CEMENT INDUSTRY FEDERATION

Cement Industry Federation

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

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1. Executive Summary

The Cement Industry Federation (CIF) welcomes the opportunity to make this submission to the inquiry into Australia's anti-circumvention framework in relation to anti-dumping measures.

As an industry body representing Australian cement manufacturers, the CIF has a key interest in an effective Anti-Dumping System. Relief from unfairly priced imports in a time-efficient manner is central to an effective Anti-Dumping System. The circumvention activities of exporters and/or importers can distort the impact of the measures and potentially void the measures of any remedial impact.

The CIF is aware that the circumvention of measures can occur via a range of activities. CIF notes that Division 5A of the *Customs Act 1901* was recently inserted to address particular circumvention activities. CIF is aware of further methods by which measures are circumvented that are not addressed by the recent amendments, including:

- the *minor* modification of the goods the subject of the measures that results in a change in tariff classification of the goods so anti-dumping measures no longer apply;

- changes in the supply of the goods to exporters in countries not the subject of the measures (i.e. country hopping); and

- reductions in the export price of goods the subject of *ad valorem* measures following the imposition of the measures.

This submission will also comment on the effectiveness of the recently introduced Division 5A provisions and the circumvention practices of other administrations. Additionally, CIF will provide comments on improvements required to the Anti-Dumping System, including:

- reducing timeframes for the publication of a Preliminary Affirmative Determination ("PAD") and the imposition of provisional measures;

  limiting timeframe extensions to the publication of the Statement of Essential Facts ("SEF") and the final report to the Minister;

- restricting extensions to exporters for the completion of exporter questionnaires to a maximum of five days;

- flexibility with investigation period; and

- increased scrutiny in monitoring the adequacy of public file documentation to limit reductions of material to commercially sensitive information and ensuring an adequate summary of the redacted material is included.

2. The Cement Industry as a stakeholder

The CIF is the peak industry association for Australia's integrated manufacturers of clinker, cement and cement products. It is an import competing industry. More than 5,000 people are directly or indirectly involved in the production of clinker and cement, predominantly in regional areas of Australia. In 2012-13, member company sales estimated 8.9 million tonnes of cement and cementitious products with a turnover of about $2.2 billion.

3. Circumvention practices of foreign exporters and Australian importers

The circumvention of anti-dumping measures involves practices that are aimed at avoiding the intended impact of anti-dumping measures on goods that have been found to be dumped and injurious to the Australian industry.

Division 5A of the Customs Act 1901 identifies certain circumvention activities including:

- the export of individual parts of goods to Australia for assembly in Australia so that the unassembled components do not attract measures;
- the assembly of parts of the goods in a third country not the subject of the measures, for export of the assembled goods to Australia;
- the export of goods through an intermediate country to which measures do not apply;
- arrangements between exporters to benefit an exporter of goods the subject of measures; and
- the goods the subject of the measures are sold in Australia at prices that are not commensurate with the total amount of dumping measure applied to the exported goods.

Some exporters have remained ahead of the recently introduced provisions of Division 5A and have identified additional practices aimed at circumvention. These include:

- the addition of minor additives sufficient to alter the description and tariff classification of the goods – although there is no change in the end-use application for the goods - in order to avoid the measures;
- sourcing the goods from an associate of the exporter in a third country to which the measures do not apply; and
- further reducing export prices where *ad valorem* duties have been applied (to 'compensate' for the levying of the measure).
- Each of the identified circumvention alternatives is examined below.

(a) Minor modification

The description of goods the subject of an application is intentionally written in general terms. This is to ensure that the goods description is not interpreted narrowly by administering authorities. As such, the administering authority is able to examine whether certain goods fall within the generic goods description.

In a typical investigation, the Anti-Dumping Commission ("the Commission") will examine whether the Australian industry manufactures like goods to the imported goods. Where the imported goods and locally produced goods are not alike in all respects, the Commission will assess whether the goods have *characteristics closely resembling* each other against the considerations of:

- physical likeness;
- commercial likeness;
- functional likeness; and
- production likeness.

Where the exported goods are slightly modified, the Commission will need to consider whether the goods continue to have characteristics closely resembling the goods the subject of the application. Where a slight modification to the goods has occurred, for example, a low cost additive is included in cement that does not alter the physical characteristics of the product including its physical appearance or performance functionality, it would be expected by CIF that the Commission will conclude that the modified goods and the locally produced goods are alike.

In situations involving slight or minor modifications to exported goods, the Commission should also take account of the following factors:

- the expectations of the customers of the goods and whether the slightly modified good is expected to perform in a similar manner to goods covered by the measures;
- the distribution channels of the slightly modified goods; and
- the manner in which the goods are promoted for sale.

Where the modified goods are sold via the same distribution channels, to the same or similar customers, for the same or similar end-uses and perform in the same or similar manner, the goods may be considered 'alike' to goods the subject of the measures.

The Commission can administratively determine whether the slightly modified goods are included within the scope of the goods description to which measures apply. Where there exists a degree of ambiguity as to whether the slightly modified goods are covered by the goods description, the Commission could conduct a "Like Goods" investigation and seek representations from interested parties and third party experts to aid the like goods assessment.

(b) Country Hopping

The circumvention of measures can occur where, immediately following the imposition of measures (whether these be provisional measures or interim duty measures), the importer sources supply of the goods from a new exporter in a country not the subject of the measures.

In some instances, the exporter in the new third country may be associated/affiliated with the exporter in the country to which anti-dumping measures apply.

It is CIF's view that the importer plays a significant role in the sourcing of goods from a new exporter to ensure that no measures apply. The importer is motivated to supply product from a new exporter, to maintain a position on the Australian market. The importer is aware that administration of the Anti-Dumping System is slow and unwieldy and that any duties to be applied will only follow an application by the Australian Industry. The importer is also aware that the average period to provisional measures is generally not less than 90 days following commencement of a formal investigation.

There is presently a minimal deterrent factor associated with seeking alternative sources of supply from countries not the subject of measures. The CIF submits that the circumvention of measures by country hopping to a new exporter can be minimized. The Commission has available to it powers to apply to a new exporter, including:

- provisional measures; or
- retrospective measures under s.269TN of the Customs Act.

Both forms of measures require the injured industry to make a new application for measures. Whereas provisional measures can only be applied from Day 60, retrospective measures can be applied retrospectively to Day 1 of the new "country hopping" investigation.

The application of retrospective measures by the Commission in circumstances where an importer previously involved in supplying dumped exports into Australia has established a new avenue of supply is an available mechanism to limit and deter country-hopping activities.

The accessing of provisional measures is a slow and ineffective means of addressing country hopping. CIF contends that retrospective measures offer a more effective deterrent to importers and exporters seeking out new sources of supply.

In conjunction with clear guidelines, retrospective measures can be used effectively to deter country-hopping activities.

(c) *Ad valorem* measures

CIF understands that the Commission has recently applied *ad valorem* measures to products[1] that the Parliamentary Secretary has determined as dumped and injurious to Australian industry. It is understood that the Commission has recommended the new form of duty on the basis that *ad valorem* measures are the most "favoured" form of duty applied in some other jurisdictions (refer Note 84, Page 89 Report No. 234). Previously, duties based upon the combined method (i.e. a variable and fixed component) has been the more common form of duty applied following Trade Remedies inquiries.

It is a concern to CIF that measures based upon the *ad valorem* method may be readily circumvented by exporters and importers. This is particularly the case where measures are relatively small – for example 5 per cent or less. All that is required is for the exporter to reduce the export price by the amount of the interim duty margin for the duty to become ineffective. *Ad valorem* measures do not allow for a penalty to be applied where the exporter reduces export prices further – whereas measures based upon the combination method (where a fixed and variable component addresses subsequent reductions in export prices) remain effective and limit further injury to the Australian industry.

As the *ad valorem* method only permits duty to be collected on a percentage of export price basis any reduction in export price that is not reflected in similar reductions of normal value will result in a recurrence of injury to the Australian industry that the anti-dumping measure was intended to prevent. The *ad valorem* method does not enable the collection of any shortfall of measures brought about by the exporter's reduction of the export price – hence CIF's concern that *ad valorem* measures may be circumvented should the exporter further reduce export prices (where there is an absence of a similar reduction in normal value).

CIF is concerned that the Commission's recent shift in preference for measures based upon the *ad valorem* further reduces the effectiveness of anti-dumping measures and shifts the balance in favour of exporters and importers and disadvantages Australian industry. Access to measures in a timely manner are already stymied due to extended delays to investigation outcomes and a lack of transparency associated with the determination of exporter normal values (i.e. due allowance for adjustments that cannot be adequately examined by Australian industry).

[1] Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden (Report No. 234) and Hot Rolled Structural Sections exported from Japan, Korea, Taiwan and Thailand (Report No. 223).

CIF does not support the recent changes in the Commission's policy in recommending measures based upon the *ad valorem* method. Anti-dumping measures based upon the *ad valorem* method can be readily manipulated by the exporter - including through the reduction of the export price. Where this occurs the level of measure actually paid is less than is required to remove the injury from dumping.

4. Operation of Circumvention Framework since June 2013

CIF is aware of only one circumvention inquiry following the introduction of the circumvention provisions in Division 5A of the *Customs Act* in mid-2013. The investigation[2] is ongoing, with final outcomes yet to be determined.

The provisions empower the Commission to address certain circumvention activities, including:

- the exportation of individual parts to Australia of goods the subject of measures;
- the assembly of parts of goods in a third country not the subject of measures;
- the export of goods through one or more third countries;
- arrangements between exporters that provide a beneficial outcome for an exporter; and
- the avoidance of the intended effect of the measures.

As indicated above, the provisions do not address the minor modification of the exported goods. This is of particular concern to CIF where cement or cementitious products can be modified with a low-cost additive that results in the exported goods description altering to a "mixture" or similar. The potential for circumvention given the experiences of other industry sectors (e.g. steel) would appear high.

The provision involving the "*avoidance of the intended effect of the measure*" is perhaps the more prominent of the nominated activities, however, could prove difficult for Australian industry to demonstrate. Evidence is required to support a claim that anti-dumping measures are being avoided. However, where the exporter *compensates* the Australian importer following the sale of goods in Australia, the Australian industry will encounter significant difficulty in evidencing arrangements of this nature.

It is common for customers to not disclose import purchasing arrangements following the imposition of measures. It is therefore difficult (if not, impossible) to evidence that the importer has increased "*the price commensurate with the total amount of duty payable on the circumvented goods*". It would appear that the onus of proof to commence an investigation rests with the Australian industry. The available information required to support a claim of duty avoidance is therefore problematic for Australian industry.

It is difficult for CIF to assess the effectiveness of the recently introduced circumvention provisions in the absence of any completed circumvention investigations.

5. Circumvention practices of other administrations

Circumvention of anti-dumping measures is addressed by other administrations including the United States ("US"), the European Union ("EU"), and Canada. The practices aimed at addressing circumvention by other administrations provide useful guidance for Australian authorities.

[2] Investigation No. 241 – Aluminium extrusions exported from China – 'Sales at a Loss'.

It would appear that the newly introduced Division 5A Anti-Circumvention provisions are modelled on the circumvention practices of the U.S. and EU. However, not all of the identified activities included in the legislative provisions of the U.S. and EU have been included in Division 5A of the Customs Act. The most notable exception involves the ability to address the minor modification of exported goods – a provision reflected in both the U.S. and E.U. legislation.

U.S. Anti-Circumvention Provisions

The U.S. regulations provide the administration (i.e. the Department of Commerce) with the power to rule on like goods determinations (referred to as "Scope Determinations"). Where there exists a level of doubt as to whether goods – including slightly modified goods – are included within the scope of the goods description, the administration will examine and rule on goods coverage.

In Scope Determination assessments the DOC will consider:

- the physical characteristics of the product;
- the expectations of the ultimate purchasers;
- the ultimate use of the product;
- the channels of trade in which the product is sold; and
- the manner in which the product is advertised and displayed.

The DOC's assessment of whether goods fall within the goods description is a similar process to that followed by the Commission in its 'like goods' assessment. However, the formalized "Scope Determination" process provides for a more robust approach to the clarification of goods coverage. Where goods are not specifically included in a goods description, DOC can conduct a formal investigation and seek input from interested parties and independent experts. The Commission (and the former Customs and Border protection) has conducted examination of 'like goods' matters within a formal inquiry process and has used the "Issues Paper" process to seek input from interested parties.

Practices to address the eligibility of goods within the goods coverage post the original investigation are limited to the recently introduced parts and assembly provisions of Division 5A. As indicated, minor modifications to goods is not included in Division 5A and could aid the Commission's ability to decide on questions of 'like goods' uncertainty.

The DOC's Anti-Circumvention powers extend to the conduct of inquiries into circumvention activities including:

- merchandise completed or assembled in the U.S. (including parts, components and sub-assemblies of the goods;
- merchandise completed or assembled in other foreign countries;
- minor alterations of merchandise; and
- later-developed merchandise (the development of goods subsequent to the investigation).

The U.S. provisions address *minor* or *slight* modifications to the exported goods. The provisions specifically address the concerns of Congress "*that foreign producers were circumventing AD duty orders by making minor alterations to products falling within the scope of an order in an effort to take these products outside of the literal scope*".

The effect of the U.S. provisions on minor modifications of the goods is that it "*includes within the scope of an anti-dumping duty order products that are so insignificantly changed*

from a covered product that they should be considered within the scope of the order even though the alterations remove them from the scope's literal order[3]".

An examination of the U.S. anti-circumvention provisions demonstrates that the Australian provisions in Division 5A fail to address the issue of minor modifications of goods the subject of measures.

EU Anti-Circumvention Provisions

The EU Regulations include Article 13 on Anti-Circumvention activities. The Regulation "extends" anti-dumping measures to exports from third countries to goods (whether slightly modified or not), including parts of goods. Circumvention is defined within Article 13 as:

> "*a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product*".

This provision provides a basis for asserting that the avoidance of dumping duties occurs where "*there is insufficient cause or economic justification other than the imposition of the duty*". It would appear that this provision shifts the onus of responsibility onto the importer to demonstrate that the change from past importing practice has been due to the measures unless the importer can demonstrate otherwise.

A declaration of this nature in Division 5A is absent.

The "practice, process or work" concept is also defined and includes *"the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics"*

And includes activities that are associated with:

> *"the consignment of the product subject to measures via third countries, the reorganization by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the Community through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers, and, in the circumstances indicated in paragraph 2, the assembly of parts by an assembly operation in the Community or a third country*."
>
> Anti-circumvention investigations may be commenced by the European Commission, upon the request of any Member State (of the EU), or by request from an interested party to an investigation.
>
> Similar to the U.S. provisions, the EU's Regulation on circumvention activities provides clarity on the activities that constitute minor modification to goods the subject of measures. The European Commission is empowered to investigate whether goods in question are intended to be covered by the goods description.

[3] Wheatland Tube Co., v United States, 161 F 3d 1365, 1370.

It would also appear that the EU provisions address country hopping as the measures can be "extended to imports from third countries, of the like product, whether slightly modified or not". The provision does not appear be determinant on whether the exporter in third country is associated or affiliated with an exporter the subject of measures or not.

CIF views the EU provisions as supportive of its concerns in addressing the circumvention of measures through the minor modification of exported goods or by seeking new sources of supply e.g. country hopping.

Canadian Anti-Circumvention Provisions

It is CIF's understanding that the Canadian International Trade Tribunal (CITT") has the power under the Special Import Measures Act ("SIMA") to "review any dumping order or finding and, in making of the review, may hear any matter before deciding it".

This provision is commonly referred to as a "Changed Circumstances Review". A review application can be made by the CITT, any other person, or any government. It is understood the Tribunal can examine activities related to circumvention of measures under a "Changed Circumstances Review".

The broad power for the CITT to investigate any matter is not dissimilar to the powers of the Minister under s.269TAG that permits the Minister to "take anti-dumping measures on own initiative". Here the Minister can write to the Commissioner to commence an investigation in accordance with the Minister's directives.

6. Areas for further consideration or development

The CIF has outlined its concerns with limitations of the Division 5A Anti-Circumvention provisions including the inability to address the minor modification(s) of goods the subject of measures, country hopping, and measures based upon the *ad valorem* method.

There are however, some further areas requiring reform to improve the effectiveness of the Anti-Dumping System. At the present time, the access to a Preliminary Affirmative Determination ("PAD") and provisional measures is slow, with timeframe extensions are common in every new investigation, and there is a lack of symmetry between exporters/importers and Australian industry when it comes to public file disclosures on commercially sensitive information.

Access to provisional measures

The objective of the Anti-Dumping System is to provide Australian manufacturers relief from unfairly priced imports in a timely manner. As the Commission's assessment of material injury is based upon past economic performance, access to measures is critical when the decline in economic performance has extended across the injury period (i.e. a minimum three or four years). In recent times, extended delays in accessing remedies has become commonplace. The Brumby Review highlighted the need for Australian industry to access measures in a timely fashion and, where extensions to inquiries were to be approved by the Minister, provisional measures would be contemplated.

This level of assurance has failed to materialize.

Manufacturing is seeking access to remedies to address dumping (and countervailing) as close as practicable from Day 60 of an investigation. The Committee is urged to highlight the deterioration in timeframes to access measures following the Brumby Review.

Extensions to Investigation Timeframes & EQRs

Investigation timeframes are extending well beyond the legislated 155-day timeframe. The 40-day timeframe for the completion of Exporter Questionnaire Responses ("EQRs") is regularly extended – in some cases up to three weeks (i.e. 21 days). Extensions granted to exporters for the completion of EQRs have a direct impact on the planning of an exporter verification visit and the timing of publication of the SEF.

The CIF encourages the Committee to recommend that the granting of extensions for the completion of EQRs be limited to only in exceptional circumstances. In such cases, a maximum five-day extension should be permitted.

A practice has emerged in 2014 where more than one extension to an investigation timeframe has been made. Extended delays to the final report to the Minister risk the return of provisional measures due to expiration. Extended investigation timeframes create uncertainty and should only occur in exceptional circumstances.

Investigation periods

It has been a CIF member's experience that the Commission has been inflexible with the nominated investigation period. As a consequence, the investigation period accepted by the Commission for the purposes of an inquiry failed to take account of a critical quarter of material injury to the Australian industry.

Further detail and discussion with the applicant industry on the appropriate investigation period for an investigation is required. CIF supports a full review of the Commission's practice in the selection of an appropriate (and relevant) investigation period.

Redaction of information from Public File documents

The principle of confidentiality of sensitive commercial information plays a significant role in an anti-dumping investigation. EQRs and submissions by or on behalf of exporters are often riddled with redactions. Minimal attempts are made to summarize redacted information as required by the Anti-Dumping Agreement and detailed in ACDN No. 2012/42.

The minimum requirement is "*to enable interested parties to obtain a reasonable understanding of the substance of information in public file documents, every deletion (or blacked out text) be followed by a bracketed summary containing sufficient detail to permit a reasonable understanding of the substance of the information deleted or blacked out*".

This standard is often not achieved. CIF requests the Committee to highlight the provision of information for the public record as ongoing issue for Australian industry. In some instances, lengthy paragraphs in importer/exporter visit reports are redacted with minimal summaries provided.

7. Closing Remarks

The CIF welcomes the Committee's initiative to inquire into the circumvention activities of exporters and importers to avoid the correct payments of applicable anti-dumping measures. The recently introduced Division 5A of the Customs Act Anti-Circumvention provisions do not fully address the circumvention activities of some exporters and importers. The slight modification of goods the subject of measures, country-hopping, and reductions in export

prices for goods the subject of *ad valorem* based measures, are examples of circumvention activities not currently addressed within Division 5A.

Additionally, further reforms are required to minimize delays for Australian industry in accessing remedies. The early publication of a PAD and imposition of provisional measures, with limited timeframe extensions are to be actively encouraged. The Commission must be encouraged to enforce the provision of information for the public record to ensure a reasonable understanding of redacted information is possible. Finally, the CIF requests the Committee to encourage the Commission to examine its policy on the selection of an investigation period and clearly reflect the policy in appropriate public guidelines.