

Avoidance of the Intended Effect of Duty

Circumvention activity in the form of ‘avoidance of the intended effect of duty’ occurs if the following apply:

- goods (the **circumvention goods**) are exported to Australia;
- those goods are manufactured in a foreign country in respect of which the notice applies;
- the exporter is an exporter in respect of which the notice applies;
- 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;
- 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
- the above circumstances occur over a reasonable period.

It is expected that the prices of imported, dumped goods increase in the Australian market when anti-dumping or countervailing duties are applied. The additional duty paid by the importer (which is an additional cost borne by the importer) is generally passed on to the client or consumer by way of increased domestic prices.

Circumvention activity that *avoids the intended effect of duty* occurs where dumping and/or countervailing duty has been imposed (and is being paid by the importer) but there is little or no effect, over a reasonable period, on the price for the goods in the Australian market e.g. the price at which the goods are sold by the importer has not increased in line with the duty paid.

A ‘reasonable period’ may differ depending on the nature of the goods in question, i.e. the characteristics of the goods, conditions of the market for the goods, and other relevant factors. Generally the Commission will not consider a period of less than three months to be a reasonable period without strong evidence to assert otherwise.

An inquiry into alleged *avoidance of the intended effect of duty* is aimed at investigating whether prices of imported goods subject to measures have increased commensurate with the dumping duties paid and, if not, the reasons why the price of the imported goods has not increased in line with the total amount of duties payable. In particular, the inquiry seeks to address situations where, for example, the circumstances are occurring because:

- (a) the exporter has, subsequent to the imposition of measures, lowered the export price (in the absence of a corresponding decrease in normal value); or
- (b) the importer is absorbing the duties because of a compensatory or other arrangement with the exporter.

Anti-circumvention inquiry process

An inquiry in relation to *avoidance of the intended effect of duty* will be conducted in 100 days, with no requirement for the Commissioner to publish a statement of essential facts. Inquiries into such circumvention activity will be conducted separately and with different processes to other anti-circumvention inquiries which have a 155 day timeframe.

The inquiry notice under s. 269ZDBE indicating that an inquiry is to be conducted in relation to a circumvention activity under s. 269ZDBB(5A) must state that the Commissioner will provide a report to the Minister within 100 days after the day the inquiry notice is published or such longer period as the Minister allows under s. 269ZHI.

It is important to note that an Australian industry member is prevented from lodging more than one application alleging a circumvention activity under s. 269ZDBB(5A) within a 12 month period. However, if the Australian industry member has new/additional grounds to make a subsequent application within the 12 month period, it may petition the Minister to exercise his/her power to request the Commissioner undertake an anti-circumvention inquiry.

Determining if circumvention has occurred

The reasons for the effect of the duty being avoided may be because, for example, there has been a reduction in profit taken on the sale, or the export price has been decreased after the imposition of measures.

In determining if circumvention activity has occurred, the Commission will give due consideration to the characteristics of the goods concerned, market conditions, nature of the relationship between the importer and exporter, and reasonable levels of profit. If external factors (such as currency fluctuation) have caused the circumstance where the selling price of the importer has not increased in accordance with the duties, the circumvention activity will not be determined to have occurred.

Where the inquiry concludes that the circumvention activity has occurred because of a lowering of the export price, sales at a loss, reimbursement or compensation from the exporter, or other activity of a similar nature, the Commissioner may recommend to the Minister that the notice be altered.

Recognising that profit reduction of itself is a legitimate business practice, an importer who is independent of the exporter, and who may be absorbing only part of the duty (but not making sales at a loss), will generally be considered to not be engaging in the circumvention activity. However, an inquiry could find evidence that the exporter was contributing to no, or limited, movement in the price of the goods by compensating the importer for the reduction in profit.

The Commissioner may recommend to the Minister that the notice not be altered, even when the circumvention activity may be occurring to a limited extent, for example where factors other than the circumvention activity have contributed significantly to the prices achieved in the market

Where circumvention has occurred, the Commissioner may recommend that the notice be altered to set new variable factors. If for example, it was established that there was some compensatory arrangement between the parties, the notice could be altered to specify a new export price at a value ascertained in accordance with the relevant provisions in the Act to

account for the circumvention activity. This would result in the dumping duty payable increasing, all other things being equal.

Termination

Section 269ZDBEA allows the Commissioner to terminate a circumvention inquiry where he/she becomes satisfied that no circumvention activity in relation to the original notice has occurred. For a circumvention activity described in s.269ZDBB(2) – (5), the Commissioner may terminate the inquiry at any time before the Commissioner would otherwise be required to place the statement of essential facts on the public record. For the circumvention activity described in s.269ZDBB(5A) the Commissioner may terminate the inquiry at any time before reporting to the Minister.

Where the Commissioner terminates an anti-circumvention activity, s. 269ZDBEA(3) requires the Commissioner to publish a public notice of the decision to terminate, notify the applicant of the anti-circumvention inquiry, and inform the applicant of their rights to have the termination decision reviewed by the Anti-Dumping Review Panel. It is the Commission's practice to publish a short report outlining the inquiries it has undertaken and the reasons for the termination at the time of publishing the notice of the termination.