

# Chapter 2

## Issues

2.1 This chapter examines the evidence that the committee has received on the following changes proposed in the bills:

- changes to the operation of the Anti-Dumping Review Panel;
- abolition of the International Trade Remedies Forum;
- minor amendments to submission deadlines, publication provisions and lodgement and withdrawal provisions; and
- technical amendments including proposed changes to:
  - the length of the investigation period;
  - cumulative assessment of injury;
  - the normal value of goods;
  - definition of a subsidy;
  - accelerated reviews; and
  - notification of subsidies.

2.2 The bills also include technical amendments relating to dumping findings, dumping periods and periods during which notices remain in force.<sup>1</sup> As the committee has received little or no evidence in relation to these matters and the specific provisions of the Customs Tariff (Anti-Dumping) Amendment Bill 2015, the committee has not commented on them in this report.

### **General comments on the bills**

2.3 The committee received 11 submissions on the bills and most of those submissions were supportive of the proposed amendments. Issues that have been raised with the committee such as the abolition of the International Trade Remedies Forum and fees for reviews are discussed in the sections below.

2.4 The Explanatory Memorandum indicates that savings generated by the implementation of the bills would be used to offset the cost of implementing other measures such as the establishment of an Anti-Dumping Information Service and improvement of the International Trade Remedies Advisory Service to assist access to

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1 Department of Industry and Science, *Submission 7*, pp 20–23.

the system, especially for small and medium sized businesses.<sup>2</sup> The Australian Industry Group welcomed this proposed use of resources.<sup>3</sup>

2.5 The Australian Chicken Growers' Council Limited submitted that it believes that the proposed amendments will contribute to a more transparent and effective process for anti-dumping applications.<sup>4</sup>

2.6 The Food & Beverage Importers Association (FBIA) expressed concern that the anti-dumping regime does not become too complex or act as a non-tariff barrier to trade. The FBIA also submitted that it was concerned that the significant number of legislative amendments creates a degree of uncertainty for overseas exporters, Australian importers and their relevant service providers.<sup>5</sup>

2.7 The FBIA recommended that the government undertake further consultation and that any changes to the anti-dumping regime meet the following criteria:

- must be supported by actual evidence of failings in the anti-dumping regime;
- must take into account that the current anti-dumping regime has only been in place for two years;
- must be consistent with Australia's international obligations;
- must be undertaken in a transparent manner which does not unduly add to the regulatory burden of those affected or create a barrier to trade; and
- should not allow for the retrospective imposition of measures on goods.<sup>6</sup>

2.8 The Australian Manufacturing Workers Unions (AMWU), The Australian Workers Union (AWU) and the Construction, Forestry Mining and Energy Union (CFMEU) submitted that:

In spite of some useful elements and workable clauses, the *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015* in its current form is unsupportable overall.

The main problem with the Bill is that it abolishes the International Trade Remedies Forum.<sup>7</sup>

2.9 The National Farmers Federation (NFF) submitted that none of the proposed changes in the bills shorten the period of investigation of a dumping claim. The NFF indicated that it considers this to be a significant weakness in the bills and suggested that one of the largest ongoing issues with dumped goods in Australia is the distortion

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2 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 6.

3 Australian Industry Group, *Submission 1*, p. 1.

4 Australian Chicken Growers' Council Limited, *Submission 3*, p. 2.

5 Food & Beverage Importers Association, *Submission 4*, pp 3–4.

6 Food & Beverage Importers Association, *Submission 4*, pp 2–3.

7 The Australian Manufacturing Workers Union, The Australian Workers Union and the Construction, Forestry Mining and Energy Union, Joint Submission, *Submission 11*, p. 2.

and impact that they have on a market, and businesses involved in that market, while a dumping investigation is undertaken.<sup>8</sup>

2.10 The Manufacturers Trade Alliance (MTA) informed that committee that the MTA welcomed the changes and the commitment of the Government, Opposition and Parliament to strengthening the antidumping system for Australian industry:

We think it is crucial that we have fair and open trade. Fair and open trade is vital to the future of Australian manufacturing, Australian agriculture and Australian food production. Australian manufacturing makes a vital contribution to the prosperity of our economy and to our nation and it is very important that it be supported.<sup>9</sup>

2.11 The Anti-Dumping Commissioner, Mr Dale Seymour, supported the bills, informing the committee that:

I acknowledge that the previous reforms do not go far enough in my view and that there is further work to be done to provide better support to Australian industries that are being injured by dumped and subsidised goods. I have said repeatedly that I am after a stronger and more robust antidumping system. That is why I am pleased that the government is delivering on its commitments to strengthen the antidumping system, which is evidenced by the reform package being committed by the committee today.

I believe that the range of reforms introduced by the bills will strengthen Australia's antidumping system.<sup>10</sup>

### **Anti-Dumping Review Panel**

2.12 The Review Panel provides merits review of certain decisions made by the Anti-Dumping Commissioner or the responsible Minister in anti-dumping matters.<sup>11</sup>

2.13 Parts 12 to 14 of the primary bill propose the following improvements to the merits review process, introducing a fee for review, including the Anti-Dumping Commissioner as a party eligible to make submissions to a review, introducing a conference mechanism, and raising the procedural and legal threshold for review. The bills do not affect the ability of parties to apply to the Federal Court for a judicial review of anti-dumping decisions.<sup>12</sup>

2.14 AUSVEG suggested that the amendments which strengthen the functions and effectiveness of the Review Panel are welcome signs that the government is willing to

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8 National Farmers Federation, *Submission 10*, p. 4.

9 Mr Bernard Lee, Manufacturers Trade Alliance and Manager, Industry and Government Affairs, Nufarm Limited, *Committee Hansard*, p. 10.

10 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 22

11 Department of Industry and Science, *Submission 7*, p. 8.

12 Department of Industry and Science, *Submission 7*, p. 8.

take action to support Australian industries and Australian businesses. AUSVEG submitted that:

Previously, operations who have been found to be dumping products on the Australian market have resorted to applying for frivolous and ungrounded reviews as a stalling tactic. This strategy allows further injury to be inflicted on Australian business while the review process continues, and exploits a review process which should be reserved for decisions where there are legitimate grounds for appeal.<sup>13</sup>

AUSVEG welcomes these reforms and the extra protection against injury they will provide to Australian businesses and industries.<sup>14</sup>

2.15 The Anti-Dumping Commissioner supported the policy approach in the amendments to make it clearer that the review process should be for genuine matters of review and welcomed the proposed conference mechanism.<sup>15</sup>

### ***Review fees***

2.16 Part 12 of the primary bill proposes that the Review Panel will be able to charge fees for a review. The fee would be prescribed by legislative instrument.<sup>16</sup> The Explanatory Memorandum sets out that:

Division 9 of the Customs Act is being amended to introduce a fee to apply for a review by the Review Panel, which will be prescribed by legislative instrument. The fee will ensure that businesses seriously consider the merits of their appeal before applying and help to offset the costs of administering the merits review function.<sup>17</sup>

2.17 The FBIA submitted that in its view it is inequitable to provide resources to Australian industry seeking the imposition of measures then, at the same time, seek to impose charges for those seeking a review of a decision before the Review Panel.<sup>18</sup>

2.18 The Australian Chicken Growers' Council Limited submitted its view on the proposed introduction of fees:

It is noted that there is provision that imposes a fee on making an application in order to discourage “frivolous” applications. While this could also limit legitimate applications from small and medium sized businesses,

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13 AUSVEG, *Submission 2*, p. 5.

14 AUSVEG, *Submission 2*, p. 5.

15 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 23.

16 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 31.

17 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 31.

18 Food & Beverage Importers Association, *Submission 4*, p. 5.

this should be limited by the provision for reviewing the quantum of the fee which is extremely important if the process is to be fair for all.<sup>19</sup>

2.19 The Hon Lily D'Ambrosio MP, Victorian Minister for Industry, suggested that the introduction of fees requires careful consideration to ensure that the level of fees do not create a barrier to businesses seeking a review of decisions by the Anti-Dumping Commission.<sup>20</sup> The FBIA also sought further details on the quantum of fees.<sup>21</sup>

2.20 The MTA did not support the introduction of review fees, suggesting that it was unclear what the hurdles would be and what would happen to the application fee if the application was rejected by the Review Panel.<sup>22</sup> The MTA also submitted that:

The proposed fee structure whereby SMEs will pay a reduced fee is open to manipulation where high-turnover exporters will seek reviews by encouraging the smaller, lower turnover, importer to make an application for review rather than subjecting themselves to a higher fee.

The MTA considers the review process should be exempt from fees. The objective of discouraging frivolous applications for review can be achieved by raising the threshold in respect of acceptable grounds for review.<sup>23</sup>

2.21 The department commented on the MTA concerns, informing the committee that:

We considered the possibility when developing the reform that other comparable jurisdictions may decide to use such practices. We believe that it is not likely. But of course we will review how the provision is played out, and if there is a need to tighten it further we will advise government to do that.<sup>24</sup>

The fee is a standard feature across nearly all review jurisdictions in Australia, including courts and tribunals. The introduction of a fee recognises that the Anti-Dumping Review Panel is a specialist body that incurs a significant cost to government.<sup>25</sup>

2.22 In its submission the department indicated that merits review is not explicitly required under the WTO agreements, and has become problematic for stakeholders

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19 Australian Chicken Growers' Council Limited, *Submission 3*, p. 2.

20 The Hon Lily D'Ambrosio MP, Minister for Industry in the Victorian government, *Submission 6*, p. 2.

21 Food & Beverage Importers Association, *Submission 4*, p. 5.

22 Mr Matt Condon, Representative of Arrium, Manufacturers Trade Alliance, *Committee Hansard*, 4 May 2015, p. 11.

23 Manufacturers Trade Alliance, *Submission 5*, p. 3.

24 Mr Paul Trottman, General Manager, Trade & International Branch, Department of Industry and Science, *Committee Hansard*, 4 May 2015, p. 20.

25 Mr Paul Trottman, General Manager, Trade & International Branch, Department of Industry and Science, *Committee Hansard*, 4 May 2015, p. 16.

and administrators because it is free to access and may consequently be 'gamed'. The department submitted that:

...the high frequency of appeals against decisions by the Minister to impose anti-dumping or countervailing duties suggests the fee-free nature of the Review Panel has encouraged dissatisfied parties to apply for review regardless of the relative merit of their complaints.

Fees for merits review are a standard feature in other government systems.<sup>26</sup>

2.23 The department provided further information in its submission on the proposed fees and included a draft legislative instrument to set the fees:

The [g]overnment has indicated that it intends large businesses and foreign governments seeking a review to be subject to a \$10,000 fee, whilst all other parties (such as small and medium sized businesses) will be eligible for a reduced fee of \$1,000.<sup>27</sup>

### ***Procedural and legal thresholds and a conference mechanism***

2.24 Part 13 of the primary bill proposes a number of changes to the Review Panel's processes, including higher procedural and legal thresholds for applications, and a requirement for statements of grounds for review applications.<sup>28</sup> The Explanatory Memorandum sets out that:

Division 9 of the Customs Act is being amended to improve merits review of anti-dumping decisions. This includes introducing a conferencing mechanism, allowing the [Anti-Dumping] Commissioner to make submissions to the Review Panel during a review, and enabling members of the Review Panel to access the expertise of the Commission in a transparent manner to assist in the review. In addition, the procedural and legal threshold for review will be raised.<sup>29</sup>

2.25 The Australian Steel Association argued that the proposed amendments are regressive and detract from the present regulations in Part 8 of the Customs Act which provide a balanced consideration of the merits of any review and the application of duties or otherwise.<sup>30</sup>

2.26 The FBIA submitted that in its view the threshold provisions are vague and may operate as a legal and financial bar and disincentive to people to seek review of decisions by the Anti-Dumping Commission.<sup>31</sup>

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26 Department of Industry and Science, *Submission 7*, p. 8.

27 Department of Industry and Science, *Submission 7*, p. 8.

28 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 33.

29 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 33.

30 Australian Steel Association Inc., *Submission 9*, pp 2–3.

31 Food & Beverage Importers Association, *Submission 4*, p. 4.

2.27 The Manufacturers Trade Alliance (MTA) welcomed the proposed change to procedural and legal thresholds and supported the proposed conferencing arrangements.<sup>32</sup> The MTA informed the committee that:

...we support the changes to the review panel to raise the threshold and raise the bar for reviews. At the moment reviews are very simple to get and we think there should be some hurdle in that regard.

In terms of seeking a review, we support the notion that a person seeking a review should be required to make a more substantial case for a review and probably identify where the errors are and how, if those areas were corrected, a different finding may result.<sup>33</sup>

2.28 However, the MTA was concerned that the proposed changes to the Review Panel's powers regarding acceptance and rejection of applications were not adequately detailed in supporting documentation to the bills.<sup>34</sup>

2.29 AUSVEG welcomed the proposal to ensure that applications for reviews must present the grounds behind the decision they believe should have been made and noted that:

The use of the Review Panel as a stalling tactic has allowed dumping exporters to inflict further injury onto Australian industry, and this amendment will ensure that the Panel is free to reject frivolous appeals.<sup>35</sup>

2.30 The department informed the committee that one of the reasons for the frequency of both appeals and acceptance of applications for review is that the procedural and legal threshold for accepting an application for review is relatively low. In addition, the department noted that the Review Panel considers that the legislation requires that if any ground is accepted for review then the Review Panel must address all grounds in its review, regardless of whether some of the grounds were invalid or insufficiently supported. As a result, interested parties may spend additional, unnecessary effort refuting invalid grounds when making their own submissions to a review.<sup>36</sup>

2.31 According to the department's submission the changes proposed in the primary bill will overcome these problems and ensure that the Review Panel only considers serious and meritorious reviews.<sup>37</sup>

2.32 The department also submitted that the proposed changes relating to conferencing:

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32 Manufacturers Trade Alliance, *Submission 5*, p. 3.

33 Mr Bernard Lee, Manufacturers Trade Alliance and Manager, Industry and Government Affairs, Nufarm Limited, *Committee Hansard*, pp 10–12.

34 Manufacturers Trade Alliance, *Submission 5*, p. 2.

35 AUSVEG, *Submission 2*, p. 2.

36 Department of Industry and Science, *Submission 7*, p. 10.

37 Department of Industry and Science, *Submission 7*, p. 10.

- would provide an opportunity for the aggrieved parties to discuss the decision;
- may avoid the need for review altogether, if the application is withdrawn;
- may also reduce the scope of the review if the applicant decides to withdraw a number of grounds for review after gaining further insight at the conference; and
- would allow the Review Panel to have all the necessary information available to assess whether to accept an application.<sup>38</sup>

### ***Withdrawal of applications***

2.33 Part 14 of the primary bill proposes changes to make it possible for applicants to withdraw applications for a review and establish the potential for partial refund of application fees.<sup>39</sup> The Explanatory Memorandum sets out that:

Item 125 inserts a new section 269ZZF. The new section provides that an applicant for review under Subdivision B – Review of Ministerial decisions, may withdraw that application and the manner of that withdrawal.

Item 125 relates to Part 12, where the Minister may, by legislative instrument prescribe a fee to apply for merits review and the instrument may make provision for, and in relation to, the refund or waiver of any fee. The intent is that the instrument will prescribe a partial refund for the full withdrawal of an application for merits review before that application is accepted by the Review Panel. Specifically, full withdrawal of an application could be an outcome of a conference set out in subsection 269ZZH as outlined in Item 98.<sup>40</sup>

2.34 The MTA acknowledged the need for a process to allow withdrawal of an application for merits review.<sup>41</sup>

2.35 The department informed that committee that presently, the Customs Act has multiple provisions setting out where certain documents must be sent in order to lodge or withdraw anti-dumping process applications. The current legislation is both confusing for stakeholders, and difficult to update when the lodgement address changes, for example, when the Commission moves to new premises.

2.36 The department also noted that applicants will be eligible for a full or partial refund for the full withdrawal of an application to the Review Panel before a review has commenced, depending on when the application is withdrawn.<sup>42</sup>

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38 Department of Industry and Science, *Submission 7*, p. 9.

39 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 42.

40 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 42.

41 Manufacturers Trade Alliance, *Submission 5*, p. 4.

42 Department of Industry and Science, *Submission 7*, p. 8.

### **Committee view**

2.37 The committee has considered the evidence it has received on the proposed changes to the operation of the Review Panel in Parts 12 to 14 of the primary bill. The committee notes that while some submitters have raised concerns about fees for reviews, other submitters have supported the proposal and the department has released a draft legislative instrument and information of the scale of the proposed fees. The committee therefore supports Parts 12 to 14 of the primary bill.

### **International Trade Remedies Forum**

2.38 The committee has considered evidence on the proposal in the bills to abolish the International Trade Remedies Forum (ITRF). The ITRF was initially established in August 2011 following the announcement of the former government's 'Streamlining Australia's anti-dumping system' policy. Legislation in Part XVC of the *Customs Act 1901* came into effect on 10 June 2013 to formally establish the ITRF.<sup>43</sup> The ITRF consists of 23 anti-dumping stakeholders (including government, union and industry bodies) and provides strategic advice to the government on the operation and reform of Australia's anti-dumping system.<sup>44</sup>

2.39 The Explanatory Memorandum describes the proposed amendment to abolish the ITRF in Part 15 of the primary bill:

Item 128 repeals Part XVC [of the *Customs Act 1901*] in its entirety.

The legislation establishing the [ITRF] is unnecessary, stakeholder consultation can operate administratively. Removing the legislative requirement for the Forum will enable the [g]overnment to adopt more flexible consultative arrangements on a needs basis with an associated reduction in the compliance burden on businesses, in line with the [g]overnment's agenda of reducing red tape.<sup>45</sup>

2.40 The AMWU, AWU and CFMEU opposed the proposal to abolish the ITRF and indicated that in their view the ITRF is the only body where unions, employers and industry groups enjoy a formal dialogue with the government on the antidumping system, and that it has been instrumental in assisting the government to implement a number of positive reforms to the antidumping system.<sup>46</sup> The AWU indicated that in its view the ITRF was a functional body that achieved regulatory outcomes.<sup>47</sup>

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43 Anti-Dumping Commission, *International Trade Remedies Forum*, <http://www.adcommission.gov.au/aboutus/ITRF.asp>, (accessed 26 March 2015).

44 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 43; Anti-Dumping Commission, *Members of the ITRF*, <http://www.adcommission.gov.au/aboutus/MembersoftheITRF.asp>, (accessed 26 March 2015).

45 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 43.

46 The Australian Manufacturing Workers Unions, The Australian Workers Union and the Construction, Forestry Mining and Energy Union, Joint Submission, *Submission 11*, pp 2–3.

47 Mr Misha Zelinsky, Executive Officer/National Vice President, The Australian Workers' Union, *Committee Hansard*, 4 May 2015, p. 5.

2.41 The Hon Lily D'Ambrosio MP, Minister for Industry in the Victorian government, did not support abolishing the ITRF and asserted that it is important to have a formal mechanism for obtaining the views of stakeholders on dumping issues.<sup>48</sup>

2.42 The FBIA was also concerned about the proposed abolition of the ITRF, submitting that:

The FBIA believes that the retention of the ITRF is of paramount importance and that, furthermore, the ITRF be subject to a new, comprehensive and transparent regime relating to the conduct of consultation, the holding of meetings and dissemination of information to be considered by those before the ITRF.<sup>49</sup>

2.43 The Australian Industry Group supported the retention of an industry forum to ensure the system continues to be effective in a dynamic business environment. The Australian Industry Group suggested that the membership of the forum could be reduced.<sup>50</sup>

2.44 The Australian Steel Association submitted that in its view the ITRF was a means to consider legislation that affects Australia's ability to engage in trade with its neighbours. The Australian Steel Association supported retaining the ITRF and including other stakeholders such as shipping companies and more downstream Australian users.<sup>51</sup>

2.45 The MTA informed that committee of its view on how the ITRF had functioned:

One of the problems, I suppose, with the forum was that it generally tended to run on a consensus model. So when you have disparate views in a room it is very hard to get consensus on everything. But having said that, certainly many of the major issues confronting industry, unions and importers were tabled at the forum.<sup>52</sup>

2.46 The Australian Forest Products Association (AFPA) suggested that if the ITRF is abolished, an alternative effective industry consultative mechanism should be established to replace the ITRF.<sup>53</sup>

2.47 The department submitted that while the ITRF had proved to be a useful avenue for raising issues:

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48 The Hon Lily D'Ambrosio MP, Minister for Industry in the Victorian government, *Submission 6*, p. 2.

49 Food & Beverage Importers Association, *Submission 4*, pp 5–6.

50 Australian Industry Group, *Submission 1*, p. 1.

51 Australian Steel Association, *Submission 9*, p. 3.

52 Mr Bernard Lee, Manufacturers Trade Alliance and Manager, Industry and Government Affairs, Nufarm Limited, *Committee Hansard*, p. 11.

53 Australian Forest Products Association, *Submission 8*, p. 2.

- the government considers that the central role of the ITRF to provide advice on the implementation of the reforms under the policy, Streamlining Australia's Anti-Dumping System, has been fulfilled;
- the ITRF's last plenary meeting was over two years ago;
- the ITRF's inflexible nature prescribed in legislation inhibited the provision of timely advice to government; and
- the ITRF required significant resources that can be better used elsewhere in the anti-dumping system.<sup>54</sup>

2.48 The National Farmers Federation submitted that in its view:

- it is critical that the proposed removal of the ITRF does not undermine the capacity of relevant organisations to engage with and communicate with government on specific matters of concern; and
- the replacement framework must allow for and provide relevant expertise and appropriate resources to effectively apply Australia's anti-dumping system across all industry sectors.<sup>55</sup>

2.49 The department informed the committee that the less rigid consulting arrangements used for a couple of years have proved to be effective. The government is considering replacing the ITRF with a smaller standing body:

The [g]overnment is currently considering establishing an 'anti-dumping consultative group'. This consultative group could be established administratively and comprise a small number of members (approximately five) which will represent a spectrum of industry interests, for example, manufacturers, producers, fabricators, importers, industry bodies and trade unions. The consultative group would be the [g]overnment's first port of call for feedback on anti-dumping issues, but not an exclusive source of advice.<sup>56</sup>

2.50 The CFMEU, AMWU and AWU raised some concerns about how the work of the ITRF had been progressed since the ITRF last met in 2013.<sup>57</sup> The department informed the committee that there has been ongoing work in the department on those issues.<sup>58</sup> The Anti-Dumping Commissioner also informed the committee that some of the matters previously considered by the ITRF had been progressed by the Anti-Dumping Commission:

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54 Department of Industry and Science, *Submission 7*, p. 11.

55 National Farmers Federation, *Submission 10*, p. 3.

56 Department of Industry and Science, *Submission 7*, pp 11, 12.

57 The Australian Manufacturing Workers Union, The Australian Workers Union and the Construction, Forestry Mining and Energy Union, Joint Submission, *Submission 11*, p. 22.

58 Mr Paul Trottman, General Manager, Trade & International Branch, Department of Industry and Science, *Committee Hansard*, 4 May 2015, p. 19.

I have subsequently spoken to many members of the ITRF in what I call my 'bilateral consultations', which was the commitment I made at one of the estimates meetings—that I would conclude a lot of that work. I have done that, and I am pleased with the level of understanding that they display.<sup>59</sup>

2.51 The Anti-Dumping Commissioner also informed the committee that he considered that he had considerable access to anti-dumping expertise in the Australian industry, unions, and bureaucracy and that the substance of the discussions was more important than the form or structure of the meeting.<sup>60</sup>

### ***Committee view***

2.52 The committee has considered the evidence it has received on the proposal to abolish the ITRF in the bills and notes that some submitters have raised concerns about the proposal to abolish the ITRF. The committee also notes that the government is considering replacing the stakeholder consultation function performed by the ITRF with a more flexible non-legislative consultation mechanism that reduces the regulatory burden on business. The committee supports the change proposed in the bills and considers that the concerns can be managed with the proposed alternative consultation arrangements.

### **Minor amendments**

2.53 In this section, the committee considers the evidence it has received on proposed minor amendments to submission timeframes, lodgement and processes.

### ***Submission deadlines***

2.54 Part 1 of the primary bill proposes to reduce the deadline for submissions during the Anti-Dumping Commission's processes from 40 days to 37.<sup>61</sup> The Explanatory Memorandum sets out that:

The parties will be required to lodge a submission within 37 days, rather than 40 days with the [Anti-Dumping] Commissioner.

The [Anti-Dumping] Commissioner will be required to have regard to these submissions lodged within 37 days (as opposed to 40 days).

These amendments will better align Australia's domestic legislation with Article 6.1.1 of the *World Trade Organization Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (WTO Agreement) and the Article 12.1.1 of the World Trade

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59 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 26.

60 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 26.

61 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 11.

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Organization Agreement on Subsidies and Countervailing Measures  
(ASCM).<sup>62</sup>

2.55 The AFPA supported the proposed changes for dealing with submissions.<sup>63</sup> AUSVEG noted that bringing the legislated deadline for submissions into line with current Anti-Dumping Commission practice will remove potential ambiguity about present processes.<sup>64</sup> The MTA welcomed the proposed change to submission deadlines and requested that the change apply to both commercial-in-confidence and public file forms.<sup>65</sup> While the MTA noted some concerns about exemptions or extensions to timeframes, they indicated that they were supportive of short extensions of up to seven days.<sup>66</sup>

2.56 The department informed the committee that the new submission deadlines are intended to place a greater focus on the requirement for submissions to be submitted promptly and align with the minimum timeframes established under WTO agreements. It will also allow information to be considered earlier by the Anti-Dumping Commissioner when deciding whether a preliminary affirmative determination can be made. The Anti-Dumping Commissioner will retain the ability to grant extensions for submissions, which is consistent with WTO agreements.<sup>67</sup>

2.57 The department also submitted that this amendment together with a heavier onus on exporters to cooperate with anti-dumping investigations and the potential for provisional measures to be imposed after 60 days are part of the government's policy to place a greater onus on foreign exporters in a way that is consistent with WTO agreements.<sup>68</sup>

***Publication, lodgement and withdrawal provisions***

2.58 The bills propose changes to allow the Anti-Dumping Commissioner to specify how submissions are to be lodged, and withdrawn and provide for anti-dumping notices to be published on the Anti-Dumping Commission's website, rather than in the *Gazette*.<sup>69</sup>

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62 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 11.

63 Australian Forest Products Association, *Submission 8*, p. 2.

64 AUSVEG, *Submission 2*, p. 2.

65 Manufacturers Trade Alliance, *Submission 5*, p. 2; Manufacturers Trade Alliance, *Supplementary Submission to Submission 5*, p. 2.

66 Mr Bernard Lee, Manufacturers Trade Alliance and Manager, Industry and Government Affairs, Nufarm Limited, *Committee Hansard*, p. 9.

67 Department of Industry and Science, *Submission 7*, p. 17.

68 Department of Industry and Science, *Submission 7*, p. 13.

69 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, pp 13–18.

2.59 The AFPA, the MTA and the Australia Steel Association supported the proposed changes to lodgement and publication requirements.<sup>70</sup>

2.60 AUSVEG recognised the importance of making notices available on websites but recommended retaining newspaper publication, raising a concern that if the notices were only available online some people may be disadvantaged:

...many vegetable growers (and other members of rural and regional industries) do not have the level of technological proficiency which may be considered to be standard among the broader Australian population. By stating that all notices must be moved online, these amendments run the risk of putting this information beyond the reach of many people for whom access may be particularly important.<sup>71</sup>

2.61 The department informed the committee that the relevant notices are already published on the Commission website. The department considers that the website is the principal source of information for dumping matters and that changes will cause negligible impact on stakeholders.<sup>72</sup>

2.62 In relation to the lodgement and withdrawal provisions, the department submitted that the Customs Act currently has multiple provisions setting out where documents must be sent to lodge or withdraw applications. The changes proposed in the bills will consolidate those provisions.<sup>73</sup>

### **Technical amendments**

2.63 In this section, the committee considers the evidence it has received on technical amendments in the bills relating to the:

- length of investigation periods;
- cumulative assessment of injury;
- normal value of goods;
- definition of a subsidy;
- accelerated reviews; and
- notification of subsidies.<sup>74</sup>

2.64 In its submission the department provided an overview of these amendments and indicated to the committee that it considers that:

There are a number of ambiguous or unclear provisions in the Customs Act, which have caused, or have the potential to cause, uncertainty for

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70 Australian Forest Products Association, *Submission 8*, p. 2; Manufacturers Trade Alliance, *Submission 5*, p. 2; Australian Steel Association Inc., *Submission 9*, p. 1.

71 AUSVEG, *Submission 2*, pp 2–3.

72 Department of Industry and Science, *Submission 7*, p. 17.

73 Department of Industry and Science, *Submission 7*, p. 17.

74 Department of Industry and Science, *Submission 7*, pp 19–23.

Australian businesses or risk Australia breaching its WTO obligations. A range of technical amendments to the system will simplify and clarify certain aspects of anti-dumping investigative processes whilst improving Australia's consistency with the WTO agreements.<sup>75</sup>

2.65 The Australian Industry Group supported moves to provide companies with timely and transparent decisions, but suggested a review of the effectiveness of any changes take place 12 months after implementation.<sup>76</sup>

2.66 The Anti-Dumping Commissioner advised the committee that the amendments to strengthen the anti-dumping system that relate to the lesser duty rule, definition of a subsidy and the length of investigation periods have his full support.<sup>77</sup>

### ***Length of investigation period***

2.67 Part 3 of the primary bill proposes that the Anti-Dumping Commissioner will not be able to vary the length of an investigation period.<sup>78</sup> Part 6 proposes that in determining whether dumping has occurred, the minimum period that must be considered will be reduced from two months to one month.<sup>79</sup>

2.68 The CFMEU did not support the proposed changes to investigation periods.<sup>80</sup>

2.69 The AFPA supported the proposed changes to investigation periods in anti-dumping matters.<sup>81</sup>

2.70 AUSVEG supported the proposed amendment to ensure that the Commission cannot vary the length of an investigation period, noting that in its view that would help to reassure Australian businesses that anti-dumping investigations will be resolved in a timely manner, and help to avoid prolonged injury if dumping behaviour is identified.<sup>82</sup>

2.71 Australian Chicken Growers' Council Limited submitted that in its view, it is important that applications are investigated in the shortest time frame possible to minimise the impact on businesses suffering financial damage from competition with dumped product.<sup>83</sup>

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75 Department of Industry and Science, *Submission 7*, p. 19.

76 Australian Industry Group, *Submission 1*, p. 1.

77 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 27.

78 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 19.

79 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 23.

80 Construction, Forestry, Mining and Energy Union, *Answers to questions on notice*, taken 4 May 2015, received 5 May 2015.

81 Australian Forest Products Association, *Submission 8*, p. 2.

82 AUSVEG, *Submission 2*, p. 4.

83 Australian Chicken Growers' Council Limited, *Submission 3*, p. 2.

2.72 AUSVEG supported the proposed amendment to reduce the minimum period to one month for calculations of dumping factors, noting that in its view that would increase the accuracy of calculations and the effectiveness of the Anti-Dumping Commission.<sup>84</sup>

2.73 The Department informed the committee that under the current provisions of the Customs Act it is unclear whether the Anti-Dumping Commissioner may vary – or be required to vary – the length of the investigation period after that notice has been published. The department submitted that:

This uncertainty is problematic for stakeholders, because varying the length of the investigation period can have a significant impact on the [Anti-Dumping] Commissioner's findings on dumping or subsidies.

Additionally, if the investigation period could be changed during the investigation, this could cause significant delays and, consequently, impose significant burdens on participating companies (both domestic and foreign), which would be required to provide revised information.<sup>85</sup>

2.74 The bills would amend the Customs Act to clarify that the length of the investigation period of an anti-dumping and countervailing investigation cannot be varied after it is established by the Anti-Dumping Commissioner's public notice. The department suggested that:

...the change will provide certainty to all stakeholders, and aligns with the Commission's current, long-standing practice of not varying the investigation period.<sup>86</sup>

### ***Cumulative assessment of injury or hindrance***

2.75 Part 4 of the primary bill proposes to allow the cumulative assessment of the impact of dumping from multiple countries by the Anti-Dumping Commissioner.<sup>87</sup>

2.76 The department informed the committee that currently the Minister may assess whether the cumulative impact of exports from two or more countries subject to an investigation is causing material injury to Australian businesses. However, the Anti-Dumping Commissioner does not have a similar power. The changes proposed in the bill would provide a similar power to the Anti-Dumping Commissioner and better align Australia's anti-dumping legislation with WTO agreements.<sup>88</sup>

2.77 The AFPA supported the proposed changes to the cumulative assessment of injury and aspects of material injury determinations.<sup>89</sup>

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84 AUSVEG, *Submission 2*, p. 4.

85 Department of Industry and Science, *Submission 7*, p. 19.

86 Department of Industry and Science, *Submission 7*, p. 19.

87 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 20.

88 Department of Industry and Science, *Submission 7*, p. 19–20.

89 Australian Forest Products Association, *Submission 8*, p. 2.

### ***Normal value of goods***

2.78 The normal value of goods is the price of the goods in ordinary course of trade in the exporter's domestic market. Dumping occurs when goods exported to Australia are priced lower than their normal value.<sup>90</sup>

2.79 The normal value of goods may be calculated by several methods set out in legislation, including the construction method and the third country prices method (in which the prices paid to export the goods to an appropriate third country are used). The department submitted that currently it is unclear whether the Anti-Dumping Commissioner is required to use the third country prices method before resorting to the construction method.<sup>91</sup> Part 5 of the primary bill proposes to clarify that there is no hierarchy for the methods available to determine a normal value of goods.<sup>92</sup>

2.80 The AFPA supported the proposed changes.<sup>93</sup> The CFMEU, AMWU and AWU also supported the proposed changes, suggesting that it is the existing practice of the Anti-Dumping Commission to do a cost construction rather than analysing export prices to third countries in this situation.<sup>94</sup>

2.81 The MTA recommended the full utilisation of third country data for determining normal value in cases where exporter's costs may not reasonably reflect actual costs and submitted that:

This complete third country surrogacy approach to establish Normal Values when a particular market situation is found would ensure that the determined Normal Value is not affected by market distortions or subsidies.

The MTA understand that this approach is not inconsistent with Australia's obligations under the WTO agreement...and it is noted that there is no provision in the Agreement specifically preventing the application of third country data as the basis for determining costs of production.<sup>95</sup>

### ***Definition of subsidy***

2.82 Part 7 of the primary bill proposes a revised definition of subsidies.<sup>96</sup> The Customs Act deems a benefit to be conferred in relation to certain direct financial payments by governments and certain bodies. The department suggested that this may

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90 Department of Industry and Science, *Submission 7*, p. 3.

91 Department of Industry and Science, *Submission 7*, p. 20.

92 Explanatory Memorandum, *Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015*, p. 22.

93 Manufacturers Trade Alliance, *Submission 5*, p. 2; Australian Forest Products Association, *Submission 8*, p. 2.

94 The Australian Manufacturing Workers Union, The Australian Workers Union and the Construction, Forestry Mining and Energy Union, Joint Submission, *Submission 11*, p. 51.

95 Manufacturers Trade Alliance, *Answers to questions on notice*, taken 4 May 2015, received 5 May 2015.

96 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 24.

restrict the Minister's ability to have regard to all relevant information, and have regard to a range of legislated guidelines, when determining if a benefit has been conferred. The department submitted that:

The Bills will amend the definition of subsidy in the Customs Act so that the receipt of a financial contribution by a government or certain bodies does not, of itself, confer a benefit. Instead the amendments will establish that a financial contribution is taken to confer a benefit if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.<sup>97</sup>

2.83 The CFMEU offered conditional support for the amendment, raising a question about whether the definition of subsidy would be more compliant with WTO agreements.<sup>98</sup> The CFMEU also suggested that:

The part should be amended in order to remove any ambiguity that the amendment is about strengthening the system and not weakening it- or alternatively not be proceeded with pending consultations with the Forum. Proceeding without the suggested amendment would enhance suspicion of a secret side deal.<sup>99</sup>

2.84 The MTA did not support the proposed changes, informing the committee that 'the MTA remains concerned that the changes to definition of Subsidy and the extension of the compliance notification have the potential to weaken Australia's anti-dumping framework rather than strengthen it.'<sup>100</sup>

2.85 The department informed the committee that:

The definition of subsidy is being aligned closer to the WTO agreements, on which the antidumping countervailing system is based. It will bring the definition into alignment with the agreement on subsidies and countervailing measures and international jurisprudence from the WTO.<sup>101</sup>

2.86 The MTA was concerned that the requirement for the Anti-Dumping Commission and Australian industries to demonstrate that a direct payment by a government body has conferred a benefit by way of reference to a market price benchmark would be additional to the requirements contained in WTO agreements.<sup>102</sup>

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97 Department of Industry and Science, *Submission 7*, p. 21.

98 Mr Travis Wacey, National Policy Research Officer; Forestry, Building Products and Manufacturing Division; Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 4 May 2014, pp 3–4.

99 Construction, Forestry Mining and Energy Union, *Answers to questions on notice*, taken 4 May 2015, received 5 May 2015.

100 Manufacturers Trade Alliance, *Answers to questions on notice*, taken 4 May 2015, received 5 May 2015.

101 Mr Julian Stockwell, Policy Officer, Anti-Dumping Policy Section, Department of Industry and Science, *Committee Hansard*, 4 May 2015, p. 20.

102 Manufacturers Trade Alliance, *Supplementary Submission 5*, p. 2.

2.87 The department responded to questions from the committee seeking to clarify how the proposed new subsidy definition would be more compliant with WTO agreements:

The current definition of subsidy in the *Customs Act 1901* deems certain direct financial payments by governments and certain bodies, on its own, to confer a benefit and therefore meet the legal definition of a subsidy. The World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement) requires more consideration than merely if a direct financial payment has been made and what type of body made the payment. Rather the SCM Agreement requires that such a payment has in fact conferred a benefit – that is, the payment must be examined to see if the recipient obtained a benefit as a result.

The Bills will amend the definition of subsidy in the *Customs Act 1901* so that the receipt of a financial contribution by a government or certain bodies does not, of itself, confer a benefit. The amendment proposed in the Bills will remove the automatic deeming of a benefit in these circumstances and replace it with a test to determine if a benefit has been conferred. The test will establish that a financial contribution is taken to confer a benefit if it is provided on terms that are more advantageous than those that would have been available on the market. This test is consistent with WTO dispute panel jurisprudence that has considered the application of the SCM Agreement. This aligns the *Customs Act 1901* with the WTO SCM agreement – in particular, Article 1 and Article 14.<sup>103</sup>

### ***Accelerated review***

2.88 Part 8 of the primary bill proposes amendments to the accelerated review provisions by increasing the range of exporters who may apply for an accelerated review, and removing the possibility that no duties will apply to the exporter.<sup>104</sup>

2.89 The MTA did not support proposed changes to timing of accelerated reviews, as the MTA considers that it is likely an incomplete application will be submitted to the Commission in a hurried manner to achieve a lodgement date.<sup>105</sup>

### ***Notification of subsidies***

2.90 Part 11 proposes to amend the Customs Act to provide that the Minister is not required to have regard to the lesser duty rule when considering the imposition of countervailing duties if the relevant country of export has not submitted notification of its subsidies at least once in the compliance period.<sup>106</sup>

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103 Department of Industry and Science, *Answers to questions of notice*, taken on 4 May 2015, received on 5 May 2015.

104 Department of Industry and Science, *Submission 7*, p. 21.

105 Manufacturers Trade Alliance, Supplementary submission to *Submission 5*, p. 2.

106 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 29.

2.91 The Australian Steel Association did not support the proposed amendment, submitting that in its view:

The ramifications of removing the Lesser Duty Rule is that duties beyond those determined to remove material injury may be applied.

The consequence would effectively be an excessive tax on the Australian users of the goods affected by the anti-dumping or countervailing application. This would directly affect the ability of these Australian businesses to be internationally competitive.<sup>107</sup>

2.92 The CFMEU did not support the proposed changes, raising concerns about the time frames in which exporters were allowed to make notifications of subsidies and that the changes may weaken Australia's ability to address dumping.<sup>108</sup>

2.93 The MTA informed the committee that their preference would be not to have a lesser duty rule, but acknowledged that there was a requirement for it under WTO agreements.<sup>109</sup> The MTA supported the proposed change to the lesser duty rule, but considered that the new requirement would be less stringent than in other countries. The MTA suggested extending the proposed changes further so that:

...in anti-dumping investigations where a particular market situation is determined, and in cases involving an Australian industry single SME, the mandatory consideration of the lesser duty rule should equally not apply.<sup>110</sup>

2.94 AUSVEG was unclear on the purpose of the amendments in the bills relating to providing more flexible powers to the Anti-Dumping Commission, the Anti-Dumping Commissioner, the Review Panel and the Minister for Industry to enable timely resolution of anti-dumping investigations.<sup>111</sup>

2.95 The department informed the committee that as currently drafted, the provisions of the Customs Act are unclear on whether a subsidy notification within the compliance period qualifies as a circumstance where the Minister may not have to consider the application of the lesser duty rule. The department submitted that the proposed amendments would:

...clarify that the Minister is not required to have regard to the lesser duty rule when considering the imposition of countervailing duties if the relevant country has not submitted any notification of its subsidies in the compliance period.<sup>112</sup>

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107 Australian Steel Association Inc., *Submission 9*, p. 2.

108 Construction, Forestry Mining and Energy Union, *Answers to questions on notice*, taken on 4 May 2015, received on 5 May 2015.

109 Mr Bernard Lee, Manufacturers Trade Alliance and Manager, Industry and Government Affairs, Nufarm Limited, *Committee Hansard*, p. 10.

110 Manufacturers Trade Alliance, *Submission 5*, p. 3; Manufacturers Trade Alliance, *Supplementary submission to Submission 5*, p. 2.

111 AUSVEG, *Submission 2*, pp 2, 4.

112 Department of Industry and Science, *Submission 7*, p. 23.

2.96 The Anti-Dumping Commissioner supported the proposed changes on notification of subsidies, to the extent that they would strengthen the incentive to provide information to the Commission.<sup>113</sup>

### **Committee view**

2.97 The committee considers that while some concerns were raised, in general there was support for the minor and technical amendments proposed in the bills. The committee has already discussed concerns about the amendments relating to the Anti-Dumping Review Panel and the International trade Remedies Forum. The committee considers that those concerns can be managed and notes that it only received 11 submissions on the bills. The committee therefore recommends that the bills be passed.

### **Recommendation 1**

**2.98 The committee recommends that the Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 and the Customs Tariff (Anti-Dumping) Amendment Bill 2015 be passed without amendment.**

**Senator Sean Edwards**

**Committee Chair**

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113 Mr Dale Seymour, Anti-Dumping Commissioner, Anti-Dumping Commission, *Committee Hansard*, 4 May 2015, p. 25.