THE AUSTRALIAN WORKERS' UNION
STRONGER TOGETHER

AWU Submission

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

November 2014

Executive Summary

There is an opportunity for the Abbott Government to build on and improve the reforms undertaken in 2013 to legislation relating to addressing the circumvention of Australia's anti-dumping regime.

The World Trade Organisation (WTO) does not currently inhibit members from addressing instances of anti-circumvention as members' currently see fit.

The Australian Workers' Union (AWU) has identified weaknesses in the scope and application of the current anti-circumvention provisions of the Customs Act 1901 and 2013 and 14 guidelines.

In the AWU's view, based on an assessment of available evidence and legislated powers, circumvention related activity (and investigations) within the Anti-Dumping Commission (ADC) is a lower order priority. This in part is explained by resource constraints affecting the prioritisation of work within ADC.

However, the current lack of anti-circumvention related inquiries (despite numerous applications by industry) is also explained by the technical difficulties which relate to establishing a case of circumvention prima facie. As a consequence, the Commissioner for Anti-Dumping appears justified in extinguishing (almost all) circumvention applications by Australian suppliers before they require the requisite diversion of (limited) ADC resources which are otherwise focused elsewhere (such as in verification activities relating to anti-dumping investigations including visits offshore).

The AWU considers that the ADC can learn from the equivalent application of anti-circumvention laws offshore (such as in Canada and the US) and, with a view to diverting more resources to these functions within ADC, share more data with these jurisdictions on commonly shared anti-dumping cases.

Previous submissions make the point that Australia does not need to "re-create" the same evidence base on the same anti-dumping techniques applied by the same companies for the same goods exploiting the same loopholes in equivalent jurisdictions. Formal information sharing between anti-dumping jurisdictions is an obvious area of cost saving freeing up funds to be redirected towards circumvention investigations.

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Australian producers are keen to assist the Commonwealth address instance of anti-dumping circumvention. Progress has been made in recent years in renovating Australia's anti-dumping and countervailing regime. However, reforms aimed at addressing anti-circumvention are a vital future step which the Commonwealth can make to assist local industry address unfair competition from exporters' offshore and local importers willing to test the application of Australia's anti-circumvention rules.

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Introduction

The House of Representatives Agriculture and Industry Committee is conducting an inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures.[1]

The terms of reference provide for the committee to inquire into and report on the following matters:

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

At the invitation of the committee, this submission addresses the terms of reference below. The committee's attention is also drawn to a previous joint submission made to the Brumby Ant-Dumping review from which this submission also draws regarding lessons to learn from other jurisdictions.[2]

1. Scope, prevalence and impact of circumvention practices

The WTO defines circumvention to mean:

[1] Media Release, *Committee to examine circumvention of anti-dumping laws,*

[2] Submission, The Brumby Anti-Dumping Review, September 2012, AMWU, AWU and CFMEU, http://www.cfmeu.net.au/sites/cfmeu.net.au/files/Brumby-Anti-Dumping-Review-Written-Submission-AMWU-AWU-CFMEU.pdf

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… avoiding commitments in the WTO such as commitments to limit agricultural export subsidies. Relevant actions include: avoiding quotas and other restrictions by altering the country of origin of a product; and measures taken by exporters to evade anti-dumping or countervailing duties.

In order to combat the use of circumvention activities by overseas producers, governments will introduce anti-circumvention measures in order to protect local industry.

As noted by the Anti-Dumping Commission (ADC), circumvention is a trade strategy that can be used by exporters and/or importers of products to either:

a) avoid the full payment of dumping and/or countervailing duties; or

b) avoid the price effect of the dumping and/or countervailing duties in the Australian market.

Circumvention activities take various forms and seek to exploit different aspects of the anti-dumping system, but the outcome of these activities is that either:

a) the relevant goods do not attract the intended dumping and/or countervailing duty;

or

b) 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 (and therefore does not have the effect of removing the injury caused by dumped and/or subsidised prices).[3]

[3] Anti-Dumping Commission, January 2014, Guidelines for preparing an application for an anti-circumvention inquiry into avoidance of the intended effect of duty, p4, http://www.adcommission.gov.au/system/documents/Guidelines-AvoidanceofIntendedEffectofDutyAnti-Circumvention.pdf

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Circumvention activities[4] include:

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

The AWU notes the comments by the Chair of the Agriculture and Industry Committee, Rowan Ramsey, MP, that…

"Industry claims that as soon as an anti-dumping decision is granted against an imported product, the producer finds a way of changing the description, altering the product or routing the product through a third country to avoid the anti-dumping action. Some months ago I was contacted by the steel industry and following my interest in this matter there has been a steady stream of contact from the steel, aluminium and food industries." [5]

There are two references made by ADC to what are and what are not circumvention activities. These are in guidelines for applicants dated June 2013,[6] and January 2014.[7]

June 2013 Guidelines (pp 1-2):

What is circumvention activity?

[4] Anti-Dumping Commission, Application for an Anti-Circumvention Inquiry, June 2013, Guidelines for Applicants, p1, http://www.adcommission.gov.au/reference-material/documents/InstructionsandGuidelinesforapplicants-Applicationforanti-circumventioninquiry.pdf

[5] Media Release, 21 October 2014, House of Representatives Standing Committee on Agriculture and Industry, *Committee to examine circumvention of anti-dumping laws*, file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/01.%20media%20release%2016%20October%202014%20-%20inquiry%20into%20circumvention%20of%20anti-dumping%20laws%20(2).pdf

[6] Anti-Dumping Commission, Application for an Anti-Circumvention Inquiry, June 2013, Guidelines for Applicants, pp 1-2, http://www.adcommission.gov.au/reference-material/documents/InstructionsandGuidelinesforapplicants-Applicationforanti-circumventioninquiry.pdf

[7] Anti-Dumping Commission, January 2014, Guidelines for preparing an application for an anti-circumvention inquiry into avoidance of the intended effect of duty, p5, http://www.adcommission.gov.au/system/documents/Guidelines-AvoidanceofIntendedEffectofDutyAnti-Circumvention.pdf

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Section 269ZDBB of the Customs Act 1901 (the Act) sets out when circumvention activity,

in relation to a notice published under subsections 269TG(2) or 269TJ(2) of the Act occurs. Circumvention activities prescribed by the Act only relate to circumvention

activities to avoid a dumping or countervailing duty notice and are not illegal or necessarily

indicative of criminal behaviour.

Circumvention activities prescribed in the Act are:

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

Circumvention activities do not include:

The following activities would not generally be considered to be circumvention activities:

- *activities that relate to goods that are subject to a (dumping or countervailing duty) notice published under subsections 269TG(1) or 269TJ(1) of the Act, respectively, and;*
- *goods that have not attracted the intended dumping or countervailing duty due to false and misleading statements provided by importers on Import Declarations (i.e. where incorrect country codes (and country of export), tariff classifications / statistical codes or exemption types are knowingly used by importers).*

Notwithstanding that the above activities may not be prescribed circumvention activities, if identified …. these activities subsequently may be investigated by the Commission where they involve potential non-compliance with the Act.

January 2014 Guidelines (pp 4-5):

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A circumvention activity in the form of avoidance of the intended effect of duty may take place where goods which incur dumping or countervailing duties are exported to Australia and the importer sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the goods.

What is circumvention activity that "avoids the intended effect of duty"?

Subsection 269ZDBB(5A) of the Customs Act 1901 (the Act) sets out when a circumvention activity avoiding the intended effect of duty occurs (in relation to a notice published under subsections 269TG(2) or 269TJ(2) of the Act). The legislation provides:

Circumvention activity, in relation to the notice, occurs if the following apply:

a) goods (the circumvention goods) are exported to Australia;

b) those goods are manufactured in a foreign country in respect of which the notice applies;

c) the exporter is an exporter in respect of which the notice applies;

d) the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount payable on the circumvention goods under the Dumping Duty Act;

e) either or both of sections 8 or 10 of the Dumping Duty Act, as the case requires, apply to the export of the circumvention goods to Australia; and

f) the above circumstances occur over a reasonable period.

What is not circumvention activity?

Avoidance of the intended effect of duty prescribed by the Act relates only to the circumvention activity and is not indicative of illegal behaviour.

It is not a circumvention activity if external factors (such as currency fluctuation or reduction in other selling and general expenses) have caused the circumstance where the selling price of the goods by the importer has not increased in accordance with the imposition of duties.

Further, recognising that profit reduction can be a legitimate business practice, it is not a circumvention activity if an importer, who is truly independent of the exporter

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from whom it purchases its goods, is absorbing the payment of the dumping and/or countervailing duty through a partial reduction in profit.

It is recognised that an applicant may not be aware of the circumstances which result in the commercial effect of the imposition of duties not being reflected in the Australian market for the goods the subject of measures. An applicant may therefore bring an application, supported by evidence to support a prima facie case, that the selling prices of goods subject to measures have failed to increase in line with the anticipated effect of duties payable, as a basis for the Commission to initiate an inquiry into the circumstances to determine whether a circumvention activity has in fact occurred.

Despite the range of legal and technical, micro and macro and external factors which do not constitute circumvention behavior the guidelines give the ADC broad (and enhanced) discretion in the screening process to investigate whether to accept or reject an application for a circumvention inquiry. This point is expanded further below.

However, it is also worth pointing out that the interpretation of the effect of subsections 269TG (1 and 2) and 269 TJ (1 and 2) which each deal with "goods the subject of a notice" appears to be crucial in deciding what activities are considered to be or not to be circumvention activity (as exempt or not) as reflected in activities listed under subsection 269ZDBB of the Customs Act 1901 and noted above

In particular, if a duty notice on goods is issued under subsections 269TG (1) and 269 TJ (1) there appears to be no recourse to relief available under subsection 269ZDBB of the Act. It is therefore assumed that in these cases the ADC could screen out applications on these (technical) grounds alone.

A lay reading of the situation would be that on the one hand, the legal hurdles are quite precise in defining circumstances where a circumvention investigation may take place. On the other hand, ADC's discretion is quite broad in being able to undertake investigations. However, without the requisite legal support it is questionable whether the ADC facing competing priorities has - given the possibility of any doubts - the will to take on cases where definitional issues such as those raised above may or may not apply when claims of circumvention are made by industry.

The committee may therefore wish to seek further clarity on the interplay of these relevant subsections and whether amendments are required in order to avoid

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circumvention related avoidance behaviours taking advantage of legal interpretations of the relevant subsections of the Customs Act hinging for example on whether or not a duty notice is issued under subsections 269 TG (1) or (2) and 269TJ (1) or (2). Clarity may also assist ADC in the pursuit of circumvention investigations.

2. Operation of the anti-circumvention framework

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

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

Of the 33 current dumping and countervailing inquiries which are currently being undertaken by the ADC (by commodity) only one case - Anti-Circumvention inquiry ADC 241 - Aluminium extrusions exported from China - is described as an anti-circumvention case.[8]

It is important to establish whether this result is as a consequence of the (non-appellable) decision making of the Commissioner to reject (anti-circumvention) applications:

The Commissioner must decide whether or not to reject the application within 20 days of lodgement of an application. The Commissioner must reject the application if not satisfied of either (or both) of the following:
(i) that the requirements of the application form have been met; and

[8] http://www.adcommission.gov.au/system/anti-circumvention-inquiry.asp

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(ii) that there appear to be reasonable grounds for asserting that the circumvention activity in relation to the original notice has occurred.[9]

It would be useful for the committee to ascertain whether the vast majority of applications are being screened out and rejected by the Commissioner at this point in the inquiry cycle. Note that the current inquiry process (refer to flow chart below) is clear in noting that rejected applications following the screening process are non-appellable. There does not appear to be any further recourse available to these applicants apart from intervention by the Minister (Parliamentary Secretary).

Information relating to anti-circumvention inquiries, the related process, details of the activities listed above, and requirements for applicants are outlined in guidelines for applicants[10] and summarized in the anti-circumvention inquiry flow chart below.

A legitimate question therefore is whether ant-circumvention activities are perceived to be an actual problem by the ADC or not? Information obtained by the AWU is that the ADC receives many applications claiming circumvention. Is it reasonable to assume therefore that the overwhelming majority of these claims are illegitimate?

Given the absence of "full blown" inquiries, is the regulatory regime responding efficiently and effectively in order to address the concerns of industry?

The AWU wonders whether resource constraints and definitional issues are playing a part in premature decision making at the ADC rejecting applications? The framework is not seen as working currently with additional complaints by the steel, aluminium and food industries.

Evidence to Senate's Economics Legislation Committee

Challenges in resource allocation at the ADC were raised by the Anti-Dumping Commissioner in Estimates testimony to the Senate's Economics Legislation Committee on 23 October 2014.

[9] ANTI-DUMPING COMMISSION, Application for an anti-circumvention inquiry into avoidance of the intended effect of duty: Guidelines for applicants, January 2014, http://www.adcommission.gov.au/system/documents/Guidelines-AvoidanceofIntendedEffectofDutyAnti-Circumvention.pdf

[10] http://www.adcommission.gov.au/reference-material/documents/InstructionsandGuidelinesforapplicants-Applicationforanti-circumventioninquiry.pdf

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Mr Seymour identified the priority he attaches to ensuring that appropriate resources were devoted in particular to verification visits relating to investigations undertaken by ADC staff which is coinciding with an uplift in applications. The following Hansard extract picks up on the question of resourcing raised by Senator Ketter:

Senator KETTER: *I refer to an anti-dumping notice on the commission's website. It is number 2014/77:*

Certain crystalline silicon photovoltaic modules or panels

Exported from the People's Republic of China'.

The notice is about an extension of time granted to issue the statement of essential facts. I note that in that statement one of the reasons for the request for the extension of time is :

the ongoing high workload of the Commission, which has impacted the availability of staff for verification visits …

Do you have sufficient staff to meet your workload?

Mr Seymour: *The number of investigators that are required to undertake a verification visits under the arrangements I have implemented is a minimum of two. There is a very good reason for that. These officers are required to travel to often very difficult places in order to investigate and verify the data that has been received by the commission, typically in the form of exporter questionnaires. At a time of very high workload it is quite a logistical task to allocate skilled and experienced officers to travel to these places and to maintain the integrity of investigations process, in terms of who is available to do the verification and come back and create the various documents, cost models and analysis needed in order to make judgements about whether that dumping may have occurred.*

I explain it that way by way of context, because it is not so much a question of whether there are enough investigators; the question is more about how I allocate available investigators on a case-by-case basis depending on the complexity of the case.

Senator KETTER: You mentioned 'in a period of high workload'. For how long have you been in this period?

Mr Seymour : *There has been a 29 per cent increase this year on last year, and that is reasonably consistent with the increase last year on the year before. I would leave it up to people far more learned than I to explain why there has been an increase in applications. As the custodian of the system, I am required, under*

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legislation, to manage an orderly investigations process and come to an orderly conclusion based on the quality of the investigation.

So I have available to me, under legislation, the opportunity to extend matters where, and if, I require them. In the majority of cases—and the one that you are referring to specifically—it is to do with the very complex nature of the investigation. In the interest of time I will not go, chapter and verse, into the detailed complexity, but suffice it to say that these are difficult inquiries and investigations to make. They are in foreign lands and there is—how do I put this?—commercial incentive that determines the behaviour of those that we may be investigating.

Senator KETTER: *How many staff do you have?*

Mr Seymour : *At the moment we are funded to 61 FTE. We currently have 55 full-time staff and we are out in the market at the moment, inside the APS, for the remaining six. Of those, 41.8 are in Melbourne and 13 are in Canberra, which means that 76 per cent of staff are based in Melbourne, consistent with the commitment to establish the antidumping commission in a major capital city with a strong manufacturing presence.* [11]

Given the identified need for additional resources and given the increasing workload at the ADC, the AWU trusts that the Government will be supplementing resourcing as part of its future package of improvements to the antidumping and countervailing systems identified by Senator Ronaldson during the Estimates hearings.[12]

Exemptions criteria

In addition to resource constraints another possible reason for the lack of current circumvention inquiry activity is the potential for effective exploitation of exemptions criteria by foreign exporters and local importers.

What is an exemption?

Goods may be exempted from anti-dumping measures if the Minister is satisfied that certain conditions have been met.

[11] Economics Legislation Committee - 23/10/2014 - Estimates - INDUSTRY PORTFOLIO - Anti-Dumping Commission
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=COMMITTEES;id=committees%2Festimate%2Fc972af79-90ce-4b97-8022-a80b42e59bc8%2F0010;orderBy=priority,doc_date-rev;page=1;query=Dataset%3Aestimate;rec=14;resCount=Default

[12] As above,

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An exemption inquiry will be conducted by the Commission and a report provided to the Minister recommending whether an exemption should be granted.

Exemption Categories

Subsections 8(7) and 10(8) of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) provide the grounds under which an exemption can be given. Subsection 8(7) deals with exemptions from dumping duties and subsection 10(8) deals with exemptions from countervailing duties. There are five grounds on which exemptions may be granted from anti-dumping measures:

- Exemption One - Like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;
- Exemption Two - A Tariff Concession Order under Part XVA of the *Customs Act 1901* in respect of the goods is in force;
- Exemption Three and Four - Exemptions based on by-laws for the goods being in existence in a schedule to the *Customs Tariff Act 1995*; and
- Exemption Five - The goods, being articles of merchandise, are for use as samples for the sale of similar goods.

Process

The Commission will consider whether the grounds for an exemption have been met. Where an application does not establish reasonable grounds the application may be rejected.[13]

[13] http://adcommission.gov.au/system/exemption.asp

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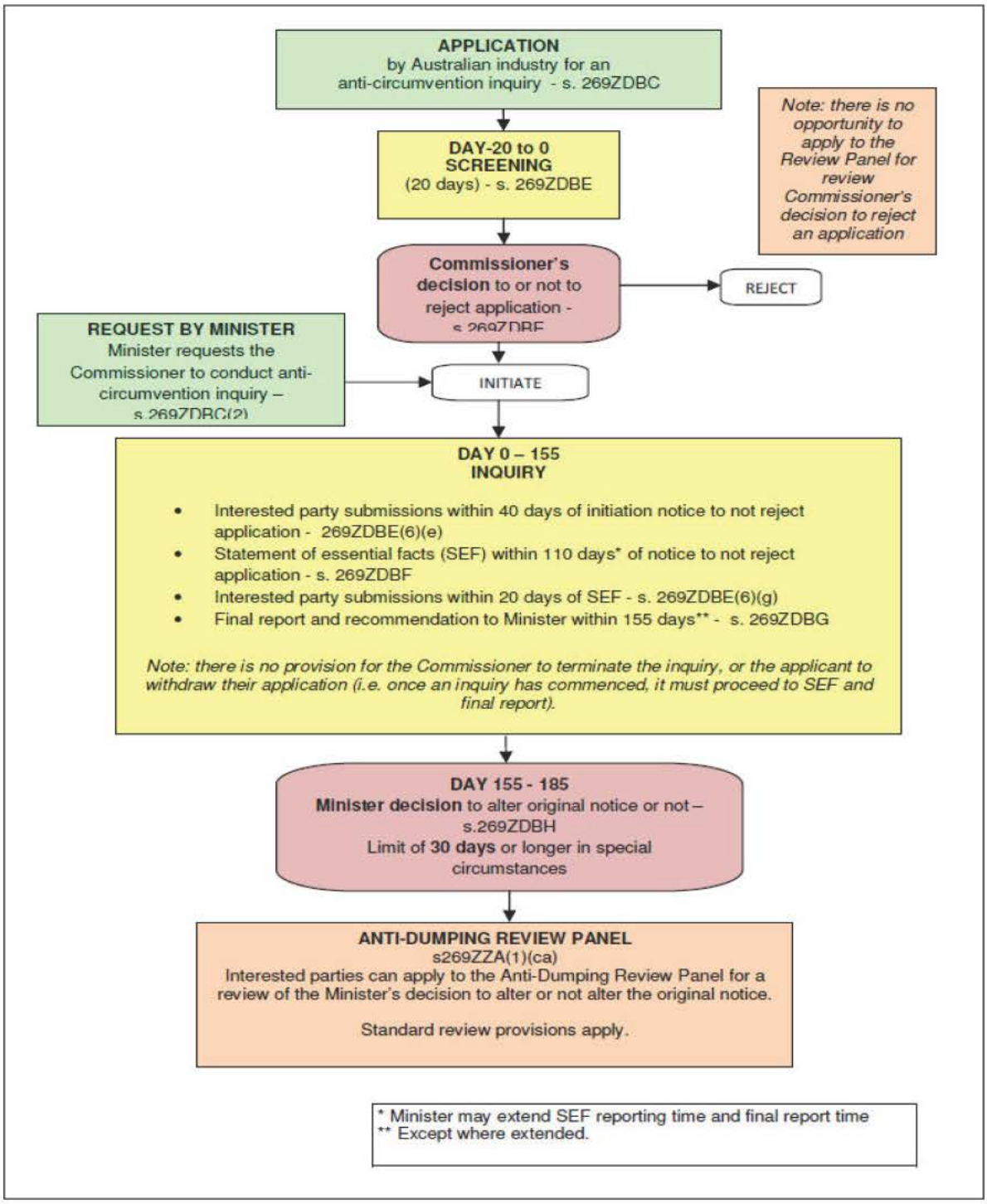
Anti-circumvention inquiry process



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Source: Ant-Dumping Commission, http://www.adcommission.gov.au/system/anti-circumvention-inquiry.asp

From 1 January 2014, a new anti-circumvention inquiry into avoidance of the intended effect of duty has been available.[14] These reforms include "speeding up" the overall review timetable by 55 days, including the final report and recommendation to be received by the Minister within 100 days rather than 155 days. The January 2014 reforms also gave broader powers dealing with sales at a loss cases.[15]

Information relating to this anti-circumvention inquiry, the related process and requirements for applicants, are set out in new guidelines for applicants[16] and summarized in the flow-chat below.

[14] Anti-Dumping Commission, What is an anti-circumvention inquiry?, http://www.adcommission.gov.au/system/anti-circumvention-inquiry.asp

[15] Recent developments in Australia's anti-dumping regime, Mr Dale Seymour, Commissioner of the Anti-Dumping Commission 2014 International Trade Law Symposium
18-19 September http://www.lawcouncil.asn.au/ILS/images/2014%20Trade%20Law%20PowerPoints.pdf

[16] http://www.adcommission.gov.au/system/documents/Guidelines-AvoidanceofIntendedEffectofDutyAnti-Circumvention.pdf

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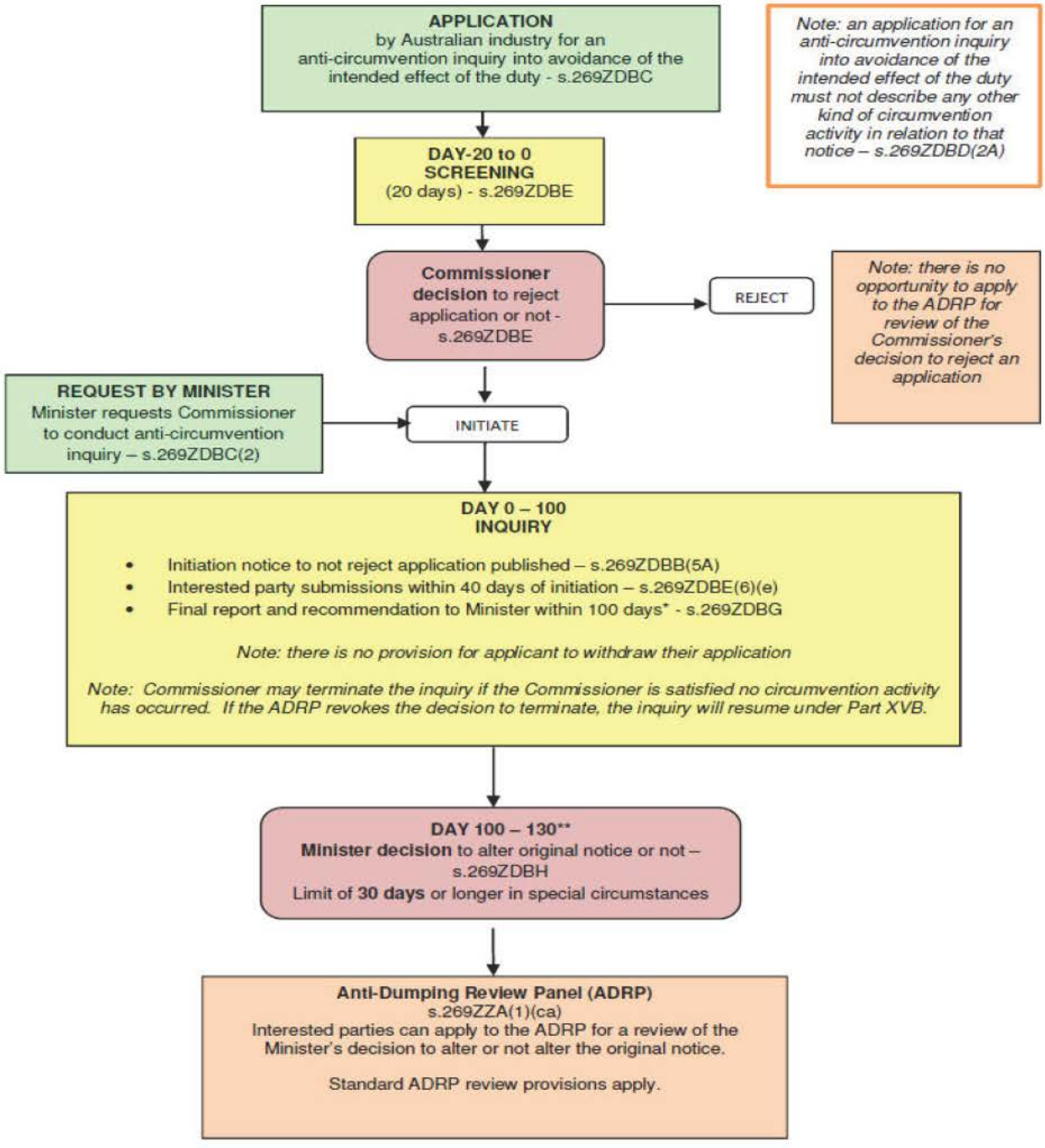
Anti-circumvention inquiry relating to avoidance of the intended effect of the duty



* Minister may extend final report timeframe beyond 100 days.
** Except where extended.

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Main changes to Australia's anti-circumvention framework

1) Introduction of a new anti-circumvention activity

The Explanatory Memorandum provides:

> The new circumvention activity, called 'avoidance of intended effect of duty', describes the situation where dumping or countervailing duty has been imposed and is being paid by the importer; however, the imposition of the duty has little or no effect as, over a 'reasonable period', the price at which the goods are sold by the importer has not increased in line with the duty payable. A reasonable period may be different for different goods depending on the characteristics of the goods, the conditions of the market for the goods, and other relevant factors.

Examples of where the intended effect of the duty has been avoided include where 'the exporter has lowered the export price, where a party in the transaction is making sales at a loss, or where the importer is absorbing the duties'.

The Explanatory Memorandum also notes that:

> In determining if circumvention activity has occurred, investigators will give due consideration to the characteristics of the goods concerned, the market conditions, the nature of the relationship between the importer and exporter, and reasonable levels of profit. After having such consideration, the Commissioner may consider that it is appropriate to recommend to the Minister that the notice not be altered, even when the circumvention activity may be occurring to a limited extent.

2) Termination of anti-circumvention inquiries

Item 25 inserts **new section 269ZDBEA**, which allows the Minister to terminate an anti-circumvention inquiry when he/she is satisfied that no circumvention activity in relation to the original notice has occurred.

Proposed subsection 269ZDBEA(1) provides that 'for circumvention activities contained in subsections 269ZDBB(2) to (5) the termination may occur at any time before the Commissioner would otherwise be required to place the statement of essential facts on the public record'. Under **proposed subsection 269ZDBEA(2)**, the Commissioner may terminate **proposed subsection 269ZDBB(5A)** inquiries at any time before reporting to the Minister.

Source: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd156

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3. Practices that circumvent anti-dumping measures and the experience of other jurisdictions

The committee is requested to consider differences in the operational effect of Australia's (amended) anti-circumvention laws and regulations (made in June 2013 and January 2014) with applicable laws in both Canada and the United States concerning an equivalent case study.

Outlined below are the 2013 legislative amendments (and amended 2014 guidelines) which gave effect to "avoidance of intended effect of duty" and "termination of anti-circumvention inquiries".

These amendments are relevant to the deliberations of the committee because they are both limited on the one hand and overly prescriptive on the other.

The context for this assessment is that there are currently no WTO rules prohibiting anti-circumvention measures.[17]

Nor as is outlined below, have other jurisdictions been as circumspect as Australia in deploying and applying these types of measures. It is unclear why the 2013 changes which included a new division dealing with circumvention did not go further in enhancing anti-circumvention provisions beyond the intended effect of duty while granting more discretion to the ADC Commissioner to terminate anti-circumvention inquiries.

These are areas which invite a clear policy response aimed at (i) extending the set of activities which justify the application of anti-circumvention measures: and (ii) enhancing (rather than constraining) the opportunity to undertake an anti-circumvention inquiry.

Changes to Australia's ant-circumvention framework require careful review in order to build on reforms. These are summarized below. [18]

[17] http://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm

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Canada and the United States

Canadian importers have been advised to take a look at the Global Trade Law Blog post "A Peek Around the Curtain: A False Claims Act Settlement for Avoiding Customs Charges" written by Mark Jensen and Ryan Roberts (outlined below) to learn about what happened in the US (as a lesson about what not to do). In this article, the authors write about a U.S. False Claims Act settlement by a U.S. importer of aluminum extrusions into the United States who intentional provided false information about the origin of the goods and participated in the deception.

While Canada does not have legislation like the *False Claims Act*, a similar set of facts relating to actions undertaken to circumvent anti-dumping duties and/or countervailing duties could land a Canadian importer of record in expensive trouble.

If a Canadian importer for example imported aluminum extrusions from China after conspiring with an exporter to misstate the origin of the goods (and route the goods via a third country such as Malaysia), they would be in trouble under Canadian laws.

If the importer filed documentation with the Canada Border Services Agency (CBSA) that it knows to be false and the documentation relates to goods that are subject to an anti-dumping/countervailing duty order of the Canadian International Trade Tribunal, the importer of record may be charged under the offence provisions of both the *Special Import Measures Act* (Canada's anti-dumping/countervailing duty law) and *Customs Act* (for misstating the origin for customs duty purposes). The penalty for committing an offence includes fines and/or imprisonment.

In addition, the importer would receive a detailed adjustment statement for the duties that were alleged to be evaded (plus interest and penalties). Most likely, the duties would be at the highest rate that was set by ministerial specification because the most likely scenario is that the real manufacturer does not have normal values. If the

[18] Customs Amendment (Anti-dumping Measures) Bill 2013 [and] Customs Tariff (Anti-Dumping) Amendment Bill 2013, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd156

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real exporter did have normal values, the transshipment through a third country in this manner may be sufficient to result in the inapplicability of those normal values. Further, the CBSA may impose administrative monetary penalties for both the false information under the *Special Import Measures Act* and the *Customs Act*. In short, the amounts payable will add up to far exceed the evaded duties.

On top of all of these amounts, the customs broker fees and lawyers fees will add up. More importantly, the appeal of the imposition of the duties would be made to the Canadian International Trade Tribunal, which is the same quasi-judicial body who made the original injury finding. The Tribunal will not be favourably disposed to any appellant who circumvented their order in such a dishonest manner. The appeals under the offence provisions would go to the courts. As a result, the importer of record would be fighting more than one legal battle in more than one legal venue.
CAVEAT: It is important to recognize that there is a very big difference between intentional transshipment of goods (discussed above) and an importer of record buying goods from a non-subject country that happen to be subject to an anti-dumping/countervailing order in Canada. There are many situations where an honest importer of record does not know the origin of the goods and is not actively attempting to circumvent an anti-dumping/countervailing duty order. These importers may still receive a detailed adjustment statement from the CBSA, but should not be subjected to other more serious enforcement measures/penalties.[19]

False Claims Act

Background

1. ADD and CVD

Antidumping and countervailing duties are imposed on products from countries found to have been engaging in unfair trade practices by the U.S. Department of Commerce and U.S. International Trade Commission. ADD apply where a company is found to dump its goods on the U.S. market below fair value. CVD apply where a company is found to have received unfair government subsidies. ADD and CVD can be substantial, with duty rates of over 100 percent in addition to the tariffs charged on the goods at issue.

[19] http://www.canada-usblog.com/2014/01/23/circumvention-of-antidumping-and-countervailing-duties-is-risky-business/

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Because of the high margins of ADD and CVD, in some instances importers have sought to avoid ADD and CVD by transshipping goods through third countries, concealing their country of origin by presenting documents showing the country of transshipment as the country of origin, even where the goods did not qualify for that status.

2. The False Claims Act

The False Claims Act (FCA), 31 U.S.C. §§ 3729-33, has been around for over 150 years, and provides that the Government can recover **treble damages plus penalties** against contractors for the knowing submission of a false claim for payment. While the statute allows the Government to sue contractors directly, these claims are often initiated by private parties as a qui tam action seeking to benefit from the statute's whistleblower rewards (up to 30% of the proceeds, depending on whether the Government intervenes in the suit). In FY 2012 alone, 647 qui tam suits were filed under the FCA, not only by disgruntled employees seeking a financial windfall, but also by business competitors seeking an edge in the marketplace.

Despite the law's lengthy history, only recently has the Government begun to use the FCA to sue for compliance lapses relating to international trade regulations. The Government has taken the position, successfully, that a contractor's failure to identify correctly a product's country of origin, and thereby avoid paying antidumping and countervailing duties, constitutes a false claim under the FCA. In December 2012, Japanese-based printing ink manufacturer Toyo Ink SC Holdings Co. Ltd. agreed to a $45 million settlement of FCA allegations levied against it by DOJ under this theory of liability. Given its success, DOJ has continued to pursue these actions, either directly or by intervening in qui tam actions, as an additional method to enforce international trade regulations.

Case Study – Aluminium Extrusions

AOn November 14, 2013, the U.S. Department of Justice announced a False Claims Act settlement with Basco Manufacturing Company, a maker of shower enclosures, for $1.1 million related to misstatements on U.S. Customs and Border Protection (CBP) entry forms.

The alleged misstatements were intended to allow the company to avoid antidumping duties (ADD) and countervailing duties (CVD) on aluminum extrusions used in its products that were actually from China, but transshipped through Malaysia in an attempt to avoid the duties.

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The settlement against Basco does not resolve the entire matter, as Basco was one company of many involved in an alleged conspiracy to conceal the Chinese origin of the aluminum extrusions at issue. Aspects of the settlement highlight certain risks posed by the False Claims Act that compound general U.S. enforcement of trade laws, and a reminder that diversion for inbound products to the United States may be a significant compliance issue for companies to be aware of.

Conclusion

The Basco settlement, while small relative to some recent FCA cases, highlights some of the important issues facing companies in customs compliance that are compounded by the U.S. government's use of the False Claims Act in this area. By being aware of the risks of inbound diversion and country of origin falsification, companies can position themselves to take appropriate measures and avoid extensive investigations and costly penalties.[20]

4. Areas for further consideration or development pertaining to the effectiveness of anti-dumping regime including circumvention activities

Issues around anti-dumping actions on manufactured products from China

The Australian Industry Group (Ai Group) on 21 October 2014 made a submission to DFAT on the Australia-China Free Trade Agreement (FTA).[21]

Chinese products exported to Australia below their cost to make and sell, or exported at prices below those sold in their market of manufacture; i.e. dumping; remains one of the key concerns raised by local manufacturers in Ai Groups' 2014 survey and consultation.

[20] **A Peek Around the Curtain: A False Claims Act Settlement for Avoiding Customs Charges** By Mark Jensen and Ryan Roberts on January 8, 2014 Posted in Customs, False Claims Act, Imports, **http://www.globaltradelawblog.com/2014/01/08/a-peek-around-the-curtain-a-false-claims-act-settlement-for-avoiding-customs-charges/#page=1**

[21] Ai Group 21 October 2014: Australian Industry Group Submission on Australia-China Free Trade Agreement, http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Policy%2520and%2520Representation/Submissions/Trade%2520and%2520Export/Submission_Australia-China_FTA.pdf, pp29-32

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Therefore it is very important Australia's anti-dumping rights not be diminished under an Australia-China FTA.

Since the granting of market economy status to China in April 2005, the key right available to Australian anti-dumping applicants, is to claim (in appropriate circumstances) that there are conditions present in the Chinese market for the goods which render sales in that market not suitable for use in determining prices. This may relate to production input costs or the domestic sales value of identical or equivalent goods.

Known as a particular "market situation" the responsible Minister under the Customs Act 1901 (currently, the Parliamentary Secretary to the Minister for Industry), may determine the 'fair' or "normal value" of the goods by reference to, either:

a) the export price paid for the goods to a third country;
b) such amount as the Minister determines to be the cost of production, which may include the substitution of certain production input costs from third country surrogates, plus a determination of the administrative, selling and general costs associated with the sale and the profit on that sale; or
c) such amount as is determined by the Minister to be appropriate having regard to all relevant information.

It is important to acknowledge that the rights under the particular "market situation" provisions in Australia's domestic legislation applies to any exporting country which is the subject of an anti-dumping investigation, not just China, and reflects the provisions contained within the WTO Anti-Dumping Agreement.

Therefore, as a matter of international consistency, there should be no erosion of these provisions under the Australia-China FTA.

- "Respondents also noted that many manufactured goods imported from China do not meet Australian safety and quality regulations and standards and the removal of tariffs under an Australia-China FTA may exacerbate this situation"[22];

22 As above, p27

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- Conformity with Australian safety and quality standards needs to be strengthened and a process developed for legal enforcement of insurance claims and contract breaches.[23]

It would be of benefit to the work of the committee therefore to clarify the dumping treatment of China under the FTA. Implementation of the FTAs with Korea and Japan will also require scrutiny and consistent treatment. As a guide, under AUSFTA, Australia and the US retain their WTO rights to anti-dumping and countervailing action and no changes will be made to relevant legislation as a result of the Agreement. [24]

The role played by the International Trade Remedies Forum (ITRF)

The AWU supports the on-going participation of the ITRF in Australia's Anti-Dumping and Countervailing System.

Through its formal advisory role, the ITRF reports to Government on options for further improvement, with contributions from industry stakeholders that are key users of the anti-dumping system contributing to the transparency and effectiveness of the anti-dumping system.[25]

However, there is a concern that the Government may abolish the body in up-coming reforms, yet to be announced.[26] Such an outcome would be a retrograde step given the coalition of interests around the ITRF table and expertise available to the Government.

Conclusion

The AWU welcomes and strongly supports the current inquiry by the Agriculture and Industry Committee. It comes at as vital time for local industry where an array of concurrent challenges including those thrown up by a number of free trade

[23] As above, p4
[24] http://www.dfat.gov.au/fta/ausfta/guide/9.html

[25] http://adcommission.gov.au/aboutus/ITRF.asp

[26] Economics Legislation Committee - 23/10/2014 - Estimates - INDUSTRY PORTFOLIO - Anti-Dumping Commission, pp128-129
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=COMMITTEES;id=committees%2Festimate%2Fc972af79-90ce-4b97-8022-a80b42e59bc8%2F0010;orderBy=priority,doc_date-rev page=1 query=Dataset%3Aestimate rec=14 resCount=Default

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agreements are putting the spotlight on the future domestic approach to addressing circumvention related activities by foreign exporters and local importers.

It is instructive to consider the approaches being adopted by other equivalent jurisdictions in particular in Canada and the United Sates.

Absent a budget constraint, it appears that the ADC could be doing more currently in taking forward applications which may otherwise be screened out at an early stage. (This submission has also taken the opportunity of reminding ADC that information sharing with equivalent agencies in other jurisdictions including in verification related activities afford possible resource savings).

There are possible legislative amendments to the Customs Act which could expand and clarify the legal framework governing anti-circumvention investigations. This submission has raised the possibility of there being currently a too-strict an application of anti-circumvention rules under relevant sections of the Customs Act when Australia's WTO rights to implement measures addressing circumvention are very wide ranging.

The AWU has offered possible options for reform for the consideration by the committee aimed at bolstering the system which build on previous reforms and sharpen the ability of ADC to undertake inquiries. The government's expectations of the ADC should also be very clear in this regard.

The AWU supports retention of the ITRF as a vital piece of the current anti-dumping regime but which currently appears to be under-utilised.

The AWU wishes the committee well in its deliberations and stands ready to assist in order to improve the ability for local industry employing thousands of our members to address instances of circumvention efficiently and effectively.

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