

Proposals for change or reform

- 4.1 This chapter examines possible changes to the anti-circumvention framework. The key areas examined are measures aimed at addressing minor modification, country hopping and duty absorption. International practices and their possible application in Australia are also considered. Additional areas of the framework examined here include effectiveness of measures, retrospective measures and post-implementation scrutiny.
- 4.2 The work of the Anti-Dumping Commission is briefly examined, including the crucial area of resources for the agency. Several aspects of the anti-dumping framework are briefly discussed.

Minor modification and like goods

- 4.3 As described in chapter three, many submissions called for the addition of minor modification to the list of circumvention activities. Submissions recommended that the Anti-Dumping Commission have the ability to treat slightly modified goods as 'alike' to goods the subject of anti-dumping measures.
- 4.4 BlueScope Steel stated that adopting this approach would ensure that the anti-dumping system is able to swiftly address circumvention activities involving the slight modification of goods, minimising further material injury to Australian industry.¹

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

- 4.5 Australia's Anti-Dumping Commissioner, Mr Dale Seymour, brought good news to the inquiry at a public hearing in March 2015. The Commissioner described a new regulation to be introduced that captures slight modification as a circumvention activity:

On 1 April 2015, there will be a new type of circumvention activity addressing the issue of slight modification of goods ... This new circumvention activity will be prescribed through regulation ...

The new regulation seeks to prescribe a new circumvention activity in which goods that would have been subject to a dumping or countervailing notice are slightly modified by a foreign exporter to avoid anti-dumping duty.²

- 4.6 The Commissioner further described the factors that may indicate a slight modification of goods to circumvent the payment of duties, including:

... the general physical characteristics of the goods, commercial characteristics of the goods, function and/or purpose of the original goods and the slightly modified goods, production likeness, intention of the exporter-importer to circumvent, recent evidence of imports of the modified goods to Australia, cost of slight modification, and patterns of trade.³

- 4.7 The Commissioner explained why the new regulation will be put in place in the framework:

The new regulation has arisen in response to feedback from several stakeholders – and I note from submissions that this is a consistent theme – who allege that certain exporters are adding minute amounts of chemical allies such as boron to some steel products in order to avoid anti-dumping measures.⁴

- 4.8 Importantly, the Commissioner added that the new regulation aligns Australia's anti-circumvention provisions more closely with those of other anti-dumping administrations that currently can address the slight modification of goods.⁵

2 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 1.

3 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 1.

4 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 1.

5 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, pp. 1-2.

- 4.9 The Commissioner also commented on the ability of the new regulation to meet the needs of Australian industry:

I am quite confident that the nature and scope of the regulation as it is being prescribed is adequate to do the task at hand. I have no doubt that we will be involved in looking at that very closely very quickly, based on advice I have got from industry. I am looking forward to being able to apply that in real time and test it, but right now I would think it has been very well crafted by the department. The policy objective is clear. I think the nature and scope of the regulation, as I say, is adequate.⁶

- 4.10 When asked if the Commission and the Department of Industry had been developing the new regulation for some time or if the drive came as a result of the Committee's inquiry, the Commissioner stated that the policy development was already in progress.⁷

- 4.11 However, the Commissioner was complimentary about the evidence to the inquiry:

I found the evidence in this process to be quite fascinating actually. That alone has established the value of the review, to be quite honest. There was nothing that I read that I was not aware of, but the way it was expressed was very useful in terms of the context and the impact.⁸

Committee comment

- 4.12 The evidence to the inquiry suggested that the minor modification of goods is a major concern to many Australian businesses. The evidence clearly stated that there has been significant loss in profits, substantial job losses, and significant avoidance of duties payable to the Australian Government.
- 4.13 The Committee is very pleased that the Department of Industry and the Anti-Dumping Commission have moved to implement a policy change by introducing a new regulation that covers slightly modified goods.
- 4.14 No doubt there will be significant interest from industry in this new regulation. The Committee expects to see a number of applications coming quickly from industry.

6 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 7.

7 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 7.

8 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 6.

- 4.15 The Committee is encouraged by the positive comments from the Commissioner concerning the impact of this particular inquiry.

Country hopping and phoenix companies

- 4.16 Country hopping and the use of phoenix companies were raised as circumvention activities in chapter three. Several submissions to the inquiry recommended that country hopping be considered a circumvention activity under the *Customs Act 1901* (the Customs Act).
- 4.17 SPC Ardmona stated that the provisions in the Customs Act regarding circumvention activities such as assembly in, or exports through, a third country could be strengthened.⁹
- 4.18 The Manufacturers' Trade Alliance recommended the extension of anti-circumvention provisions to address 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.¹⁰
- 4.19 Orica Ltd stated that country hopping activities are not limited to associated parties of the exporter. Orica Ltd considers the role of the Australian importer in country hopping activities as pivotal in the commencement of exports to Australia from a new source country.¹¹
- 4.20 Orica Ltd stated that anti-circumvention provisions should extend to the activities of foreign exporters and Australian importers that elicit exports of goods from a third country following the imposition of measures on the exporting country.¹²
- 4.21 Capral Ltd stated that importers found to have circumvented duties must not be allowed to be wound up and have phoenix companies appear in their place.¹³ Capral Ltd suggested that the Commission should have the powers necessary to ensure that importers cannot use phoenix companies to further circumvent dumping and countervailing duties.¹⁴

9 SPC Ardmona, *submission 21*, p. 9.

10 Manufacturers' Trade Alliance, *submission 23*, p. 2.

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

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

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

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

- 4.22 The Anti-Dumping Commissioner, Mr Dale Seymour, stated that country hopping is captured under the current framework:

In June 2013, new legislative provisions commenced in the *Customs Act 1901* for conducting anti-circumvention inquiries based on prescribed circumvention activities. These formed a central component of the previous government's Streamlining Australia's Anti-dumping System reforms package. The package covered, firstly, assembly of parts in Australia; secondly, assembly of parts in a third country; thirdly, export of goods through one or more third countries; fourthly, arrangements between exporters; and, finally, any additional circumstances prescribed by regulation.¹⁵

- 4.23 The Anti-Dumping Commissioner, discussed potential deficiencies in the anti-circumvention investigation process, explaining that it is difficult to establish facts regarding third country or third party entities:

I do not think, prospectively, there are any deficiencies so far as capturing the importer entities that have a relationship with [an applicant]. It is really just the application of retrospectivity. The question that I am struggling with is, right now, I am fairly clear that, unless those entities were operating through the investigation period, I cannot make a recommendation based on organisations that do not exist.¹⁶

- 4.24 The Commissioner further explained that, in the case of the Capral investigation, any company associated with the exporter would be captured:

So, prospectively, the decision that the parliamentary secretary took very clearly establishes that anybody in an importer relationship with PanAsia as the exporter is captured by the anti-circumvention decision ... The issue with Capral is really a much more specific issue to do with application of retrospectivity to a number of companies that emerged after the end of the investigation period. I took the view that I was only able to investigate entities that were in play, if you like, during the investigation period.¹⁷

15 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 27 November 2014, p. 2.

16 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 3.

17 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 3.

- 4.25 The Commissioner discussed the difficulties of investigating export activity through third countries:

There is the evidence-gathering exercise itself. What you are seeking to do is to go into third countries and, in somewhat difficult circumstances, seek information and evidence from parties to a matter. That in itself can be a very difficult and challenging exercise. It requires me to send people into those markets.¹⁸

Committee comment

- 4.26 The Committee is cognisant of the country hopping and phoenix company issues and the difficulties they present to Australian businesses and the Anti-Dumping Commission.
- 4.27 The Committee is aware that circumvention attempts will still be made irrespective of the anti-dumping measures imposed.
- 4.28 The Committee is of the opinion that, despite the difficulties presented, country hopping or export through third countries is adequately covered by the legislative provisions introduced in 2013.

Duty absorption

- 4.29 As summarised in chapter three, submissions to the inquiry raised concerns over duty absorption as a circumvention activity, where exporters manipulate prices to overcome or absorb the duties applied to exported goods.
- 4.30 There was much discussion in the submissions regarding the application of the most appropriate form of duty. Submissions claimed that a combination of duties is preferred over only fixed duties or only the *ad valorem* method.
- 4.31 The Australian Steel Institute stated that, where only the *ad valorem* method is used, there is a high risk that the exporter will simply reduce prices, thereby circumventing the intended measures.

18 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 27 November 2014, p. 5.

4.32 The Australian Steel Institute therefore recommended utilising a combination of fixed and variable duties:

This will deter exporters from reducing export prices post the imposition of measures. This method has been used to good effect in the past.¹⁹

4.33 Mr Alan Gibbs, Manager of International Trade Affairs at BlueScope Steel, also stated the combination method is a much preferred measure than just the *ad valorem* duty.²⁰

4.34 Similarly, the Bureau of Steel Manufacturers of Australia recommended that a combination of duties be adopted as the default duty to reduce circumvention via price manipulation.²¹

4.35 When questioned about the application of appropriate duties, the Anti-Dumping Commissioner explained that the current system is adequate, follows a very well established international standard and is consistent with World Trade Organisation principles.²²

4.36 When asked if the duty is insufficient if the price of the product in the marketplace does not go up, the Commissioner explained:

No, [it] does not really say that the duty is insufficient; it is really saying that something else is at play. If that is drawn to our attention or we pick it up through our post-implementation monitoring then we will deal with it ourselves ...²³

4.37 The Commissioner discussed the complexity of the various forms of duty that might be recommended to the Minister in an anti-dumping investigation:

We do not by default use one form of duty exclusively. Different duty methods are used on a case-by-case basis. ... Typically, a combination method has been used. However, the forms of duty available to the minister now include a combination of fixed and variable duty method, which is known as the combination duty; a fixed duty method; a floor price duty method; and *ad valorem* duty method.²⁴

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

20 Mr Alan Gibbs, Manager, International Trade Affairs, BlueScope Steel Pty Ltd, *Committee Hansard*, Canberra, 19 March 2015, p. 7.

21 Bureau of Steel Manufacturers of Australia, *submission 22*, p. 1.

22 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 3.

23 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 6.

24 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 6.

- 4.38 The Commissioner explained that the forms of dumping duty calculation all have the same objective of removing the injurious effects of dumping. However, the Commissioner added that certain forms of duty will better suit the particular circumstances of some dumping cases when compared with other forms of duty.²⁵

Committee comment

- 4.39 The Committee appreciates the complexities of establishing and imposing the most appropriate duty or duties on a case by case basis.
- 4.40 However, the Committee is of the opinion that the combination method of imposing duties should be the Minister's default position. The Committee recognises the need to have various options available to the Minister, and also understands that the application of a combination of duties may not be suitable in every circumstance.
- 4.41 With the combination method as the default position rather than one particular duty, the Minister would need to demonstrate a need for selecting one method over a combination, or indeed one method over another.

Recommendation 1

The Committee recommends that the Minister, in imposing any anti-dumping duties, should use a combination of duties in preference to a single duty. This should be the default position in each case, unless it can be demonstrated by the Minister that a single duty is more suitable than a combination.

International practices and their possible application in Australia

- 4.42 As described earlier in this report, the submission from the Department of Industry provided a summary comparison of some of the features of anti-circumvention frameworks in comparable jurisdictions.²⁶ The summary

25 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 7.

26 Department of Industry, *submission 2*, Attachment D, pp. 13-14.

compares Australia with the European Union (EU), the United States (US) and Brazil.

4.43 Of particular note is the fact that the summary demonstrates that Australia meets more criteria than the other three jurisdictions. The only key provision that Australia does not meet concerns addressing slightly modified goods. However, this has now been addressed by the Anti-Dumping Commission as discussed earlier in this chapter.

4.44 Australia also leads the way in terms of investigation timeframes, with a 155 day timeframe, being well inside nine months (EU and Brazil) or 300 days (US).²⁷

4.45 The Department described the EU's broader approach to defining and addressing circumvention activity in comparison to the US, Brazil and Australia:

The broad EU definition allows various types of circumvention to be addressed including: product alternation (modified products); third country circumvention (including trans-shipment); and arrangements between exporters with lower duty rates.²⁸

4.46 The Department also explained that the EU has a 'reinvestigation' process that allows the effectiveness of duties to be assessed, and, if necessary, revised:

This type of inquiry asks the question 'Are the duties working as intended?' and is distinct from a 'review of measures' which considers if the level of dumping has changed over time and needs to be adjusted.²⁹

4.47 The Department explained that Brazil also has a 'redetermination' process that addresses if the effectiveness of duties has been compromised because of the manner in which the duty was applied, or if the price of dumped products has not risen as expected.³⁰

4.48 Capral Ltd provided comment on consistency in the imposition of duties between jurisdictions, possibly reflecting the use of different forms of duties in those cases:

In 2009 we put an application in with the then anti-dumping department, and in 2010 duties of between zero and 10 per cent were awarded. This compared very poorly against Canada and the USA, where measures of 30 per cent plus were put in. This is the

27 Department of Industry, *submission 2*, Attachment D, p. 14.

28 Department of Industry, *submission 2*, p. 8.

29 Department of Industry, *submission 2*, p. 8.

30 Department of Industry, *submission 2*, p. 8.

same product, coming from many of the same factories, at the same pricing – so clearly there was a huge difference between findings in other countries around the world, and Australia ...³¹

Committee comment

- 4.49 The Committee is pleased that the Australian anti-circumvention framework compares favourably with those of other jurisdictions. It would appear that, in establishing a framework, Australia has adopted the best practices of other countries around the world. The Committee notes that the Australian framework outperforms others in terms of timeframes for investigations.
- 4.50 The Committee is concerned about consistency in the imposition of duties across jurisdictions. The Committee is of the opinion that, for the same product, a duty imposed in one jurisdiction should be similar to that imposed by another jurisdiction.
- 4.51 The Committee advises the Anti-Dumping Commission to examine and analyse the application of duties across jurisdictions with a view to providing consistency in imposing duties.

Effectiveness of anti-circumvention measures

- 4.52 One of the objectives of this inquiry was to consider the effectiveness of the anti-circumvention framework to date.
- 4.53 At the first public hearing for the inquiry, Mr Paul Trotman, General Manger of the Trade and International Branch in the Department of Industry, discussed the fact that the anti-circumvention framework is relatively new, and the impact that the first investigation may have:

The interesting thing about the anti-circumvention framework is that we are living and breathing still the very first application that has been brought and the decision that has been brought to bear, so it is difficult in a true policy sense to look at it with a degree of objectivity because you are very much in the midst of a live application. That is not to say that the government may not want to introduce further provisions and may want to introduce those quickly if they believe that the anti-circumvention framework is not working in the intended way ...³²

31 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 1.

32 Mr Paul Trotman, General Manger, Trade and International Branch, Department of Industry, *Committee Hansard*, Canberra, 26 March 2015, p. 3.

- 4.54 At the last public hearing for the inquiry, the Anti-Dumping Commissioner discussed the intent of the Commission, considering that one investigation has been completed:
- In my view there is absolutely no room for people to be avoiding these duties once they have been established. It is outrageous behaviour. From a commissioner perspective, as an independent statutory officer, my view is that the government has given me this regulation and I intend to apply it properly. I have shown through the way we approached the first anti-circumvention activity that we absolutely mean business in this area.³³
- 4.55 The Australian Workers' Union submission questioned whether the framework could efficiently and effectively address the concerns of industry, given the very low number of investigations. Further, the submission raised concerns about resource constraints and definitional issues that may be playing a part in the premature rejection of circumvention applications.³⁴
- 4.56 The Department of Industry noted that, between 11 June 2013 (when the anti-circumvention framework was established) and 27 November 2014, there were 10 anti-circumvention referrals to the Anti-Dumping Commission. The Department noted that a referral is not a formal application.³⁵
- 4.57 The Department added that the referrals were made to the Commission by the Australian Customs and Border Protection Service compliance/investigations work areas or by stakeholders through the dumping hotline.³⁶
- 4.58 The Department stated that it has not received any feedback from stakeholders as to why inquiries into circumvention activities have not been applied for by Australian industry. The Department added that the limited number of applications may not necessarily indicate a low prevalence of circumvention activities by importers and foreign exporters.³⁷
- 4.59 The Department listed possible factors that may have contributed to the low number of anti-circumvention applications by Australian industry:
- circumvention activities are not prevalent;

33 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 7.

34 Australian Workers' Union, *submission 5*, p. 11.

35 Department of Industry, *submission 2.1*, p. 2.

36 Department of Industry, *submission 2.1*, p. 2.

37 Department of Industry, *submission 2*, p. 9.

- the existence of an anti-circumvention framework deters circumvention activities;
- businesses do not understand circumvention or how the anti-circumvention framework operates;
- businesses are unaware of circumvention activities taking place;
- businesses are unable to gather sufficient evidence supporting claims of circumvention;
- businesses may be aware but not able to submit an application as not part of 'Australian industry'; or
- the existing anti-circumvention framework does not cover the type of circumvention activity occurring.³⁸

Committee comment

- 4.60 The Committee acknowledges that there has been only one investigation into circumvention activity, with that case being open at the beginning of the Committee's inquiry. That investigation concluded during the course of the inquiry.
- 4.61 The Committee is aware of factors that may currently limit the number of applications; it is a costly exercise, takes time, and not enough circumvention activities had been captured in regulations.
- 4.62 The Committee hopes that the recommendations in this report will assist in making the framework more accessible for Australian businesses.
- 4.63 The Committee is mindful of the fact that the anti-circumvention framework has not been properly tested. However, the Committee is confident that the effectiveness of the framework will be tested as new cases emerge, with each completed case sure to further inform policy development.

Retrospective measures

- 4.64 Some submissions called for the introduction of retrospective measures, allowing collection of duties back to the onset of an anti-dumping or circumvention investigation.
- 4.65 For example, Orica Ltd stated that retrospective measures could be readily applied in some circumstances to bolster the effectiveness of the anti-dumping system.³⁹

38 Department of Industry, *submission 2*, p. 9.

39 Orica Ltd, *submission 17*, p. 7.

- 4.66 Capral Ltd stated that any measures taken to counter circumvention must have a strong deterrence factor, and reiterated the need for retrospective measures to be applied.⁴⁰
- 4.67 However, the Department of Industry explained that duties can be collected retrospectively on goods:
- ... between the day the investigation is initiated (day 0) and the day securities could be taken (day 60), or were taken (up to a limit of 90 days prior to the date of imposition).⁴¹
- 4.68 Retrospective measures provisions are outlined in section 269TN of the *Customs Act 1901*.
- 4.69 Mr Paul Trotman of the Department of Industry discussed possible retrospective measures policy changes as the anti-circumvention framework develops:
- There are provisions which could be introduced which might be able to tighten up future investigations and look at things like prospectivity or retrospectivity. These are the sorts of things that we might look at in assessing how the current provisions are operating and whether they could be improved. Sometimes these things are best dealt with when a period of time has elapsed so you can look at all the details and all the information that has been presented and make a thoughtful response ...⁴²

Post-implementation scrutiny

- 4.70 Some submissions to the inquiry recommended that the Commission be more proactive in monitoring imports into Australia to ensure compliance with anti-dumping measures.
- 4.71 Capral Ltd stated that the anti-circumvention framework relies on industry to monitor the market and prepare cases for the Anti-Dumping Commission to investigate.⁴³ Capral Ltd believes it would be preferable for the Commission to have the capabilities, powers and resources to proactively monitor and audit imports to ensure compliance with measures and lessen the burden on industry.⁴⁴

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

41 Department of Industry, *submission 2*, p. 3.

42 Mr Paul Trotman, General Manager, Trade and International Branch, Department of Industry, *Committee Hansard*, Canberra, 26 March 2015, p. 3.

43 Capral Ltd, *submission 7*, pp. 2-3.

44 Capral Ltd, *submission 7*, pp. 2-3.

4.72 Capral Ltd added that such monitoring and auditing could include:

- ongoing analysis of industries susceptible to dumping;
- periodic audits of importers subject to dumping duties;
- occasional spot inspections of imported goods subject to dumping duties; and
- placing analysts in key exporting countries to monitor export industries.⁴⁵

4.73 Mr Phil Jobe, Director of Capral Ltd, discussed the importance of a monitoring role for the Commission:

I think it is vital that the Anti-Dumping Commission plays a very proactive role in monitoring and assessing [circumvention activity], to the point that I think it possibly does need to have people doing monitoring in the country where exports are emanating from ... I would strongly encourage the Anti-Dumping Commission to be very proactive about the post-implementation of this, to make sure that the decision they have made is carried through and does actually have an impact in the industry going forward.⁴⁶

4.74 The Anti-Dumping Commission's ongoing surveillance and enforcement role was discussed at length during a public hearing for the inquiry. The Anti-Dumping Commissioner discussed recent improvements to the Commission's surveillance and enforcement capability:

... in the most recent announcements of the further strengthening of the system by this government, the minister announced the establishment of an Anti-Dumping Information Service, including the creation of a market intelligence unit inside the ADIS, which, as a proposal from me originally, was designed to give me the post-implementation market analytical capability [for ongoing surveillance].⁴⁷

4.75 The Commissioner further explained that the Anti-Dumping Information Service market intelligence unit capability is designed to work with the anti-circumvention unit and the Australian Customs and Border Protection Service compliance division to ensure that post-implementation border control analysis is paramount.⁴⁸

45 Capral Ltd, *submission 7*, pp. 2-3.

46 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 4.

47 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

48 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

4.76 The Commissioner added that post-implementation activities will be more effectively scrutinised:

... with the market intelligence unit, under my direction, taking a very clear focus on post-implementation behaviours, I am quite confident we will be able to monitor [circumvention behaviours] far more effectively.⁴⁹

4.77 The Commissioner discussed the intent of companies that continue to circumvent measures and how they will be detected and managed:

I do not know that we will stop the construction of new entities. They are motivated by market incentives and opportunities that are far outside of my control. ... [If] we see a change in the nature and scope of how those products are being imported ... that will give us a fair indication that something is going on, and we will follow that up. We will follow it up very strongly in a joint operation with the compliance division of the Australian Customs and Border Protection Service.⁵⁰

4.78 The Commissioner reiterated the commitment to post-implementation enforcement:

... it is on the public record that there are a number of very significant investigations going on now and they are all to do with post-implementation circumvention of anti-dumping or countervailing duties ... What it shows is that the Australian Customs and Border Protection Service is absolutely serious about post-implementation monitoring, and so are we.⁵¹

4.79 The Commissioner also reiterated that the Anti-Dumping Information Service is a great initiative of the Australian Government in further strengthening the framework system and building the Commission's capability.⁵²

49 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

50 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

51 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

52 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 26 March 2015, p. 4.

The Anti-Dumping Commission

4.80 This section of the chapter examines the operations of the Commission, and details areas that require attention or further improvement. The section concludes with some analysis of issues raised about the anti-dumping investigation process.

Feedback

4.81 The Committee sought views from Capral Ltd on its experiences with its initial anti-dumping case, the first anti-circumvention investigation, and how the Commission has operated throughout.

4.82 Initially, Capral Ltd was negative about the way the initial dumping investigation in 2014 was conducted:

We believe that there were serious problems with outdated legislation, there were issues with the skill level and resources that the department had at the time, and we certainly believe that there was a culture of timidity, risk aversion, et cetera.⁵³

4.83 Capral Ltd argued that dumping investigations should be conducted by a separate statutory commission, with its own commissioner.⁵⁴ This arrangement is now in existence.

4.84 Capral Ltd spoke positively about the outcomes of the first anti-circumvention investigation initiated in 2014 and completed in early 2015:

We now have [the Commission], and I think the decision we have just received gives us enormous encouragement that that actually is working. It gives us much more faith in the process, the commissioner and the commission.⁵⁵

4.85 Capral Ltd explained further that the outcome is a very positive decision for the industry:

... [it] demonstrates quite a different culture, approach and methodology by the new commissioner and his staff in the commission, and we think that is a very positive development.⁵⁶

Resources

4.86 Several submissions discussed the issue of resources available to the Anti-Dumping Commission.

53 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 1.

54 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 2.

55 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 2.

56 Mr Phil Jobe, Director, Capral Limited, *Committee Hansard*, Canberra, 26 February 2015, p. 1.

- 4.87 The Export Council of Australia holds concerns that the efficiency of the anti-dumping framework may be adversely affected by a lack of resources or expertise in the Commission.⁵⁷ The Export Council of Australia is also concerned that, since the most recent changes to the framework, the workload of the Commission has increased and that the Commission requires significant additional resources.⁵⁸
- 4.88 The Export Council of Australia also suggested that the relocation of the Commission from Canberra to Melbourne and the move of its administration from Customs to the Department of Industry may have resulted in the loss of critical expertise.⁵⁹
- 4.89 The Australian Forest Products Association suggested that the Commission requires additional resourcing and case managers in order to effectively implement the framework.⁶⁰
- 4.90 The Australian Forest Products Association also suggested that the Commission's staff will continue to require broader training and skills in the relevant manufacturing industry processes and practices to better understand the basis of the specific complex cases that they investigate.⁶¹
- 4.91 Additionally, the Australian Forest Products Association stated that the Commission will continue to need to be adequately funded, and willing to engage and utilise independent industry experts on complex investigations.⁶²

Committee comment

- 4.92 The Committee is aware that the anti-circumvention system has only been in place for just under two years and that only one investigation has been concluded. Feedback on the work of the Anti-Dumping Commission's work has been positive from the single successful anti-circumvention applicant.
- 4.93 The Committee expects more investigations to be initiated now that minor modification is treated as a circumvention behaviour. Accordingly, the Committee expects the demands on the Anti-Dumping Commission to increase, at least in the medium term, and available resources will need to be monitored and adjusted as necessary.

57 Export Council of Australia, *submission 19*, p. 4.

58 Export Council of Australia, *submission 19*, p. 4.

59 Export Council of Australia, *submission 19*, p. 4.

60 Mr Ross Hampton, Chief Executive Officer, Australian Forest Products Association, *Committee Hansard*, Canberra, 19 March 2015, p. 2.

61 Australian Forest Products Association, *submission 6*, p. 3.

62 Australian Forest Products Association, *submission 6*, p. 3.

- 4.94 Further, the Committee wishes for the Anti-Dumping Commissioner to brief the Committee on a regular basis regarding anti-circumvention case load, progress and outcomes, and any changes to the relevant frameworks. This is particularly important as additional anti-circumvention cases are brought forward by industry and dealt with in the near future.

Recommendation 2

The Committee recommends that the Anti-Dumping Commissioner provide a briefing to the Committee every six months for the remainder of the 44th Parliament. The briefings should include any proposed legislative or regulatory changes, progress on anti-circumvention cases, and any changes to Anti-Dumping Commission processes.

Anti-dumping investigation process

- 4.95 Most submissions to the inquiry commented on the need for minor or indeed major changes to the anti-dumping investigation process.
- 4.96 As this report deals specifically with anti-circumvention measures, the report will not examine each of these areas in great detail. Instead, a brief summary is provided below. The main points described may be able to contribute to any review of policy and procedure.

Application process

- 4.97 The Australian Workers' Union noted that applications that are rejected following the screening process are not appealable, and that there does not appear to be any further recourse available to these applicants apart from intervention by the Minister.⁶³

Duration of inquiry

- 4.98 Submitters to this inquiry called for shorter timeframes for anti-dumping and circumvention investigations.
- 4.99 The Department of Industry stated that a dumping investigation must be completed within 155 days from the date of initiation. The legislation allows for extensions.⁶⁴

63 Australian Workers' Union, *submission 5*, p. 11.

64 Department of Industry, *submission 2.1*, p. 2.

- 4.100 Seven dumping and countervailing investigations were completed between 1 July 2013 and 30 November 2014. The average length of these investigations was 275.8 days.⁶⁵
- 4.101 Orica Ltd has observed delays in investigations in each of the following key stages of the application/investigation process:
- the ‘screening’ of the application extends beyond 20 days;
 - the granting of extensions to exporters to complete [Exporter Questionnaire Responses], in some instances by as much as 21 days to the initial 40-day period;
 - access to a Preliminary Affirmative Determination and provisional measures is extending beyond Day 110 of the investigation timeframe;
 - the publication of the [Statement of Essential Facts] is extended to periods well in excess of the legislated 110 days; and
 - further delays are emerging post the [Statement of Essential Facts] and report to the Minister.⁶⁶

Scope of an investigation

- 4.102 Mr Justin Wickes, an anti-dumping specialist, provided comments on defining the scope of an anti-dumping investigation.
- 4.103 Mr Wickes explained that the scope of an anti-dumping investigation is defined by the description of the imported goods provided by the local industry in its application for anti-dumping measures. However, the industry may not be aware of the exact nature and form of the goods being imported.⁶⁷
- 4.104 Further, Mr Wickes stated that once an investigation has been initiated the definition of the goods cannot be changed, even if it becomes clear that the scope of the investigation is narrower or wider than the industry intended.
- 4.105 Mr Wickes explained that this can have significant implications for the assessment of injury to the local industry and the application of any resulting measures. Mr Wickes added that, if measures are applied to a group of goods with an ambiguous definition, the measures may be more easily circumvented.
- 4.106 Mr Wickes recommended that Australian law be amended to give the Anti-Dumping Commission the power to amend the scope of an investigation prior to initiation and during an investigation.⁶⁸

65 Department of Industry, *submission 2.1*, p. 2.

66 Orica Ltd, *submission 17*, p. 9.

67 Mr Justin Wickes, *submission 8*, p. 2.

68 Justin Wickes and Associates, *submission 8*, p. 2.

Early determinations

- 4.107 Several submissions called for more timely access to measures, including provisional measures from day 60 of an investigation.⁶⁹
- 4.108 Submissions suggested that provisional measures at day 60 of an investigation could adequately deter exporters and/or importers from engaging in country hopping circumvention activity.⁷⁰

Data

- 4.109 The collection of data for investigation purposes was discussed in several submissions.
- 4.110 AUSVEG suggested that the amount of data required to file a dumping claim be reduced, thereby alleviating the burden on Australian suppliers and producers who are already suffering from the effects of dumping on their market share. AUSVEG added:
- The time and resources that suppliers are currently required to allocate on top of the regular running of their business present a sometimes unworkable obstacle to dumping claims.⁷¹
- 4.111 AUSVEG suggested that another possible method of streamlining the anti-dumping framework would be to reduce the amount of data vegetable growers need to collate before a claim can be brought to the Anti-Dumping Commission.⁷²
- 4.112 The Australian Workers' Union suggested that information sharing between the Anti-Dumping Commission and equivalent agencies in other jurisdictions could achieve possible resource savings.⁷³
- 4.113 The Australian Forest Products Association also discussed the need for improvements in data collection on imports:
- Australian industry has repeatedly identified the access (or lack thereof) to sufficiently detailed import statistics and the transparency or granularity of this data, as major constraints in evaluating anti-dumping applications ... Coarse product category data also makes it difficult to compare like products, where the cost of producing a particular product customised for the

69 Australian Forest Products Association, *submission 6*, p. 2; Orica Ltd, *submission 17*, p. 2; Bureau of Steel Manufacturers of Australia, *submission 22*, p. 3; Mr Ross Hampton, Chief Executive Officer, Australian Forest Products Association, *Committee Hansard*, Canberra, 19 March 2015, p. 2.

70 Bisalloy Steel Group Pty Ltd, *submission 13*, p. 4; Orica Ltd, *submission 17*, p. 7.

71 AUSVEG, *submission 3*, p. 6.

72 AUSVEG, *submission 3*, p. 4.

73 Australian Workers' Union, *submission 5*, p. 26.

Australian market is not the same as the cost of producing an equivalent product in the importer's domestic market due to differing product standards etc.⁷⁴

Passing on the duties collected

4.114 AUSVEG suggested that revenue from dumping duties should contribute to support measures, such as financial relief or investment in research and development, for the injured local industry:

Any revenue gained from the increased duties on dumped goods must be passed on to the affected industries to help them endure the effect on their market and recover once the dumping has been nullified.⁷⁵

Lesser duty rule

4.115 Several submissions called for the abolition of the lesser duty rule. However, little discussion, explanation or reasoning was detailed in those submissions.

4.116 The lesser duty rule limits the amount of duty that can be applied to remedy dumping or subsidisation to the amount necessary to remove injury to the domestic manufacturer of a product. Recent reforms removed the rule as a mandatory consideration by the Minister where the Australian industry includes at least two small-medium enterprises and/or where the normal value of the goods cannot be determined by reference to the exporting country's market.⁷⁶

4.117 The Australian Steel Institute explained its position on the application of the lesser duty rule:

In a market such as Australia, we have one SME in a particular area ... it holds in the order of 40 per cent market share, so its competition is imported. We have recommendations that there needs to be consideration of elimination of the lesser duty rule, so,

74 Australian Forest Products Association, *submission 6*, p. 4.

75 AUSVEG, *submission 3*, p. 6.

76 *Anti-Dumping Commission - Updates to the Anti-Dumping System - January 2014*, <www.adcommission.gov.au/notices/Documents/2013/131220-ADN2013-108-UpdatestoAnti-DumpingSystem-January2014.pdf>, accessed 21 April 2015; *Two new developments in the Australian anti-dumping framework*, <www.kwm.com/en/au/knowledge/insights/two-new-developments-in-the-australian-anti-dumping-framework-20130529>, accessed 21 April 2015; *WTO: Technical information on anti-dumping*, <www.wto.org/english/tratop_e/adp_e/adp_info_e.htm>, accessed 21 April 2015.

where the finding is that there can be the application of a higher duty, to have that apply.⁷⁷

4.118 The Australian Steel Institute recommended that the Commission and the Minister should be able to exercise discretion to not apply the lesser duty rule in cases involving two or more SMEs, or where the Australian industry comprises one producer who does not have a dominant market position of greater than 60 per cent of the market.⁷⁸

4.119 Orica Ltd stated that it does not support the application of the lesser duty rule in every investigation:

Where exporters are found to have exported at dumped prices and caused material injury to the Australian industry, anti-dumping measures based upon the full margin of dumping should be applied.⁷⁹

4.120 Orica Ltd recommended the abolition of the lesser duty rule, adding that:

... in other jurisdictions the use of the lesser duty rule is less prominent (e.g. Canada and the EU) and certainly does not impact the final measures in such a manner as in Australia.⁸⁰

Committee comment

4.121 This inquiry does not aim to fully examine the merits, legalities, or pros and cons of Australia's anti-dumping system. The Committee reiterates that the existence of the anti-dumping and anti-circumvention frameworks is not up for debate.

4.122 However, a substantial amount of evidence was received regarding changes to the anti-dumping framework. Some of these changes also assist in improving the anti-circumvention framework.

4.123 The Committee encourages the Anti-Dumping Commission and the Department of Industry to consider the proposals, suggestions and recommendations made in submissions to this inquiry, with a view to making changes to policy, practice or procedure, should the benefits of those changes be considered substantial.

4.124 The Committee is cognisant of the fact that anti-dumping law and regulation is a complex area, encompassing domestic law, international agreements and business competition. The Committee supports the notion that any changes to the anti-dumping framework must be supported by

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

78 Australian Steel Institute, *submission 18*, pp. 8-9.

79 Orica Ltd, *submission 17*, p. 9.

80 Orica Ltd, *submission 17*, p. 2.

evidence of failings in the system, and that any changes must be transparent and not unduly burdensome to industry.

- 4.125 The Committee recognises and appreciates that the establishment of the Anti-Dumping Commission, the appointment of an independent Commissioner and the changes recently implemented at this level with respect to circumvention are producing a different environment for Australian businesses dealing with the act of circumvention. The declaration by the Commissioner around the classification of 'like goods' is warmly welcomed by the Committee as a watershed moment, but it will take a little while before a clear assessment can be made of its effectiveness.
- 4.126 The Committee is of the opinion that any proposed changes to the anti-dumping framework should be made in consultation with stakeholders and affected parties.
- 4.127 The Committee will not make any formal recommendations regarding the anti-dumping framework. However there is one exception and it applies to the length of both anti-dumping and anti-circumvention inquiries. The timeframe requirement for investigations has been exceeded considerably. An average of more than 275 days for seven recent investigations is far beyond the required 155 day timeframe. The average timeframe must be reduced in order for Australian industry to have confidence in the frameworks and the Anti-Dumping Commission itself.

Recommendation 3

The Committee recommends that the Anti-Dumping Commission and the Department of Industry fully examine all investigation processes with a view to meeting the prescribed timeframes for anti-dumping and anti-circumvention investigations; the Anti-Dumping Commissioner will report back to the Committee on any measures being implemented as part of the six monthly briefings referred to in Recommendation 2.

Rowan Ramsey MP

Chair

19 May 2015

