

PUBLIC RECORD

LEVEL 3 MINTER ELLISON BUILDING 25 NATIONAL CIRCUIT FORREST
GPO BOX 369 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minterellison.com
T +61 2 6225 3000 F +61 2 6225 1000

19 May 2014

Mail correspondence to GPO Box or DX

BY EMAIL: acu@adcommission.gov.au

The Director
Operations 3
Anti-Dumping Commission
Customs House
1010 Latrobe Street
DOCKLANDS VIC 3008

Dear Sir/Madam

Circumvention Inquiry – Certain Aluminium Extrusions exported from the People's Republic of China

We represent Oceanic Aluminium Pty Ltd (**Oceanic**), one of the importers named in the application for the above inquiry.

We submit that having regard to either the terms of subsection 269ZDBB(5A) (**subsection**) of the *Customs Act 1901* (Act) or the details of the purported initiation of this inquiry, it must be discontinued immediately.

Subsection 269ZDBB(5A) of the Customs Act 1901 (Act) exceeds the legislative power of the Commonwealth

The subsection provides that:

Circumvention activity, in relation to the notice, occurs if the following apply:

- (a) goods (the ***circumvention goods***) are exported to Australia from a foreign country in respect of which the notice applies;
- (b) the exporter is an exporter in respect of which the notice applies;
- (c) either or both of sections 8 and 10 of the Dumping Duty Act apply to the export of the circumvention goods to Australia;
- (d) 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 of duty payable on the circumvention goods under the Dumping Duty Act;
- (e) the circumstances covered by paragraphs (a) to (d) occur over a reasonable period.

MINTER ELLISON GROUP AND ASSOCIATED OFFICES

ADELAIDE AUCKLAND BEIJING BRISBANE CANBERRA DARWIN GOLD COAST HONG KONG
LONDON MELBOURNE PERTH SHANGHAI SYDNEY ULAANBAATAR WELLINGTON

If the Minister, after inquiry and report, declared pursuant to section 269ZDBH of the Act that alterations to the original notice were to apply on the ground set out in paragraph (d) of the subsection, it would result in the fixing of prices for certain Australian domestic sales of imported goods. There is no specific head of power in the Constitution authorising the Commonwealth to control such prices and attempts by referendums to so extend federal power have been decisively defeated. A federal enactment allowing control of domestic prices is beyond the power of the Parliament unless it can be linked to one of the heads of power specified in the Constitution. Thus, for example, the extensive price control legislation introduced during the course of the Second World War was declared valid by the High Court on the ground that it was made pursuant to the defence power¹.

In the present matter the only possible head of power that might be identified as supporting the validity of the subsection is the external affairs power. It is true that Australia's international obligations arising under the WTO dumping² and subsidies agreements support the validity of any provision in Part XVB that is a domestic legislative expression of an element of those agreements. However the enacted subsection is an example of Australia deciding to go beyond the limitations expressed in the *Anti-Dumping Agreement* by purporting to extend its power to construct an export price to circumstances in which the exporter and importer are not associated parties. There is no mandate in the *Anti-Dumping Agreement* or GATT 1994 for such an extension.

GATT 1947 first addressed the issue of the circumstances in which contracting parties could construct an export price by reference to the price at which goods were resold in the importing country:

Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer³.

While not referring specifically to hidden or sales dumping, the current *Anti-Dumping Agreement*⁴ follows the original provision in requiring the parties to be associated, or for there to be a compensatory arrangement, as preconditions for the construction of an export price. The purported application of subsection 269ZDBB(5A) is not limited by those preconditions and

¹ *Victorian Chamber of Manufactures v Commonwealth* (Prices Regulations) [1943] HCA 19

² *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* 1994.

³ Paragraph 1 of Interpretative Note *Ad Article VI* from Annex I to GATT 1947

⁴ Article 2.3

consequently cannot be characterised as giving expression to Australia's international obligations under the *Anti-Dumping Agreement*. Therefore in our submission the subsection cannot be validated on the ground that it was made under the external affairs power and consequently its enactment exceeds the legislative power of the Commonwealth.

The inquiry notice does not comply with s.269ZDBE(6)

The inquiry notice published by the Commissioner on 14 April 2014 does not comply with the requirements of s.269ZDBE(6) of the Act. The notice *does not describe the original notice the subject of the inquiry*⁵ and does not *state that the inquiry will examine whether circumvention activities in relation to the original notice have occurred*⁶. Furthermore, the notice does not properly identify the alleged circumvention activity that is the subject of the inquiry but merely adopts the terms of a heading to the subsection that does not reflect either the circumvention activity description set out in s.269ZDBB(5A)(d) of the Act or the statements of the Minister in the Explanatory Memorandum and second reading speech. In the absence of a valid inquiry notice, we submit that the inquiry cannot lawfully proceed.

The examination period specified in the inquiry notice does not allow the Commissioner to meet his statutory obligations

The subsection tasks the Commissioner with examining whether an importer has increased the price of goods to a degree ... *commensurate with the total amount of duty payable* ... *under the Dumping Duty Act* [Emphasis added]. That Act provides for ... *final assessment of the dumping duty payable*... and, pending that final assessment, ... *an interim duty*⁷. A similar provision applies to countervailing duties⁸. Clearly, the total amount of duty payable in the current matter cannot be ascertained until the deeming provision of s.269Y(4) of the Act takes effect, provided that no application under Division 4 of Part XVB of the Act has been lodged for an assessment of duty payable. Equally clear in the present matter is the fact that, prior to his reporting deadline of 23 July 2014, the Commissioner will not be able to undertake his assessment of the factors referred to in paragraph (d) of the subsection because he will have no knowledge of the final duty payable in calendar year 2013, being the reasonable period specified in the inquiry notice.

The earliest date at which that information could become available to the Commissioner is 27 October 2014. In the event, however, that the importer applies under Division 4 of Part XVB of the Act for a final duty assessment for an importation period that relates in part to goods entered

⁵ Act: s.269ZDBE(6)(b)

⁶ *ibid*, s.269ZDBE(6)(c)

⁷ *Dumping Duty Act*: s.8(3).

⁸ *ibid*, s.10(3)

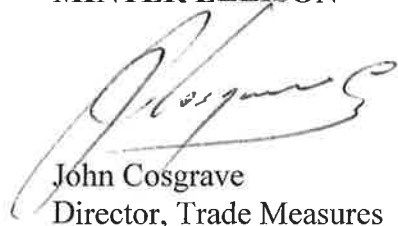
for home consumption in 2013, the Minister's final decision under s.269Y of the Act may not be available until a further 185 days beyond 27 October 2014 have elapsed.

Obviously, under either scenario the Commissioner cannot fulfil his statutory obligations in the present matter in the allocated time period and consequently we submit that it would be unlawful to continue the inquiry.

For the reasons set out above we request your early advice that the unlawful circumvention inquiry has been discontinued. Alternatively, if the Commissioner takes the view that the terms of section 269ZDBEA apply to unlawful circumvention inquiries, we request that he terminate the inquiry under subsection (2) of that section on the ground that, patently, there is no evidence of the variable factors applying over the course of the examination period specified in the inquiry notice and consequently no evidence for the total period of the amount of final duty payable, which is an essential element of any lawful assessment of the occurrence of any circumvention activity.

Yours sincerely

MINTER ELLISON



John Cosgrave
Director, Trade Measures

Contact:	John Cosgrave Direct phone +61 2 6225 3781 Fax: +61 2 6225 1781
E.mail:	john.cosgrave@minterellison.com
Partner Responsible:	Ross Freeman Direct phone: +61 3 8608 2648
Our reference:	RNF:JPC 1077359