Australian Government
Anti-Dumping Commission

CUSTOMS ACT 1901 - PART XVB

TERMINATION OF INVESTIGATION NO. TER 179B

ALLEGED DUMPING OF QUICKLIME EXPORTED FROM THAILAND

7 NOVEMBER 2014

PUBLIC RECORD

PUBLIC RECORD

CONTENTS

PUBLIC RECORD

ABBREVIATIONS

Abbreviation / short form	Description
$ or AUD	Australian dollars
ACBPS	Australian Customs and Border Protection Service
the Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
ADA	The *World Trade Organization Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (also referred to as the Anti-Dumping Agreement)
ADRP	Anti-Dumping Review Panel
ADRP Report	ADRP Report entitled *Quicklime exported from the Kingdom of Thailand – Review of Decisions to terminate an investigation to publish a dumping duty notice* published on 8 August 2013
Chememan Thailand	Chememan Co. Ltd
Cockburn Cement	Cockburn Cement Limited
the Commission	The Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
the Minister	Minister for Industry
NIP	Non-Injurious Price
the Parliamentary Secretary	the Parliamentary Secretary to the Minister for Industry
SEF	Statement of Essential Facts
SEF 179	SEF for Investigation No. 179 published on 16 February 2012
SEF 179A	The SEF for the first resumed investigation published on 19 March 2013
SEF 179B	This SEF for the second resumed investigation published on 7 October 2014
TER 179A	Termination Report 179A, in relation to the second termination of the investigation due to a finding of negligible injury caused by dumping published on 2 May 2013
TMRO	Trade Measures Review Officer
TMRO Report	TMRO's Report entitled *Review of a termination decision – Application of Cockburn Cement Pty Ltd* published on 25 June 2012
WTO	The World Trade Organization

1 SUMMARY AND FINDINGS

1.1 Introduction

This resumed investigation (Investigation No. 179B) is in response to the Anti-Dumping Review Panel's (ADRP's) decision to revoke the then delegate of the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service's (the ACBPS)[1] decision to terminate the investigation[2] into the alleged dumping of quicklime exported to Australia from Thailand.

A chronology of key developments that preceded the ADRP's decision, are as follows:

- on 31 October 2011, an investigation into the alleged dumping of quicklime exported from Thailand to Australia was initiated. This followed an application seeking the publication of a dumping duty notice lodged by Cockburn Cement Limited (Cockburn Cement), an Australian manufacturer of quicklime;
- on 3 April 2012, the CEO decided to terminate the investigation due to the finding that dumped exports of quicklime had caused negligible injury to the Australian industry[3] (herein referred to as 'the CEO's first termination decision') – *Termination Report No. 179* (TER 179) dated April 2012 refers[4];
- Cockburn Cement sought a review of the termination decision by the former Trade Measures Review Officer (TMRO)[5];
- on 25 June 2012, the TMRO subsequently revoked the CEO's first termination decision;
- the investigation was resumed, and on 2 May 2013, the CEO[6] again decided to terminate the investigation due to the finding that dumped exports of quicklime had caused negligible injury to the Australian industry[7] (herein referred to as 'the CEO's second termination decision') – *Termination Report No. 179A* (TER 179A) dated May 2013 refers;
- Cockburn Cement sought a review of the CEO's second termination decision by the TMRO;
- on 8 August 2013, the ADRP (which succeeded the TMRO in June 2013) revoked the CEO's second termination decision; and
- as a result, the Commissioner of the Anti-Dumping Commission (the Commissioner) issued *Statement of Essential Facts (SEF) No. 179B* (SEF 179B) on 7 October 2014. SEF 179B also found that during the

[1] All future references to the 'CEO' in this Report also refer to the 'delegate of the CEO'. Also, while not explicitly stated, all references in this Report to the 'CEO' refer to the 'then CEO'.

[2] Investigation No. 179A refers.

[3] In accordance with subsection 269TDA(13) of the *Customs Act 1901* (the Act). References in this Report to 'section' and 'subsection' are used interchangeably.

[4] Termination Reports are accessible on the Anti-Dumping Commission's (the Commission's) website at www.adcommission.gov.au.

[5] While not explicitly stated, all future references to the 'TMRO' in this Report also refer to the 'former TMRO'.

[6] A different delegate of the CEO made the second termination decision (as opposed to the delegate of the CEO that made the first termination decision).

[7] In accordance with subsection 269TDA(13) of the Act.

investigation period dumped exports of quicklime from Thailand caused negligible injury to the Australian industry.

This *Termination Report No.179B* (TER 179B) sets out the facts on which the Commissioner based his decision to terminate the investigation.

1.2 Findings

The Commissioner has reconsidered the key findings made in SEF 179B[8], and taken into account submissions received in response to SEF 179B. As a result, the Commissioner has reconfirmed the key findings for this resumed investigation, as detailed below[9].

The Commissioner has found that it is not open to him to amend the investigation period of 1 July 2010 to 30 June 2011 (herein referred to as the investigation period)[10].

The Commissioner has found that during the investigation period:

- quicklime was exported to Australia from Thailand at dumped prices;
- the volume of dumped goods was not negligible;
- exports of dumped quicklime caused negligible injury to the Australian industry; and
- there is no threat of material injury being caused to the Australian industry due to dumped goods.

Subsection 269TDA(13) of the Act prescribes that if the Commissioner is satisfied that:

- an application has been made for a dumping duty notice; and
- in relation to goods exported to Australia[11], the injury, if any, to the Australian industry that has been, or may be, caused by those exports is negligible;

he must terminate the investigation.

Based on the findings of this investigation, on 7 November 2014 the Commissioner decided to terminate the investigation in relation to quicklime exported to Australia from Thailand[12].

A notice regarding the termination decision was published in *The Australian* newspaper on 7 November 2014 (**Non-Confidential Attachment 1** refers). Anti-Dumping Notice (ADN) No. 2014/124 also relates to the termination of the investigation.

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8 SEFs are accessible on the Commission's website at www.adcommission.gov.au.

9 These findings are paraphrased.

10 The investigation period is discussed in more detail at Chapter 3 of this Report.

11 The subject of the application for a dumping duty notice.

12 In accordance with subsection 269TDA(13) of the Act.

1.3 Application of law to facts

1.3.1 Authority to make decision

Division 2 of Part XVB of the Act sets out, among other matters, the procedures to be followed and the matters to be considered by the Commissioner in conducting investigations in relation to the goods covered by an application for anti-dumping measures.

1.3.2 Termination – legislative basis

Section 269TDA of the Act prescribes the grounds when the Commissioner must terminate a dumping investigation.

Subsection 269TDA(13) of the Act provides that:

> *"Commissioner must terminate dumping investigation if export causes negligible injury etc.*
>
> *(13) If:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the Commissioner is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;*
>
> *the Commissioner must terminate the investigation so far as it relates to that country".*

1.4 Anti-Dumping Review Panel

On 27 May 2013, Cockburn Cement sought a review by the TMRO of the CEO's second termination decision made in relation to the quicklime investigation. On 10 June 2013, the ADRP replaced the TMRO, as the body that conducts merits review of certain anti-dumping decisions made by the Minister responsible for anti-dumping matters and the Commissioner.

Following consideration of Cockburn Cement's application the ADRP revoked the CEO's second termination decision. The ADRP's decision was published in *The Australian* newspaper on 8 August 2013. The ADRP's Report[13] setting out its

[13] *Quicklime exported from the Kingdom of Thailand – Review of Decisions to terminate an investigation to publish a dumping duty notice, dated 8 August 2013* (ADRP's Report) refers.

reasons for the decision is available on the ADRP's website at www.adreviewpanel.gov.au.

The ADRP's findings are discussed in detail at Section 3.1.2 of SEF 179B.

1.5 Statement of Essential Facts No. 179B

On 7 October 2014, the Commissioner issued a SEF (SEF 179B) to resume the investigation.

The Commission's key findings for this resumed investigation (as detailed in SEF 179B) reflect several of the findings specified in TER 179A, which relied on the findings specified in SEF 179A and SEF 179 (Section 1.5.1 below refers). For this reason:

- TER 179A;
- *Statement of Essential Facts No. 179A* (SEF 179A) dated March 2013; and
- *Statement of Essential Facts No. 179* (SEF 179) dated February 2012;

should be read in conjunction with SEF 179B.

In addition to reconfirming several of the key findings made for TER 179A, the Commission also made new findings and conclusions in SEF 179B (Section below 1.5.2 refers).

1.5.1 Reconfirmed findings - from TER 179A

In SEF 179B, the Commission reconfirmed the following findings specified in TER 179A, as shown in Table 1 below.

Issue	SEF 179B finding[14]
Investigation period	The Commission found that the investigation period established at the outset of the investigation (and advised in a public notice dated 31 October 2011) is 1 July 2010 to 30 June 2011, and that this period cannot be altered or extended, once set and published in the public notice (issued under subsection 269TC(4) of the Act). The Commission found that any injury experienced prior to the investigation period cannot be attributed to dumped exports.
Australian industry	The Commission found that there is an industry producing like goods, comprising twelve Australian quicklime producers. Cockburn Cement was the only producer located in Western Australia (WA).
Goods and like goods	The Commission found that locally produced quicklime is like to the goods the under consideration (GUC).

[14] These were preliminary findings or views of the Commission as detailed in SEF 179B. These were not final findings for the investigation at that stage.

Issue	SEF 179B finding[15]
Dumping	The Commission found that during the investigation period: • quicklime exported to Australia from Thailand by Chememan Co. Ltd (Chememan Thailand), the sole Thai exporter of the goods, was dumped at a margin of 48%; • the dumping margin is not negligible; and • the volume of dumped goods from Thailand was not negligible.
Non-Injurious Price (NIP)	The Commission found that it is appropriate to derive a NIP by setting the Unsuppressed Selling Price for quicklime sold into: • the non-alumina sector, as equal to Cockburn Cement's cost to make and sell for quicklime, plus a reasonable amount for profit; and. • the alumina sector, as equal to Cockburn Cement's weighted average selling price during a period unaffected by dumping (in 1 July 2010 to 30 June 2011). The NIPs for respective sectors were adjusted to reflect 100% available lime content of the goods in order to ensure an appropriate point of comparison between quicklime with different concentrations of calcium oxide.
Causation	The Commission found that during the investigation period the dumped exports caused negligible injury to the Australian industry.
Threat of material injury	The Commission found that material injury was not threatened to the Australian industry due to the exportation of the goods into the Australian market. The Commission did not consider that there is a threat that future injury may be caused by dumped goods.

Table 1: SEF 179B – reconfirmed TER 179A findings

1.5.2 New findings - resumed investigation (No. 179B)

In SEF 179B, the Commission made new findings following the reconsideration of information and evidence obtained and verified (as relevant) during the investigation, as shown in Table 2 below.

[15] These were preliminary findings or views of the Commission as detailed in SEF 179B. These were not final findings for the investigation at that stage.

Issue	SEF 179B finding[16]
Australian market	The Commission found that the size of the Australian market for quicklime was approximately 2.4 million tonnes in 2010-11.
Economic condition of the Australian industry	The Commission found that the Australian industry (as a whole) experienced injury in respect of its quicklime sales, in the form of: • reduced sales revenue; • price depression; and • reduced profits[17]. While several of these findings reflected the findings made in TER 179A, the Commission reassessed the quantum of the injury experienced.

Table 2: SEF 179B – new findings

1.5.3 Submissions in response to SEF 179B

Interested parties were invited to make submissions in response to SEF 179B by 27 October 2014. The Commission received two submissions (both dated 27 October 2014). One submission was received from *Moulis Legal* on behalf of Chememan Thailand (a Thai exporter) (**Non-Confidential Attachment 2** refers). One submission was received from *Roger Simpson & Associates* on behalf of Cockburn Cement (Australian industry) (**Non-Confidential Attachment 3** refers). These submissions are available on the Electronic Public Record for the investigation at www.adcommission.gov.au.

1.6 Approach to TER 179B

Based on the Commission's consideration of submissions received in response to SEF 179B, the Commission has not changed any of its findings that were made in SEF 179B (for the purposes of TER 179B) for the investigation.

The Commission's findings and conclusions are based on available information obtained and verified during the entire course of the investigation, from the initiation date (31 October 2011) to the date of the Commissioner's termination decision (7 November 2014 – the third termination decision)[18].

As the Commissioner has decided to terminate the investigation based on a finding of negligible injury that was caused by dumped Thai exports of quicklime, this Report does not reiterate the key findings in SEF 179B, in relation to:

[16] These were preliminary findings or views of the Commission as detailed in SEF 179B. These were not final findings for the investigation at that stage.

[17] Reduced profitability related to Cockburn Cement only. Due to the absence of cooperation from other Australian industry members with the investigation, profitability effects for the entire Australian industry could not be assessed. SEF 179B also found other injury factors for Cockburn Cement only in specific market segments.

[18] This includes Investigation No. 179B (current investigation), Investigation No. 179 (initial investigation) and Investigation No. 179A (first resumed investigation).

- goods and like goods;
- the Australian industry;
- dumping;
- NIP;
- Australian market;
- threat of material injury; and
- compliance with World Trade Organization (WTO) obligations.

The Commission's findings in relation to these issues as detailed in SEF 179B have not changed.

The two submissions that were received in response to SEF 179B only addressed the following findings / issues:

- amending the investigation period (Chapter 3 of this report refers);
- the injury experienced by the Australian industry (including the timing of this injury), and attributing dumped goods to this injury (Chapter 3 of this report refers); and
- the Commission's approach to assessing the economic condition of the Australian industry (Chapter 4 of this report refers).

These submissions did not address any other findings in SEF 179B.

The Commission considers it appropriate that TER 179B only covers SEF 179B findings that were the subject of submissions made by Cockburn Cement and Chememan Thailand in response to SEF 179B. These issues are relevant to the finding that exports of dumped quicklime from Thailand have caused negligible injury to the Australian quicklime industry (during the investigation period). The Commission's findings in relation to these issues as detailed in SEF 179B have not changed.

Given the long and complex history of this investigation, to provide sufficient background to key issues in this Report, sections of SEF 179B have been reproduced.

2 BACKGROUND

2.1 Application

On 6 October 2011, Cockburn Cement lodged an application requesting that the then Minister for Home Affairs (the Minister[19]) publish a dumping duty notice in respect of quicklime exported to Australia from Thailand.

On 19 October 2011, Cockburn Cement provided further information and data in support of its application. As a result, the 20 day period for considering the application recommenced.

2.2 Initiation of investigation

Following consideration of the application, the CEO decided not to reject the application, and the ACBPS[20] initiated an investigation on 31 October 2011. Public notification of initiation of the investigation was made in *The Australian* newspaper on 31 October 2011.

Australian Customs Dumping Notice (ACDN) No. 2011/53 provides further details regarding the initiation of the investigation, and is available on the Commission's website at www.adcommission.gov.au.

In respect of the investigation, the public notice[21] (in relation to the initiation of the investigation) advised that:

- the investigation period[22] for the purpose of assessing dumping was 1 July 2010 to 30 June 2011; and
- the injury analysis period for the purpose of determining whether material injury has been caused to the Australian industry was from 1 January 2008.

The investigation period is discussed in detail at Chapter 3 of this report.

2.3 Goods under consideration

The GUC is quicklime. The applicant provided further details about the GUC as follows:

> *"Quicklime is also known as Calcium Oxide as this is the dominant chemical composition of quicklime (CaO). Other common names to describe this product are Burnt Lime and Unslaked Lime. Quicklime is a white to grey, caustic, crystalline solid at room temperature.*
>
> *Quicklime is typically made by the thermal decomposition of materials such as*

[19] While not explicitly stated, all references in this Report to the 'Minister' refer to the 'then Minister'.

[20] The Commission was established on 1 July 2013, and is responsible for administering Australia's anti-dumping system. The ACBPS was previously responsible for this administration. The Commissioner was appointed as the statutory head of the Commission in August 2013.

[21] That was issued under subsection 269TC(4) of the Act.

[22] As defined in subsection 269T(1) of the Act.

limestone, that contains calcium carbonate ($CaCO_3$; mineral calcite) in a lime kiln. This is accomplished by heating the material to above 1100 °C, a process called calcination or lime-burning, to liberate a molecule of carbon dioxide (CO_2); leaving quicklime"[23].

2.3.1 Tariff classification

The application stated that the goods are classified to the following tariff subheading and statistical code of Schedule 3 to the *Customs Tariff Act 1995* of 2522.10.00 (statistical code 26). These goods are duty free from all sources.

2.4 Previous cases

There have been no previous dumping investigations into exports of quicklime in Australia.

2.5 Statement of Essential Facts No. 179

The Commissioner (and previously the CEO) must, within 110 days after the initiation of an investigation, or such longer period as the Minister allows, place on the public record a SEF on which the Commissioner (and previously the CEO) proposes to base final recommendations in relation to the relevant application to the Minister[24].

On 20 February 2012, the ACBPS published SEF 179. In formulating this SEF, the CEO had regard to the application concerned, submissions concerning publication of the notice that were received by the ACBPS within 40 days after the date of initiation of the investigation, and any other matters considered relevant.

Interested parties were invited to respond to SEF 179 by 12 March 2012.

2.6 Termination Report No. 179

On 3 April 2012, the ACBPS published TER 179 setting out its findings and conclusions in relation to exports from Thailand and reasons for the decision to terminate the investigation.

In TER 179, the ACBPS found that:

- quicklime from Thailand was exported at dumped prices during the investigation period;
- the dumped exports caused negligible injury to the Australian industry; and
- material injury was not threatened to the Australian industry because of the exportation of the goods into the Australian market.

A notice advising the termination decision was published in *The Australian* newspaper on 3 April 2012. TER 179 is accessible on the Commission's website at www.adcommission.gov.au.

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[23] *Consideration Report No. 179* dated 27 October 2011, page 8 refers.

[24] Subsection 269TDAA(1) of the Act refers.

2.7 Trade Measures Review Officer

On 27 April 2012, Cockburn Cement applied to the TMRO to review the CEO's first termination decision.

Following consideration of Cockburn Cement's application for review, the TMRO revoked the CEO's first termination decision[25]. On 25 June 2012, the TMRO's revocation decision was published in *The Australian* newspaper. The TMRO's Report[26] outlining the TMRO's reasons for the decision is accessible on the ADRP's website at www.adreviewpanel.gov.au.

2.8 Statement of Essential Facts No. 179A

On 19 March 2013, the ACBPS published SEF 179A for the resumed investigation. Interested parties were invited to respond to SEF 179A by 8 April 2013.

2.9 Termination Report No. 179A

On 2 May 2013, the ACBPS published TER 179A setting out its findings and conclusions and the reasons for terminating the investigation.

The ACBPS found that:

- quicklime was exported from Thailand at dumped prices during the investigation period;
- the dumped exports caused negligible injury to the Australian industry;
- even if injury from an earlier period was taken into account, and dumping was found for that earlier period, the dumped exports would have caused negligible injury to the Australian industry; and
- there was no threat of injury to the Australian industry.

A notice advising the termination decision was published in *The Australian* newspaper on 2 May 2013. TER 179A is accessible on the Commission's website at www.adcommission.gov.au.

2.10 Anti-Dumping Review Panel

On 27 May 2013, Cockburn Cement sought a review by the TMRO of the CEO's second termination decision.

Following consideration of Cockburn Cement's application for review, the ADRP (which replaced the TMRO on 10 June 2013), revoked the CEO's second termination decision[27]. The ADRP's decision was published in *The Australian* newspaper on 8 August 2013.

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25 Under subsection 269ZZT(1)(b) of the Act.

26 *Decision of the Trade Measure Review Officer, Review of a Termination Decision, Application of Cockburn Cement Pty Ltd, dated 25 June 2012* (TMRO's Report) refers.

27 Under subsection 269ZZT(1)(b) of the Act.

The ADRP's Report[28] setting out the ADRP's reasons for the decision is available on the ADRP's website at www.adreviewpanel.gov.au.

The effect of the ADRP's decision is that the Commissioner must issue a SEF to resume the investigation.

2.11 Statement of Essential Facts No. 179B

On 7 October 2014, the Commission published SEF 179B to resume the investigation following the ADRP's decision to revoke the CEO's second termination decision. SEF 179B found that during the investigation period dumped exports of quicklime from Thailand caused negligible injury to the Australian industry. Therefore, SEF 179B proposed that the Commissioner terminate the investigation subject to submissions received in response to SEF 179B.

Interested parties had 20 days to respond to the SEF 179B. As discussed at Section 1.5.3 two submissions were received in response to SEF 179B.

2.12 Termination Report No. 179B

This Report (TER 179B) details the Commissioner's basis for making his decision to terminate the dumping investigation into quicklime exported from Thailand. This includes the Commission's assessment of submissions received in response to SEF 179B.

The Commission has found that the submissions received in response to SEF 179B contained no new information that would warrant overturning the preliminary finding that negligible injury to the Australian quicklime industry has been caused by dumped exports from Thailand. Therefore the Commissioner remains satisfied that the injury to the Australian quicklime industry caused, or may be caused, by exports of dumped quicklime from Thailand, is negligible.

As a result, the Commissioner must terminate the investigation as prescribed by subsection 269TDA(13) of the Act (Section 1.3.2 refers).

[28] ADRP's Report refers.

3 INVESTIGATION PERIOD

3.1 TER 179B finding

The Commission has reconfirmed that the investigation period for this quicklime investigation is 1 July 2010 to 30 June 2011. The Commission considers that it is not open to the Commissioner to alter the investigation period, subsequent to the issuing of a public notice (under subsection 269TC(4) of the Act). Furthermore, the Commission considers that the Commissioner has no legislative power to alter the investigation period.

The Commission also considers that the Act does not provide for the Commissioner to have regard to a period prior to the investigation period for the purpose of determining if those earlier exports were dumped. Given this finding, the Commission considers that any injury experienced by the Australian industry prior to the investigation period cannot be attributed to dumped exports of quicklime.

Subsequent to considering submissions provided in response to SEF 179B, the Commission has not changed its findings in relation to the investigation period, or attributing dumped goods to injury experienced outside this period, as detailed in SEF 179B.

3.2 Approach to this Chapter

This Chapter sets out:

- the Commission's finding detailed in SEF 179B in relation to the investigation period;
- submissions received in response to SEF 179B in relation to this issue; and
- the Commission's consideration of these submissions and its final assessment in relation to this issue.

3.3 SEF 179B finding

The Commission's finding that it is not open to the Commissioner to amend the investigation period once set, has not changed since SEF 179B. The finding detailed at Section 3.1 (for this Report) reflects the finding for SEF 179B.

To provide an understanding of the basis for this finding, the relevant Sections from SEF 179B have been reproduced below (Sections 3.3.1 to 3.3.10 refer).

3.3.1 "Key issue

While the ADRP did not make specific findings in relation to the investigation period, the issue has been strongly contested by interested parties, especially by Cockburn Cement. In both of Cockburn Cement's applications for merit review (to the TMRO and ADRP), Cockburn Cement claimed that it was prejudiced by the investigation period being set from 1 July 2010 to 30 June 2011. Cockburn Cement contended that the ACBPS should have taken into account price reductions in respect of contracts with customers in the non-alumina sector between March and June 2010.

Cockburn Cement claims if these price reductions were taken into account the CEO would have found that dumped exports of quicklime had caused material injury.
This Chapter provides an overview of the relevant legislative framework in relation to the investigation period, views of the TMRO and other interested parties, and the Commission's views on this issue.

3.3.2 Legislative framework

3.3.2.1 The investigation period

The investigation period is defined in subsection 269T(1) of the Act as follows:

> *"**investigation period**, in relation to an application for a dumping duty notice or a countervailing duty notice in respect of goods, means a period specified by the Commissioner in a notice under subsection 269TC(4) to be the investigation period in relation to the application".*

Subsection 269TC(4) of the Act specifies the requirements that need to be set out by the Commissioner[29] in a public notice, if a decision is made not to reject an application for the Minister to publish a dumping duty notice. Paragraph 269TC(4)(bf) refers to the investigation period, as follows:

> *"If the Commissioner decides not to reject an application under subsection 269TB(1) or (2) in respect of goods, the Commissioner must give public notice of the decision:*
> *……..*
>
> *(bf) indicating that a report will be made to the Minister:*
> *(i) within 155 days after the date of initiation of the investigation; or*
> *(ii) within such longer period as the Minister allows under section 269ZHI;*
>
> *on the basis of the examination of exportations to Australia of goods the subject of the application during a period specified in the notice as the investigation period in relation to the application; …"*

The Act reflects the relevant Articles in the WTO ADA, and Australia's WTO obligations. The WTO ADA assumes that the determination of whether dumping has occurred, which must be made before a country imposes dumping duty on exports, will be made by reference to a 'period of investigation' (Articles 2.2.1; 2.2.1.1; 2.4.1 refer). The WTO ADA does not address resetting or amending an investigation period.

There is no provision in the Act that expressly allows for the investigation period to be amended after it is specified in the relevant public notice by the Commissioner.

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29 In this Chapter "CEO" and "Commissioner" are used interchangeably.

3.3.3 Policy approach to setting an investigation period

3.3.3.1 General

The investigation period is fundamental to an investigation, as it establishes the time period that will be the focus of the investigation and upon which the Commissioner will base final recommendations to the Parliamentary Secretary. The exports of goods occurring during the investigation period will be examined to determine if they are dumped and causing material injury to the Australian industry producing like goods.

The purpose of setting the investigation period is to ensure that a reasonable time period is considered to determine if dumping has occurred and material injury has been caused by that dumping. It allows an investigation to be conducted, and assessments to be made, in an impartial and unprejudiced manner based on the facts present in that period. The Commissioner is required to set an investigation period. The investigation period has a start and end date – events outside the investigation period are usually not taken into account when assessing dumping.[30] TER 179A stated that it was the ACBPS policy that an investigation period will be nominated generally for a period of twelve months preceding the initiation date and ending on the most recently completed quarter or month.

TER 179A states:

> *"in the absence of submissions or facts arising during the initial phases of the investigation which suggest a 12 month period is unsuitable, that the Customs and Border Protection is likely to set a 12 month period"[31].*

The Commission notes that the text "initial phases of the investigation" referred to in the quote above, refers to the period when an anti-dumping application is being considered, and when an investigation has not yet been initiated. The Commission considers that its approach for setting an investigation period reflects the predominant approach adopted by other comparable anti-dumping administrations.

The Commission acknowledges that for several recent dumping investigations the investigation periods have respectively exceeded twelve months (e.g. for the dumping investigation for exports of certain power transformers the investigation period was three years). However, for these cases, the Commission identified compelling reasons (before the investigations were initiated) for setting the investigation periods at greater than twelve months (e.g. the relevant goods were extensive capital equipment that were supplied to meet specific project requirements through tender processes, and the development, manufacture and supply of the goods was completed over an extended period).

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30 *Dumping and Subsidy Manual* (Manual), August 2012, Section 3.2. This Manual is available on the Commission's website at www.adcommission.gov.au.

31 TER 179A, page 10 refers.

3.3.3.2 Submissions to resumed investigation

In its submission dated 21 March 2014, Cockburn Cement highlighted that for the dumping investigation into exports of hot rolled coil (HRC) exported from Japan, Korea, Malaysia and Taiwan anti-dumping measures were set by reference to prices for the goods outside of the investigation period. Cockburn Cement noted that this approach was supported by the TMRO following a reinvestigation in respect of HRC. However, the Commission notes for the HRC investigation (as confirmed during the HRC reinvestigation) that prices outside the investigation period were only referenced when recommending the level of anti-dumping measures to be imposed. These prices were not referenced for the Commission's dumping and injury assessments. For this investigation, the Commission found that during the investigation period dumped goods had caused injury to the Australian industry.

3.3.4 Facts of this case – TER 179A

TER 179A stated that:

> *"In this case the 12 month period was set as the 12 month financial year period ending on 30 June 2011 prior to the initiation date in October 2011. This is in line with Customs and Border Protection's standard practice as demonstrated in other dumping cases. It is also consistent with WTO guidelines - the WTO Committee on Anti-Dumping Practices formulated a recommendation at its meeting of 4-5 May 2000 that, as a general rule the period of data collection for dumping investigations (i.e. the investigation period) normally should be twelve months ending as close to the date of initiation as is practicable. The investigation period is established at the initiation of an investigation based on information provided in the application.*
>
> *Meetings were conducted with the applicant and its consultant prior to initiation of the case to discuss the application and its parameters. The investigation period was known to be 12 months long and was not raised as an issue by the applicant or its representative. Through this process the applicant was provided the opportunity to address any concerns prior to the investigation period being established. All issues raised were addressed in the consideration report at the time of initiation"[32].*

TER 179A found that based on the information received in the application and the pre-initiation meeting, the investigation period established in this case was reasonable in the circumstances and within relevant policy guidelines.

TER 179A found that due care was taken in the selection of the investigation period based on the information available at the time of initiation of the case and the applicant has suffered no injustice from the process. The appropriate investigation period was set on the basis that it was done so in line with existing policy and procedures and in accordance with WTO accepted practices.

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[32] TER 179B, pages 10 to 11 refer.

3.3.5 Trade Measures Review Officer

As discussed at Sections 2.6 and 3.2, following a review of the CEO's first termination decision, the TMRO decided to revoke the CEO's decision. The TMRO found that it was the absolute discretion of the CEO to set the investigation period. The TMRO found that while it was uncommon for the ACBPS to revisit the identification of the investigation period subsequent to the initiation of an investigation, there may be case circumstances where adherence to the set investigation period leads to an unreasonable outcome.

The TMRO considered that the CEO had/has the power to amend the investigation period by virtue of Section 33 of the Acts Interpretation Act 1901 (assuming that certain procedures are followed to ensure procedural fairness).

The TMRO concluded that:

> *"35. In my view, the particular circumstances of this case are such that it would have been appropriate for the CEO of Customs to have revisited and amended the investigation period when it became apparent that the bulk of any injury claimed to be suffered by the applicant was sustained in the 3 month period immediately preceding the investigation period"[33].*

In addition, the TMRO found that in the alternative to amending the investigation period the CEO can, and should have, had regard to the injury experienced by Cockburn Cement for the six months prior to the investigation period (i.e. January to June 2010). The TMRO found that it was open to the ACBPS to assess whether injury was experienced for the prior period by reference to export price and normal values for quicklime (to determine whether dumping was occurring).

Responding to a request by the TMRO, the ACBPS provided the TMRO with injury analysis for the period January 2010 to June 2011. Based on this analysis, the TMRO concluded that:

> *"30…….. The analysis concluded that an examination of the actual loss of revenue incurred by the Applicant during the period between January 2010 and June 2011 amounted to [redacted]% of revenue which in turn led to a reduction of [redacted]% in profit. In my view, these revenue and profit losses would be significant, and the CEO could be satisfied that they would constitute material injury for the purposes of s 269TG and 269TAE of the Customs Act.*
>
> *31. However, in the absence of an investigation in to[34] the export price and normal value in respect of a period commencing in January or March of 2010, a conclusion cannot be drawn that the revenue and profit losses incurred by the Applicant during the extended period were caused by dumping. While the applicant has advanced propositions suggesting that the dumping margin of 48% found in respect of the investigation period would likely have been the same in the prior period, these propositions are not sufficient to found a final decision"[35].*

33 TMRO's Report, paragraph 35 refers.

34 This SEF has not corrected any formatting issues contained within direct quotes.

35 TMRO's Report, paragraphs 30 to 31 refer.

3.3.6 Anti-Dumping Review Panel

As discussed at Sections 2.9 and 3.1, following a review of the CEO's second termination decision, the ADRP decided to revoke the CEO's decision. In its report, the ADRP indicated that because the legal basis for the ACBPS (in TER 179A) to conduct its 'further injury analysis' was not clear (i.e. whether it was on the basis of the CEO amending the investigation period, or whether it was on the basis of the CEO linking injury found to have occurred the investigation period, to dumping), that it would only focus on reviewing the 'further injury analysis'. The ADRP also indicated its reluctance to review the TMRO's findings. Therefore, the ADRP made no specific findings in relation to whether the investigation period could or should have been changed in this case.

3.3.7 Factual clarifications

The Commission considers that it is necessary to set out the facts as they were understood by the TMRO and the ADRP. When commenting on the investigation period, a key issue considered by the TMRO was the 'impact of the investigation period in this case'. The TMRO met ACBPS officials and requested additional injury analysis for the longer period (including the six months prior to the investigation period). The TMRO's report stated:

> *"29. As outlined above, the primary ground advance by the applicant is that the delegate of the CEO of Customs would have found that the applicant had suffered material injury caused by the dumped exports if the investigation period had included the period between March and June 2010.*
>
> *30. Subsequent to the meeting with the representatives of Customs, Customs have provided me with an injury analysis which covered the period between January 2010 and June 2011 based on material already available to Customs. The analysis concluded that an examination of the actual loss of revenue incurred by the Applicant during the period between January 2010 and June 2011 amounted to [redacted]% of revenue which in turn led to a reduction of [redacted]% in profit. In my view, these revenue and profit losses would be significant, and the CEO could be satisfied that they would constitute material injury for the purposes of s 269TG and 269TAE of the Customs Act. The TMRO considers that these circumstances are unusual"[36].*

The TMRO held the opinion that the financial position of the applicant in the period immediately prior to the investigation was such that there was sufficient cause for the CEO to have 'revisited and amended the investigation period'. In the TMRO's Report, the TMRO cited an 'actual loss in revenue' and a 'reduction in profit'.

Given this factual background about the investigation period this resumed investigation (INV 179B) considered two important issues. The first was whether injury had to be assessed for the industry as a whole. On this matter the Commission agrees with Section 7.5 of TER 179A which commented that the TMRO had considered the level of injury to Cockburn Cement alone and not the

36 TMRO's Report, paragraphs 29 to 30.

whole of the Australian industry. This finding was been supported by the ADRP[37], where it expressed support for the finding by the ACBPS that it was necessary to examine injury for the Australian industry as a whole (this issue is also discussed at Section 10.5.3).

The second factual issue concerning the investigation was the data referred to by the TMRO. When the Commission examined the injury to the Australian industry as a whole over that 'further injury analysis' period, which as noted was a part of the TMRO's consideration of investigation period, the Commission calculated the injury figures as follows:

- *the revenue decrease is [redacted]% [less than 1%] for the Australian industry as a whole. This varies slightly from the [redacted]% [less than 1%] decrease that was previously calculated by the ADRP. The TMRO had cited a [redacted]% [less than 2%] decrease but this related to Cockburn Cement only; and*
- *the profit effect to the Australian industry as a whole was not able to be calculated with any certainty. However, following the rationale of the ADRP at paragraph 67 which speculated about a likely effect on profit at the whole of industry level, this SEF has amended (and corrected) the percentage to be [redacted]% [less than 1%] not the [redacted]% [less than 3%] shown by the ADRP[38].*

With these data clarifications a revenue fall of [redacted]% [less than 1%] for the whole of a large domestic market is insignificant, as is any likely profitability reduction on the whole of the industry.
The Ministerial Direction in relation to material injury directs (among other things) that:

- *material injury is injury which is not immaterial, insubstantial or insignificant; and*
- *the injury must be greater than that likely to occur in the normal ebb and flow of business.*

Had the facts described above been before the ADRP it is unlikely that a change to an investigation period by extending it into an earlier period would have been found warranted (assuming that it was open to the Commission to extend the period, which as discussed above is not the case). The two percentages showing revenue and profitability declines are insignificant, and in line with the Ministerial Direction would not be greater than that likely to occur in the normal ebb and flow of business.

The ADRP's Report stated that:

> *"66. I note a high dumping margin of 48% found for the originally set investigation period is a relevant factor to consider when assessing the materiality of any injury caused (ss.269TAE(1(aa)). A revenue fall of [redacted]%[less than 1%] for the whole of a large domestic market is on the face of it insignificant. However while no profit loss was able to be estimated for the total domestic market, a [redacted]% profit drop to the producer which has*

37 ADRP's Report, paragraph 52 refers.

38 ADRP's Report, paragraph 31 refers.

approximately 50% of the domestic market suggests a level of injury greater than that which may arise from considering in isolation [redacted]% [less than 1 %] revenue reduction to the total domestic market. As against that the following principal factors are indicative that any injury caused may not be as significant as is reflected in the profit drop to Cockburn Cement's market: …"[39].

There is no indication, in the Commission's view, having regard to these facts as recalculated in this current investigation (INV 193B), that there are any special circumstances to justify an extension to the investigation period as Cockburn Cement had argued in its application for review. This assumes that it would be open to the Commissioner to amend the investigation period, which the Commission has found is not the case.

Chapter 10 also discusses the injury related figures as they have been interpreted by various interested parties, including the TMRO and the ADRP.

3.3.8 Submissions to the resumed investigation

Cockburn Cement has made several submissions to the investigation arguing that the investigation period should be amended (by reiterating the TMRO's findings)[40]*. Cockburn Cement also argued that if the Commissioner does not amend the investigation period, then the injury experienced in the months prior to the investigation period should be taken into account.*

Other interested parties, including the GOT, Chememan Thailand (and its Australian importer, a related company), and Alcoa made submissions to the resumed investigation claiming that there was no legislative basis for the Commissioner to revisit or amend the investigation period. These interested parties claim that even if the investigation period was extended to January 2010, or March 2010, the Commissioner would still find that dumped exports of quicklime had caused negligible injury (if the earlier period was assessed).

3.3.9 The Commission's assessment

The Commission has assessed and reconsidered whether it is open to the Commissioner to revisit or amend the investigation period (of 1 July 2010 to 30 June 2011) for the quicklime investigation.

In making its assessment, the Commission has considered legal, and policy and procedural considerations, which are detailed in the following Sections.

3.3.9.1 Legal considerations

<u>Prescriptive requirements – setting an investigation period</u>

The Commission considers that the setting of the investigation period only arises once, and in specific and prescribed circumstances, specifically where the Commissioner decides not to reject a valid application for the publication of a

39 ADRP's Report, paragraph 66 refers.

40 These submissions are available on the Electronic Public Record for the investigation, which is available on the Commission's website at www.adcommission.gov.au.

dumping duty notice. Paragraph 269TC(4)(bf) explicitly requires the Commissioner to specify an investigation period in the public notice advising the Commissioner's decision (to not reject an application, which will result in an investigation being initiated). The Commission considers it is at the Commissioner's discretion to set the investigation period (Section 5.4 refers) and there is no explicit power in the Act to enable the Commissioner to revisit or amend the investigation period (subsequent to the issuing of the public notice required by subsection 269TC(4) of the Act).

Given this prescriptive requirement, the Commission also does not consider that the investigation period can be amended under Section 33(1) or 33(3) of the Acts Interpretation Act 1901.

> *"(1) Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires….*
> *…*
> *Power to make instrument includes power to vary or revoke etc. instrument*
>
> *(3) Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument".*

The Commission considers that there is sufficient contrary intention evinced throughout Part XVB of the Act that any alteration or consideration of periods prior to the investigation period is prohibited (sections 269TACB, and subsections 269TDA(2) and (17) of the Act refer). Therefore, the Commission considers the Commissioner can only set the investigation period once (and cannot subsequently be amended), as prescribed by paragraph 269TC(4)(bf) of the Act.

<u>Determination of dumping for a dumping investigation</u>

The Act provides for the Minister[41] to impose dumping duties under subsections 269TG(1) and (2) of the Act. A key component of the anti-dumping system is the requirement by the Minister to determine whether dumping has occurred, in accordance with section 269TACB of the Act. The Commissioner is also required to consider this when making decisions and recommendations under section 269TE of the Act (in having regard to the same considerations as the Minister).
Section 269TACB of the Act specifies that:

> ***"Working out whether dumping has occurred and levels of dumping***
>
> *(1) If:*
>
> *(a) application is made for a dumping duty notice; and*

[41] As discussed at footnote 9 (to SEF 179B), the relevant Minister for this investigation is the Parliamentary Secretary is the relevant decision maker for this investigation.

(b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and

(c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;

the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred.

(2) In order to compare those export prices with those normal values, the Minister may, subject to subsection (3):

(a) compare the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period; or

(aa) use the method of comparison referred to in paragraph (a) in respect of parts of the investigation period as if each of these parts were the whole of the investigation period; or

(b) compare the export prices determined in respect of individual transactions over the whole of the investigation period with the corresponding normal values determined over the whole of that period; or …" (emphasis added).

Subsequent subsections of section 269TACB detail methods of determining whether dumping has occurred, and the relevant margin, in each case by reference to the investigation period. Section 269TACB clearly prescribes that the Minister, in exercising section 269TG powers must determine whether dumping 'has occurred', and the margin of that dumping, only by reference to any dumping which occurred in the investigation period.

At all statutory stages in a dumping investigation commenced by application, a determination as to whether there 'has been dumping', and the further question as to whether such past dumping 'has caused' injury, must be made by reference to any dumping that occurred in the investigation period declared in the public notice issued under subsection 269TC(4) of the Act, in accordance with section 269TACB of the Act.

The Full Federal Court of Australia (Federal Court) decision of Pilkington (Aust) Ltd v Minister of State for Justice & Customs (2002) 127 FCR 92 (Pilkington) held, and is binding authority to the effect, that determining whether dumping has occurred for the purposes of subsections 269TG(1) or (2) of the Act[42] is governed by section 269TACB of the Act, and therefore the determination must be made by examining exports during the investigation period. While the Federal Court did not specifically consider whether an investigation period once set can be amended, the Commission considers the Federal Court judgement seems to support the finding that the period cannot be amended.

Therefore, the Commission considers that it is not open to the Minister to decide that dumping has occurred for the purposes of subsections 269TG(1) or (2) of the

[42] Or in relation to a decision to terminate an investigation under subsection 269TDA(1) of the Act.

Act by reference to any dumping that occurred prior to the declared investigation period. It is also clear that it is not open to the Commissioner to recommend that the Minister make such a finding. This is relevant for quicklime, given the investigation is examining whether there are grounds to recommend that a dumping duty notice be published in accordance with subsections 269TG(1) and (2) of the Act.

Further, determining whether past dumping 'has caused material injury' for the purposes of subsections 269TG(1) or (2) of the Act necessarily requires determining whether dumping has occurred applying section 269TACB of the Act, by examining exports during the investigation period.

Given the highly prescriptive nature of the legislative requirements in examining exports to assess whether dumping and material injury has occurred, the Commission considers that the Commissioner does not has an implied power under the Act to amend the investigation period, at any given point in time.

Considering a period prior to the investigation period

The Commission also has a different interpretation compared to the TMRO[43] regarding the purpose of subsection 269T(2AD) of the Act as a basis to consider a period prior to the investigation period.

Under subsection 269T(2AD) of the Act, the Commission considers that for the purpose of determining whether material injury has been caused to an Australian industry the Commission may examine periods prior to the investigation period. This is the basis on which the Commission sets an 'injury analysis period' as distinct from the 'investigation period'. This allows a comparison of the economic condition of the Australian industry at an earlier period with the conditions observed within the investigation period. Typically, the Commission will specify an 'injury analysis period' commencing several years earlier than the investigation period (i.e. for the quicklime investigation the injury analysis period was set from 1 January 2008).

The Commission considers that the injury period is not, and cannot be, used to assess exports occurring during that period to determine if they were dumped – that is the explicit purpose of the investigation period.

The TMRO further stated[44] that section 269TAB[45] and section 269TAC[46] of the Act do not in their terms limit the examination of the export price and normal value by reference to the investigation period, and therefore that it would be open to the ACBPS to determine the export price and normal value for a period prior to the investigation period, and then determine whether any injury in that period had been caused by dumping.

43 TMRO Report, paragraph 25 refers.

44 TMRO report, paragraphs 26 to 27 refer.

45 Relevant to the determination of export price.

46 Relevant to the determination of normal value.

However, the Commission considers that in respect of a dumping investigation, sections 269TAB and 269TAC of the Act should be read in context with the rest of the Act – particularly subsection 269TC(4) and section 269TACB of the Act.

In effect, paragraph 269TC(4)(bf) of the Act provides:

> *"a report will be made to the Minister…on the basis of the examination of exportations to Australia of goods the subject of the application during a period specified in the notice as the investigation period" (paraphrased).*

Therefore, the Commission considers that in a dumping investigation (i.e. for new anti-dumping measures) the question of whether goods are dumped must be based on the examination of exportations of the goods to Australia that occurred during the investigation period. Further, this test must be done based on an export price of goods exported during the investigation period and normal value of like goods during the investigation period.

Subsection 269T(2AD) of the Act provides that the Minister may consider information in relation to the Australian industry prior to the investigation period for the purpose of determining whether a causal link is established between dumping within the investigation period and any asserted material injury. In this context, the Commission considers subsection 269T(2AD) of the Act seems to reinforce the centrality of the investigation period (as a key component of the Minister's decision to publish a dumping duty notice).

The Commission considers that section 269TAB and section 269TAC of the Act are silent as to determining an export price or normal value (as relevant) with reference to an investigation period. The Commission considers this is because the methods described in those sections are also used for other processes within the anti-dumping system – such as reviews of measures, accelerated reviews (for new exporters) and duty assessments.

It is the Commission's view that the Commissioner may not have regard to a period before the investigation period to determine if dumping has occurred and that having such regard to an earlier period is not provided for by subsection 269T(2AD) of the Act. The Commission considers subsection 269TC(4) and section 269TACB of the Act can be interpreted so that the investigation as to whether dumping has occurred must be performed for exportations occurring within the investigation period. This is fundamental to the anti-dumping system – the Commissioner must conduct an investigation as to whether goods are dumped, based on exportations to Australia during the investigation period.

Subsequently, the Commissioner is not able to presume that the goods exported prior to the investigation period were dumped, and cannot attribute any injury suffered as a result of those exports to dumping. The Commission also considers that for a new investigation section 269TAB and section 269TAC of the Act cannot be used to determine an export price and normal value of goods exported prior to an investigation period.

3.3.9.2 Policy and procedural considerations

TER 179A indicated that the setting of an investigation period is important to ensure a transparent and fair (and unbiased) investigation process. TER 179A indicated that there may be procedural fairness issues if the investigation period were to be altered at a later stage of the investigation. TER 179A advised that the investigation period is notified to all parties at the initiation of an investigation.

In its submission dated 1 October 2014 Clayton Utz on behalf of Alcoa stated that parties provided responses based on the parameters set at the initiation of the case. To alter the investigation period subsequently could lead to a breach of procedural fairness given the parties were not provided with an opportunity to respond to claims involving the additional time period.

The TMRO indicated that if the investigation period were to be amended certain procedures would need to be followed to ensure procedural fairness was afforded to interested parties (e.g. such as publishing a revised notice specifying the revised investigation period, advising all interested parties of the changes, and possibly seeking an extension of investigation timeframes).

However, the Commission considers that changes to an investigation period (if provided for in the Act) could cause uncertainty for stakeholders (i.e. it would cause confusion regarding the status of submissions made consisting of information and data covering differing investigation periods). It could also potentially lead to investigation delays and duplication. The Commission considers that given the Act (reflecting Australia's WTO obligations) prescribes a strict legislative timeframe for conducting anti-dumping investigations the possibility that it is open to the Commissioner to amend an investigation period seems contrary to the intention of this legislative framework.

Notwithstanding that extension of time can be granted by the relevant Minster for an investigation, the Commission considers that seeking extensions of timeframe of an investigation in order to amend an investigation period is not appropriate nor does it accord with the intention of the extension provisions (provided for under section 269ZHI of the Act).

The Commission also considers that the identified purposes of the notification procedures in subsection 269TC(4) of the Act would be undermined if the Commissioner had the ability to vary the investigation period after the investigation had been initiated.

3.3.10 The Commission's conclusion

In conducting its assessment regarding whether it is open to the Commission to revisit or amend the investigation period, the Commission has considered several legal and, policy and procedural considerations (as discussed at Sections 5.10.1 and 5.10.2).

Based on this assessment the Commission has found that it is not open to the Commissioner to revisit or amend the investigation period, once it is set and specified in the public notice published under subsection 269TC(4) of the Act.

Therefore, in relation to the investigation for quicklime, the Commission considers that it is not open to the Commissioner to amend the investigation period of 1 July 2010 to 30 June 2011.

The Commission's analysis and assessment of whether dumped exports of quicklime caused or threatened to cause material injury to the Australian industry, has been completed in accordance with this finding (and has been confined to the investigation period, as set in the relevant notice published on 31 October 2011) (Chapter 10 refers)"[47].

3.4 Submissions received in response to SEF 179B

3.4.1 Cockburn Cement

In its submission dated 27 October 2014, Cockburn Cement disputed the findings in SEF 179B in relation to the investigation period.

Cockburn Cement contends that the investigation period should be changed to take into account the four month period (April to June 2010) immediately preceding the investigation period[48]. Cockburn Cement claims that if the Commission assessed whether the exported goods during this earlier period were dumped, the Commission would find that these goods were dumped. This is based on the assumption that an assessment for the earlier period is likely to produce similar results of the 48% dumping margin found for the investigation period. Cockburn Cement claims that subsequent to assessing that the goods were dumped for the earlier period it would then find that these dumped goods caused material injury to the Australian industry.

Cockburn Cement considers that the Commissioner's power to amend the investigation period is discretionary, and that the Commissioner's view that the investigation period cannot be amended has no legal basis (as the Commission has not provided a "*reference to any legislation which exclusively forbids such amendment*"[49]). Cockburn Cement considers that the absence of an explicit power in the Act to amend the investigation period does "*not lead to a conclusion that it is not open to do so*[50]". To support its view, Cockburn Cement notes that:

> "*it was found by Mr Stephen Skehill SC*[51] *(TMRO) that it is open for Customs/the Commission to extend the July 2010-June 2011 IP or otherwise analyse whether the injury experienced during March-June 2010 was caused by dumping and that the particular circumstances of this case make it appropriate to do so*"[52].

47 SEF 179B, pages 22 to 34 refer.

48 Cockburn Cement's submission also refers to extending the investigation period to incorporate six months immediately prior to the investigation period (January to June 2010).

49 Cockburn Cement's submission to SEF 179B, page 2 refers.

50 Ibid, page 2 refers.

51 In this case, SC refers to 'Special Counsel' as distinct from "Senior Counsel'.

52 Cockburn Cement's submission to SEF 179B, page 3 refers.

Cockburn Cement claims that that the circumstances of this case are appropriate for amending the investigation period, as:

- the ACBPS erred in setting the investigation period as 1 July 2010 to 30 June 2011, given Cockburn Cement's application was predicated on Thai imports which it claims undercut its domestic selling prices and caused Cockburn Cement to reduce its domestic selling prices in March to June 2010;
- the ACBPS found that "*there was material injury caused to Cockburn by price undercutting by Thai imports*[53]" due to price reductions (in March and June 2010) which led to "*substantially reduced profit*[54]";
- given the ACBPS found that the Thai exports of quicklime were dumped at a margin of 48% during the investigation period, it is highly unlikely that export prices and normal values would vary during January to June 2010; and
- "…*there be very little doubt that dumped imports from Thailand have caused material injury to Cockburn, the representative of the Australian industry producing quicklime to this investigation*[55]".

In addition, Cockburn Cement claims that the procedural fairness issues associated with amending the investigation period discussed in SEF 179B are not relevant for this case, given the extensive duration of this investigation.

The Commission's assessment of Cockburn Cement's claims is at Section 3.5.

3.4.2 Chememan Thailand

In its submission dated 27 October 2014, Chememan Thailand supports the findings in SEF 179B in relation to the investigation period. Specifically, Chememan Thailand supports the following SEF 179B findings, that:

- once set, an investigation period cannot be changed;
- injury that occurred prior to the investigation period cannot be attributed to dumped good; and
- during the investigation period the injury that was found to be attributed to dumped goods is negligible.

Given Chememan Thailand's submission supports the Commission's findings in relation to the investigation period and attributing dumped goods to injury, its views are not reiterated in the Commission's assessment of Cockburn Cement's claims at Section 3.5.

3.5 The Commission's final assessment

The Commission has considered Cockburn Cement's submission made in response to SEF 179B in relation to the investigation period and attributing dumped goods to injury caused to the Australian industry outside the investigation period (Section

53 Cockburn Cement's submission to SEF 179B, page 2 refers.

54 Ibid, page 2 refers.

55 Ibid, page 2 refers.

3.4.1 refers). The Commission has found that no new information was provided that would warrant overturning its SEF 179B finding. The Commission has reconfirmed that once set the investigation period (of 1 July 2010 to 30 June 2011) cannot be amended.

In SEF 179B, the Commission assessed whether it is open to the Commissioner to revisit or amend the investigation period, by considering several legal, policy and procedural considerations (reproduced at Sections 3.3.1 to 3.3.10 above).

3.5.1 Legal considerations

The Commission considers that SEF 179B provided a detailed overview of the legal considerations for setting and amending an investigation period (Section 3.3.9.1 refers). The Commission does not agree with Cockburn Cement's view that the Commissioner's power to amend an investigation period once set simply reflects a non-mandatory policy.

The Commission considers that it is not open to the Commissioner to amend the investigation period once set. This is based on a consideration of the relevant legislative provisions in the Act (and how they operate and interrelate) in relation to:

- setting an investigation period (which can only be set once, when an application for anti-dumping measures is not rejected by the Commissioner (or in this case the CEO) in which the investigation period is notified in a public notice issued under subsection 269TC(4) of the Act);
    - the Commission considers that, given the prescriptive requirement of the Act, the investigation cannot be amended under sections 33(1) or 33(3) of the *Acts Interpretation Act 1901*;
- determining whether dumping has occurred during an investigation period (for the purposes of an application for a dumping duty notice this assessment must be made for the investigation period, as prescribed under section 269TACB of the Act);
    - this approach was confirmed by the Federal Court's *Pilkington* judgement; and
- considering a period prior to an investigation period to attribute injury caused outside the investigation period to dumped goods (in respect of a dumping investigation (i.e. for new measures) an assessment of whether the goods were dumped must be completed based on the export price for the goods and the normal value for like goods during the investigation period);
    - the Commission considers sections 269TAB (export price) and 269TAC (normal value) of the Act should be read in context with the rest of the Act, especially with subsection 269TC(4) and section 269TACB of the Act.

The Commission considers that it is not open to the Commissioner to amend an investigation period once set based on the legal considerations detailed above (noting these provisions also reflect the WTO Anti-Dumping Agreement (ADA)).

3.5.2 Policy and procedural issues

The Commission considers that the policy and procedural fairness issues associated with amending the investigation period (as discussed Section 3.3.9.2) are also relevant to the investigation. The Commission does not agree with Cockburn Cement's claim that these issues "*have no relevance to this investigation*"[56]. While the Commission considers that these issues are secondary to the legislative considerations discussed at Sections 3.5.1 and 3.3.9.1, they do support the need for certainty, transparency and procedural fairness encapsulated in the Act.

3.5.3 Factual clarifications

The Commission notes that Cockburn Cement's claim that the ACBPS found that material injury has been caused by dumped imports of quicklime from Thailand is incorrect. Throughout this investigation, the ACBPS and the Commission have never made this finding. The ACBPS and the Commission have consistently found that any injury to the Australian industry that has been caused, or may be caused, by dumped goods is negligible.

3.5.4 The Commission's conclusion

The Commission considers that it is not open to the Commissioner to amend the investigation period once that period is set and specified in the public notice issued under subsection 269TC(4) of the Act. In relation to the investigation for quicklime, the Commission maintains its view that it is not open to the Commissioner to amend the investigation period of 1 July 2010 to 30 June 2011.

The Commission has considered Cockburn Cement's claims and has found that no new information has been provided that warrants overturning its SEF 179B finding in relation to the investigation period.

Therefore, the Commissioner is satisfied that it is not open to him to amend the investigation period that was set for this dumping investigation into exports of quicklime from Thailand. Accordingly, the Commission's analysis and assessment of whether dumped exports of quicklime caused or threatened to cause material injury to the Australian industry, has been completed in accordance with this finding (and has been confined to the investigation period, as set in the relevant notice published on 31 October 2011).

Given this finding the Commissioner is also satiated that any injury to an Australian industry that may have occurred prior to an investigation period cannot be attributed to dumped goods.

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[56] Cockburn Cement's submission to SEF 179B, page 3 refers.

4 APPROACH TO ASSESSING THE ECONOMIC CONDITION OF THE AUSTRALIAN INDUSTRY

4.1 TER 179B finding

The Commission has reconfirmed that its assessment of the economic condition of the Australian quicklime industry and a determination of injury must be based on the Australian industry as a whole. This approach reflects the *Ministerial Direction on Material Injury*[57] and legislative requirements in the Act which are consistent with the WTO ADA.

Based on submissions provided in response to SEF 179B, the Commission has not changed its findings in relation to assessing injury to the Australian industry as a whole as detailed in SEF 179B.

The Commission reconfirms that the injury experienced by the Australian quicklime industry as a whole (and Cockburn Cement individually) was not significant (with all injury indicators measured at less than 1%[58])[59]. The Commission is satisfied that the injury suffered by the whole of the Australian industry was negligible (and cannot be considered material).

Chapter 10 of SEF 179B contained the Commission's analysis and assessment of the economic condition of the Australian quicklime industry. This Chapter and Chapter 12 of SEF 179B also detail the Commission's findings (and supporting analysis) that negligible injury has been, or is likely to be, caused to the Australian industry by dumped exports of quicklime from Thailand. These Chapters should be read in conjunction with this Report.

As the Commission has found that dumped goods have caused, or are likely to cause, negligible injury to the Australian industry, the Commissioner has terminated the investigation.

4.2 Approach to this Chapter

This Chapter sets out:

- the Commission's approach detailed in SEF 179B to assessing the economic condition of the Australian industry as a whole[60];
- submissions received in response to SEF 179B in relation to this issue; and

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57 On 27 April 2012, the then Minister signed a direction on how to assess material injury to the CEO (this was subsequently amended to incorporate references to the Commissioner). This Ministerial Direction replaced the previous direction and Ministerial letters regarding material injury. The Ministerial Direction is available on the Commission's website at www.adcommission.gov.au

58 These indicators were proportionately less than 1%, as found in SEF 179B.

59 And accords with the definitions that have been provided of the term 'negligible'. Noting that these definitions are guidance only and not prescribed in the Act.

60 Which relates to the finding that negligible injury has been experienced by the Australian industry due to dumped Thai exports.

- the Commission's consideration of these submissions and its final assessment in relation to this issue.

4.3 SEF 179B finding

The Commission's approach to assess the economic condition of the Australian industry as a whole (and to not solely make an assessment of injury based solely on Cockburn Cement, as representative of the Australian industry) has not changed since SEF 179B. The finding detailed at Section 4.1 (for this Report) reflects the finding for SEF 179B.

To provide an understanding of the basis for this finding, the relevant Sections from SEF 179B have been reproduced below (Sections 4.3.1 to 4.3.5. refer).

4.3.1 "Legislative framework

Under section 269TG of the Act, one of the matters that the Parliamentary Secretary must be satisfied of in order to publish a dumping duty notice is that, because of the dumping, material injury has been, or is being caused, or has been threatened to the Australian industry producing like goods.

Section 296TAE of the Act outlines how injury to an Australian industry can be assessed. In June 2012, the Minister gave a direction on how to assess material injury to the CEO (this was subsequently amended to incorporate references to the Commissioner). This Ministerial Direction[61] replaced the previous direction and Ministerial letters regarding material injury. The Ministerial Direction is available on the Commission's website at www.adcommission.gov.au

4.3.2 Australian industry claims

Cockburn Cement claimed that dumped exports of quicklime from Thailand have caused material injury in the form of:

- *loss of sales and market share;*
- *price undercutting;*
- *price depression;*
- *reduced sales revenue; and*
- *reduced profit and profitability.*

Cockburn Cement represents approximately 40%[62] of total Australian production and a higher share of sales of local production, due to the captive use of quicklime by some producers. Cockburn Cement is the largest producer in Australia.

Cockburn Cement claimed that dumped exports entered the Australian market in March 2010.

61 This Ministerial Direction has been referenced previously in this SEF.

62 This figure has been updated since TER 179A.

4.3.3 Commencement of injury, and analysis period

4.3.3.1 General

For the purpose of assessing material injury to the Australian industry, the Commission has focused its analysis on the economic performance of the Australian industry from 1 January 2008. Given Cockburn Cement represents approximately 40% of total Australian production and a significantly higher share of the actual sales of local production due to the degree of captive production, Cockburn Cement's data has been extrapolated and used as a basis to assess the economic performance of the Australian industry, as a whole. Section 10.5.3 discusses the Commission's assessment of the economic performance of the Australian industry, as a whole.

4.3.3.2 Data

The injury analysis detailed in this Section is based on the financial information submitted, and verified, by Cockburn Cement; data from ACBPS import database; and data from the NLAA[63]. For INV 179[64], Cockburn Cement provided half yearly production, cost and sales data for 1 January 2008 to 31 July 2011. Cockburn Cement provided its revenue and profit data in six months blocks. Therefore, a number of graphs in this Chapter cover the period January 2008 to June 2011.

Subsequent to the ADRP's decision to revoke the CEO's second termination decision, Cockburn Cement provided updated data for:

- *total actual volume of sales for 2012 and full year forecasts for 2013 and 2014;*
- *total profit for 2012 and forecast profit for 2013; and*
- *the pricing impact on individual customers affected by the original downward pricing adjustment in 2010 and 2011.*

Only the updated data that relates to the injury analysis period and investigation period has been used by the Commission for its assessment of the economic condition of the Australian industry.

4.3.4 Different market sectors

Cockburn Cement supplies quicklime to the alumina and non-alumina market segments sectors in the Australian quicklime market. The Commission has analysed and assessed injury experienced in each sector (as relevant) and in the market as a whole.

63 NLAA refers to National Lime Association of Australia, the peak body representing the Australian lime industry.

64 INV 179 refers to Investigation No. 179.

4.3.5 Different geographical market segments

Submissions to the resumed investigation

In its submissions to the resumed investigation Cockburn Cement claimed that[65]:

- *it is normal practice to consider material injury experienced by applicants for anti-dumping measures whose output of like products constitutes a major proportion of the total domestic production of those products as material injury to the Australian industry producing like products, unless there is evidence to the contrary; and*
- *'regional injury' is not a relevant consideration as:*
  - *it has standing as the domestic industry producing quicklime; and*
  - *it meets the definition of 'domestic industry' per Article 4.1 of the WTO ADA.*

The Commission's assessment

The Commission does not agree with Cockburn Cement's view. Although it may be open to the Commission to regard injury suffered to a particular member or members of the Australian industry as being representative of the entire industry as a whole, for the purpose of assessing the materiality of the injury, the whole Australian industry must be considered. Furthermore, in this case, exports of quicklime from Thailand are almost exclusively supplied to WA. The Commission therefore finds that it would not be appropriate to consider that injury suffered by Cockburn Cement must necessarily represent damage to the rest of the Australian industry. This is not to discount the possibility that any injury suffered by Cockburn Cement cannot also be regarded as material injury to the Australian industry as a whole, and the Commission has proceeded with its analysis below with that view.

The Commission does not dispute that Cockburn Cement had standing to bring the application for the original dumping investigation.

Australia's dumping legislation does not contain the regional industry exception provision at Article 4.1(ii) of the WTO ADA. The Commission's approach to determining injury is set out above in line with the relevant domestic legislation. This approach reflects the Ministerial Direction as it relates to regional injury (which is consistent with Article 4.1 of the WTO ADA), as noted above.

The Commission considers that there has always been a requirement to consider whether injury had occurred to the industry as a whole in accordance with the Federal Court decision in Swan Portland Cement Limited and Cockburn Cement Limited and The Minister for Small Business and Customs and The Anti-Dumping Authority G377 1990 and with the Ministerial Direction. This requirement has been met according to the circumstances of each case regardless of whether a regional industry is involved.

Where the 'major proportion' constitutes a significant part of the total domestic production, the evidentiary requirement to consider whether the Australian industry

65 These submissions are available on the Electronic Public Record for the investigation, which is available on the Commission's website at www.adcommission.gov.au.

as a whole is suffering a material injury, may be more easily met. However, in all cases it is necessary to examine whether there has been a material injury to the Australian industry as a whole. The ADRP also supports this view"[66].

4.4 Submissions received in response to SEF 179B

4.4.1 Cockburn Cement

In its submission dated 27 October 2014, Cockburn Cement noted its concerns in relation to the Commission's injury assessment taking into account the whole Australian industry rather than assessing the inquiry experienced by Cockburn Cement, individually, as a representative of the Australian industry. Cockburn Cement claims:

> "*that the matter of regional injury and the question of the Australian industry to the whole Australian industry did not arise until the first resumption of this investigation (no. 179A), when it was introduced by Customs to support its termination intent*"[67].

Cockburn Cement claims that, notwithstanding a dumping assessment for goods exported during the first half of 2010, the injury (measured as reduced profitability[68]) experienced by Cockburn Cement is material. Cockburn Cement also claims that as it represented approximately 50% of the total volume of the goods produced in Australia, that the injury it experienced is representative of the Australian industry (especially in the absence of any other participation by Australian industry members during the investigation). Cockburn Cement claims that its preferred approach reflects global practice by other anti-dumping administrations.

4.5 The Commission's final assessment

4.5.1 Legal basis and WTO framework

The Commission has considered Cockburn Cement's submission made in response to SEF 179B in relation to assessing the economic condition of the Australian industry as a whole (Section 4.4.1 refers) and has found that no new information was provided that would warrant overturning its approach or finding.

As stated in SEF 179B, the Commission is required to consider injury to the whole Australian industry. The Commission's consideration of any material injury involves weighing all of the relevant factors in the context of the Australian domestic market as a whole. This approach reflects the *Ministerial Direction on Material Injury* and legislative requirements in the Act which are consistent with the WTO ADA. The Commission's considers that its approach is consistent with the findings of the *Federal Court in Swan Portland Cement Limited and Cockburn Cement Limited and*

66 SEF 179B, pages 43 to 46 refer.

67 Cockburn Cement's submission in response to SEF 179B, page 2 refers.

68 Cockburn Cement's claims that this reduced profitability equated to [redacted]% or $[redacted] million.

The Minister for Small Business and Customs and The Anti-Dumping Authority G377 [1991] FCA 49 (Swan and Cockburn Cement).

> *"The Court held:*
>
> > *'...the expression "domestic industry" in the context of the antidumping legislation refers to an industry viewed throughout Australia as a whole and does not refer to a part of that industry, whether it be determined by geographic, market or other criteria. '*
> > *(Lockhart J at p 451)*
>
> *The Court upheld the approach of the then Anti-Dumping Authority to determine the impact that the imports had on the local Western Australian industry before considering the impact on the Australia wide industry (p455)"*[69]*.*

4.5.2 Anti-Dumping Review Panel

In its application seeking a review of the CEO's second termination decision to the TMRO (who was succeeded by the ADRP), Cockburn Cement claimed that the WA quicklime market should be treated as a "*different industry for the purposes of injury analysis*"[70]. Cockburn Cement claimed that when assessing injury, only the WA market should be considered (and should solely be based on Cockburn Cement's data as the sole Australian quicklime manufacturer in WA). Cockburn Cement claimed that extrapolating injury factors across the entire Australian market diluted any negative profit and revenue effects.

The ADRP found that:

> *"52. A determination of injury - whether material or negligible injury - must be based on an assessment of injury to the Australian industry as a whole. It is not confined to an assessment to a particular segment of an industry. As a result the calculations relied on behalf of Cockburn Cement's production in Western Australia in ground 8.1(c) of the application for review to conclude that material injury has been suffered are of limited value since they address only revenue and profit loss for Cockburn Cement and do not address the connection between those results and the outcomes for the Australian industry as a whole. Customs adopted the correct approach in the instant case and the submission in the application for review on this point is misguided"*[71].

The ADRP rejected Cockburn Cement's claims that injury to the Australian industry should be exclusively based on the WA quicklime market.

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69 ADRP's Report, pages 23 to 24 refer.

70 Ibid, page 22 refers.

71 Ibid, page 24 refers.

4.5.3 Injury to the Australian industry as a whole

In SEF 179B, the Commission found that during the investigation period, when the injury to Cockburn Cement is extended to the whole of the Australian industry, that the injury experienced included:

- reduced revenue due to price depression of [redacted] (representing a reduction of [redacted]% [less than 1%]); and
- profit foregone due to price depression[72].

The assessment above was based on extrapolated data where it was estimated that Cockburn Cement represented approximately 40%[73] (and not 50%) of the quicklime market share. In addition to meeting requirements in the Act, the Commission considers it appropriate in this case where the Australian industry member that participated in the investigation represented 40% of the market to extrapolate Cockburn Cement's data to assess the economic consideration of the whole Australian industry (which represented approximately the remaining 60% of the market).

Furthermore, the Commission has identified that the profit injury (expressed as a percentage and in million dollars) highlighted in Cockburn's Cement submission to SEF 179B reflects:

- Cockburn Cement's data only;
- data for a longer period and not for the investigation period; and
- data that was included in previous reports for this investigation which appear to have been misconstrued by several stakeholders (and was clarified at Section 10.9 of SEF 179B).

4.5.4 The Commission's conclusion

As discussed previously, the Commission considers that its assessment of the economic condition of the Australian quicklime industry and a determination of injury must be based on the Australian industry as a whole. This approach reflects the *Ministerial Direction on Material Injury,* legislative requirements in the Act (as interpreted by the Federal Court) and has been supported by the ADRP.

Given this approach, the Commission has reconfirmed that the injury experienced by the Australian industry as a whole (and Cockburn Cement individually) was not significant (with all injury indicators measured at less than 1%). The Commission is satisfied that the injury experienced by the whole of the Australian industry was negligible.

[72] Which as discussed previously cannot be accurately calculated for the entire Australian industry.

[73] As explained in Section 8.3 of SEF 179B.

5 CONCLUSION

5.1 The Commissioner's conclusion

Under subsection 269TDA(13) of the Act, if an application is made for a dumping duty notice, and in that investigation of the application of the goods, the Commissioner is satisfied that injury to an Australian industry has been, or may be, caused by exports is negligible, the Commissioner must terminate the investigation so far as it relates to that country.

The Commissioner is satisfied that an application has been made for a dumping duty notice for the export of quicklime from Thailand and that injury to an Australian industry has been, or may be, caused by the export of quicklime from Thailand is negligible.

Therefore, on 7 November 20104, the Commissioner terminated the dumping investigation into exports of quicklime from Thailand.

6 ATTACHMENTS

Attachment No.	Title / description
Non-Confidential Attachment 1	Public notice of the Commissioner's decision to terminate the dumping investigation into quicklime exported from Thailand (published on 7 November 2014)
Non-Confidential Attachment 2	Submission in response to SEF 179B - *Moulis Legal* on behalf of Chememan Thailand dated 27 October 2014
Non-Confidential Attachment 3	Submission in response to SEF 179B - *Roger Simpson & Associates* on behalf of Cockburn Cement dated 27 October 2014