

The Senate

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Economics  
Legislation Committee

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Customs Amendment (Anti-dumping Measures)  
Bill (No. 1) 2015

Customs Tariff (Anti-Dumping) Amendment  
Bill 2015

May 2015

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# Senate Economics Legislation Committee

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# Chapter 1

## Introduction and background

1.1 On 26 February 2015 the Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 and the Customs Tariff (Anti-Dumping) Amendment Bill 2015 (the bills) were introduced into the House of Representatives.<sup>1</sup> On 18 March 2015 the bills were introduced into the Senate and were referred to the Senate Economics Legislation Committee (the committee) for inquiry and report by 5 May 2015.<sup>2</sup>

### Conduct of the inquiry

1.2 The committee advertised its inquiry on its website. The committee also wrote directly to the Commonwealth, state and territory governments and other stakeholders, drawing attention to the inquiry and inviting them to make written submissions.

1.3 The committee received 11 submissions, which are listed at Appendix 1. The committee held one public hearing in Canberra on 4 May 2015. The committee thanks all those who assisted with the inquiry, especially those who made written submissions and attended the hearing.

### Structure of this report

1.4 This report comprises two chapters:

- The remaining sections of Chapter 1 provide background information about Australia's anti-dumping system and a summary of the proposed amendments; and
- Chapter 2 examines the arguments for and against the proposed amendments.

### Background on Australia's anti-dumping system

1.5 This section provides background on Australia's anti-dumping system, and discusses previous reviews and reforms of the system.

1.6 Australia's anti-dumping system has been set up to manage circumstances in which Australian businesses may suffer injury as a result of goods from overseas being dumped into markets within Australia. The Anti-Dumping Commission has described dumping and anti-dumping as follows:

Dumping occurs when an exporter sells goods to Australia at a price that is below the '*normal value*' of the goods. The normal value will usually be the domestic price of the goods in the country of export. The margin of dumping is the amount by which that normal value exceeds the '*export price*' of the goods.

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1 House of Representatives, *Votes and Proceedings*, No. 99, 26 February 2015, p. 1143.

2 *Journals of the Senate*, No. 85, 18 March 2015, p. 2316.

Dumping is not prohibited under international trade agreements and it is not illegal.<sup>3</sup>

Anti-dumping 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.<sup>4</sup>

1.7 The Productivity Commission has described Australia's anti-dumping system as a system that seeks to remedy the injurious effects on Australian industry caused by imports deemed to be unfairly priced:

It allows local industry to apply for anti-dumping duties on goods 'dumped' in Australian markets at prices below those prevailing in the exporter's domestic market or to apply for countervailing duties on goods that have been subsidised by the government of the country of export. Where the dumping or subsidisation results in material injury to local industry, anti-dumping or countervailing duties can be applied.<sup>5</sup>

1.8 Countervailing duties are duties imposed on goods by an importing country which finds that an exporting country has directly or indirectly subsidised<sup>6</sup> those exports, thus resulting in a (threatened) material injury to a domestic firm or industry.<sup>7</sup>

1.9 As a member of the World Trade Organisation (WTO), Australia's anti-dumping system is based on WTO agreements that:

- prescribe rules for the conduct of anti-dumping investigations and the application of measures to address dumping, including how member countries may: initiate cases, calculate dumping margins, determine injury, enforce remedial measures and review past determinations; and
- regulate measures designed to remedy material injury caused by subsidised imports.<sup>8</sup>

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3 Anti-Dumping Commission, *Australia's Anti-Dumping and Countervailing (anti-subsidy) System*, Fact sheet, November 2013, p. 1.

4 Anti-Dumping Commission, *What is Dumping?*, <http://www.adcommission.gov.au/system/default.asp>, (accessed 25 March 2014).

5 Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry report, No. 48, 18 December 2009, p. IV;

6 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, Anti-Dumping Commission, *What is a subsidy?*, <http://www.adcommission.gov.au/system/what-is-a-subsidy.asp>, (accessed 25 March 2015).

7 Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry report, No. 48, 18 December 2009, pp XI –XII; Anti-Dumping Commission, *Australia's Anti-Dumping and Countervailing (anti-subsidy) System*, Fact sheet, November 2013, p. 1.

1.10 The WTO agreements are an important part of the international trade system and signify that dumping and subsidisation can constitute unfair trade practices and that, where they do, nations are entitled to respond. The WTO agreements on anti-dumping and countervailing are intended to achieve a level playing field. However, interpretation of the agreements differs between countries.<sup>9</sup>

### ***Previous reviews and reform of Australia's anti-dumping system***

1.11 This section provides a brief summary of previous reviews and reforms of Australia's anti-dumping system. The Productivity Commission has summarised the usage and previous reviews of the anti-dumping system, noting that usage increased in the early 1980's following the earlier global recession:

Though Australia's anti-dumping system has been in place for over 100 years, it was not until the early 1980s that usage of the system became significant.

This was triggered by global recession, falling commodity prices and the Government's reluctance to raise tariff levels.

Usage of the system peaked in the mid-1980s, which led to a backlash against the system from some users of the products subject to measures.

Since the mid-1980s (aside from a brief upsurge in the early 1990s) usage of the system has steadily declined.

[A] major review of the anti-dumping system was carried out in 1986 (the Gruen Review). Subsequent reviews — including the Willett Review in 1996 and the Joint Study in 2006 — have focussed largely on the administration of the system.<sup>10</sup>

1.12 In 1988, following the Gruen Review in 1986, legislation was passed to establish the Anti-Dumping Authority (ADA) to create a two-tier administrative system. The system included Australian Customs Service (Customs)<sup>11</sup> conducting investigations up to a preliminary findings stage, and the ADA reviewing the preliminary findings and making final findings.<sup>12</sup>

1.13 The 1996 Willett Review initiated by the then Government led to a new legislative framework and new administrative arrangements, including a

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8 *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ('the Anti-Dumping Agreement') and the *Agreement on subsidies and countervailing measures*, contained in Annex 1A of the *Marrakesh Agreement establishing the World Trade Organisation*, opened for signature 15 April 1994, ATS [1995] No. 8 (entered into force 1 January 1995).

9 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, p. 4.

10 Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry report, No. 48, 18 December 2009, p. 169.

11 The organisation's name was subsequently changed to the Australian Customs and Border Protection Service, in 1998.

12 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, p. 17.

rationalisation of the two-stage investigation system. The ADA was abolished in 1998 and Customs assumed sole responsibility for investigating and reporting on dumping matters.<sup>13</sup>

1.14 In 2006 a joint study by relevant federal government departments was initiated to assess whether Australia's anti-dumping administration reflected best practice and to respond to concerns of Australian manufacturers about the effectiveness of the system.

1.15 In December 2009 the Productivity Commission completed an inquiry into Australia's Anti-dumping and Countervailing System. The inquiry found that the Australian anti-dumping system benefits a small number of firms whose goods compete with imported goods (import-competing firms), but imposes costs on the rest of the economy. However, the net economic cost is likely to be small.

1.16 The Productivity Commission also found that there were deficiencies in the Australian anti-dumping system including that:

- there is no consideration of the wider economic impacts of anti-dumping measures;
- measures can too easily become akin to long-term protection, or outdated in the face of changing market circumstances; and
- decision-making and its outcomes are not sufficiently transparent.

1.17 The Productivity Commission recommended that a public interest test should be put in place to take account of wider impacts of measures and prevent the imposition of measures that would be disproportionately costly.<sup>14</sup>

1.18 In 2011 this committee completed inquiries into two bills proposing changes to Australia's anti-dumping system. In its report on the Customs Amendment (Anti-dumping Measures) Bill 2011, the committee noted that the bill was introduced following the Full Federal Court's findings in *Minister of State for Home Affairs v Siam Polyethylene*<sup>15</sup> to address a lack of clarity in the review process. The amendments proposed by that bill were separate to the Government's consideration of the Productivity Commission's inquiry report and a private senator's bill which considered a broad range of issues related to Australia's anti-dumping framework.<sup>16</sup>

1.19 In June 2011 the then government announced a package of reforms referred to as 'Streamlining Australia's anti-dumping system'. The reforms took account of reports

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13 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, p. 17; John Carroll, *Australian Anti-dumping and Countervailing Measures*, Lex Mundi Asian Pacific Conference, May 2000, p. 3.

14 Productivity Commission, *Australia's Anti-dumping and Countervailing System*, Inquiry report, No. 48, 18 December 2009, p. X.

15 [2010] FCAFC 86.

16 Senate Economics Legislation Committee, *Customs Amendment (Anti-dumping Measures) Bill 2011 [Provisions]*, June 2011, p. 2.

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by the committee and set out to implement 15 of the 20 recommendations made by the Productivity Commission's inquiry.<sup>17</sup>

1.20 Aspects of the policy, Streamlining Australia's anti-dumping system, have been implemented through legislation including the following legislation:

- *Customs Amendment (Anti-dumping Improvements) Act 2011;*
- *Customs Amendment (Anti-dumping Improvements) Act (No. 1) 2012;*
- *Customs Amendment (Anti-dumping Improvements) Act (No. 2) 2012;*
- *Customs Tariff (Anti-dumping) Amendment Act (No. 1) 2012; and*
- *Customs Amendment (Anti-dumping Improvements) Act (No. 3) 2012.*

1.21 In 2012, following concerns about a threefold increase in the number of anti-dumping claims in Australia in 2011–12, the then government requested the former Premier of Victoria, John Brumby, to undertake a review of anti-dumping issues (the Brumby review). The Brumby review noted that while significant reform had already been undertaken, further reform was needed:

While there is widespread support for the range of reforms put in place by the Australian Government over recent years, the reforms needs to continue and more needs to be done. Further changes to Australia's anti-dumping arrangements are vital if Australia is to achieve an effective, highly regarded and world-class anti-dumping and countervailing system.<sup>18</sup>

1.22 The Brumby review drew attention to the performance and resourcing of the anti-dumping system over two decades and the impact of contemporary pressures:

For almost two decades the Australian anti-dumping system has been administered with limited resources and a low organisational profile. The inability to meet key performance indicators as well as extensions of time sought demonstrate pressure on our system. The workload of the administration has near tripled in the last 12 months and a number of relevant drivers indicate a high likelihood that more anti-dumping applications are on the way. The low profile and limited resources at a time of intense international competition has undermined public confidence in the system, especially from a manufacturer perspective.<sup>19</sup>

1.23 The primary recommendation of the Brumby review was that a new International Trade Remedies Authority, Agency or Commission be established under legislation and that the agency be separately and adequately resourced, and headed by a legislated CEO or Commissioner who reports directly to the Minister for Home Affairs and Justice. The Brumby review also made a number of other

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17 Australian Customs and Border Protection Service, *Streamlining Australia's anti-dumping system*, June 2011, p. 3.

18 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, p. 5.

19 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, p. 8.

recommendations associated with the implementation and operation of the new body.<sup>20</sup>

### ***The Anti-Dumping Commission and Review Panel***

1.24 Following the recommendations of the Brumby review, legislation to establish the Anti-Dumping Commission was passed in March 2013 and the Commission was established in July 2013.<sup>21</sup> The Anti-Dumping Commission:

...administers Australia's anti-dumping and countervailing (anti-subsidy) 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 Minister whether anti-dumping or countervailing duties should be imposed on goods from the countries named in the application.<sup>22</sup>

1.25 The Anti-Dumping Review Panel (Review Panel) conducts independent reviews, upon application, of certain decisions made by the Minister for Industry and Science (or the Parliamentary Secretary) or by the Commissioner of the Anti-Dumping Commission in relation to anti-dumping and countervailing investigations.<sup>23</sup> The Review Panel was established on 10 June 2013. Three panel Members are appointed by the Minister for Industry and Science under the *Customs Act 1901* for a term of up to three years.<sup>24</sup>

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

1.26 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.

1.27 In June 2013, new legislative provisions for conducting anti-circumvention inquiries commenced. These provisions are based on 'prescribed' circumvention practices. This formed a central component of the previous Government's Streamlining Australia's anti-dumping system reforms package.<sup>25</sup>

1.28 On 15 September 2014 the Minister for Industry, the Hon Ian Macfarlane MP, asked the House of Representatives Standing Committee on Agriculture and Industry

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20 The Hon John Brumby, *Review into Anti-Dumping Arrangements*, November 2012, pp 11–12.

21 Australian Customs and Border Protection Service, *Annual Report 2012–13*, p. 24.

22 Anti-Dumping Commission, *The Anti-Dumping Commission*, <http://www.adcommission.gov.au/aboutus/default.asp>, (accessed 25 March 2015).

23 Anti-Dumping Review Panel, <http://www.adreviewpanel.gov.au/Pages/default.aspx>, (accessed 25 March 2015).

24 Anti-Dumping Review Panel, *About the ADRP*, <http://www.adreviewpanel.gov.au/About/Pages/default.aspx>, (accessed 25 March 2015).

25 Department of Industry, *Submission 2, Inquiry into Australia's Anti-Circumvention Framework in Relation to Anti-Dumping Measures*, p. 4.

to conduct an inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures. The terms of reference provide for that committee to inquire into and report on the following matters:

- the scope, prevalence and impact of circumvention practices by foreign exporters and Australian importers, especially from the perspective of Australian businesses;
- the operation of the anti-circumvention framework since its introduction in June 2013 including its accessibility, use by Australian businesses, recent amendments and effectiveness to date;
- practices that circumvent anti-dumping measures and the models for addressing practices administered by other anti-dumping jurisdictions; and
- areas which require further consideration or development including the effectiveness of anti-dumping measures and the range and scope of circumvention activities.<sup>26</sup>

### **Current and previous packages of reforms**

1.29 On 15 December 2015, the Minister for Industry the Hon Ian Macfarlane MP and Parliamentary Secretary Bob Baldwin MP announced a package of reforms called 'Levelling the playing field for Australian Manufacturers and producers':<sup>27</sup>

The measures deliver the Government's remaining anti-dumping election commitments and make further improvements, including addressing behaviours of firms trying to avoid payment of duties. The package also improves access to the system through greater assistance to businesses. All of the reforms comply with Australia's World Trade Organization and other international trade obligations.<sup>28</sup>

1.30 An earlier package of reforms set out in *'The Coalition Policy to Boost the Competitiveness of Australian Manufacturing'*, released in August 2013, also proposed measures to strengthen Australia's anti-dumping system by introducing

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26 House of Representatives Standing Committee on Agriculture and Industry, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Agriculture\\_and\\_Industry/Anti-Dumping](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Agriculture_and_Industry/Anti-Dumping), (accessed 25 March 2015).

27 The Hon Ian Macfarlane MP, Minister for Industry and Bob Baldwin MP, Parliamentary Secretary, Joint media release, *Levelling the playing field for Australian Manufacturers and producers*, 15 December 2014, <http://minister.industry.gov.au/ministers/baldwin/media-releases/levelling-playing-field-australian-manufacturers-and-producers>, (accessed 25 March 2015).

28 Department of Industry, *Levelling the playing field – changes to Australia's Anti-dumping laws*, <http://www.industry.gov.au/industry/IndustryInitiatives/TradePolicies/Pages/Levelling-the-playing-field-changes-to-Australia%E2%80%99s-Anti-dumping-laws.aspx>, (accessed 8 May 2015).

more stringent deadlines for the submission of information to dumping and subsidisation investigations.<sup>29</sup>

## **Overview of the bills**

1.31 This section provides a brief overview of the purpose of the bills and the changes that the bills propose.

### ***Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015***

1.32 The Customs Amendment (Anti-dumping Measures) Bill (No. 1) 2015 is the primary bill. The explanatory memorandum sets out the purpose of the primary bill:

The purpose of the Bill is to amend the *Customs Act 1901* (Customs Act) to strengthen Australia's provisions dealing with the submission of information in anti-dumping and countervailing duty investigations, simplify and modernise publication provisions for anti-dumping notices, consolidate lodgement provisions for anti-dumping applications and submissions, clarify the length of the investigation period in anti-dumping matters, clarify the cumulative assessment of injury, clarify normal value provisions, clarify the calculation of the dumping margin, clarify material injury determinations, clarify effective notice periods, clarify the definition of a subsidy, amend provisions dealing with new exporters, clarify provisions regarding consideration of the lesser duty rule, streamline the processes and implement a higher procedural and legal threshold for review to be undertaken by the Anti-Dumping Review Panel (Review Panel) and allow the Government to replace the statutory International Trade Remedies Forum (the Forum) with administrative business consultative arrangements.<sup>30</sup>

1.33 The primary bill contains one schedule with 15 Parts, each of which proposes a different change to the *Customs Act 1901*. Part 15 of the schedule proposes to abolish the International Trade Remedies Forum, which was established to provide strategic advice to government on the operation of Australia's anti-dumping system.<sup>31</sup> Parts 12 to 14 of the primary bill propose changes to the operation of the Anti-Dumping Review Panel, including:

- Part 12 which proposes that the Anti-Dumping Review Panel will be able to charge fees for reviews. The fees would be prescribed by legislative instrument;<sup>32</sup>

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

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

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

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

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- Part 13 which proposes a number of changes to the Anti-Dumping Review Panel's processes, including higher procedural and legal thresholds for applications, and a requirement for statements of grounds for review applications;<sup>33</sup> and
  - Part 14 which 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>34</sup>

1.34 Parts 1 to 11 of the primary bill contain a series of technical amendments which propose changes to submission timeframes, lodgement and processes (Parts 1 and 2), investigation timeframes (Parts 3 and 6), criteria for decisions (Parts 4, 5, 7, 10 and 11) and alignment with WTO agreements (Parts 9 and 10):

- Part 1 proposes to reduce the deadline for submissions during the Anti-Dumping Commission's processes from 40 days to 37;<sup>35</sup>
- Part 2 proposes changes to allow the Anti-Dumping Commissioner to specify how submissions are to be lodged, and that anti-dumping notices will be published on the Anti-Dumping Commission's website rather than in the *Gazette*;<sup>36</sup>
- Part 3 proposes that the Anti-Dumping Commissioner will not be able to vary the length of an investigation period;<sup>37</sup>
- Part 4 proposes to allow the cumulative assessment of the impact of dumping from multiple countries;<sup>38</sup>
- Part 5 proposes to clarify that there is no hierarchy for the methods available to determine a normal value of goods;<sup>39</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>40</sup>

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

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

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

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

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

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

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

- Part 7 proposes a revised definition of subsidies;<sup>41</sup>
- Part 8 proposes revised arrangements for accelerated reviews that constrain the Minister to only be able to leave the duty unchanged, or apply it at a lower rate during the review. In addition, the definition of new exporters is changed so that potentially a larger number will be able to seek accelerated reviews;<sup>42</sup>
- Part 9 proposes changes to the period during which notices remain in force to align with the trade rules set out by WTO agreements. Anti-dumping measures would expire after five years from the date of the original imposition of the measures;<sup>43</sup>
- Part 10 proposes to clarify that a finding of dumping cannot be made in relation to goods exported prior to the investigation period (in line with WTO commitments);<sup>44</sup> and
- 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>45</sup>

### ***Customs Tariff (Anti-Dumping) Amendment Bill 2015***

1.35 The purpose of the Customs Tariff (Anti-Dumping) Amendment Bill 2015 (tariff bill) is to amend the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Act) to simplify and modernise publication provisions for anti-dumping notices, clarify provisions regarding consideration of the lesser duty rule and clarify the operation of exemption provisions.<sup>46</sup>

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

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

42 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 25.

43 Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015*, p. 26.

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

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

46 Explanatory Memorandum, *Customs Tariff (Anti-Dumping) Amendment Bill 2015*, p. 2.

# 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.

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- 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.

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.



## **Dissenting Report by Labor Senators**

1.1 The Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 and the Customs Tariff (Anti-Dumping) Amendment Bill 2015 were referred to the Senate Economics Legislation Committee for inquiry and report on 18 March 2015. Submissions closed on 15 April 2015.

1.2 These bills make several amendments to Australia's anti-dumping laws, including the abolition of the International Trade Remedies Forum (ITRF) and the introduction of fees for reviews by the Anti-Dumping Review Panel (ADRP).

### **International Trade Remedies Forum (ITRF)**

1.3 The ITRF was introduced by Labor in government as part of a package of reforms to improve and streamline Australia's anti-dumping system.

1.4 The ITRF is a formal advisory group, comprising key users of the anti-dumping system, charged with providing expert advice to government on the effectiveness of the anti-dumping system. Its membership is drawn from industry, manufacturers, producers, importers, unions, industry associations and representatives from government agencies.

1.5 The role of this expert advisory group is to provide ongoing strategic advice and feedback to government on the implementation and monitoring of Australia's anti-dumping system. For this reason, the role of the ITRF was enshrined in legislation to ensure that this valuable dialogue continues in the future.

1.6 It is disappointing that the government is proposing to abolish a measure that previously enjoyed bi-partisan support. It is the Labor Party's view that getting rid of independent advice is counterproductive and demonstrates this government's aversion to genuine consultation with industry.

1.7 Labor Senators on this Committee also note that the evidence tendered to this inquiry confirms that the ITRF has not met since March 2013, despite being required to meet at least twice a year under the Customs Act (the Act).

1.8 The government is therefore intending to abolish the ITRF without ever having convened a meeting, despite supporting its establishment by the former Labor government, and despite the fact that it was formed by an Act of Parliament to advise the Minister on the operations of the anti-dumping system.

1.9 Given this, evidence tendered to the Committee by the Department of Industry and Science in its submission, which states that 'the central role of the Forum has been fulfilled', lacks credibility.

1.10 The Committee has not heard any evidence in favour of abolishing the ITRF from stakeholders, with the exception of the Department of Industry and Science.

1.11 On the contrary, submissions from the Victorian government, the AMWU, AWU and CFMEU, the Australian Industry Group, the Food & Beverage Importers Association, the Australian Forest Products Association, the Australian Steel Association and the National Farmers Federation were either supportive of the

retention of the ITRF or expressed concerns about the arrangements for its proposed replacement.

1.12 These concerns were echoed in evidence presented at the public hearing and are most comprehensively articulated in the joint submission to the Committee from the AMWU, AWU and CFMEU.

1.13 Labor Senators thank the unions for their ongoing proactive role in ensuring Australia's anti-dumping system is effective in minimising injury to Australian industry.

### **Fees for Reviews by the Anti-Dumping Review Panel (ADRP)**

1.14 Labor Senators on this Committee also have serious concerns about the proposal to introduce fees for reviews by the ADRP.

1.15 Several submissions, including from the Manufacturers' Trade Alliance, the Victorian government, the Food & Beverage Importers Association, the Australian Steel Association and the joint submission from the AMWU, AWU and CFMEU, either expressed concerns or opposed outright the imposition of fees for reviews by the ADRP.

1.16 It has been suggested, for example in the submission from the Manufacturers' Trade Alliance, that increased legal and procedural thresholds would be more effective in curtailing frivolous review applications.

1.17 Concerns were also raised that the proposed fee structure, which provides a lower fee for SMEs, may be manipulated by high-turnover exporters channelling review applications through a lower-turnover importer in order to avoid paying the higher fee.

1.18 This issue has clearly not been adequately addressed and requires much more consultation with relevant stakeholders and users of Australia's anti-dumping system.

### **Other Concerns**

1.19 There was opposition and concerns raised by a number of stakeholders to several technical measures in these bills and some amendments were proposed.

1.20 These matters include (but are not limited to): the ability of the Anti-Dumping Commissioner to vary the length of the investigation period, the definition of a subsidy, the lesser duty rule, determining the normal value of goods, access to import data, and how measures in these bills relate to Australia's Free Trade Agreements.

1.21 Labor Senators note that in the absence of an appropriate consultative body, such as the ITRF, stakeholders have no formal mechanism for raising these concerns and participating in an open and transparent dialogue with government about the ongoing operation of Australia's anti-dumping system, particularly as it relates to the aforementioned concerns.

## Conclusion

1.22 Australia's anti-dumping system is critically important to the maintenance of fair trade for our domestic producers. The previous Labor government improved and streamlined the system, including establishing measures such as the ITRF.

1.23 The ITRF was a constructive body and performs an important function in ensuring Australia's anti-dumping system is operating effectively. The government should utilise the ITRF, as it is required to by law.

1.24 Labor Senators believe that the decision to abolish the ITRF is premature and unjustified, particularly given that it previously enjoyed bipartisan support and has never met during the present government's term.

1.25 Furthermore, Labor Senators remain unconvinced that the introduction of fees for reviews by the ADRP is the most appropriate way to reduce frivolous review applications. Evidence tendered to this Committee, both in the submissions and in the public hearing, supports this assessment.

1.26 For these reasons, Senators Carr, Dastyari and Ketter do not support the majority report and make the following recommendations to the Senate:

### Recommendation 1

**1.27 Labor Senators recommend that the Customs Amendment (Anti-Dumping Measures) Bill (No. 1) 2015 be amended to delete the section of the bill which abolishes the International Trade Remedies Forum, so as to retain the forum.**

### Recommendation 2

**1.28 Labor Senators request that the legislative instrument imposing a fee for review by the ADRP be delayed until the effect of increased legal and procedural thresholds for review applications can be assessed.**

**1.29 Should the increased legal and procedural thresholds prove insufficient in reducing frivolous applications to the ADRP, the appropriateness of further increasing these thresholds should be considered as a potential alternative to imposing a fee.**

### Recommendation 3

**1.30 Labor Senators recommend that a meeting of the ITRF be convened as a matter of urgency, to consider and provide feedback on any matters relating to these bills and any other related issues, including:**

- **length of the investigation period;**
- **definition of a subsidy, including the government's policy to strengthen the enforcement of the provisions of the WTO Agreement on Subsidies and Countervailing Measures, and the government's policy to take a stronger stance in WTO forums on the transparency of foreign subsidies;**
- **the lesser duty rule;**
- **fees for reviews by the ADRP and their possible manipulation;**

- **Australia's Particular Market Situation provisions, including options for determining 'normal value' where a particular market situation has been found and exporters' costs do not reasonably reflect costs associated with production and sale;**
- **access to all data, including import data for the purposes of investigating dumping and unfair subsidies; and**
- **the ongoing operation of the ITRF, including mechanisms to ensure that it is convened in accordance with the Act and utilised to efficiently and effectively fulfil its role as stipulated by the legislation.**

**Senator Sam Dastyari  
Deputy Chair**

**Senator Chris Ketter**

**Senator the Hon Kim Carr**

## **Additional Comments by Senator Nick Xenophon**

1.1 Australia's anti-dumping and countervailing system has undergone significant change over the last five years since the measures originally introduced by the Rudd Government in 2011 that arose, at least in part, from the Productivity Commission's 2009 inquiry and my Private Senator's Bill, the *Customs Amendment (Anti-Dumping) Bill 2011*. Subsequent governments have continued to respond to concerns about the system, and it is generally acknowledged that the legislative framework is now suitably robust.

1.2 I do not resile from my position of supporting a reverse onus of proof in anti-dumping cases. I note that this was essentially Coalition policy in 2011:

The Coalition's Plan to Strengthen Australia's Anti-Dumping Regime will:

1. Transfer anti-dumping responsibilities from Customs to the Department of Industry;
2. Reverse the onus of proof in anti-dumping investigations;
3. Commit more funding for anti-dumping investigations;
4. Hire an additional 20 specialist anti-dumping investigators;
5. Introduce more stringent and rigorous enforcement of deadlines for submissions;
6. Crack down on those overseas producers who don't cooperate with anti-dumping investigations, and
7. Strengthen enforcement of the provisions of the WTO Agreement on subsidies and countervailing measures.<sup>1</sup>

1.3 While the government now asserts that a reverse onus of proof would be against WTO rules, there ought to be a willingness on the part of the government to explore the toughest possible measures to ensure dumping does not occur that does not contravene WTO rules. It seems that other countries, particularly the US and European Union, have taken a much more active approach against dumping than successive Australian governments have.

1.4 It is vital to note, however, that the application of this legislative framework is equally important. While the Abbott government's transition of the Anti-Dumping Commission from Customs to Industry is to be congratulated, the system as a whole is still overly complex, under-resourced, and difficult for businesses to access. By their very nature, anti-dumping and countervailing investigations create a labyrinthine mix of domestic and international law that is almost impossible for anyone who is not an expert to navigate. Indeed, Anti-Dumping Commissioner Dale Seymour stated in the

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1 Coalition media release on anti-dumping, 7 November 2011, available online: <http://www.liberal.org.au/latest-news/2011/11/07/anti-dumping-regime-0>

hearing for this inquiry that there are only about 1,000 technical experts around the globe and that most of those live outside Australia.<sup>2</sup>

1.5 Given that many of the Australian businesses who most need protection from dumped products are small to medium manufacturers, it is vitally important that the system be easy to access and navigate, and that the application and review processes not be overly onerous. Indeed, one small business was quoted \$1 million to fight an anti-dumping case by a specialist firm of lawyers: clearly a prohibitive amount.

1.6 I note that the government has expanded on the Trade Remedies Adviser role that previously existed under the Australian Industries Group to ensure that SMEs are supported and advised during the application process. While I strongly support this measure in theory, I believe there is significant scope to improve it in practice, particularly in terms of resourcing.

1.7 Further, I believe there is a far greater role for the Commission itself in taking a more pre-emptive position in terms of dumping activity. I strongly encourage the government to provide greater resources to the Commission so that it can appropriately monitor and respond to cases in other jurisdictions and be more active on an international level. The whole onus of bringing and proving cases should not be on Australian businesses; instead, the Commission must take on part of this responsibility as an advocate for Australian industry in these matters and seek to address issues before they reach a critical stage.

1.8 In terms of the measures in the bills themselves, it is my strong view that the International Trade Remedies Forum should be retained. This is a vitally important mechanism for facilitating communication between industry, government and other interested parties. It is not enough, in my view, for the government to 'consider' replacing the ITRF with an administratively established measure, particularly one with as a few as five members.<sup>3</sup> Anti-dumping and countervailing measures are an incredibly important part of what should be a broad suite of measures to support industry, and a consultative forum mandated through legislation is the only appropriate way to ensure thorough consultation with industry and other interested parties takes place.

1.9 I also note concerns raised with the committee regarding the operation of the ITRF since its last meeting in 2013. This is unacceptable, and I refer the government to its legislative responsibilities in this regard.

1.10 I also share the concerns of submitters regarding the proposed measure to allow the Review Panel to charge fees for review. While I acknowledge the need to address frivolous reviews or the use of the process as a stalling tactic, it is vital to ensure that the establishment of fees does not create an undue burden or even a disincentive for valid applicants. While I will reserve my final position until the government releases the regulations, I do support the position of the Manufacturers'

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

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

Trade Alliance that there are other measures (including greater scrutiny of applications) that could be equally efficient in addressing these concerns.

1.11 In addition, I support the concerns raised by the CFMEU and the MTA regarding the proposed change to the definition of 'subsidies'. In my view, proving whether or not a benefit has occurred to determine whether a payment can be considered a subsidy is adding an additional layer of complexity to the system, and will make it more difficult for duties to be applied. As such, I oppose this proposed change.

1.12 Further, I am concerned that the proposed changes to the notification of subsidies relating to the measures regarding the lesser duty rule have the effect of reducing compliance requirements on relevant countries. Under these proposed changes, for example, a country would only have had to report subsidies *once* during the two most recent biennial periods in which subsidy notifications were due. In effect, this means that countries will only have to report once in a four year period for the lesser duty rule to be considered, which will provide little or no protection to Australian industry.

1.13 I also acknowledge the issues that have been raised in relation to the proposed changes to the lesser duty rule. In my view it would be preferable for the rule to be removed completely. Given the WTO requirements, however, the government should approach clarifying the application of the rule in such a way as to provide the greatest support to Australian industry. It is my view that the proposed changes make the application of the rule slightly better than is currently the case, but are still behind the best practice of other countries.

1.14 While there is general support for most of the measures in these bills, there are still significant concerns amongst industry and other interested parties regarding the operation of Australia's anti-dumping and countervailing system as a whole. This is particularly relevant in terms of the operation of the Commission and how it applies the legislative framework to protect Australian industry.

### **Recommendation 1**

**1.15 That the bills be amended to remove Parts 7, 11 and 15.**

### **Recommendation 2**

**1.16 That, subject to Recommendation 1, the bills be passed.**

### **Recommendation 3**

**1.17 That a root and branch review regarding the overall effectiveness of the Anti-Dumping Commission and the legislative framework under which it operates commences within 12 months of the passage of these bills.**

**Senator Nick Xenophon**

**Independent Senator for South Australia**



# **Appendix 1**

## **Submissions Received**

### **Submission**

<b>Number</b>	<b>Submitter</b>
1	The Australian Industry Group
2	AUSVEG
3	Australian Chicken Growers Council Ltd
4	Food and Beverage Importers Association
5	Manufacturers' Trade Alliance
6	The Hon. Lily D'Ambrosio MP, Victorian Government
7	Department of Industry and Science
8	Australian Forest Products Association
9	Australian Steel Association
10	National Farmers' Federation
11	Australian Manufacturing Workers Union, Australian Workers Union and Construction, Forestry Mining and Energy Union

### **Additional information received by the committee**

- Opening statement tabled by the Australian Manufacturing Workers Union, Australian Workers Union and Construction, Forestry Mining and Energy Union at a public hearing held in Canberra on 4 May 2015.
- Opening statement tabled by the Manufacturers' Trade Alliance at a public hearing held in Canberra on 4 May 2015.
- Opening statement tabled by the Department of Industry and Science at a public hearing held in Canberra on 4 May 2015.
- Opening statement tabled by the Anti-Dumping Commissioner at a public hearing held in Canberra on 4 May 2015.

## **Answers to questions on notice**

- From a public hearing held in Canberra on 4 May 2015, received from the Construction, Forestry Mining and Energy Union on 5 May 2014.
- From a public hearing held in Canberra on 4 May 2015, received from the Manufacturers' Trade Alliance on 5 May 2014.
- From a public hearing held in Canberra on 4 May 2015, received from the Department of Industry and Science on 5 May 2014.
- From a public hearing held in Canberra on 4 May 2015, received from the Anti-Dumping Commissioner on 5 May 2014.

## **Appendix 2**

### **Public Hearings and Witnesses**

#### **Canberra, 4 May 2015**

CLARK, Mr Stuart, Assistant Manager, Anti-Dumping Policy Section, Department of Industry and Science

CONDON, Mr Matt, Representative of Arrium, Manufacturers Trade Alliance

GIBBS, Mr Alan, Secretary, Manufacturers Trade Alliance

LEE, Mr Bernard, Manager, Industry and Government Affairs, Nufarm Limited

SEBASTIAN, Ms Melanie, Acting Director, Legal and International, Anti-Dumping Commission

SEYMOUR, Mr Dale, Anti-Dumping Commissioner, Anti-Dumping Commission

STOCKWELL, Mr Julian, Policy Officer, Anti-Dumping Policy Section, Department of Industry and Science

TROTMAN, Mr Paul, General Manager, Trade & International Branch, Department of Industry and Science

WACEY, Mr Travis, National Policy Research Officer; Forestry, Building Products and Manufacturing Division; Construction, Forestry, Mining and Energy Union

ZELINSKY, Mr Misha, Executive Officer/National Vice President, The Australian Workers' Union