



Export Council of Australia

The Voice for Australia's Exporters

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Committee Secretary
House of Representatives Standing Committee on Agriculture and Industry
PO Box 6021
Parliament House
Canberra ACT 2600

Submission to the Inquiry into circumvention of Australia's anti-dumping laws by the House of Representatives Standing Committee on Agriculture and Industry

The Export Council of Australia ("**ECA**") thanks the Committee for the opportunity to make this submission to the Inquiry into circumvention of Australia's anti – dumping laws.

A not-for-profit, membership based organisation, the ECA is the peak industry body representing Australia's exporters and importers. With a membership base of 1,000 and a reach of 15,000, the ECA represents companies of all sizes and across a wide range of industries. The ECA's core activities include research, advocacy, skills development and events.

The ECA also works collaboratively with a number of Federal and State Government Departments and Agencies to advance its business and the interests of its members; these include DFAT, Austrade, Efic, the Australian Customs and Border Protection Service ("**Customs**") and the Department of Agriculture. In the case of Customs, this work involves membership of the Customs and Border Protection National Consultative Committee and the Industry Advisory Group for the development of the Trusted Trader Programme.

The ECA wishes to make the following submission to the Inquiry.

Background to Australia's anti-dumping, countervailing and circumvention Regime

1. Notwithstanding that the ECA's primary role is to represent SME exporters, in reality the majority of Australian exporters of products also import goods as inputs to manufacture. Accordingly, exporters (including ECA members) are also affected by Australia's anti – dumping and countervailing regime ("**Regime**"). For those purposes, Australian exporters are keen to ensure that the Regime is transparent and affords certainty as to the cost of inputs to manufacture. Clearly, the imposition of additional duties whether as a result of an anti – dumping or countervailing investigation has an effect on an exporter, which effect is usually unexpected and cannot be readily passed on to customers and is ultimately borne by the exporter.
2. The ECA does wish to bring to the attention of the Committee that there is little, if any, contemporary economic theory which supports the imposition of anti – dumping or countervailing duties. There have also been suggestions that the Regime has more adverse than beneficial effects and it should, in fact, be dismantled, along with tariffs



themselves. Accordingly the ECA assumes that the Committee proceeds on the basis that there is merit in continuing the Regime.

3. The ECA believes that the Regime must also be consistent with WTO Agreements on Anti – Dumping, Countervailing and Trade Facilitation, Australia's obligations under its various Free Trade Agreements ("**FTA**"), and must be imposed in a way which does not have an adverse impact on Australia's overseas reputation or attract any retaliatory action against Australian exports in overseas markets.
4. The ECA is aware of the changes to the Regime as and from June 2013 and the rationale for the changes. The ECA endorses the principle that overseas manufacturers should be able to adopt measures which do not offend our Regime and any changes to the Regime should not be able to be adopted in a retrospective manner to adversely affect the position of those who had validly traded without imposition of measures up until any anti – circumvention measures are imposed.
5. The ECA is also aware that the anti – circumvention provisions introduced in June 2013 prescribed for specific types of "circumvention" activity as well as allowing for additional circumvention activities to be added by way of regulation. The ECA understands that regulations have been passed to include one additional instance of proscribed circumvention activity.
6. At this stage the ECA is only aware of one anti – circumvention Inquiry having been initiated, in relation to the alleged circumvention of measures applying to exports of aluminium extrusions to Australia.
7. This anti – circumvention Inquiry is being conducted at the same time as a large number of other anti – dumping or countervailing Investigations are also being conducted by the Anti – Dumping Commission ("**ADC**") which includes applications for measures in the first instance, exemption applications and termination investigations. In addition there are a number of measures in place at the moment and the number of those measures has increased significantly in recent years.
8. The ECA is of the view that the Regime is one of the most complex regulatory areas as it operates at the intersection of international and domestic law, politics, economics and competition theory. It was also the subject of extensive reform a little over 12 months ago. Accordingly it is very important to ensure that transparency and clarity in the Regime is maintained otherwise the Regime can, of itself, represent an impediment to trade and an unnecessary level of regulation. The Federal Government is currently endeavouring to reduce the level of regulation in business and trade and the ECA remains concerned that the Regime is, by comparison, becoming more regulated and more complex.
9. Based on the comments above, the ECA recommends that if there are to be any changes to the Regime (which includes the adoption of other regulations to proscribe additional circumvention behaviour), those changes:
 - a. must be supported by actual evidence of failings in the Regime;
 - b. must take into account that the Regime has only been in place for 12 months;
 - c. must be consistent to Australia's obligations under the WTO Anti – Dumping and Countervailing Agreements, Australia's FTA obligations and the obligations to arise under the WTO Trade Facilitation Agreement;

- d. must be undertaken in a transparent manner which does not unduly add to the regulatory burden of those affected; and
- e. should also not allow measures to be adopted which allowed for the retrospective imposition of measures on exporters and importers whose trading had not, until then, attracted the anti – circumvention provisions or those whose actions have been undertaken for other legitimate commercial or legal reasons.

10. The ECA also recommends that before making any decision on any such additional changes to the Regime, the Committee should commission extensive further research and consultation with stakeholders and affected parties over and above this Inquiry. That should include both Australian industry, overseas exporters and importers of goods. The ECA does not believe that any changes to the Regime should be endorsed and implemented merely based on evidence and submissions to the Committee alone for the Inquiry.

Commentary on the Regime and any need for change

1. In reviewing the Terms of Reference for the Inquiry, the ECA wishes to bring to the attention of the Committee, that there are already extensive provisions in the Customs Act 1901 and other "border" legislation which would allow prosecution of parties who may act inadvertently, recklessly or deliberately in a manner which would avoid the collection of anti – dumping or countervailing duties. Such action could include the adoption of incorrect description or tariff classification of goods or their origin. That could lead to prosecution of the parties to the transactions including their licensed customs brokers or the issue of penalties on a strict liability basis. Not only is this supported by the investigation resources available to Government but by the fact that licensed customs brokers are obliged by the conditions of their licences to report misleading, false or incorrect statements to Customs and can be penalised or be subjected to action against their licences should they fail to do so. Accordingly the ECA assumes that the Committee is, in fact, focussed on "circumventing" behaviour alone and not such other improper behaviour which is intended to, or has the effect of avoiding the imposition of measures.
2. Further to the comment in paragraph 1 under this heading the ECA wishes to also bring to the attention of the Committee that local industry which is subjected to heavy and unexpected damage from surges in cheap imports that do not attract the imposition of anti – dumping and countervailing measures also can have recourse to "safeguard" protection. The right to seek safeguards exists in general (as recently sought by certain food producers) and can be invoked specifically by Australia under its various FTA. This represents another avenue of recourse for those affected.
3. As mentioned above, the ECA is aware that the "anti – circumvention" provisions have only been in place for just over 12 months and there is currently only one Investigation being undertaken which has yet to be concluded. That may suggest either that the Regime is inadequate, that it is not properly understood or that it is not actually needed to the extent that would be suggested. The ECA is concerned that to make further amendment to the Regime so soon after adoption of the anti – circumvention provisions may not be warranted and that further time may be needed to assess the real impact and efficiency of the provisions.
4. The ECA is also aware that the Regime originally proscribed certain types of activity that constituted circumvention and allowed for additional activity to be proscribed by regulation which has only occurred in relation to one type of activity. Accordingly, the ECA does recommend that the Committee inquire of those seeking amendment to the Regime as to why it does not readily permit the inclusion of other circumventing behaviour instead of further amendment to the Regime itself.

5. The ECA does hold concerns that the efficiency of the Regime may be adversely affected by a lack of resources or expertise for the ADC. The ECA is aware that many of the Investigations undertaken by the ADC since its inception have been extended beyond the statutory timeframes, some quite extensively. This does create uncertainty and additional expense for those affected especially where the ADC has imposed preliminary securities at an early stage of an Investigation. The ECA is aware of suggestions that the move of the location of the ADC from Canberra to Melbourne and the move of its administration from Customs to the Department of Industry may have caused the ADC to lose critical expertise. While the ECA does not question the professionalism and efficiency of the ADC and, indeed, commends the actions of the ADC, the ECA is concerned that the workload of the ADC since the most recent changes to the Regime is such as to require significant additional resources and expertise.
6. The ECA is aware of proposals in the past to augment the Regime by way of "reversing the onus" on exporters so that if a prima facie case is established then the presumption is for measures to be applied unless the parties accused of the measures can prove that measures should not be applied. The Parliament has previously rejected such proposed provisions and the ECA recommends that rejection of such an approach should continue.

Recommendations

From the perspective of the SME sector and the ongoing regulatory impact of the Regime, the ECA makes the following recommendations.

1. That in the absence of compelling evidence, it is premature for Government to implement a further set of changes to the Regime at this stage and that any review should only be undertaken at the expiry of another 12 month period.
2. That Government allocate additional funding to the ADC, Customs and the Department to ensure that those industries affected by dumping or subsidies are fully aware of the terms of the Regime (and the associated Safeguards regime) to facilitate use of the existing provisions.
3. That the ADC is allocated additional funding and resources to enable it to address any perceived shortfalls in those areas to enable the ADC to undertake its role as intended.
4. That proper consideration is given to the use of the existing Regime (perhaps by proscribing additional circumvention behaviour by regulation) rather than seeking further amendments to the Regime.
5. That any recommended amendments should not include a reversal to the onus of proof in an Investigation so that those the subject to the Investigation are not subject to the more difficult defence of this presumption.
6. That any recommended amendments to the Regime should only arise from a further and more detailed assessment undertaken by an experienced policy body (not a Government agency) following a comprehensive and detailed further assessment of the alleged problems and other ways in which those alleged problems can be remedied.
7. The assessment should be more wide ranging than purely relating to circumvention and should take into account other issues which adversely affect those the subject of Investigations. By way of example this could include disadvantages experienced arising from the confidentiality and secrecy of submissions by local industry and the fact that local industries are allowed to instigate Investigations and seek measures based on broad descriptions of goods affected which prove to be well beyond those produced by the local industry, effectively acting as an anti – competitive measure on exporters and their customers. In the latter case, the ECA believes that the Regime could benefit from a more rigorous assessment of the scope of goods under investigation at the time of application by the local industry.

8. The assessment to be undertaken should not purely focus on the "defensive" and "protective" aspects of the Regime and should consider whether the Regime could benefit from other amendments such as the adoption of a bounded "national interest" test.
9. That the ultimate adoption of any amendments to the Regime needs to take into account the basic criteria as set out in paragraphs 9 and 10 under the heading "background" above.

The ECA would be pleased to appear before the Committee and provide further detail on its submission if so desired.

Sincerely



Andrew Hudson
Director and Trade Policy Committee Chair
Export Council of Australia