

Circumvention practices

- 3.1 This chapter examines the circumvention practices used by foreign exporters and Australian importers.
- 3.2 The informal Manufacturers' Trade Alliance (MTA) submission, representing nine companies in six industries, described the three main circumvention activities that impact on Australian industry:
- the minor modification of goods where the essential characteristics of the goods have not been substantially altered;
 - the export of goods (including minor modified goods) from third countries where the exporter and/or the Australian importer was involved in an earlier investigation of the goods; and
 - the exporter reducing export prices to evade the full intent of the dumping duties and therefore prolonging the injury that the measure was intended to prevent.¹
- 3.3 Most other submissions to the inquiry also discussed or described these three activities. Each of these activities is described in detail below. In addition, the issue of exporters establishing phoenix companies is discussed. The chapter concludes with a short discussion on other circumvention practices observed in Australia.

Minor modifications or 'like goods'

- 3.4 Multiple submissions to the inquiry explained that a key circumvention activity involved the slight alteration of a product in order to avoid the intended impact or effect of the anti-dumping measure imposed.
- 3.5 The submissions stated that current regulatory provisions do not address the minor modification of exported goods.
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1 Manufacturers' Trade Alliance, *submission 23*, p. 2.

- 3.6 As an example, the Cement Industry Federation submission stated that this was of particular concern:

... where cement or cementitious products can be modified with a low-cost additive that results in the exported goods description altering to a “mixture” or similar.²

- 3.7 Two key examples of Australian industries impacted by slight modification of ‘like goods’, steel and ammonium nitrate, are discussed below.

Steel

- 3.8 The inquiry received several submissions relating to circumvention activities impacting the Australian steel industry.³

- 3.9 BlueScope Steel discussed the modification of steel and the intention of producing an alloy product:

It is our experience that increasing volumes of flat steel imports are being slightly modified by the addition of an alloy, principally boron, in minor quantities (commonly referred to as “pixie dust”) and then reclassified under Australia’s tariff system so as to avoid or circumvent anti-dumping measures. The evidence indicates that this practice is deliberately and sometimes blatantly aimed at avoiding dumping duties, with the alloy goods being sold into the same end-use applications as non-alloy steel but without dumping measures being applied.⁴

- 3.10 BlueScope Steel stated that the imported modified goods continue to compete directly with similar Australian products in all end-use applications that were previously considered as comprising the Australian market in the lead-up to the imposition of the anti-dumping measures.⁵

- 3.11 Bisalloy Steel Group also stated that minor modification does not alter the essential characteristics of the goods or the end-use application of the goods:

The alloyed products are sold via the same distribution channels, to the same end-use customers, and are used in the same end-use applications as non-alloyed products. The addition of the low-cost

2 Cement Industry Federation, *submission 16*, p. 6.

3 BlueScope Steel Pty Ltd, *submission 9*; Bisalloy Steel Group Pty Ltd, *submission 13*; Arrium Ltd, *submission 14*; Australian Steel Institute, *submission 18*; Bureau of Steel Manufacturers of Australia, *submission 22*.

4 BlueScope Steel, *submission 9*, p. 3.

5 BlueScope Steel, *submission 9*, p. 9.

alloy is sufficient ... to avoid the payment of measures ... imposed on non-alloyed goods.⁶

- 3.12 Arrium Ltd also discussed the minor modification of steel products and the impacts on the Australian steel market. The example given related to hollow structural sections (HSS) imported into Australia from China and Malaysia:

Within six months of [anti-dumping] measures being imposed, certain exporters began adding very small amounts of ... boron, to the HSS steel. Imports of "alloyed" HSS products increased by approximately 1,000 per cent from 300 tonnes per month to 3,000 to 4,000 tonnes per month. Whilst the addition of micro levels (8ppm) of boron doesn't alter the essential characteristics of the goods in any manner, it permits a change to a tariff statistical code from non-alloy to alloy. For a cost of less than \$5/t to add the 8ppm of boron, foreign exporters are currently evading up to \$100/t in dumping measures. The addition of boron in many steel goods is a deliberate circumvention strategy ...⁷

- 3.13 The Australian Steel Institute also noted that, while recent circumvention examples have highlighted the increase in the use of boron to create an alloy steel, other elements could also be added to provide the same effect.⁸

- 3.14 Mr Mark Vasella, Chief Executive of BlueScope Steel Australia, further discussed the intent of minor modification and its direct impact on the Australian steel industry:

Circumvention is low cost and high gain to the exporter, but increasingly costly to the local steel industry. In recent years, we have seen dramatic increases in volumes of imported steel arriving here under the other alloy tariff code, but destined for the same end-use applications as non-alloyed steel minus dumping measures. For galvanised steel alone, we conservatively estimate that revenue lost to our company through circumvention by minor modifications at more than \$30 million for the period between October and January just gone.⁹

- 3.15 The Arrium Ltd submission stated that, since dumping measures were imposed on HSS steel products in June 2012, more than 54,000 tonnes of the product have been imported as alloy, thereby avoiding dumping

6 Bisalloy Steel Group Pty Ltd, *submission 13*, pp. 4-5.

7 Arrium Ltd, *submission 14*, p. 6.

8 Australian Steel Institute, *submission 18*, p. 7.

9 Mr Mark Vasella, Chief Executive, BlueScope Steel, *Committee Hansard*, Canberra, 19 March 2015, p. 6.

duties.¹⁰ Arrium Ltd added that this circumvention has depressed the Australian steel industry's domestic selling prices by approximately ten per cent, costing the industry millions of dollars in annual profit, and contributing to a reduction in the industry's workforce.¹¹

- 3.16 Arrium Ltd discussed the need for the Australian Government to redress the minor modification situation:

In 2005, the Australian pipe and tube industry embarked on a process of attempting to have effective measures implemented to remove the injury caused by dumping. It took seven years and a series of investigations before Customs and Border Protection finally applied dumping and subsidisation measures in 2012 on hollow structural sections, pipe and tube exported from China, Taiwan, Korea and Malaysia. We believe it took foreign exporters less than three months to circumvent these measures – by, for example, in this case the addition of eight parts per million of boron to simply change the tariff codes under which the products were imported. Arrium raised this circumvention issue with the government almost two years ago. Today, the circumvention and injury to the Australian industry continues.¹²

- 3.17 BlueScope Steel's submission also discussed the need for change in circumvention regulation:

The inability of the newly-introduced circumvention provisions to address minor modifications of goods exported to Australia that are otherwise the subject of measures is a significant flaw in the legislative framework, and one requiring immediate redress.¹³

- 3.18 Mr Mark Vasella of BlueScope Steel added:

Treating goods with minor modification as alike to goods that are subject of anti-dumping measures will hopefully plug this loophole.¹⁴

Ammonium nitrate

- 3.19 Orica Ltd provided a key example of goods that have been modified to avoid anti-dumping measures.
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10 Arrium Ltd, *submission 14*, p. 6.

11 Arrium Ltd, *submission 14*, p. 6.

12 Mr Steve Hamer, Chief Executive Steel, Arrium Ltd, *Committee Hansard*, Canberra, 19 March 2015, p. 6.

13 BlueScope Steel, *submission 9*, p. 9.

14 Mr Mark Vasella, Chief Executive, BlueScope Steel, *Committee Hansard*, Canberra, 19 March 2015, p. 6.

- 3.20 Orica Ltd explained that the company's recent involvement with Australia's anti-dumping system commenced in 2000 when it participated in an industry application for anti-dumping measures on ammonium nitrate exported from the Russian Federation. Anti-dumping measures have remained in place since May 2001.¹⁵
- 3.21 The Orica Ltd submission claimed that the company, on occasion, has encountered attempts by exporters to circumvent anti-dumping measures.¹⁶
- 3.22 Orica Ltd explained that ammonium nitrate is a commodity product with significant volumes exported from Russia and the former Russian states, and added that ammonium nitrate is subject to minor modification:
- ... the low production cost associated with Russian ammonium nitrate makes it all the more realistic that additives can be incorporated into the finished [ammonium nitrate] at minimal cost.¹⁷
- 3.23 Orica Ltd explained that, in the European Union, the ammonium nitrate industry was concerned about changes in exporter activity following the imposition of measures on Russian exporters:
- Producers/exporters altered the products through the addition of minimal amounts of calcium. The goods were then identified as "mixtures" of [ammonium nitrate], and it was asserted that the "mixture" goods were not the subject of the measures.¹⁸
- 3.24 However, the submission from Orica Ltd explained that the European Commission was able to effectively deal with the attempts to circumvent the measures:
- The European Commission concluded that the [ammonium nitrate] mixtures were alike to [ammonium nitrate that was] the subject of the measures and extended the goods description to include mixtures of [ammonium nitrate] where it is evident that the slightly altered goods have essentially the same physical characteristics as the original goods, are sold via the same distribution channels to the same end-use customers, and are used in the same end-use applications, as the "goods".¹⁹
- 3.25 Discussion on redressing the minor modification and like goods issues can be found in chapter four.
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15 Orica Ltd, *submission 17*, p. 3.

16 Orica Ltd, *submission 17*, p. 3.

17 Orica Ltd, *submission 17*, p. 4.

18 Orica Ltd, *submission 17*, p. 3.

19 Orica Ltd, *submission 17*, p. 4.

Country hopping

- 3.26 The second significant circumvention activity described in this chapter is country hopping or the export of goods from third countries.
- 3.27 Bisalloy Steel explained that an exporter can commence exporting goods from an affiliated supplier in another country that is not the subject of anti-dumping measures.²⁰
- 3.28 Capral Ltd also explained that goods can be shipped through a third country to avoid anti-dumping measures:
- [Aluminium] extrusions destined for Australia are shipped from China to a third country and then shipped to Australia purporting to originate from the third country. Only Chinese extrusions are subject to dumping and countervailing duties, therefore importers claiming the goods are from another country will avoid paying the duties.²¹
- 3.29 The Australian Forest Products Association noted that the paper product industry is characterised by large international companies that often have operations in several countries, which can facilitate the ability to switch sourcing of products if anti-dumping measures are applied.²²
- 3.30 Orica Ltd claimed that following the imposition of anti-dumping measures, it is not uncommon for importers to seek out new sources for supply, adding that this may particularly be the case where the market opportunities in Australia are significant.²³
- 3.31 Orica Ltd observed the emergence of ammonium nitrate exports from the Ukraine, following the imposition of measures on Russian ammonium nitrate:
- ... it is Orica's understanding that some of the [ammonium nitrate] exported from the Ukraine has been manufactured in Russia. The emergence of the Ukraine as a source of supply to Australia could, at the time, be attributed to the imposition of [anti-dumping] measures on [ammonium nitrate] of Russian origin.²⁴
- 3.32 Orica Ltd further explained that it has encountered recent circumstances concerning the export of ammonium nitrate to Australia that was declared as being of Malaysian origin. Orica Ltd stated that Malaysia does not have

20 Bisalloy Steel Group Pty Ltd, *submission 13*, p. 1.

21 Capral Ltd, *submission 7*, p. 2.

22 Australian Forest Products Association, *submission 6*, p. 2.

23 Orica Ltd, *submission 17*, p. 4.

24 Orica Ltd, *submission 17*, p. 4.

ammonium nitrate manufacturing facilities, leading the company to conclude that the exported goods are of Russian origin.²⁵

3.33 Orica Ltd explained further:

In some instances, [ammonium nitrate] of Russian origin can be transported to the Ukraine and then forwarded to Malaysia where it “enters the commerce” of Malaysia. The goods may then be further redirected to Australia. The low commercial cost of producing [ammonium nitrate] in Russia ... permits [ammonium nitrate] to be trans-shipped via one or more countries for eventual export to Australia.²⁶

3.34 Orica Ltd stated that it has raised the incorrect country of origin issue with the Australian Bureau of Statistics so that the imports can be correctly identified.²⁷

3.35 The SPC Ardmona submission stated that the imposition of an anti-dumping duty may create an incentive for producers to move production to other countries or to start producing in the country that imposed the anti-dumping duty.²⁸

3.36 SPC Ardmona discussed the complexities of food production and the difficulty in keeping track of ingredients:

Recent years have seen a substantial increase in trade of intermediate or completed goods ... For example ingredients could be sourced for one country, semi processed in/from another and final assembly of the goods could occur in the third country. These scenarios lead to difficulty in determining the country of origin of the goods and in establishing whether duties are being circumvented.²⁹

3.37 Discussion on redressing country hopping issues can be found in chapter four.

Duty absorption

3.38 A further form of circumvention of anti-dumping measures involves price manipulation to overcome or absorb the duties applied to exported goods.

25 Orica Ltd, *submission 17*, p. 5.

26 Orica Ltd, *submission 17*, pp. 5-6.

27 Orica Ltd, *submission 17*, p. 5.

28 SPC Ardmona, *submission 21*, p. 6.

29 SPC Ardmona, *submission 21*, p. 6.

- 3.39 BlueScope Steel suggested that where an anti-dumping measure is applied, it is expected that the selling price on the Australian market would increase by at least the amount of the measure.³⁰
- 3.40 The Australian Steel Institute stated that an importer/exporter could absorb the duty, sell into the market at the same price, and continue to cause injury to the market.³¹
- 3.41 Orica also pointed out that an importer can forego profit or secure a subsequent disbursement from the exporter to compensate for the absorption of the duty.³²
- 3.42 Bisalloy Steel Group Pty Ltd (Bisalloy) has experienced the circumvention of anti-dumping measures, observing further reductions in product export prices following the application of provisional anti-dumping measures.³³
- 3.43 The Australian Steel Institute submission explained that Bisalloy won an anti-dumping case concerning certain steel products; subsequently all four of the competitors cited in the case reduced their prices. The nett effect was that the price was the same in the marketplace as it was prior to the successful anti-dumping investigation. Bisalloy therefore found itself in the same position of material injury as prior to the anti-dumping investigation.³⁴
- 3.44 Orica observed that section 269ZDBB of the *Customs Act 1901* addresses the avoidance of the intended effect of the anti-dumping measure, noting that the provision is predicated on “increasing the price commensurate with the total amount of duty payable” on the circumvented goods.³⁵
- 3.45 Orica noted that, in certain circumstances, the importer may absorb a proportion of the anti-dumping measure, thereby discounting eligibility under section 269ZDBB as the total duty payable is not reflected in the selling price.³⁶

Measures

- 3.46 The Anti-Dumping Commission’s *Guidelines on the application of forms of dumping duty* (the duty guidelines) provide details on types of duty, as described below.

30 BlueScope Steel, *submission 9*, p. 10.

31 Australian Steel Institute, *Committee Hansard*, Canberra, 5 March 2015, p. 2.

32 Orica Ltd, *submission 17*, p. 6.

33 Bisalloy Steel Group Pty Ltd, *submission 13*, p. 1.

34 Australian Steel Institute, *submission 18*, p. 7.

35 Orica Ltd, *submission 17*, p. 6.

36 Orica Ltd, *submission 17*, p. 6.

Ad valorem method

3.47 The duty guidelines state that the most common form of duty is the *ad valorem* duty:

It is duty applied as a proportion of the export price. It is like other long standing *ad valorem* duties of Customs. The duty amount, in Australia's case, is usually the actual FOB (Free on Board) export price multiplied by the percentage dumping duty rate.³⁷

3.48 The duty guidelines also state that an *ad valorem* duty method is one of the simplest forms of duty and it is easy to administer.³⁸

3.49 The duty guidelines go on to explain that an *ad valorem* duty suits a situation where a commodity's prices vary significantly over time, because:

- an *ad valorem* duty method which applies the duty to the actual export price ... does not show the same variability in the 'effective' rate of the duty that arises under the combination or fixed duties, as export prices change ... ; and
- an *ad valorem* method may not need to be subject to frequent review unlike the other duty methods.³⁹

3.50 Orica noted that the Anti-Dumping Commission applies measures on an *ad valorem* basis:

The rationale for *ad valorem* measures is based upon the Commission's understanding that *ad valorem* measures are the most common form of measure in other jurisdictions.⁴⁰

3.51 Orica claimed that *ad valorem* measures are readily circumvented by exporters via further reductions in the export price.⁴¹

Fixed duty method

3.52 The duty guidelines state that a fixed duty method operates to collect a fixed amount of duty, regardless of the actual export price of the goods.⁴²

37 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 11.

38 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 11.

39 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 12.

40 Orica Ltd, *submission 17*, p. 6.

41 Orica Ltd, *submission 17*, p. 6.

42 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>

- 3.53 In imposing the duty, the duty guidelines state that, as an example, \$10 per tonne must be paid regardless of whether the actual export price of the goods at the time of import is \$100 per tonne or \$500 per tonne.⁴³
- 3.54 The duty guidelines state that the main advantage of this form of duty is that it ensures the effectiveness of measures where there is a likelihood of price manipulation or circumvention.
- 3.55 The duty guidelines add that those circumvention or manipulation activities may often be associated with:
- complex company structures such as where there are wholly owned subsidiaries and where parties are related; or
 - where there are new forms of the product via mixtures with other products emerging.⁴⁴
- 3.56 The duty guidelines briefly discuss advantages of the fixed duty method:
- ... [an advantage is] that it can be more precisely applied than the *ad valorem* duty method in some cases; and
 - a key disadvantage ... is that in a rising market the protective effect of the fixed duty can become quickly eroded.⁴⁵

Combination method

- 3.57 Several submissions to the inquiry suggested that a combination of fixed duty and variable methods be applied.
- 3.58 BlueScope Steel, in its supplementary submission, provided a simple example that explained fixed measures versus fixed and variable measures.⁴⁶
- 3.59 The Cement Industry Federation stated that it supports the combination method over the *ad valorem* method alone:
- ... measures based upon the *ad valorem* method may be readily circumvented by exporters and importers. This is particularly the case where measures are relatively small – for example five per cent or less. All that is required is for the exporter to reduce the export price by the amount of the interim duty margin for the duty

dumpingduty-November2013.pdf>, accessed 21 April 2015, p. 10.

43 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 10.

44 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 10.

45 'Guidelines on the application of forms of dumping duty' <www.adcommission.gov.au/accessadsystem/investigations/Documents/Guidelineformsofdumpingduty-November2013.pdf>, accessed 21 April 2015, p. 10.

46 BlueScope Steel Pty Ltd, *submission 9.1*, p. 1.

to become ineffective. *Ad valorem* measures do not allow for a penalty to be applied where the exporter reduces export prices further – whereas measures based upon the combination method (where a fixed and variable component addresses subsequent reductions in export prices) remain effective and limit further injury to the Australian industry.⁴⁷

- 3.60 Discussion on redressing duty absorption issues can be found in chapter four.

Phoenix companies

- 3.61 Evidence to this inquiry suggested that a particular circumvention activity involves the supply of goods through alternate companies that are not subject to anti-dumping measures.

- 3.62 Mr Phil Jobe, Director of Capral Ltd, discussed the very recent anti-circumvention case that ruled in Capral's favour, and explained the use of 'phoenix companies' in that case:

One of the aspects of this decision we were not pleased with was the retrospectivity back to April. We were very pleased that the principle was achieved, but in this case the importers set up a \$2 company just after the inquiry was announced and starting buying, we understand, the bulk of the metal through that company, which was not listed in the original application, and by that very simple act they appear, at this point anyway, to have avoided something like \$8 million to \$8½ million worth of [duties] ... [The] circumvention case [was] initiated by the Commissioner on 14 April. On 1 June last year, the phoenix company started operating.⁴⁸

- 3.63 Mr Jobe explained that the phoenix company issue needs to be examined:

We just think that a phoenix company being able to set up after a commissioner has announced an inquiry and then being able to avoid any of that retrospectivity probably needs attention.

But I do think that, if a circumvention inquiry is underway, it should apply to the companies that have been found to have engaged in circumvention activities and their successors. That is what is needed, and we need clarity about whether those powers are available now or whether amendments are needed to clarify

47 Cement Industry Federation, *submission 16*, p. 5.

48 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 3.

that. But I think that is a major gap right now in the circumvention, in the anti-dumping cases.⁴⁹

Other practices

3.64 Submissions to the inquiry outlined an array of circumvention practices, in addition to the key activities described above.

3.65 Arrium Ltd provided a list of examples of importers changing product tariff classifications in order to evade applicable dumping duties, including:

- Foreign exporters re-specifying a product without necessarily making a physical change to the product. An example of this is dual specifying HSS as “Line Pipe” so that it can be imported under a different tariff code.
- Foreign exporters applying a primer to steel product so that a change in the tariff classification occurs for the goods from “uncoated steel” to “coated steel”.
- Foreign exporters drilling a hole in a beam or tube of steel to enable a change of the tariff classification to a ‘fabricated’ steel.⁵⁰

3.66 Capral Ltd also discussed product misclassification using aluminium extrusions as an example:

Customs uses its imports clearance system to collect dumping and countervailing duties, which relies on importers correctly classifying and describing the goods as extrusions in order to attract the duties. Importers will avoid paying the duties if the goods are misclassified or wrongly described.⁵¹

3.67 The Australian Customs and Border Protection Service (ACBPS) submission stated that there are several practices used by unscrupulous entities to circumvent the payment of anti-dumping and countervailing duties.⁵²

3.68 ACBPS added that these practices often involve collusion between several parties in the supply chain:

... at times, they involve professional fraud facilitation networks that have an extensive global footprint, operate in several

49 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 3.

50 Arrium Ltd, *submission 14*, p. 6.

51 Capral Ltd, *submission 7*, p. 2.

52 Australian Customs and Border Protection Service, *submission 15*, p. 2.

countries and pose a direct risk to several jurisdictions including Australia.⁵³

3.69 The ACBPS claimed that these professional networks facilitate the avoidance of millions of dollars in duties and taxes across numerous jurisdictions.⁵⁴

3.70 ACBPS provided a list of some of the known or suspected practices employed to illegally circumvent anti-dumping and countervailing duties, some of which have been canvassed in this chapter:

- hiding the true origin of the goods to avoid payment of [anti-dumping and countervailing] duties by falsifying, or fraudulently obtaining, certificates of origin or other documentary evidence; transshipping the goods through a third country and physically changing the presentation of the goods (e.g. re-packaging, re-labelling);
- manipulating the value of the goods subject to [anti-dumping and countervailing] duties, which may involve collusion between the foreign manufacturer or exporter and the Australian importer;
- misclassifying the goods subject to [anti-dumping and countervailing] duties to a tariff classification that does not attract such duties;
- falsely claiming an exemption on the basis of goods, country or exporter;
- misreporting the goods, often through underreporting the correct quantity of the total number of goods in a consignment, or an incorrect description or origin of the goods;
- collusion between foreign exporters so that goods subject of [anti-dumping and countervailing] duties are supplied from a lower duty rate supplier or exempt supplier; and
- comingling goods the subject of [anti-dumping and countervailing] duties in the same consignment as those that are not.⁵⁵

53 Australian Customs and Border Protection Service, *submission 15*, p. 2.

54 Australian Customs and Border Protection Service, *submission 15*, p. 2.

55 Australian Customs and Border Protection Service, *submission 15*, pp. 2-3.

