
The Parliament of the Commonwealth of Australia

Circumvention: closing the loopholes

Inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures

House of Representatives
Standing Committee on Agriculture and Industry

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Canberra

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Foreword

Manufacturing in Australia has for many years been coming under increasing pressure from imported products and there has been a decline in national manufacturing output. Despite the decline of some forms of manufacturing, other sectors of the economy have expanded and on any measurement Australians have enjoyed larger increases in standard of living than most comparable countries.

Much of the increase in Australian living standards has been driven by our open trading system that has sought to remove protective barriers to our markets and concurrently reduce barriers to other markets for our goods. The open trade policies have also reduced costs to other businesses that have been able to expand and prosper as a result, enjoying the 'world price' for their input costs.

As such, we have encouraged our manufacturing industry to increase efficiency so that they are able to compete with overseas manufactured goods. If they can compete fairly at that level then, as they enjoy a freight advantage, they should prosper.

However, it does not mean that it is in Australia's interest that cheaper goods be given access to our markets if they are unfairly subsidised and sold to our consumers at less than the cost of production. All that is achieved in those circumstances is the transfer of jobs off-shore with no guarantee the goods in question will continue to be supplied below production cost when local production is driven out of business.

It is because of this reason that Australia has developed the anti-dumping framework and appointed an Anti-Dumping Commissioner. While some manufacturers are concerned that the task of launching an anti-dumping action is too onerous, many have done so and had successful outcomes with duties being applied to the offending goods.

Manufacturers have been generally pleased with this process but have become increasingly dismayed as they have watched the entities which have had the rulings placed against them indulge in a raft of activities that avoid the duties and thus the intention of the action.

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

It was quite clear from our earliest submissions that the issue of 'like product' (the minor modification of goods to avoid duty) was at the forefront of industry concerns. It is highly likely that the Committee would have recommended strong action in this area were it not for the announcement in March by the Department of Industry that regulations had been altered to empower the Anti-Dumping Commission to deal with this issue.

Australian industry is still acclimatising to the new opportunities presented on the anti-dumping landscape by the appointment of an Anti-Dumping Commissioner in August 2013. While the ruling on slight modification will also take a while to digest, I understand that some applications have already been lodged as a result.

Overall the Committee is of the opinion that most of what can be done at the moment has been done and that it is prudent to observe the effects of the latest rulings before further steps are contemplated.

Equally, the Committee recognises the rewards for circumventing anti-dumping actions are high and that those intent on circumvention have proved enormously resourceful and adaptable. It is for this reason the Committee believes all concerned, including the Committee, should keep a close watching brief on the situation.

The inquiry was relatively short, with little travel, and I would like to thank all those who made their time and resources available to participate. I thank my fellow members for their application to the task.

Rowan Ramsey MP
Chair



Membership of the Committee

Chair	Mr Rowan Ramsey MP	
Deputy Chair	Ms Clare O’Neil MP	
Members	Hon Joel Fitzgibbon MP	Ms Melissa Price MP
	Ms Michelle Landry MP	Mr Dan Tehan MP
	Ms Cathy McGowan AO MP	Mr Rick Wilson MP
	Mr Tony Pasin MP	Mr Tony Zappia MP

Committee Secretariat

Secretary	Ms Julia Morris
Inquiry Secretary	Mr Anthony Overs
Office Manager	Ms Morana Kavgic
Administrative Officer	Ms Kathy Blunden



Terms of reference

The Committee is to conduct an inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures, with particular consideration given to:

- the scope, prevalence and impact of circumvention practices by foreign exporters and Australian importers, especially from the perspective of Australian businesses;
- the operation of the anti-circumvention framework since its introduction in June 2013 including its accessibility, use by Australian businesses, recent amendments and effectiveness to date;
- practices that circumvent anti-dumping measures and the models for addressing practices administered by other anti-dumping jurisdictions; and
- areas which require further consideration or development including the effectiveness of anti-dumping measures and the range and scope of circumvention activities.



List of recommendations

4 Proposals for change or reform

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.

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.

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.

Introduction

- 1.1 Australian industry is often subjected to competition from heavily subsidised overseas manufacturers that dump products below cost of production on our market. Although product dumping is not illegal, the World Trade Organisation allows Australia to take action against dumped products that cause material injury to Australian industry.
- 1.2 When anti-dumping action is taken, some importers immediately find a way to circumvent that action. Industry claims that as soon as an anti-dumping decision is granted against an imported product, the producer finds a way of changing the description, altering the product or routing the product through a third country to avoid the anti-dumping action.
- 1.3 This inquiry examined circumvention activities and the framework in place to address those actions.

Background to the inquiry

- 1.4 The Committee agreed on 15 September 2014 to inquire into and report on Australia's anti-circumvention framework in relation to anti-dumping measures. The inquiry was referred to the Committee by the Minister for Industry, the Hon Ian MacFarlane MP.
- 1.5 The Terms of Reference called for the Committee to inquire into and report on the following matters:
 - the scope, prevalence and impact of circumvention practices by foreign exporters and Australian importers, especially from the perspective of Australian businesses;
 - the operation of the anti-circumvention framework since its introduction in June 2013 including its accessibility, use by Australian businesses, recent amendments and effectiveness to date;

- practices that circumvent anti-dumping measures and the models for addressing practices administered by other anti-dumping jurisdictions; and
 - areas which require further consideration or development including the effectiveness of anti-dumping measures and the range and scope of circumvention activities.
- 1.6 The inquiry was advertised in *The Australian* and on social media. The Committee sought submissions from relevant Australian Government ministers and from state and territory governments. In addition, the Committee sought submissions from a wide range of Australian manufacturers and industry peak and representative bodies.
- 1.7 The Committee received 26 submissions and two supplementary submissions. Three submissions were confidential. The submissions are listed at Appendix A.
- 1.8 The Committee held five public hearings in Canberra. Public hearing details are listed at Appendix B.

Structure of the report

- 1.9 Chapter two provides an overview of the anti-dumping and anti-circumvention frameworks and briefly outlines the work of the Anti-Dumping Commission.
- 1.10 Chapter three examines the circumvention practices used by foreign exporters and Australian importers.
- 1.11 Chapter four explores possible improvements to the anti-circumvention framework, including measures aimed at addressing key circumvention activities.

Australia's anti-dumping framework

- 2.1 This chapter provides definitions of dumping and circumvention, explores the anti-dumping and anti-circumvention frameworks and briefly outlines the work of the Anti-Dumping Commission.

Dumping

- 2.2 This section of the chapter defines dumping, subsidies and material injury, and explores anti-dumping action. The role of the Anti-Dumping Commission is briefly examined.

What is dumping?

- 2.3 The Department of Industry's submission to the inquiry outlined several definitions in relation to dumping. Firstly, the Department's submission defined dumping:

Dumping occurs when goods exported to Australia are priced lower than their 'normal value', which is usually the comparable price in the ordinary course of trade in the exporter's domestic market.¹

- 2.4 The submission explained further the definition of 'normal value':
... where the price in the ordinary course of trade is unsuitable, 'normal value' may also be determined using comparable prices of exports to a third country or the cost of production plus selling, general and administrative expenses and profit.²

1 Department of Industry, *submission 2*, p. 1.

2 Department of Industry, *submission 2*, p. 1.

2.5 The Department explained dumping in the context of trade agreements:

Dumping is not a prohibited practice under the World Trade Organization (WTO) agreements. Rather, the WTO agreements permit anti-dumping duties to be imposed when dumping causes, or threatens to cause, material injury to an Australian industry.³

Subsidies

2.6 The Department explained that, in a similar way to dumping, subsidies may also impact on Australian businesses:

A subsidy is any financial assistance (or income or price support) by a government that benefits, either directly or indirectly, an exporter of goods to Australia. If the subsidy causes, or threatens to cause, material injury to an Australian industry, remedial action may be taken.⁴

Material injury

2.7 The dumping of goods on Australian markets may cause material injury to Australian industry. The Department stated:

Material injury is typically demonstrated through prices, volume and/or profit indicators and is usually reflected by the Australian industry suffering a material reduction in selling prices, profit or market share. Material injury is considered to be above the normal ebb and flow of business.⁵

Anti-dumping action

2.8 The Department of Industry's submission explained that remedial action may be taken where dumping and/or subsidisation causes, or threatens to cause, material injury to an Australian industry.⁶

2.9 The Anti-Dumping Commission website discusses the potential for anti-dumping measures:

Anti-dumping or countervailing measures can only be imposed where the Minister is satisfied that goods exported to Australia have been dumped or subsidised, and that dumping or

3 Department of Industry, *submission 2*, p. 1.

4 Department of Industry, *submission 2*, p. 1.

5 Department of Industry, *submission 2*, p. 1.

6 Department of Industry, *submission 2*, p. 1.

subsidisation has caused, or is threatening, material injury to an Australian industry producing like goods.⁷

- 2.10 The Department's submission explained further that the Australian industry or business concerned must demonstrate that there is dumping or subsidisation, and that the industry has suffered material injury as a result.⁸
- 2.11 The Department explained that, if dumped or subsidised goods are found to have caused, or threaten to cause, material injury to an Australian industry producing like goods:
- ... anti-dumping or countervailing measures may be imposed ... through the publication of a dumping duty notice or countervailing duty notice by the relevant Minister.
- 2.12 The Department's submission explained that an anti-dumping action is the imposition of a measure by the Australian Government, in the form of an additional duty on imports and/or a minimum export price, to remedy material injury to Australian manufacturers caused by dumping. Additionally, countervailing action is the imposition of a measure to remedy material injury caused by a subsidy.⁹
- 2.13 Australia's Anti-Dumping Commissioner, Mr Dale Seymour, explained that when anti-dumping or countervailing measures are imposed:
- ... additional dumping and countervailing duties become payable in respect of the exportation of those goods to Australia for a period of five years, unless revoked earlier. Those duties are payable by the importer of goods upon the entry of the goods into Australia ... The purpose of those duties is to level the playing field from a price perspective in the Australian market ... In simple terms, the uplift of the price of imported goods through the imposition of an additional duty is meant to provide relief to Australian producers and manufacturers.¹⁰

7 Anti-Dumping Commission – Explaining the system, <www.adcommission.gov.au/adsystem/Pages/Explaining-the-System.aspx>, accessed 13 April 2015.

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

9 Department of Industry, *submission 2*, p. 1.

10 Mr Dale Seymour, Commissioner, Anti-Dumping Commission, *Committee Hansard*, Canberra, 27 November 2014, pp. 1-2.

The Anti-Dumping Commission

- 2.14 The Anti-Dumping Commission (the Commission) administers Australia's anti-dumping and countervailing system. The Department provided some organisational details:
- On 27 March 2014, the Commission transferred from the Australian Customs and Border Protection Service to the Department of Industry to give effect to machinery of government changes announced following the federal election in September 2013.
 - In August 2013, Mr Dale Seymour was statutorily appointed as the Commissioner.¹¹
- 2.15 The Department of Industry's submission explained that, upon application by the Australian industry setting out prima facie evidence of the dumping or subsidy and the material injury, the Commission commences an investigation and reports to the relevant Minister whether anti-dumping or countervailing duties should be imposed on the goods from the countries named in the application.¹²

Anti-dumping Acts and regulations

- 2.16 The Department provided information on the foundation for the development of Australia's anti-dumping framework:
- Australia's anti-dumping legislation is based upon the [World Trade Organization] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and the WTO Agreement on Subsidies and Countervailing Measures.¹³
- 2.17 The Commission administers Australia's anti-dumping and countervailing system under the following legislation:
- *Customs Act 1901* (Customs Act), particularly Parts XVB and XVC;
 - *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act);
 - *Customs Administration Act 1985*;
 - *Customs Regulations 1926*; and
 - *Customs Tariff (Anti-Dumping) Regulation 2013*.¹⁴
- 2.18 Further information on dumping, the Commission and the anti-dumping investigation process is available at the Commission's website.¹⁵

11 Department of Industry, *submission 2*, p. 2.

12 Department of Industry, *submission 2*, p. 2.

13 Department of Industry, *submission 2*, p. 2.

14 Department of Industry, *submission 2*, p. 2.

15 *Anti-Dumping Commission home page*, <www.adcommission.gov.au/Pages/default.aspx>.

Circumvention

- 2.19 This section of the chapter defines circumvention, outlines the anti-circumvention framework, recent amendments to the framework, and discusses the impacts of circumvention on Australian businesses. The use of the framework by Australian businesses is also briefly discussed.

What is circumvention?

- 2.20 The Department of Industry's submission defined circumvention as:

... a practice used by exporters and importers of certain products to avoid the full payment of dumping and countervailing duties. The outcome of these activities is that they ensure that the relevant goods do not attract the intended dumping or countervailing duty. This reduces the effectiveness of the trade remedy to Australian industry.¹⁶

- 2.21 The Anti-Dumping Commissioner described circumvention activity in detail:

Circumvention activities can take on various forms and exploit different aspects of the anti-dumping system. The objective of circumvention activities is generally to ensure that the goods do not attract the relevant dumping or countervailing duty that would otherwise be payable or, alternatively, that the relevant good attracts the duty, which is paid, but the payment does not have the intended price effect in the market. This reduces the effectiveness of the trade remedy to Australian industry.¹⁷

- 2.22 The scope, prevalence and impact of circumvention practices by foreign exporters and Australian importers is discussed in chapter three.

Anti-circumvention framework

- 2.23 The Department of Industry explained that the purpose of the anti-circumvention framework is to ensure that anti-dumping measures are effective and to ensure that there is relief for the injured domestic industry.¹⁸

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

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

18 Department of Industry, *submission 2*, p. 4.

- 2.24 Australia's Anti-Dumping Commissioner, Mr Dale Seymour, discussed the introduction of the anti-circumvention 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.

- 2.25 The Commissioner explained that the new provisions covered:

- assembly of parts in Australia;
- assembly of parts in a third country;
- export of goods through one or more third countries;
- arrangements between exporters; and
- any additional circumstances prescribed by regulation.¹⁹

- 2.26 The Commissioner explained the operation of the framework, including the ability to make regulations:

Australia's anti-circumvention framework is set out in Division 5A of the Customs Act. Included in this division is a provision that provides the relevant Minister a regulation-making power to add new behaviours designed to circumvent measures to those which can be investigated. This regulation-making power provides flexibility for emerging circumvention practices to be addressed, while sufficiently limiting the scope of behaviours so as to not catch activities which are not circumventing measures or lead to frivolous complaints. [As at 27 November 2014], no regulations have been made to prescribe additional circumstances which are defined to be circumvention practices.²⁰

Impact on Australian business

- 2.27 Many submissions to the inquiry discussed the potential negative commercial impacts that circumvention activities can have on Australian businesses that are already suffering due to dumping.

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

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

- 2.28 A wide range of industries subjected to dumping and circumvention of anti-dumping measures are represented in submissions made to the inquiry. Those industries include:
- steel;²¹
 - aluminium;²²
 - cement;²³
 - electric cables;²⁴
 - paper;²⁵
 - ammonium nitrate;²⁶
 - agricultural chemicals;²⁷
 - preserved fruit;²⁸
 - dried fruit;²⁹ and
 - vegetables.³⁰
- 2.29 The impacts of circumvention of anti-dumping measures can be profound. Data supplied in the Australian Steel Institute submission provided evidence of circumvention, showing a ten-fold increase in imports of certain so-called 'alloy' steel products since anti-dumping measures were imposed on the regular carbon steel products in July 2012.³¹
- 2.30 The Australian Steel Institute added that this circumvention impacts on revenue to the Australian Government and negatively impacts on jobs in the industry.
- 2.31 Capral Ltd also discussed the significant impact on Australian jobs:
- Capral is a manufacturer of aluminium extrusions ... In recent times in our industry, over 500 direct jobs and almost 2,000 in total, which is about one-third of the workforce, have been lost in

21 BlueScope Steel Ltd, *submission 9*; Arrium Ltd, *submission 11*; Australian Steel Institute, *submission 18*; Bureau of Steel Manufacturers of Australia Ltd, *submission 22*.

22 Capral Ltd, *submission 7*.

23 Cement Industry Federation, *submission 16*.

24 Australian Cablemakers Association Ltd, *submission 11*.

25 Australian Forest Product Association, *submission 6*.

26 Orica Ltd, *submission 17*; Manufacturers' Trade Alliance, *submission 23*.

27 Manufacturers' Trade Alliance, *submission 23*.

28 SPC Ardmona, *submission 21*.

29 Manufacturers' Trade Alliance, *submission 23*.

30 AUSVEG, *submission 3*.

31 Australian Steel Institute, *submission 18*, p. 6.

Australia. We put this down mainly to unfair dumping of extrusions.³²

- 2.32 Mr Phil Jobe, Director, Capral Ltd, discussed the production of aluminium overseas and the impact of product dumping on the Australian aluminium industry:

Imports from China ramped up rapidly over a number of years, to 40 per cent of our industry. If you look at smelters in China, it is one industry where they do not have a cost advantage. They have to import bauxite, electricity is not cheap, and there have been independent reports showing that in China the cost to manufacture billet, the feedstock, is something like 20 to 30 per cent higher on average than the rest of the world. Yet, they can sell that 17 per cent cheaper on average over some periods. The Chinese government owns over 50 per cent of those smelters. So I think we were able to clearly demonstrate ... the injury to Australia.³³

- 2.33 AUSVEG explained that dumping has negative impacts on the economy by allowing foreign producers the chance to gain market share where they would otherwise not be competitive.³⁴ AUSVEG discussed the impact of dumping on the Australian vegetable industry and the broader implications for regional areas:

The position of the vegetable industry in the Australian food marketplace has been established through decades of hard work and high production standards, leading to widespread recognition of the high quality of Australian vegetables. Exporters who dump vegetable commodities into the Australian market below the cost of production undermine this position and eat into the market share of vegetables in the Australian shopping basket by undercutting Australian suppliers on price while offering produce of lower quality.³⁵

- 2.34 AUSVEG claimed that this behaviour can have serious impacts on the national economy, and, significantly, on economies in the regions in which suppliers work and operate:

When a supplier's profitability is impacted by anti-competitive behaviour like dumping, they are inevitably unable to contribute

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

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

34 AUSVEG, *submission 3*, p. 2.

35 AUSVEG, *submission 3*, p. 2.

to their regional economy – hours are cut, jobs are lost, and less revenue flows into other businesses in the area.³⁶

Continued or recurring material injury

- 2.35 Several submissions to the inquiry described continuing material injury suffered by industry due to circumvention of anti-dumping measures.
- 2.36 BlueScope Steel's submission provided a list of products for which anti-dumping measures have been imposed.³⁷ BlueScope Steel stated that, despite the imposition of anti-dumping measures, in certain instances the anti-dumping measures have been avoided resulting in a recurrence of material injury. BlueScope referred to monthly ABS import data, which:
- ... reflects a ninety-fold increase in import volumes as classified under the 'other alloy' statistical tariff code for galvanised steel for the period October 2013 to September 2014.³⁸
- 2.37 BlueScope Steel estimates that the value of the interim dumping duties foregone by the Australian Government on the circumvented import volumes is between one and three million dollars for the same period.³⁹
- 2.38 BlueScope Steel stated that the cost of the circumvention has been:
- ... the ongoing injury in the form of lost domestic sales, reduced selling prices and reduced profitability from the lower price offers from circumventing exporters and importers that do not pay the imposed dumping duties. BlueScope is consequently forced to price-match against the measures-free imports in the commodity product market in Australia, even though the modified goods have been sold to the same customers and same end-use applications ...⁴⁰
- 2.39 BlueScope Steel provided estimates of loss in revenue:
- Even taking the most conservative approach, using the smallest avoided dumping margin of 2.6 per cent on imported galvanised steel, over the past twelve months this translates to an annual loss of revenue to the company of approximately \$15 to \$20 million. If based on highest margin of 8.5 per cent for exports from Taiwan, the price-impact would be up to \$50 million.⁴¹

36 AUSVEG, *submission 3*, p. 2.

37 BlueScope Steel, *submission 9*, p. 8.

38 BlueScope Steel, *submission 9*, p. 8.

39 BlueScope Steel, *submission 9*, p. 8.

40 BlueScope Steel, *submission 9*, p. 8.

41 BlueScope Steel, *submission 9*, p. 8.

- 2.40 The submission from SPC Ardmona discussed the financial implications for companies in fighting dumping:

Substantial investment is incurred in raising an anti-dumping application and participating in the investigation. This investment is undermined when companies with anti-dumping duties imposed are able to bypass their obligations through circumvention activities.⁴²

Use by Australian businesses

- 2.41 Since the introduction of the anti-circumvention framework in 2013, and as at 31 March 2015, there has been only one anti-circumvention application lodged with the Anti-Dumping Commission.⁴³

- 2.42 The Department of Industry provided details on the subsequent investigation into the avoidance of the intended effect of duty applicable to certain aluminium extrusions exported from the People's Republic of China:

This application was lodged by Capral, an Australian manufacturer of aluminium extrusions, on 19 March 2014. Capral asserts that circumvention has occurred which is avoiding the intended effect of the duties. On 14 April 2014, the Commission's first expedited anti-circumvention inquiry was initiated.⁴⁴

- 2.43 The Anti-Dumping Commissioner further described the timeline of the investigation:

I reported my findings and recommendations to then Parliamentary Secretary to the Minister for Industry, on 23 December 2014. On 9 February 2015 the Minister for Industry and Science accepted my recommendations and the reasons for my recommendations.⁴⁵

- 2.44 The Commissioner described the outcomes of the investigation:

... five importers identified by the applicant, Capral, were found to be avoiding the intended effect of the duty, by selling the goods without increasing the price commensurate with the total amount of duty payable. Based on this finding, the Minister altered the original dumping duty and countervailing duty notice in respect

42 SPC Ardmona, *submission 21*, p. 3.

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

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

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

of PanAsia, which resulted in an increase of combined interim duty from 10.1 per cent to 57.6 per cent.⁴⁶

- 2.45 The Commissioner further explained that the outcomes of the anti-circumvention investigation apply retrospectively as well as prospectively:

Retrospective duties took effect from 14 April 2014, the date of initiation of the inquiry, and applied to the exports from PanAsia of certain aluminium extrusions to the five importers, who were examined during the inquiry. Prospective duties took effect from the date of publication of the minister's declaration on 19 February 2015 and applied to all exports from PanAsia. So, prospectively, all are captured; retrospectively, [the alterations apply to] the five importers who were examined by the inquiry.⁴⁷

- 2.46 The Department explained that, given the investigation involved a number of complex issues, the inquiry timeframe was extended on several occasions.⁴⁸

- 2.47 The Commissioner also discussed the conduct of this first investigation, and lessons learned:

As this was the Commission's first anti-circumvention inquiry, it raised a number of complex legal policy and operational issues, as you can well imagine. This has provided for the identification of any areas that need to be addressed through future reform. We are working closely with the Department's anti-dumping policy team on those issues.⁴⁹

Anti-circumvention in other jurisdictions

- 2.48 The Department of Industry briefly outlined circumvention of anti-dumping provisions that have been implemented in other jurisdictions. The Department noted that the frameworks for each jurisdiction feature different approaches and processes to address circumvention practices.⁵⁰

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

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

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

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

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

- 2.49 The Department's submission provides a summary comparison of some of the features of comparable jurisdictions' anti-circumvention frameworks.⁵¹
- 2.50 Further analysis can be found in chapter four of this report.

Recent amendments

- 2.51 A new type of circumvention activity addressing the issue of slight modification of goods was prescribed through regulation on 1 April 2015.⁵² This circumvention activity is further discussed in chapter three and chapter four.

51 Department of Industry, *submission 2*, Attachment D.

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

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.
-

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.

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/Guidelineformsof dumpingduty-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/Guidelineformsof dumpingduty-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/Guidelineformsof dumpingduty-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/Guidelineformsof

- 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/Guidelineformsof dumpingduty-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/Guidelineformsof dumpingduty-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/Guidelineformsof dumpingduty-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.

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 Manager 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 Manager, 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.
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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.

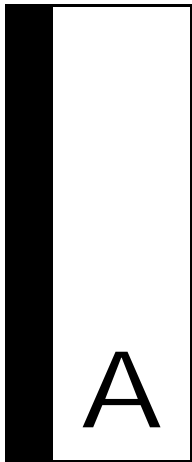
Recommendation 3

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



Appendix A – Submissions

1	ABB Australia
2	Department of Industry
2.1	Department of Industry
3	AUSVEG
4	Law Council of Australia
5	Australian Workers' Union
6	Australian Forest Product Association
7	Capral Limited
8	Wickes & Associates Pty
9	BlueScope Steel
9.1	BlueScope Steel
10	Confidential
11	Australian Cablemakers Association Limited
12	Confidential
13	Bisalloy Steel Group Ltd
14	Arrium
15	Australian Customs and Border Protection Service
16	Cement Industry Federation
17	Orica Limited
18	Australian Steel Institute

- 19 Export Council of Australia
- 20 Construction, Forestry, Mining and Energy Union and Australian
Manufacturing Workers' Union (AMWU)
- 21 SPC Ardmona
- 22 Bureau of Steel Manufacturers of Australia Limited
- 23 Manufacturers' Trade Alliance
- 24 POSCO
- 25 Confidential
- 26 Sanwa Pty Ltd



Appendix B – Public Hearings

Thursday, 27 November 2014 – Canberra

Anti-Dumping Commission

Mr Dale Seymour, Commissioner

Ms Emma Hatcher, Director, Legal and International Section

Ms Christie Sawczuk, Director, Operational Policy Section

Department of Industry

Mr Paul Trotman, General Manager, Trade and International Branch

Mr Stuart Clark, Acting Manager, Anti-Dumping Policy Section

Thursday, 26 February 2015 – Canberra

ABB Australia Pty Limited

Mr Julian Guild, Market Manager, Transformers

Mr Daniel Moulis, Principal, Moulis Legal

Capral Limited

Mr Phil Jobe, Director

Mr Justin Wickes, Anti-Dumping Adviser

Thursday, 5 March 2015 - Canberra**Australian Steel Institute**

Mr Donald McDonald, Chief Executive

Mr Ian Cairns, National Manager, Industry Development and Government Relations

Thursday, 19 March 2015 – Canberra**Australian Forest Products Association**

Mr Ross Hampton, Chief Executive Officer

Mr Michael Stephens, Manager, Strategic Policy and Pulp & Paper

BlueScope Steel Australia and New Zealand

Mr Mark Vassella, Chief Executive

Mr Alan Gibbs, Manager, International Trade Affairs

Arrium Ltd

Mr Steve Hamer, Chief Executive Steel

Mr Steve Porter, General Manager Steel in Concrete and Trade, OneSteel Manufacturing

Thursday, 26 March 2015**Anti-Dumping Commission**

Mr Dale Seymour, Commissioner

Ms Christie Sawczuk, Director, Operational Policy Section

Department of Industry and Science

Mr Paul Trotman, General Manager, Trade and International Branch

Mr Scott Wilson, Manager, Anti-Dumping Policy Section