there is a coincidence in timing between trends.<sup>48</sup>

Alternate analytical methods are arguably not required if the methodology previously advocated is adopted. A "but for" test is unreliable as it is based on unfounded assumptions. Further, the test for the "but for" analytical method<sup>49</sup> lacks clarity on how this is assessed and what standard of likelihood is required based on what evidence. The *Anti-Dumping Agreement* requires findings of injury to be based on "positive evidence" not on whether something is likely to occur. The example provided is not "positive evidence" but mere speculation. A counterfactual analysis does not provide evidence that the injury was caused by dumping/subsidisation but, rather, it is an economic methodology as what could be expected to be occurring or to occur.

See: <https://plato.stanford.edu/entries/causation-counterfactual/>

### **Section 26: Statement of Essential Facts**

#### **General Comments**

The Statement should set out the Commission's preliminary findings of "fact" and, preferably, the evidence on which those facts are based, subject to confidentiality obligations, and not expressions of opinion, speculation, conjecture, etc., on the part of the Commission (e.g. the Commission is of the view that..." or the "Commission considers that ...). These are expressions of opinion and not statements of fact.

### **Section 29: Undertakings**

#### **General Comments:**

This section causes unnecessary duplication given that price undertakings may be offered under s 269TG, s 269TJ and s 269TEB of the *Customs Act 1901* (cth).

It is unclear how a situation where an exporter may be willing to offer a price undertaking but may not know what the relevant export price will be until the Commission has reported to the Minister and the Minister has accepted the recommendations in that report of the Commission, including on export prices, dumping, and non-injurious prices. The processes for price undertakings in s 269TEB of the *Customs Act 1901* (cth) should be

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<sup>48</sup> Ibid 127.

<sup>49</sup> Ibid 128.

followed and be completed before the Commission makes any recommendation to the Minister on whether the price undertaking should be accepted and the exporter should be made aware of the Commission's proposed recommendation so that the exporter may assist the Minister in making a decision whether or not accept the offer of a price undertaking.

## Section 32: Anti-Circumvention

### General Comments:

These provisions are inconsistent with the *Anti Dumping Agreement* and *SCM Agreement*. A dumping or subsidy investigation is required before antidumping measures may be imposed.

### Section 32.2: Policy

There is a lack of clarity around how antidumping measures imposed and on what parts. Further, there is no discussion on how the ADC knows which parts are used for what purpose given that they may be used for multiple purposes. The parts would have passed through customs and duty paid, then the imposition of a tax on those parts or the end product would be in breach of the national treatment requirement in the *General Agreement on Tariffs and Trade*.<sup>50</sup>

It is questioned why a circumvention activity includes situations where the good to which the antidumping measure applies is assembled in another country from parts from the country to which the antidumping measures apply plus parts sourced from a country or countries that are not subject to the antidumping measures apply regardless of the value of those other parts and the value of the assembly operation.

Export of goods to third parties is arguably already covered in transit provisions in Part XVB.<sup>51</sup>

It is questioned why not passing on the full amount of antidumping measures is considered a circumvention activity.<sup>52</sup> Not passing on the full amount of other customs duties imposed on imports is neither an offence nor proscribed in any other way under the *Customs Act 1901* (Cth), but rather a commercial decision by the importer. Simply, a commercial decision by the importer as to what amount of the antidumping measures it passes on, just as it is for an Australian industry to sell its goods, or some of them, at a loss or engage in price discrimination, constitutes "fair" trade under Australia's legal system.

The relevance of the considerations set out in Reg 48 of the *Customs (International Obligations) Regulations 2015* (Cth) is not fully explored. Whether there has been a "slight modification" of a good would be or should be determined solely on the basis of the extent to which the characteristics of the good have changed.

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<sup>50</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*').

<sup>51</sup> *Customs Act 1901* (Cth) Part XVB.

<sup>52</sup> Anti-Dumping Commission, *Dumping and Subsidy Manual Consultation Draft* (at February 2017) 168.

## **Section 37: Monitoring of Measures**

### **Section 37.1: Context**

Australian Border Protection has sought to enforce antidumping measures through criminal prosecutions or claims for short paid duty but without the necessary evidence to support the action taken.

Presumably, Australian Border Protection has sought advice from the Commonwealth DPP before initiating prosecutions, including whether sufficient evidence exists to support the prosecution. However, in a recent case evidence adduced by Australian Border Protection was held inadmissible in the District Court and upheld in the Court of Appeal, while certain irregularities were noted by the courts in the Commonwealth's handling of evidence it had obtained through search warrants. This raises the question of whether the processes undertaken by the Commonwealth are sufficiently robust before initiating a prosecution.