

## **Department of Industry**

### **Submission**

## **The House of Representatives Standing Committee on Agriculture and Industry Inquiry into Australia's Anti-Circumvention Framework in Relation to Anti-Dumping Measures**

### **1. Introduction**

The Department of Industry (the department) is providing information in response to the following terms of reference:

- 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.

### **2. Anti-Dumping**

#### **What is 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. 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.

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.

#### **What is a subsidy?**

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

#### **What is anti-dumping action?**

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. Countervailing action is the imposition of a measure to remedy material injury caused by a subsidy.

#### **What is material injury?**

Remedial action may be taken where dumping and/or subsidisation causes (or threatens to cause) material injury to an Australian industry.

Injury to an Australian industry is demonstrated through all relevant indices and factors that reflect the state of that industry. 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.

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

The Australian industry concerned must demonstrate that there is dumping or subsidisation, and that the industry has suffered material injury as a result. Injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation.

**What happens if dumped or subsidised goods are found to have caused, or threaten to cause, material injury?**

Where it is established that dumped or subsidised goods have caused material injury to an Australian industry producing like goods, anti-dumping or countervailing measures may be imposed. These measures are imposed through the publication of a dumping duty notice or countervailing duty notice by the relevant Minister.

### **3. Administration of Australia's anti-dumping system**

#### **The Anti-Dumping Commission**

The Anti-Dumping Commission (the Commission) administers Australia's anti-dumping and countervailing system. Upon application by the Australian industry setting out prima facie evidence of the dumping or subsidy and the injury, the Commission commences an investigation and reports to the relevant Minister whether anti-dumping or countervailing duties should be imposed on goods from the countries named in the application.

On 27 March 2014, the Commission transferred from the Australian Customs and Border Protection Service (the ACBPS) to the department to give effect to Machinery of Government changes announced following the Federal election in September 2013.

The Commission is headed by a statutorily appointed Anti-Dumping Commissioner (the Commissioner). In August 2013, Mr Dale Seymour was appointed as the Commissioner by the then Minister for Home Affairs.

#### **World Trade Organization and legislative framework**

Australia's anti-dumping legislation is based upon the *WTO 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*.

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*.

In December 2013, the Minister for Industry (the Minister) delegated responsibility for decision making on operational matters under Parts XVB and XVC of the Act and other anti-dumping legislation to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary)<sup>1</sup>.

### **4. How is an anti-dumping investigation conducted?**

#### **General**

The anti-dumping and countervailing investigation process generally starts with an application from an Australian industry producing 'like goods' to those which the applicant alleges are being dumped and/or subsidised. The Australian industry concerned must demonstrate not only that dumping or subsidisation is occurring but also that it has suffered material injury as a result.

Once an application is lodged, the Commission has up to 20 days to determine whether there is an Australian industry producing like goods to the allegedly dumped (or subsidised) goods, and whether there are reasonable grounds for the publication of a dumping or countervailing duty notice. If there are reasonable grounds, the Commission will commence an investigation.

The Commission has up to 155 days after initiation to complete its investigation and report to the Minister, unless the Minister approves an extended deadline. A flow chart highlighting the investigation process and associated timeframes forms **Attachment A**.

The Commission will advise importers and exporters of the initiation of an investigation and will request information, including on relevant import and export transactions. This information is required within 37 days of

---

<sup>1</sup> For the purposes of this submission references to the Minister also refer to the Parliamentary Secretary.

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

the commencement of the investigation. As part of the investigation process, the Commission may visit the premises of the importers and exporters to undertake further investigations and verify the information provided.

Submissions from importers, exporters and any other interested parties are required within 37 days from the commencement of the investigation. Interested parties are any people or entities such as businesses, industry groups or academics who have an interest in the investigation and who may wish to make a comment or argument about the investigation.

### **Provisional measures**

From day 60 of the investigation, provisional measures may be imposed, in the form of securities on imports of the goods. This will only occur once the Commissioner makes a Preliminary Affirmative Determination.

### **Statement of Essential Facts and Report to the Minister**

On or before day 110 of the investigation, the Commissioner must issue a Statement of Essential Facts (SEF) on which he proposes to base his final recommendations and report to the Minister. Interested parties will then have 20 days to respond and lodge submissions in response to the SEF.

After consideration of the submissions received, the Commissioner will report his conclusions and recommendations to the Minister. The Minister then decides, within 30 days, whether to impose anti-dumping and countervailing measures.

### **Retrospective duties**

In special circumstances, the Minister may issue a retrospective notice on dumped and/or subsidised goods that entered home consumption up to 90 days before securities were taken (or when the Commission had a right to take securities). This is permitted when the goods have previously been found to have been dumped and/or subsidised in Australia, material injury to the Australian industry has been caused by the dumping and/or subsidisation of large quantities of the goods during a short period, and publication of a retrospective notice is necessary prevent the serious undermining of the effect of dumping and/or countervailing duties. Other limited circumstances similar to this example also available.

If such a notice is made, then 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).

### **Termination**

Under certain circumstances, the Commissioner must terminate all or part of an investigation. These include where there are findings of negligible dumping margins, negligible countervailable subsidisation, negligible import volumes or negligible injury caused by dumping or subsidisation.

### **Review**

Certain decisions of the Commission and the Minister are reviewable by the Anti-Dumping Review Panel (the ADRP). These include, for example, the decision to reject an application for an investigation, the decision to terminate an investigation and the decision to impose measures. The ADRP conducts merits review in accordance with the Customs Act and reports to the Minister.

## **5. Australia's anti-circumvention framework**

Australia's anti-circumvention framework in respect of anti-dumping measures is a recent innovation in the anti-dumping system.

Circumvention is 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.

The relevant WTO Anti-Dumping and Subsidies and Countervailing Measures Agreements do not contain specific provisions regarding the actions WTO Members may take to address the circumvention of anti-dumping measures. However, a 1995 WTO Ministerial Decision on Anti-Circumvention notes that while negotiators during the Uruguay Round of multilateral trade negotiations were unable to agree on specific text, it is desirable for uniform rules to be applied in this area and referred the matter to the WTO Committee on Anti-Dumping Practices.

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

### **What is an anti-circumvention inquiry?**

Circumvention practices take various forms and exploit different aspects of the anti-dumping and countervailing system. The outcome of these practices is that they ensure that the relevant goods do not attract the intended dumping or countervailing duty, or the relevant goods attract the duty, which is paid, but the payment of the duty does not have the intended price effect in the market.

In June 2013, new legislative provisions for conducting anti-circumvention inquiries, based on 'prescribed' circumvention practices commenced. This formed a central component of the previous Government's '*Streamlining Australia's anti-dumping system*' reforms package.

An anti-circumvention inquiry is an inquiry into whether certain practices are occurring with the intention of avoiding or reducing dumping or countervailing duties, or avoiding the price effect of the dumping or countervailing duties in the Australian market. In January 2014, additional legislative provisions for an expedited anti-circumvention inquiry into the avoidance of the intended effect of duty (i.e. sales at a loss) commenced.

Circumvention activities include:

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

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

Australia's anti-circumvention framework is set out in Division 5A of the Customs Act. Currently, no regulations have been made to prescribe additional circumstances which are defined to be circumvention practices.

Australia's system has a clear distinction between circumvention and non-compliance matters. Non-compliance, such as the provisions of false and misleading statements by importers that lead to dumped goods not attracting the intended dumping or countervailing duty, is not considered a circumvention trade strategy. Non-compliance with Customs-related law is addressed through compliance related activities conducted by the ACBPS.

For the purpose of this submission, anti-circumvention inquiries do not include 'like goods determinations' (also known as a scoping inquiry in some foreign jurisdictions). The purpose of like goods determination is to ascertain whether a particular product is covered by an existing anti-dumping or countervailing duty notice. The ACBPS is able to perform a like goods determination, although there is no explicitly legislated process for doing so.

### **Who can apply?**

Australian industry (i.e. that manufactures like goods) can apply for an anti-circumvention inquiry based on prescribed circumvention activities, by completing an approved application form. The application must set out reasonable grounds for asserting that circumvention has occurred – this is similar to the requirements of foreign jurisdictions that also have anti-circumvention frameworks. There is no time limit following the imposition of a measure in which a circumvention application must be lodged.

It should be noted that the requirements for bringing an application for an anti-circumvention inquiry are considerably less onerous than the requirements to bring an application for an initial anti-dumping or countervailing investigation.

### **Consideration of applications**

When an application for an anti-circumvention inquiry is received, the Commissioner will decide whether or not to reject the application within 20 days of its lodgment. The Commissioner must reject the application if not satisfied that the requirements of the application form have been met, and that there does not appear to be reasonable grounds for asserting that one or more circumvention activities have occurred.

If the Commissioner does not reject the application, or if the Minister requests an inquiry, a notice will be published in a nationally distributed newspaper, indicating that an inquiry is to be conducted. The applicant will also be notified of the Commissioner's decision.

### **Submissions**

The Commission will contact known interested parties inviting them to participate and lodge a submission to the inquiry. The deadline for submissions is currently 40 days after publication of the notice.

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

### Statement of Essential Facts

Within 110 days from the initiation of an anti-circumvention inquiry (excluding an inquiry into the avoidance of the intended effect of duty), a SEF must be placed on the public record. The Minister may extend the SEF deadline, following a request for the extension of time by the Commissioner.

The SEF contains the facts on which the Commissioner proposes to base a recommendation to the Minister in relation to the occurrence of a circumvention activity (which will also include recommendations for altering the original dumping duty notice and/or countervailing duty notice).

Interested parties may lodge responses to the SEF within 20 days from placement of the SEF on the public record.

### Report to the Minister

The Commissioner must give the Minister a report within 155 days recommending whether the original dumping duty notice and/or countervailing duty notice should be altered, and if so, the alterations to be made. The Minister may extend the report deadline.

The report must include a statement of the Commissioner's reasons that sets out the material findings of fact on which that recommendation is based and provides particulars of the evidence relied on to support those findings.

### Minister's decision

The Minister must, within 30 days of receiving the report, declare by notice in the Gazette and a nationally circulated newspaper, whether the original dumping duty notice and/or countervailing duty notice should be altered, and if so, the alterations to be made. Measures can be imposed on the circumvention goods from the date of the anti-circumvention investigation initiation.

A flowchart highlighting the process and associated timeframes for an anti-circumvention inquiry (excluding an inquiry into the 'avoidance of the intended effect of the duty') forms **Attachment B**.

### Avoidance of intended effect of duty

While the above process applies to most anti-circumvention inquiries, a slightly different process applies to the conduct of an inquiry into 'avoidance of the intended effect of the duty'.

This process has a legislated timeframe of 100 days in which the Commissioner must report to the Minister, instead of the 155 day timeframe that applies to inquiries into all other circumvention activities (this period may be extended by the Minister). To make this timeframe possible, there is no requirement for the Commissioner to publish a SEF. The timeframes for considering the application and initial submission period are the same for both processes.

An inquiry into this type of circumvention activity can only be applied for in isolation (i.e. not in combination with other circumvention activities), because of the different timeframes that apply. An additional restriction is that an applicant may not apply for this type of inquiry more than once every 12 months. This restriction does not apply to inquiries that are requested by the Minister.

A flowchart highlighting the process and associated timeframes for an inquiry into 'avoidance of the intended effect of the duty' forms **Attachment C**.

### Review

The Minister's decision to alter or not alter the original dumping duty notice and/or countervailing duty notice is reviewable by the ADRP.

## 6. Circumvention activities

There are currently five prescribed activities that can be addressed by Australia's anti-circumvention framework. These circumvention activities are described in detail below.

The framework also includes a provision that allows the Minister to, by regulation, add new behaviours designed to circumvent measures to those which can be investigated. This provision provides flexibility for emerging circumvention practices to be addressed, whilst sufficiently limiting the scope of behaviours so as not to catch activities not circumventing measures or lead to frivolous complaints. Behaviours added by regulation follow the investigative process established in the legislation (ie 155 day timeframe). Legislative amendment is required to introduce a new investigation type that differs from the regular process.

### Assembly of parts in Australia

Circumvention activity in the form of 'assembly of parts in Australia' occurs if the following apply:

- a) goods in the form of individual parts (the **circumvention goods**) are exported to Australia;

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

- b) those parts are manufactured in a foreign country in respect of which the notice applies;
- c) those parts are assembled in Australia, whether or not with other parts, to create goods (the assembled goods) that would be the subject of the notice if they were exported to Australia by an exporter in respect of which the notice applies;
- d) the total value of the parts manufactured in that foreign country is a significant proportion of the value of the assembled goods; and
- e) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.

This activity captures circumstances where parts representing a significant value of the assembled goods are manufactured in a country subject to the notice and exported to Australia as parts, which do not attract interim dumping or countervailing duty. The parts are then used in the manufacture of the assembled goods in Australia that would have been subject to interim dumping or countervailing duty had they been exported to Australia in the assembled state. The parts may be assembled in Australia with or without addition parts (regardless of whether these parts are sourced from Australia or other countries). In this circumstance the assembly process in Australia would be considered minor and insignificant. Example 1 below illustrates this type of circumvention activity.

### Example 1

In this example, the exporter in Country A is the exporter undertaking the circumvention activity. The Australian importer and assembler may or may not be aware of the circumvention activity. Also, the Australian importer may not be the assembler and may on-sell the imported parts to the Australian assembler. This type of activity would also be considered 'assembly of parts in Australia' (i.e. the circumvention activity).

### Assembly of parts in a third country

Circumvention activity in the form of '**assembly of parts in a third country**' occurs if the following apply:

- a) *goods in the form of individual parts are manufactured in a foreign country (the original country) in respect of which the notice applies;*
- b) *those parts are assembled in a foreign country in respect of which the notice does not apply, whether or not with other parts, to create goods (the **circumvention goods**) that would be the subject of the notice if they were exported to Australia by an exporter in respect of which the notice applies;*
- c) *the circumvention goods are exported to Australia;*
- d) *the total value of the parts manufactured in the original country is a significant proportion of the customs value (within the meaning of section 159 of the Customs Act) of the circumvention goods; and*
- e) *section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.*

This activity is similar to the 'assembly of parts in Australia' activity; however for this activity the assembly of the goods that would have been subject to the notice occurs in a third country. This third country is not subject to a dumping or countervailing duty notice.

The goods are subsequently exported to Australia from the third country in their assembled state and do not attract interim dumping or countervailing duty. In this circumstance the assembly process in the third country would be considered minor and insignificant. Example 2 below illustrates this type of circumvention activity.

### Example 2

In this example, the exporter in Country A is the exporter undertaking the circumvention activity. The assembler and exporter in the third country and the Australian importer may or may not be aware of the circumvention activity.

### Export of goods through one or more third countries

Circumvention activity in the form of '**export of goods through one or more third countries**' occurs if the following apply:

- a) *goods (the **circumvention goods**) are exported to Australia from a foreign country in respect of which the notice does not apply;*
- b) *before that export, there were one or more other exports of the goods from a foreign country to another foreign country;*
- c) *the first of those other exports was from a foreign country in respect of which the notice applies;*
- d) *the circumvention goods would be the subject of the notice if they were exported to Australia by an exporter in respect of which the notice applies; and*
- e) *section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.*

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

This activity covers circumstances where goods would have been subject to the notice had they been exported directly from their originating country that is subject to a notice.

Instead, the goods are exported through one or more third countries that are not subject to the notice. These goods therefore do not attract interim dumping and / or countervailing duties. Example 3 below illustrates this type of circumvention activity.

### Example 3

In this example, the exporter in Country A is the exporter undertaking the circumvention activity. The exporter in the third country (or countries) and the Australian importer may or may not be aware of the circumvention activity.

#### Arrangements between exporters

Circumvention activity in the form of '**arrangements between exporters**' occurs if the following apply:

- a) goods (the **circumvention goods**) are exported to Australia from a foreign country in respect of which the notice applies;
  - b) the exporter exported the circumvention goods under an arrangement with another exporter from that foreign country;
  - c) the other exporter is an exporter in respect of which the notice applies;
  - d) the circumvention goods would be the subject of the notice if they were exported to Australia by the other exporter;
- either:
- (i) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia; or
  - (ii) section 8 or 10 of the Dumping Duty Act, as the case requires, applies to the export of the circumvention goods to Australia, but the interim duty payable in relation to that export is less than the interim duty that would have been payable if the other exporter had exported the goods to Australia.

This activity covers circumstances where goods that are the subject of a notice are exported to Australia from the original exporter through another exporter in that originating country that is subject to a lesser rate of duty or is exempt from the notice. In this circumstance either a lesser amount or no dumping or countervailing duty is applicable to the goods. Examples 4 and 5 below illustrate this type of circumvention activity.

### Example 4

In this example, Exporter A in Country A is the exporter undertaking the circumvention activity. Exporter B in Country A may also knowingly be participating in the circumvention activity. The Australian importer may or may not be aware of the circumvention activity.

#### Avoidance of the intended effect of duty

Circumvention activity in the form of '**avoidance of the intended effect of duty**' occurs if the following apply:

- a) goods (the **circumvention goods**) are exported to Australia;
- b) those goods are manufactured in a foreign country in respect of which the notice applies;
- c) the exporter is an exporter in respect of which the notice applies;
- d) the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount payable on the circumvention goods under the Dumping Duty Act;
- e) either or both of sections 8 or 10 of the Dumping Duty Act, as the case requires, apply to the export of the circumvention goods to Australia; and
- f) the above circumstances occur over a reasonable period.

In the usual course of trade, the price of dumped goods increases in the Australian marketplace when anti-dumping duty is collected at the border. The additional dumping or countervailing duty paid by the importer for the goods is generally passed on to the client or consumer in the form of increased prices in the Australian market.

The circumvention activity captures circumstances where dumping and/or countervailing duty has been imposed (and is being paid by the importer upon entry of the goods) but there is little or no effect, over a reasonable period, on the price at which the goods are sold in the Australian market, for example the price of the goods has not increased in line with the duty payable.

### Example 5 - Goods sold at a loss

In this example, there is a dumping and/or countervailing duty notice in relation to widgets exported from Country A to Australia. An exporter in Country A is undertaking the circumvention activity. The Australian importer – or

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

their associate – is likely to be aware of the circumvention activity as it is benefitting from financial compensation offered by the exporter for continuing to sell the circumvention goods at a price which would not recover the cost of the payment of dumping duty. This type of activity would be considered 'sales at a loss' (and fall within the description of the circumvention activity). In these circumstances, the Minister may consider it is reasonable to alter the notice as it applies to that exporter to adjust the export price to reflect the compensation arrangement between the exporter and importer.

In contrast to the example, if there was no compensatory arrangement between the exporter and the importer, and instead the importer had simply reduced its profit margin on the sale of widgets from 30% to 10% to cover the payment of 20% dumping duties (i.e. the sales were not made at a loss), this type of conduct would generally not be considered as avoidance of the intended effect of duty, as this may be a legitimate business decision on behalf of the importer.

A further example of the circumvention activity might be where an importer is selling the goods subject to measures at a loss, without any compensation from the exporter, because it is selling those goods in conjunction (i.e. bundled with) other goods in the transaction which are sold at a profit. This may be considered as avoidance of the intended effect of duty.

## 7. Current practice – Australia's first anti-circumvention inquiry

Since June 2013, there has only been one anti-circumvention application lodged for an inquiry 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.

Given this inquiry involves a number of new and complex legal, policy and operational issues the inquiry timeframe has been extended by the Parliamentary Secretary on several occasions.

The Commission is currently in the final stages of this inquiry. The Commissioner's final report and recommendations in relation to this inquiry are due to the Parliamentary Secretary by 12 December 2014.

The Parliamentary Secretary's decision is due 30 days after receiving the report (ie by 12 January 2015).

As at November 2014, the Commission has not undertaken any other anti-circumvention investigations.

## 8. Other jurisdictions

An increasing number of other jurisdictions have implemented provisions to address the circumvention of anti-dumping measures. Anti-circumvention frameworks for each jurisdiction feature different approaches and processes to address the circumvention practices. A basic comparison of the systems of the United States (US), the European Union (EU), and Brazil follows, although there are many other jurisdictions that also have anti-circumvention frameworks. The table at **Attachment D** provides a summary comparison of some of the features of these comparable jurisdictions' anti-circumvention frameworks.

### United States

The US has applied anti-circumvention provisions since 1987. The US system is capable of addressing various types of circumvention practices including: products completed or assembled in the US; products completed or assembled in foreign countries; minor alterations of merchandise; and later developed merchandise. The US has two methods of addressing goods that are altered from the goods that are originally investigated.

US anti-circumvention inquiries take up to 300 days to complete, but can be completed earlier.

### European Union (EU)

The EU takes a 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 transshipment); and arrangements between exporters with lower duty rates. Importation of parts for assembly and exports after minor assembly can only be investigated in relation to dumping duties (and not subsidy cases).

In addition to its circumvention legislation, the EU also 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



Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to  
Anti-Dumping Measures

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.

EU anti-circumvention inquiries have a 6 month timeframe, which can be extended to 9 months in special circumstances.

## **Brazil**

Brazil introduced anti-circumvention legislation in 2010 and has since amended its procedures. The Brazilian system is capable of addressing various types of circumvention behavior including: importation of parts for assembly; assembly of parts in a third country; and marginally modified goods.

In addition to its circumvention legislation, 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 has not risen as expected.

Brazil's anti-circumvention inquiries have a 6 month timeframe, which can be extended to 9 months in special circumstances.

## **9. Effectiveness of the current framework and possible future reform**

It is difficult to measure the effectiveness of the anti-circumvention framework as it is a relatively new feature of the anti-dumping system and no anti-circumvention inquiries have been completed. To date, Australian industry has only made one application for an anti-circumvention inquiry, and the resulting inquiry is currently underway (and due to be completed in December 2014). The anti-circumvention framework has not been properly tested, and supporting policies and practices have not been consolidated or embedded. This makes areas requiring further consideration and policy development difficult to identify.

The department has not received any feedback from stakeholders on the specific explanations as to why inquiries into the other prescribed circumvention activities have not been applied for by Australian industry. The limited number of applications may not necessarily indicate a low prevalence of circumvention activities by importer and foreign exporters. Possible factors that may have resulted in the low number of anti-circumvention applications by Australian industry include:

- circumvention activities are not prevalent;
- 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.

The department has received feedback from some stakeholders that Australia's anti-circumvention framework could be improved by expanding the range of prescribed circumvention practices to include the practice of overseas manufacturers slightly modifying the dumped goods. These goods allegedly circumvent measures by having very similar characteristics and still compete with the goods manufactured domestically. However, small modifications change the tariff classification of the goods so that it falls outside the scope of the goods subject to the anti-dumping measures. For example, if anti-dumping measures apply to a certain class of non-alloy steel and minor elements are added to the steel to create an alloy but not substantially alter the good so that it continues to be used for the same uses, imports of the alloy would potentially circumvent the anti-dumping measures and undermine relief to the injured steel manufacturer. As noted above, some other jurisdictions already have provisions to address this practice, including in ways other than through an anti-circumvention framework.

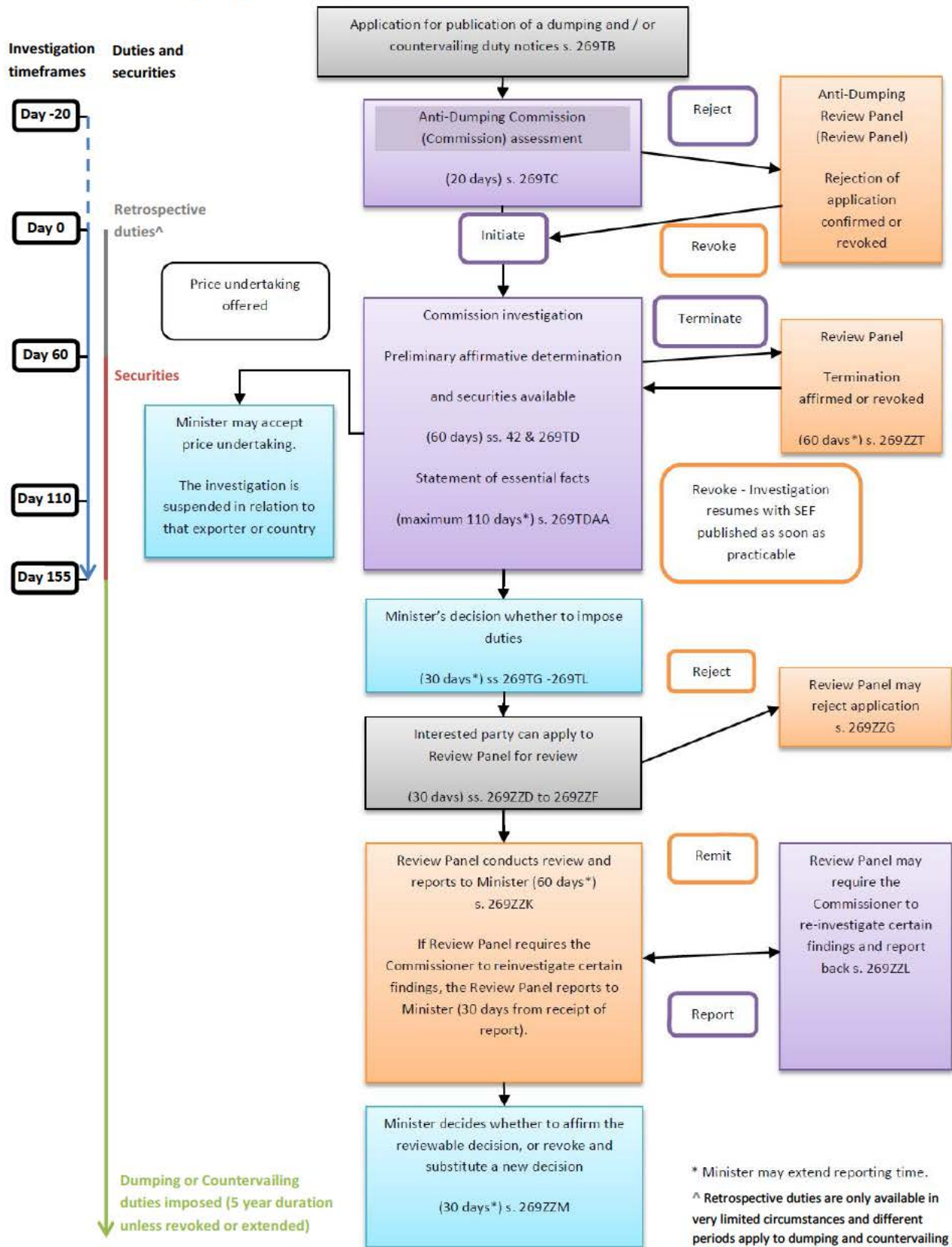
In the lead up to the 2013 Federal election, the Government (then Opposition) announced a range of anti-dumping reforms to strengthen Australia's anti-dumping system. The Government has announced that it is currently considering the implementation of its reforms and will make an announcement in the near future.

As noted previously, the anti-circumvention framework provides flexibility for the Minister to prescribe emerging business activities designed to circumvent anti-dumping measures to the activities already prescribed. Changes to the inquiry process or the anti-circumvention framework may require legislative amendment.

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to Anti-Dumping Measures

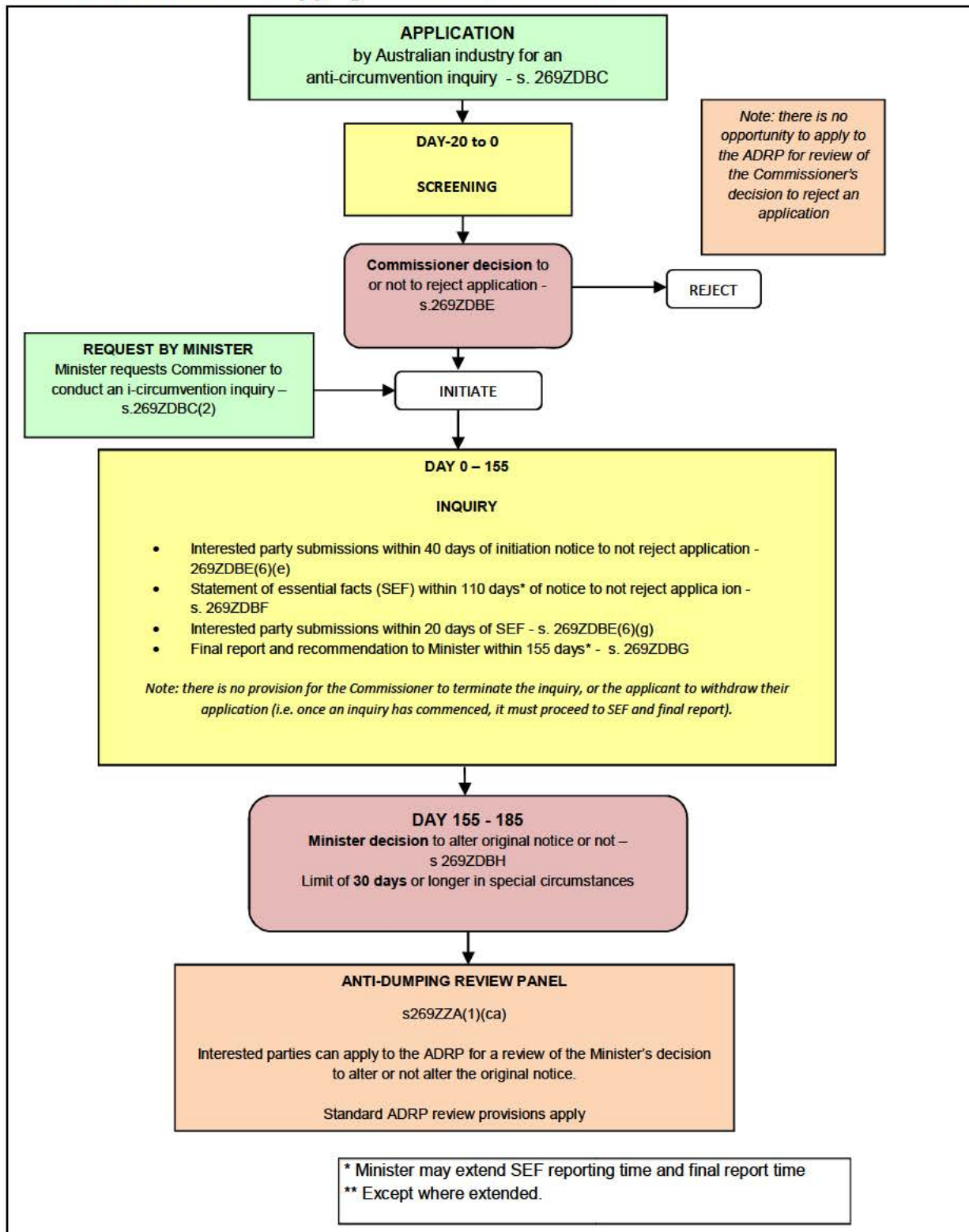
## Attachment A

### Anti-dumping investigation - process and timeframes



## Attachment B

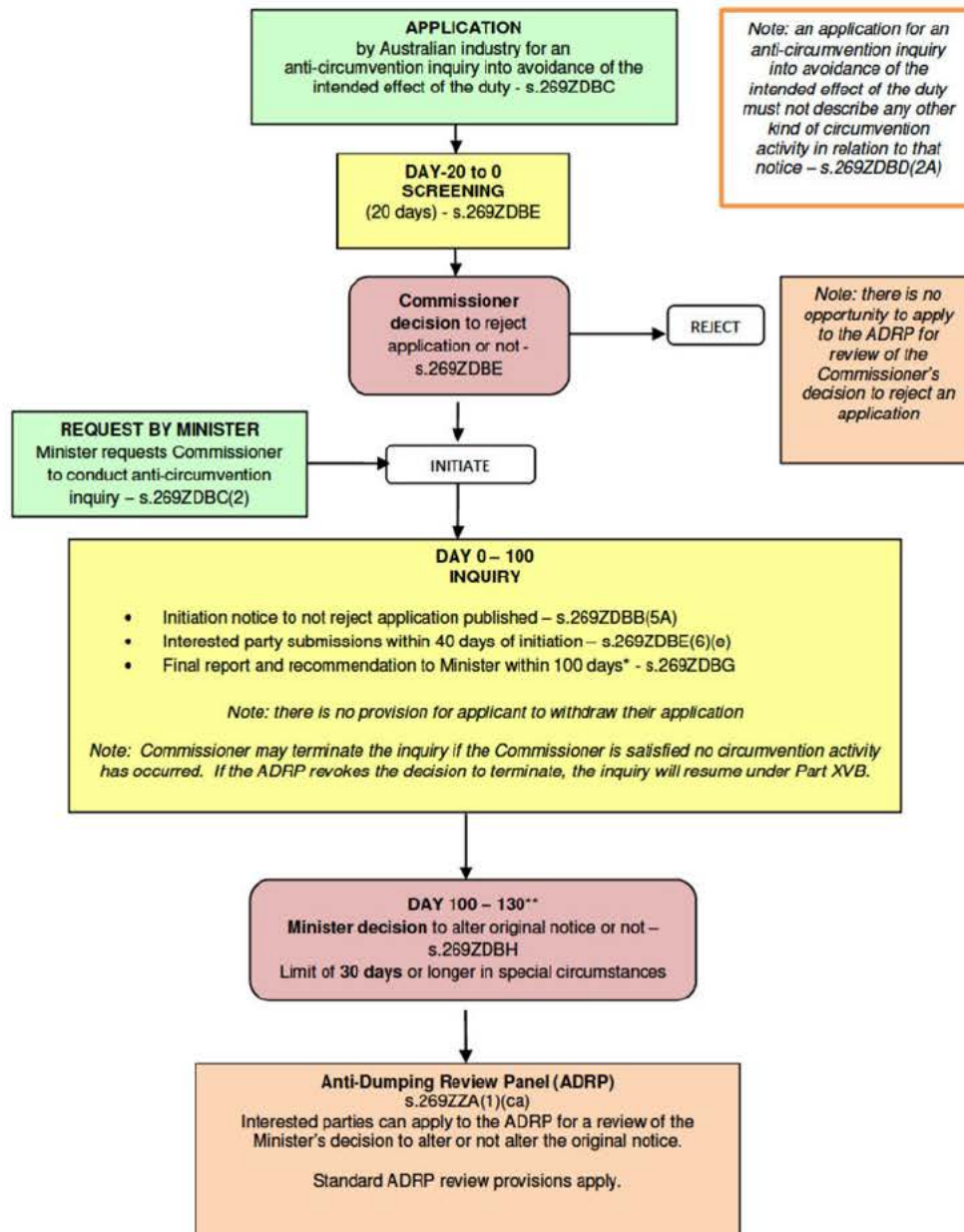
### Anti-circumvention inquiry (excluding inquiry into the avoidance of intended effect of duty) - process and timeframes



## Attachment C

### Anti-circumvention inquiry into the avoidance of intended effect of duty - process and timeframes

#### Anti-circumvention inquiry relating to avoidance of the intended effect of the duty



\* Minister may extend final report timeframe beyond 100 days.

\*\* Except where extended.



**Attachment D****Comparison of select international anti-circumvention frameworks of other jurisdictions**

| FEATURE   | AUSTRALIA   | EUROPEAN UNION (EU)   | UNITED STATES   | BRAZIL   |
|---|---|---|---|--|
| <b>Types of circumvention</b>                             |   |   |   |  |
| Can address assembly of parts in the importing country    | √   | √   | √   | √  |
| Can address assembly of parts in a third country          | √   | √   | √   | √  |
| Can address export through third countries                | √   | √   | X – The US addresses this in other provisions   | X – Brazil addresses this in other provisions  |
| Can address arrangements between exporters                | √   | √   | X – The US has different provisions regarding affiliated / related parties and annual reviews that may address this practice                                      | X  |
| Can address avoidance of the intended effect of duties    | √   | √ - The EU features a 'Reinvestigation' process that can address behaviour dealt with in Australia through anti-circumvention | X   | √ - Brazil features a 'Redetermination' process that can address behaviour dealt with in Australia through anti-circumvention  |
| Can address slightly modified goods                       | X   | √   | √   | √  |
| Can address other types of circumvention not listed above | X – Australia features a regulation making power so new types of circumvention can be added without passing primary legislation | √ - The EU system features a broad 'catch-all' definition of circumvention  | X   | X – Brazil had a broad 'catch-all' provision which was later repealed  |
| <b>Inquiry procedures</b>                                 |   |   |   |  |
| Who may apply for anti-circumvention inquiries            | Domestic manufacturer; Minister   | Any interested party (includes domestic manufacturers and importers); Investigating authority; EU Member state                | Interested party (includes foreign governments and manufacturers; domestic manufacturers and importers; trade associations or unions); Minister (aka Secretary in | Interested party (includes foreign governments and manufacturers; domestic manufacturers and importers; other parties as allowed by the authority); Department (SECEX) |

Department of Industry Submission to the Inquiry into Australia's Anti-Circumvention Framework in Relation to Anti-Dumping Measures

| FEATURE   | AUSTRALIA  | EUROPEAN UNION (EU)   | UNITED STATES   | BRAZIL                     |
|---|--|---|---|----------------------------|
|   |  |   | US terminology)   |                            |
| Evidence required to make an application for an anti-circumvention inquiry  | Reasonable grounds for asserting circumvention has occurred                  | Sufficient evidence regarding the allegation of circumvention | Information that is reasonably available to support allegation of circumvention | Requires detailed evidence |
| Transparency feature: Public notice published when an anti-circumvention inquiry is initiated                               | √  | √   | √   | √                          |
| Anti-circumvention inquiry timeframes   | 155 days (or 100 days for avoiding the intended effect of the duty inquiry ) | Concluded within 9 months                                     | Up to 300 days  | Concluded within 9 months  |
| Is there a process to exempt goods from anti-dumping duties that are expanded resulting from an anti-circumvention inquiry? | √  | √   | X   | √                          |
| Are anti-circumvention inquiry decisions subject to administrative or judicial review?                                      | √  | √   | √   | Unknown                    |

**Other anti-dumping jurisdictions that feature an anti-circumvention framework include:** Mexico, India, Egypt and South Africa.

**Other anti-dumping jurisdictions that do not feature an anti-circumvention framework include:** New Zealand and Canada (for the purpose of this submission 'like goods determinations' are not considered to be an anti-circumvention process).