

Update

Australia set to establish Anti-Dumping Commission

From 1 July 2013, a new anti-dumping authority will be established in Australia. The *Customs Amendment (Anti-Dumping Commission) Act 2013* setting up the Anti-Dumping Commission (the **Commission**) was recently passed by the Australian Parliament.

Background

Australia's anti-dumping and countervailing measures regime implements the rules and procedures in the World Trade Organisation Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures.

Under these agreements, WTO members may impose pecuniary penalties where it is found that a company is exporting a product at a price lower than the price it normally charges in its own home market or if a company is found to be receiving a prohibited financial contribution from a foreign government which artificially reduces the cost of the product.

Currently, within Australia's anti-dumping system, the International Trade Remedies Branch of the Australian Customs and Border Protection Service (**Customs**) has sole responsibility for investigating claims of dumping and subsidisation. Following an investigation, Customs will provide a report to the Minister for Home Affairs and Justice who decides whether the import of goods involves dumping or countervailable subsidisation and whether such import warrants the imposition of anti-dumping measures,

countervailing duties or another remedy. The Minister's decision is appealable to a Trade Measures Review Officer and points of law are referable to the Federal Court of Australia.

Anti-dumping actions on the rise

Given ongoing weakness in the global economy and the high value of the Australian dollar¹, there is a concern that the Australian market, particularly the manufacturing sector, may be facing a greater risk from dumping. Since 2007, there has been a steady rise in the number of anti-dumping applications brought in Australia. According to Customs Annual Report, in 2011-12 the number of anti-dumping applications was 30 compared to 11 applications in 2010-11.

Australian Government reform

Since 2009, the Government has commissioned two reports on Australia's anti-dumping system² and has already introduced a number of changes to the system under its "Streamlining Australia's Anti-Dumping System" policy.³

The 2012 Review led by the Hon John Brumby, former Premier of Victoria, was specifically tasked with considering the feasibility of a Commonwealth Anti-Dumping

¹ The Australian dollar has been at, or above, parity with the \$US since 2011; it hit a record high of 0.8349 against the Euro in 2012; and a 28-year high of 69p against the GBP in March 2013.

² Productivity Commission Inquiry Report No. 48 (18 December 2009): Australia's Anti-dumping and Countervailing System; Brumby Review into Anti-dumping Arrangements (November 2012).

³ See *Customs Amendment (Anti-Dumping Improvements) Act 2011*; *Customs Amendment (Anti-Dumping Measures) Act 2011*; *Customs Amendment (Anti-Dumping Improvements) Act (No. 1) 2012*; *Customs Amendment (Anti-Dumping Improvements) Act (No. 2) 2012*; *Customs Amendment (Anti-Dumping Improvements) Act (No. 3) 2012*.

Agency. The Review made the following Primary Recommendation:

It is recommended that a new International Trade Remedies Authority, Agency or Commission be established under legislation. To fully realise its benefits, the agency must be:

- **separately and adequately resourced**, and
- **headed by a legislated CEO or Commissioner** who reports directly to the Minister for Home Affairs and Justice.

The Government accepted this recommendation and the Customs Amendment (Anti-Dumping Commission) Act 2013 establishes the Anti-Dumping Commission and the Anti-Dumping Commissioner.

The Anti-Dumping Commission: What has changed?

The Brumby Review considered a number of different models for the anti-dumping authority, including a stand-alone agency and a separate but supported agency, but concluded that there was not sufficient demand from business to justify a separate agency given the additional associated costs. Accordingly, it was recommended that establishment of an authority within an existing department would be most appropriate. The Government accepted this recommendation and the Commission will be established within Customs.

From 1988 until 1998, the Anti-Dumping Authority (ADA) existed in Australia. Under this earlier system, Customs would carry out investigations to a preliminary findings stage and the ADA would make final findings. This model was also considered by the Brumby Review, however, the general consensus that emerged from the consultation process was that there should continue to be a single agency for administration of the Australian anti-dumping system. Accordingly, while there is a new Commission, this does not introduce another layer in the anti-dumping system in Australia.

Instead, the Commissioner will take over the role that the CEO of Customs currently performs in the anti-dumping system and the Commission will now have responsibility for investigating claims of dumping and subsidisation. Although the Commission is within Customs, the Commissioner will report directly to the Minister for Home Affairs and Justice rather than to the CEO of Customs. The Commissioner will

Further information

If you would like further information on any issue raised in this update please contact:

Dean Carrigan

E: dean.carrigan@clydeco.com

Avryl Lattin

E: avryl.lattin@clydeco.com

Clyde & Co, Level 30, 420 George Street, Sydney NSW 2000 Australia

T: +61 2 9210 4400

F: +61 2 9210 4599

have the power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions. Applications are now being sought for the first Commissioner who is expected to serve a five-year term.

The creation of the Commission and the appointment of a dedicated Commissioner is designed to raise the profile of the anti-dumping system in Australia and will allow the new appointee to be solely focussed on the anti-dumping role. The Commission will be located in Melbourne, rather than with Customs' Head Office in Canberra, to allow the new authority to engage more closely with industry stakeholders and to attract a more specialised workforce.

The final decision-making, including for imposition of measures, will remain with the Minister for Home Affairs and Justice.

Across the world there are many different systems for implementing the WTO Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures. The new Australian model shares some features with the US and Canadian approach. Both the US and Canada have an independent authority to deal with anti-dumping. However, in each of their systems, separate entities assess the claims of dumping and injury, and, in both the US and Canada, the imposition of counter-veiling measures is automatic rather than at the discretion of a Minister.

Next Steps: More reforms to the anti-dumping framework expected

The Hon Jason Clare MP, Minister for Home Affairs and Justice, has foreshadowed that further legislative reforms with respect to Australia's anti-dumping system will be introduced in the next parliamentary sitting period.

The foreshadowed changes include: removal of mandatory consideration of the lesser duty rule in complex cases; clarification of the application of retroactive duties; introduction of a review mechanism to reduce the complexity of the existing review processes and make them more effective; and improvements in the infringement notice scheme to increase penalties and provide a more effective deterrent against importers making false or misleading statements to try to circumvent duties.

Further advice should be taken before relying on the contents of this summary.

Clyde & Co accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co.

Clyde & Co is a multi-disciplinary partnership registered with the Law Society of New South Wales.

© Clyde & Co Australia 2013