

28 November 2014

Committee Secretary  
House of Representatives Standing Committee on Agriculture and  
Industry  
PO Box 6021  
Parliament House  
Canberra ACT



Dear Standing Committee

**Inquiry into Australia's Anti-Circumvention Framework in relation to Anti-Dumping Measures**

The Law Council of Australia welcomes the opportunity to make this submission to the House of Representatives Standing Committee on Agriculture and Industry inquiry into Australia's Anti-Circumvention Framework in relation to Anti-Dumping Measures (**Inquiry**).

The Inquiry has invited interested persons and organisations to address, the following matters:

- (a) the scope, prevalence and impact of circumvention practices by foreign exporters and Australian importers, especially from the perspective of Australian businesses;
- (b) 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;
- (c) practices that circumvent anti-dumping measures and the models for addressing practices administered by other anti-dumping jurisdictions; and
- (d) areas which require further consideration or development including the effectiveness of anti-dumping measures and the range and scope of circumvention activities.

This Submission was prepared by the International Law Section, Trade and Business Committee of the Law Council in response to that invitation.

The Law Council is the peak national representative body of the Australian legal profession – it represents some 60,000 legal practitioners nationwide. **Attachment A** provides a profile of the Law Council.

The Law Council would be pleased to discuss its submission with the Standing Committee. In the first instance, please contact the International Law Section administrator Ms Jacintha Victor John, at

Yours faithfully

MARTYN HAGAN  
SECRETARY-GENERAL



Law Council  
OF AUSTRALIA

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# Inquiry into Australia's Anti-Circumvention Framework in relation to Anti-Dumping Measures

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**House of Representatives Standing Committee on  
Agriculture and Industry**

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## Introduction

### Summary of Submission

1. The Law Council submits that:

- (a) a separate anti-circumvention procedure in addition to the ordinary anti-dumping and countervailing measures is unnecessary because circumvention is uncommon. Circumvention should and could be dealt with under the existing anti-dumping and countervailing laws and customs regulations; and
- (b) Australia's anti-circumvention framework is potentially in violation of the WTO Anti-Dumping Agreement (**ADA**) and the Agreement on Subsidy and Countervailing Measures (**SCM Agreement**) and may well be used against normal business practices and for protectionist purposes. This has the potential provoke retaliation by other WTO member countries.

### The Anti-Circumvention Framework – whether it is necessary?

2. The introduction of an anti-circumvention framework under Division 5A of the *Customs Act 1901 (Act)* in 2012 was intended to “address prescribed circumvention activities by importers and exporters” and “circumvention” was defined as “a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and countervailing duties.”<sup>1</sup>
3. Section 269ZDBB of the Act sets out a list of prescribed circumvention activities including:
  - (a) where exporters of the goods being subject to dumping and/or countervailing duties “circumvent” the duties by:
    - I. exporting parts of the goods to Australia which are then assembled into the subject goods in Australia (Section 269ZDBB(2));
    - II. exporting parts of the goods to a third country which are then assembled into the subject goods in that third country, with the assembled goods consequently exported to Australia (Section 269ZDBB(3));
    - III. exporting the subject goods to Australia through a third country or third countries (Section 269ZDBB(4));
    - IV. exporting the subject goods to Australia through another exporter in the same country of exportation as the other exporter is subject to a lower duty rate or is exempt from the duties (Section 269ZDBB(5)) and
  - (b) where the selling price of the goods being subject to dumping and/or countervailing duties in Australia did not increase commensurate with the total amount of the duties payable (Section 269ZDBB(5A)).
4. The Law Council is concerned about whether such an anti-circumvention framework is necessary in practice.
5. To the knowledge of the Law Council, the introduction of the anti-circumvention framework was not based on research into whether the prescribed activities have

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<sup>1</sup> Explanatory Memorandum, *Customs Amendment (Anti-Dumping Improvements) Bill (No.3) 2012*, p.6.

occurred and if so, their frequency. Since the introduction of the framework, only one application has been made, which concerned an anti-circumvention inquiry into aluminium extrusions from China (**Case 241**).<sup>2</sup> This application related to circumvention activity contemplated by section 269ZDBB(5A) only and not the other prescribed circumvention activities. This raises doubt about whether the prescribed circumvention activities have actually been used by exporters and importers to “avoid the full payment of dumping and countervailing duties”, and hence whether the anti-circumvention framework is necessary.

6. Section 269ZDBB(5A) is a newly introduced provision which concerns avoidance of the intended effect of existing dumping and/or countervailing duties and in particular is intended to deal with circumvention activities resulted from “the lowering of the export price, sales at a loss, profit reduction, reimbursement or compensation from the exporter, or other activity of a similar nature”.<sup>3</sup> Again, the Law Council is unaware of any research into how often these activities have occurred in Australia.
7. While the US and the EU are the two most frequent users of anti-dumping and countervailing measures, circumvention does not seem to be a serious problem in practice. From 1995 to 2013, the US and the EU, respectively, initiated 641 and 526 antidumping<sup>4</sup> and countervailing<sup>5</sup> investigations, and imposed 398 and 330 antidumping<sup>6</sup> and countervailing<sup>7</sup> measures. In the EU only maintained 12 anti-circumvention measures by the end of 2013 and had during that year initiated 3 anti-circumvention investigations out of a total of 45 investigations.<sup>8</sup> Similarly, in the US, only 5 anti-circumvention investigations have been initiated since 2012.<sup>9</sup> The statistics show that circumvention compliance activities are rare which does not support the creation of a separate anti-circumvention procedure in addition to the ordinary anti-dumping and countervailing procedures.
8. Several WTO member countries share the position that circumvention of anti-dumping and countervailing measures should and could be dealt with by using the ordinary anti-dumping investigation procedures, such that circumvention activities should be investigated “as a separate dumping case for which a new investigation of dumping and injury determination should be conducted”.<sup>10</sup> In fact, many WTO member countries do not have a separate anti-circumvention framework but have dealt with circumvention activities under existing anti-dumping rules and customs regulations. Accordingly, Australia can address circumvention of anti-dumping and countervailing measures, if it does occur, under the existing anti-dumping rules and customs regulations.
9. Australia has been one of the proponents of the creation of a uniform anti-circumvention framework under the WTO. In a submission to the Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention, Australia set out its main concern as below:

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<sup>2</sup> *Anti-circumvention inquiry – Aluminium extrusions from China* (case 241), accessible at:

<http://www.adcommission.gov.au/cases/EPR241.asp>

<sup>3</sup> Replacement Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill 2013; Customs Tariff (Anti-Dumping) Amendment Bill 2013*, p. 15.

<sup>4</sup> [http://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsByRepMem.pdf](http://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf)

<sup>5</sup> [http://www.wto.org/english/tratop\\_e/scm\\_e/CV\\_InitiationsByRepMem.pdf](http://www.wto.org/english/tratop_e/scm_e/CV_InitiationsByRepMem.pdf)

<sup>6</sup> [http://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresByRepMem.pdf](http://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf)

<sup>7</sup> [http://www.wto.org/english/tratop\\_e/scm\\_e/CV\\_MeasuresByRepMem.pdf](http://www.wto.org/english/tratop_e/scm_e/CV_MeasuresByRepMem.pdf)

<sup>8</sup> [http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc\\_152184.pdf](http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152184.pdf)

<sup>9</sup> [https://www.federalregister.gov/articles/search?conditions%5Bagency\\_ids%5D%5B%5D=261&conditions%5Bterm%5D=anti-circumvention&order=newest&page=1&quiet=true](https://www.federalregister.gov/articles/search?conditions%5Bagency_ids%5D%5B%5D=261&conditions%5Bterm%5D=anti-circumvention&order=newest&page=1&quiet=true)

<sup>10</sup> Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention, Paper by the Republic of Korea, G/ADP/IG/W/17 (28 May 1999). Also see Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention, Paper by Japan, G/ADP/IG/W/15 (30 October 1998); Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention, Paper by New Zealand, G/ADP/IG/W/11 (20 October 1998).

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*a costly and time-consuming new application by the domestic industry would not be necessary. The most affected by injurious dumping in Australia are small- and medium-sized enterprises, which find making an application highly burdensome. In circumstances where industries have been found to be suffering injury and entitled to the relief of anti-dumping measures, it is therefore not appropriate to penalise these industries by requiring the additional burden of a new application when these industries are faced with potential circumvention.*<sup>11</sup>

10. This concern is not supported by the anti-dumping practice in Australia as most of the applicants for anti-dumping and / or countervailing investigations are large, instead of small-and medium-sized, Australian manufacturers.
11. As shown in the table below, among the 21 anti-dumping and/or countervailing investigations initiated in Australia during 2012 – 2014, 4 investigations were applied by BlueScope Steel Limited (**BlueScope**) and 3 by OneSteel Manufacturing Pty Ltd (**OneSteel**). Both of the companies are major producers of steel products in Australia and are certainly not small- and medium-sized enterprises.
12. Among the remaining 14 investigations, the majority of the applicants are large companies and global suppliers including:
  - (a) 2 investigations applied by SPC Ardmona Operations Limited, Australia's largest producer of premium packaged fruit and vegetable having over 50 years experience supplying global markets;<sup>12</sup>
  - (b) 1 investigation applied by Australian Vinyls Corporation Pty Ltd, "Australia's leading manufacturer and supplier of vinyl (PVC) resin and wood-plastic composites";<sup>13</sup>
  - (c) 1 investigation applied by Nufarm Limited (with Accensi Pty Limited), "one of the world's leading crop protection and specialist seeds companies" with manufacturing and marketing operations in many countries and supplying more than 100 countries in the world;<sup>14</sup>
  - (d) 1 investigation applied by Australian Paper Pty Ltd, a major manufacturer of pulp, paper and packaging and Australia's largest envelope manufacturer with its products being exported to over 75 countries;<sup>15</sup>
  - (e) 1 investigation applied by Norske Skog Industries Australia Limited, the Australian subsidiary of Norske Skog the world's largest producer of newspaper (Newsprint) and magazine paper and a major supplier of newsprint in Australia;<sup>16</sup>
  - (f) 1 investigation applied by Wilson Transformer Company Pty Ltd, a leading manufacturer of power and distribution transformers in Australia with its products being exported to more than 12 countries;<sup>17</sup>

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<sup>11</sup> Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention, Paper by Australia, G/ADP/IG/W/48 (16 April 2003).

<sup>12</sup> <http://spcardmona.com.au/about-us/who-we-are>

<sup>13</sup> <http://www.av.com.au/AboutUs>

<sup>14</sup> <http://www.nufarm.com/About>

<sup>15</sup> <http://www.australianpaper.com.au/about-us/>

<sup>16</sup> <http://www.norskeskog.com/Sales/Australasia/Australia.aspx>

<sup>17</sup> [http://www.wtc.com.au/WTC/company\\_intro.aspx](http://www.wtc.com.au/WTC/company_intro.aspx)



- (g) 1 investigation applied by Austube Mills Pty. Ltd., an experienced and respected steel business with “more than 200 distribution networks across Australia and New Zealand”,<sup>18</sup>
- (h) 1 investigation applied by Simcoa Operations Pty Ltd, who produces “the world's highest quality silicon” and “operates the only fully integrated silicon metal production plant in the world”,<sup>19</sup>
- (i) 1 investigation applied by Keppel Prince Engineering Pty Ltd (with Haywards), “Australia’s largest producer of wind towers and wind farms”,<sup>20</sup>
- (j) 1 investigation applied by Bisalloy Steels Pty Ltd, the Australian subsidiary of Bisalloy Steel Group a global manufacturer and supplier of quench & tempered steel plate with operations in China, Indonesia and Thailand and distribution channels across Australia and “in at least a dozen countries worldwide”,<sup>21</sup> and
- (k) 1 investigation applied by Olex Australia Pty Limited, “Australia’s largest power cable manufacturer ... with sales offices and distribution centres throughout the Asia-Pacific Region”.<sup>22</sup>

| Item        | Investigation                                   | Applicants  |
|-------------|---|---|
| <b>2012</b> |   |   |
| 1.          | INV183 (Formulated glyphosate)                  | Nufarm Limited and Accensi Pty Limited                  |
| 2.          | INV 187 (Polyvinyl chloride homopolymer resin)  | Australian Vinyls Corporation Pty Ltd                   |
| 3.          | INV 188 (Hot rolled coil steel)                 | BlueScope Steel Limited                                 |
| 4.          | INV 190 & 193 (Galvanised steel)                | BlueScope Steel Limited                                 |
| <b>2013</b> |   |   |
| 5.          | INV 198 (Hot rolled plate steel)                | BlueScope Steel Limited                                 |
| 6.          | INV 216 (Prepared or preserved peach products)  | SPC Ardmona Operations Limited                          |
| 7.          | INV 217 (Prepared or preserved tomato products) | SPC Ardmona Operations Limited                          |
| 8.          | INV 219 (Power transformers)                    | Wilson Transformer Company Pty Ltd                      |
| 9.          | INV 221 (Wind towers)                           | A.C.N. 009 483 694 Pty Ltd (Haywards) and Keppel Prince |

<sup>18</sup> <http://www.austubemills.com/why-us/austube-mills-history>

<sup>19</sup> <http://www.simcoa.com.au/company-2.html>

<sup>20</sup> <http://www.keppelprince.com/default.asp?id=1,2,0,12>

<sup>21</sup> <http://www.bisalloy.com.au/>

<sup>22</sup> [http://www.olex.com.au/eservice/Australia-en\\_AU/navigate\\_158525/About\\_Nexans\\_Olex.html](http://www.olex.com.au/eservice/Australia-en_AU/navigate_158525/About_Nexans_Olex.html)

|             |  |  |
|-------------|--|--|
|             |  | Engineering Pty Ltd                      |
| 10.         | INV 223 (Hot rolled structural steel sections) | OneSteel Manufacturing Pty Ltd           |
| 11.         | INV 225 (Copy paper)                           | Australian Paper Pty Ltd                 |
| <b>2014</b> |  |  |
| 12.         | INV 234 (Quenched and Tempered Steel Plate)    | Bisalloy Steels Pty Ltd                  |
| 13.         | INV 237 (Silicon Metal)                        | Simcoa Operations Pty Ltd                |
| 14.         | INV 238 (Deep Drawn Stainless Steel Sinks)     | Tasman Sinkware Pty Ltd                  |
| 15.         | INV 239 (PV Modules or Panels)                 | Tindo Manufacturing Pty Ltd              |
| 16.         | INV 240 (Rod in Coils)                         | OneSteel Manufacturing Pty Ltd           |
| 17.         | INV 242 (Newsprint)                            | Norske Skog Industries Australia Limited |
| 18.         | INV 249 (Zinc Coated (galvanised) Steel)       | BlueScope Steel Limited                  |
| 19.         | INV 254 (Hollow Structural Sections)           | Austube Mills Pty. Ltd.                  |
| 20.         | INV 264 (Steel Reinforcing Bar)                | OneSteel Manufacturing Pty Ltd           |
| 21.         | INV 271 (PVC Flat Electric Cables)             | Olex Australia Pty Limited               |

13. As a result, since 2012, only two investigations were brought by Australian companies that can be regarded as small- and medium-sized enterprises, that is, Tasman Sinkware Pty Ltd and Tindo Manufacturing Pty Ltd.

14. Accordingly, the concern that small-and medium-sized Australian businesses will be subject to high financial burdens if they are required to initiate a new investigation against circumvention activities finds little support in practice and does not justify the need for a separate anti-circumvention framework. In fact, Case 241, the only anti-circumvention inquiry initiated since the introduction of the anti-circumvention framework in Australia, was brought by Capral Limited, "Australia's largest manufacturer and distributor of aluminium profiles"<sup>23</sup> and also one of the most experienced users of anti-dumping and countervailing procedures in Australia<sup>24</sup>. Accordingly, it appears that the anti-circumvention system does not serve the interest of small- and medium-sized Australian businesses to any new advantage, but appears of most benefit to experienced users of the anti-dumping and countervailing procedures.

<sup>23</sup> <http://www.capral.com.au/Who-we-are>

<sup>24</sup> Capral Aluminium, Half Year 2013 Results Presentation, p. 8: <http://www.capral.com.au/Results-Presentations>



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15. In light of the above, the Law Council does not believe that the anti-circumvention framework is necessary but believes that the existing anti-dumping and countervailing procedures provide adequate protection for Australian businesses. It is possible that the anti-circumvention framework may be used for protectionist purposes.

The Anti-Circumvention Framework – whether it is WTO-consistent and justifiable?

16. The Law Council is concerned about whether the current anti-circumvention framework in Australia is WTO-consistent and justifiable.

17. As set out in section 3 above, Section 269ZDBB of the Act essentially contemplates 3 categories of prescribed activities, including circumvention by:

- (a) exporting parts of subject goods which are subsequently assembled into the subject goods in Australia or in a third country with the assembled goods subsequently exported to Australia (**Assembling Activities**);
- (b) exporting the subject goods through a third country or a local exporter subject to a lower duty rate or exempted from the duties (**Change of Exporting Country or Exporter**);
- (c) business activities that result in the selling price of subject goods in Australia not increasing commensurate with the total amount of the duties payable (**Avoidance of Intended Effect of Duty**).

18. While it appears that these activities may have the effect of circumventing existing anti-dumping and/or countervailing duties, there are questions about whether:

- (a) these activities are actually illegitimate business activities; and
- (b) dealing with these activities through a separate anti-circumvention inquiry, instead of a new investigation, is consistent with the ADA or the SCM Agreement.

Legitimacy of circumvention activities

19. There is a threshold question about whether prescribed circumvention activities should be regarded as illegitimate or legitimate business activities. It is the Law Council's view that these activities may well reflect legitimate and normal business decisions rather than an intention to circumvent existing anti-dumping and/or countervailing measures.

20. How the Australian Anti-Dumping Commission (**Commission**) could be certain that activities are motivated by an attempt to circumvent existing anti-dumping and/or countervailing measures rather than by legitimate business decisions in certain circumstances is questionable. For example, in relation to the Assembling Activities, it is normal for a car producer to switch to producing and supplying car parts due to existing duties on cars but not on parts. It is legitimate for a French producer of cars to move its assembling process to Vietnam due to the significantly lower labour costs there. In relation to the Change of Exporting Country or Exporter, why is it illegitimate for a Chinese exporter of cars to decide to change its country of exportation due to existing anti-dumping and/or countervailing duties on cars in Australia? In relation to Avoidance of Intended Effect of Duty, a reasonable business decision may be to lower the selling price of cars in Australia and hence lower profits if that decision is resulted from a devaluation of Australian currency against Chinese currency or a decrease in prices of raw materials for the production of cars or in labour costs in the Chinese market.

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21. The Law Council believes that none of the prescribed circumvention activities can be easily characterised as illegitimate activities with the intention to circumvent existing anti-dumping and/or countervailing measures. The Australian anti-circumvention framework, as it currently stands, does not have a mechanism that mandates the consideration of all of the relevant circumstances with an aim to ensure that anti-circumvention measures are applied to genuine circumvention activities only and not to legitimate and normal business activities. In the absence of such a mechanism, the current framework may lead to unjustified application of anti-dumping and/or countervailing measures to legitimate business activities and hence impede normal investment and commercial activities. In addition, due to the lack of agreement on the scope of circumvention activities worldwide, an unjustified application of anti-circumvention measures in Australia may well provoke retaliatory action, and subject Australian exports to the same kind of investigations and measures, in other jurisdictions.

#### WTO-consistency

22. There are no uniform rules under the WTO on anti-circumvention. During the Uruguay Round negotiations, GATT *Contracting Parties* discussed intensively the issue of circumvention and anti-circumvention but could not reach an agreement on issues such as:

- (a) whether circumvention activities are illegitimate business activities;
- (b) what activities should be treated as circumvention; and
- (c) whether circumvention activities should be dealt with separately from the existing anti-dumping rules.<sup>25</sup>

23. Consequently, the negotiators reached a Decision on Anti-Circumvention deciding to “refer this matter to the Committee on Anti-Dumping Practices” for further negotiations.<sup>26</sup> Since then, the WTO members have negotiated this matter under the Committee on Anti-Dumping Practices Informal Group on Anti-Circumvention but have not been able to reach an agreement on the issues unresolved in the Uruguay Round negotiations. The lack of agreement on these issues and on a uniform rule on anti-circumvention means that any anti-circumvention investigation and the resultant application of anti-dumping and or/countervailing measures must conform to the existing WTO rules and in particular the rules set out in the ADA and the SCM Agreement.

24. According to the current Australian anti-circumvention rules, if an anti-circumvention inquiry finds that one or more circumvention activities has occurred, the Minister may determine to alter the original notice imposing anti-dumping and/or countervailing duties (section 269ZDBH of the Act). Such a determination may lead to:

- (a) the imposition of duties on goods that are not the subject goods of the original anti-dumping and/or countervailing investigation and measures;
- (b) the imposition of duties on countries that are not subject to the original investigation and measures;
- (c) the imposition of duties on an exporter who is subject to a lower duty or is exempt from the duties; and

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<sup>25</sup> Stewart, Terence P., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, (Kluwer Law and Taxation Publishers, Volume II, 1993) at 1616-1640.

<sup>26</sup> [http://www.wto.org/english/docs\\_e/legal\\_e/39-dadp1\\_e.htm](http://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm)

- (d) the imposition of higher duties on the subject goods.
25. As such, the current anti-circumvention framework is potentially inconsistent with the WTO rules as it essentially allows the imposition of anti-dumping and/or countervailing duties without findings of the existence of dumping and/or subsidy and without findings of material injury and causation.
26. Anti-dumping and countervailing measures are one of the few forms of protectionism allowed under the WTO rules. Before the establishment of a WTO uniform rule on anti-circumvention, anti-circumvention measures (which are essentially the extension of the application of existing anti-dumping and/or countervailing measures) must not be imposed unless the conditions set out in the ADA and the SCM Agreement are satisfied. Essentially, the ADA and the SCM Agreement require two conditions to be met before imposing anti-dumping and/or countervailing measures:
- (a) there must be an investigation into whether the product in question is being exported to Australia at dumped and/or subsidised prices; and
  - (b) if so, the export of those goods at those dumped and/or subsidised prices is causing material injury to an Australian industry producing like goods.
27. However, under the Australian anti-circumvention framework, there is no requirement for consideration of either of these conditions before the imposition of anti-circumvention measures. Rather, whether anti-circumvention measures should be applied is solely based on examination of whether any of the prescribed circumvention activities has occurred.
28. Certainly, the fact that one or more circumvention activities has occurred does not necessarily mean that there is dumping and/or subsidization and that that dumping and / or subsidisation has caused material injury to the Australian industry concerned. For example, a circumvention activity would occur if, instead of exporting cars from China, which are subject to anti-dumping measures in Australia, car parts were exported from China and then assembled in Australia, or were exported to Vietnam, assembled into cars and then exported to Australia. If an anti-circumvention inquiry finds that these activities have actually occurred, the existing anti-dumping duties on cars exported from China may be applied to car parts exported from China or cars exported from Vietnam. Accordingly, the measures are imposed in the absence of any investigation into whether products were actually sold at dumped prices, and if so, whether the dumping has caused a material injury to Australian industry. Without such an investigation, there is no basis to decide the exact dumping margin (if any), likely resulting in the imposition of a dumping duty at a rate higher than what is necessary to remove any material injury caused.
29. Relevantly, Article 18.1 of the ADA prohibits members from applying anti-dumping measures unless the rules contemplated in the ADA are applied and satisfied. Article 18.4 requires members to take all necessary steps to ensure that their domestic laws, regulations and administrative procedures are in conformity with WTO rules. Contrary to these rules, Australia's current anti-circumvention framework allows anti-dumping measures to be imposed without applying the rules set out in the ADA. The analysis above also applies to the SCM Agreement which contains similar rules as those of the ADA.
30. Finally, the Law Council is particularly concerned about the newly introduced category of circumvention activities, namely, Avoidance of Intended Effect of Duty. As mentioned above, these activities may arise from the lowering of export price, sales at

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a loss, profit reduction, reimbursement or compensation from the exporter, or other activity of a similar nature.<sup>27</sup> Besides the concern that these activities may result from legitimate business decisions, the Law Council believes that anti-circumvention inquiry into these activities may lead to abuse of anti-dumping and/or countervailing measures and violations of the ADA and the SCM Agreement. If an anti-circumvention inquiry finds that circumvention activities have occurred, the Minister may decide to increase the rate of an existing anti-dumping duty.

31. In Case 241, the Commission published Issue Paper 2014/02 setting out, amongst other things, the scope of the inquiry which merely included an assessment of whether circumvention activities have occurred and if so “what the export price of the goods would have been if the importers’ selling prices had passed on the duty”.<sup>28</sup> However, the inquiry will not involve assessment of whether the normal value of the subject goods has changed and whether an increase in the existing dumping duty rate is necessary to remove any material injury caused. Article 11.1 of the ADA relevantly provides that “[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” Accordingly, the anti-circumvention inquiry may contravene the ADA as it does not mandate an assessment of whether dumping has occurred and has caused a material injury before the imposition of a higher dumping duty.
32. In addition, Australia’s anti-dumping system is not established on the basis of studies on whether the system has actually been effective or could be effective. Experience suggests that anti-dumping is not an effective way, and certainly not the best way, to bolster Australia’s manufacturing industry. The decline of Australia’s car industry<sup>29</sup>, despite having been protected by anti-dumping measures and heavy subsidies, suggests strongly against the position that dumping is the cause of, and anti-dumping is the solution to, struggling Australian industries. To the contrary, anti-dumping, as a form of protection through protectionist anti-dumping measures (ie tariffs), is probably the worst solution as it will only further reduce the competitiveness and efficiency of these industries. It is accepted that tariffs, of whatever nature, inhibit competition as they are protectionist devices that do not promote innovation and, consequently, the competitiveness of industries benefitting from such protection. It has been for this reason that successive governments have lowered and abolished tariffs. The introduction and use of the anti-circumvention framework, therefore, does not contribute to the development of Australian industries but can provide inefficient Australian industries a way to circumvent the successive tariff reductions and counteract the positive effect of the tariff reductions.

### Conclusion

33. The Law Council takes the position that the current anti-circumvention framework in Australia is not necessary and not justifiable, and may well contravene the WTO rules set out in the ADA and the SCM Agreement.
34. Circumvention activities are not common in practice and could be dealt with by using the ordinary anti-dumping and / or countervailing procedures. Given the fact that the anti-dumping and countervailing system has been used predominantly by large Australian companies, it is likely that the anti-circumvention system will also be used mainly by large companies and hence will be unlikely to serve the interest of small- and medium-size Australian enterprises.

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<sup>27</sup> See above n 3.

<sup>28</sup> <http://www.adcommission.gov.au/cases/documents/027-Otherreport-2014-02-IssuespaperforAluminiumExtrusions.pdf>, pp. 3, 6.

<sup>29</sup> <http://www.carsguide.com.au/car-news/the-future-of-the-australian-car-industry-once-the-factories-close-29726>

35. The circumvention activities contemplated in Australia's current anti-circumvention framework may not necessarily be motivated by the intention to circumvent existing anti-dumping and / or countervailing duties, but may arise from legitimate and normal business decisions. It is, therefore, unjustifiable for Australia to apply anti-circumvention measures to these activities. The application of anti-circumvention measures, typically by extending the existing anti-dumping and/or countervailing duties to goods or countries not subject to the original investigations imposing the duties, also raises the issue of WTO-consistency. Typically, since the anti-circumvention framework allows the application of anti-circumvention measures without an assessment of the existence of dumping, the magnitude of dumping margin, and material injury caused by the dumping, any measures resulted from an anti-circumvention inquiry under the framework may well constitute a violation of the ADA.
36. The Law Council is unaware of research into the effectiveness of the anti-dumping and countervailing system. However, it is suggested that anti-dumping and countervailing duties are protectionist in nature which impede the enhancement of competitiveness and efficiency of businesses and hence are detrimental to the recovery and development of struggling Australian industries. The introduction of the anti-circumvention framework is not best directed at promoting the growth of Australian businesses and going forward, should take steps to ensure that the framework is not used against normal business activities or for purposes of isolating Australian companies from foreign competition through tariff protection.
37. In light of the above, it is the Law Council's view that the Australian government should reconsider the necessity and the justifiability of the anti-circumvention framework by assessing:
- (a) whether circumvention activities have occurred and if so, how frequently;
  - (b) whether these circumvention activities reflect legitimate and normal business decisions, and how to ensure that an anti-circumvention inquiry does not deter legitimate and normal business activities;
  - (c) whether genuine circumvention activities can be dealt with under the ordinary anti-dumping and countervailing procedures and if not, why;
  - (d) whether anti-circumvention inquiries, and more generally anti-dumping and countervailing investigations, can assist Australian businesses by increasing their efficiency and competitiveness; and
  - (e) whether the current anti-circumvention law may violate the WTO rules and if so, how the law should be amended to avoid such violations.
38. The Australian government should also be mindful that Australia's use of anti-circumvention for a wider application of existing anti-dumping and/or countervailing duties or an imposition of a higher rate of such duties without respecting the existing rules under the ADA and the SCM Agreement may easily trigger retaliatory actions by other countries in which Australia has significant economic interest.



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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.