Australian Government
Anti-Dumping Commission

PUBLIC RECORD

CUSTOMS ACT 1901 - PART XVB

REPORT
NO. 285A

REVIEW OF ANTI-DUMPING MEASURES
HOLLOW STRUCTURAL SECTIONS
EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA
BY DALIAN STEEFLORCE HI-TECH CO LTD

12 June 2018

CONTENTS

ABBREVIATIONS

ACBPS	Australian Customs and Border Protection Service
the Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
the applicant	Steelforce Australia Pty Ltd
Assistant Minister	Assistant Minister for Science, Jobs and Innovation
ATM	OneSteel Australian Tube Mills Pty Ltd
China	The People's Republic of China
the Commission	the Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
CTMS	Costs to make and sell
Dalian Steelforce	Dalian Steelforce Hi-Tech Co., LTD
FCA	Federal Court of Australia
GOC	Government of China
GOI	Government of India
the goods	Hollow Structural Sections as described in section 3.3
HRC	Hot rolled coil
Minister	Minister for Home Affairs
NMDC	National Minerals Development Corporation
the Regulation	*Customs (International Obligations) Regulation 2015*
REP 285	*Anti-Dumping Commission Report No. 285*
REP 285A	*Anti-Dumping Commission Report No. 285A*
SASAC	State-Owned Assets Supervision and Administration Commission
SBB	Steel Business Briefing
SEF	Statement of Essential Facts
SG&A	Selling, general, and administrative expenses
Steelforce Australia	Steelforce Australia Pty Ltd
Steelforce Trading	Steelforce Trading Pty Ltd
Tianjin Youfa	Tianjin Youfa Steel Pipe Co Ltd
TMRO	Trade Measures Review Officer

1 SUMMARY AND RECOMMENDATIONS

1.1 Summary

This review is in response to an application from Steelforce Australia Pty Ltd (Steelforce Australia) to review the anti-dumping measures (in the form of a dumping duty notice) applying to certain hollow structural sections (HSS)[1] exported to Australia from the People's Republic of China (China) as they apply to Steelforce Australia's supplier Dalian Steelforce Hi-Tech Co., Ltd (Dalian Steelforce).

The application for review is based on a change in the variable factors relevant to the taking of the anti-dumping measures in relation to Dalian Steelforce. The variable factors relevant to the review are the normal value, export price, and the non-injurious price (NIP). The application claims that the normal value and export price have changed.

This Report 285A (REP 285A) follows the decision by a majority of the Full Court of the Federal Court of Australia (Full Court) in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20 (*Steelforce v Parliamentary Secretary*). That decision set aside Report 285 (REP 285) and remitted the matter to the Anti-Dumping Commission (the Commission) to prepare a report according to law.

1.2 Applicable law

Division 5 of Part XVB of the *Customs Act 1901* (the Act)[2] provides for affected parties to apply for a review of anti-dumping measures. The division, among other matters:

- sets out the circumstances in which applications for the review of anti-dumping measures may be made;
- sets out the procedure to be followed by the Commissioner of the Anti-Dumping Commission (the Commissioner) in dealing with such an application and preparing a report for the Assistant Minister for Science, Jobs and Innovation (Assistant Minister);[3] and
- provides for the Assistant Minister, after consideration of the report, to leave the measures unaltered or to modify them as appropriate.

1.3 Findings and conclusions

The Commissioner has conducted a review of the anti-dumping measures in respect of exports of certain HSS from China to Australia as they affect Dalian Steelforce and is satisfied that the variable factors relevant to the taking of those measures have changed.

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[1] Refer to the full description of the goods in section 3.3 of this report.

[2] A reference to a legislative provision in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

[3] For the purpose of this review the Minister is the Assistant Minister for Science, Jobs and Innovation.

1.4 Recommendations

In summary, the Commissioner recommends:

- the dumping duty remain a combination of fixed and variable duties;
- the fixed component of interim dumping duty be revised to an amount equal to 17.3 per cent of the export price; and
- the revised interim dumping duty have effect for goods entered for home consumption by Dalian Steelforce from 3 January 2017 to 2 July 2017 (both dates inclusive).

Primary recommendation

The Commissioner recommends that the Assistant Minister modify the dumping duty notice in relation to Dalian Steelforce on the basis of the findings in this report that the variable factors (normal value, export price and NIP) have changed.

Effective dates

In making a declaration modifying the dumping duty notice, the Assistant Minister must specify a date in the declaration from which the changed variable factors are taken to have effect (subsection 269ZDB(1)(a)(iii)). That date must be no earlier than the date of publication of the notice given under section 269ZC indicating the proposal to undertake the review (subsection 269TDB(6)(a)).[4] In practice the Commission generally recommends that any change to variable factors arising from a review take effect from the date of publication of the notice declaring the outcome of the review. On that basis, but for Dalian Steelforce's application for judicial review, the decision would have been made on 30 March 2016.

In the circumstances of this review the Commission has the advantage of having some visibility of the effect of a change of variable factors for interim dumping duties on the final dumping duties that would have been payable to the Commonwealth if those variable factors changed on 30 March 2016. The Commission has found that changing the variable factors would result in no net change in the final dumping duties payable by Dalian Steelforce for importation periods 3 January 2016 to 2 July 2016 (Duty Assessment DA0080) and 3 July 2016 to 2 January 2017 (Duty Assessment DA0096); however, subject to further assessment by the Commission, the Commission considers that changing the variable factors would result in a change in the final dumping duties payable by Dalian Steelforce for the importation period 3 January 2017 to 2 July 2017 (Duty Assessment DA0106). On that basis the Commission would recommend that the variable factors are changed for HSS exported by Dalian Steelforce that has been entered for home consumption in Australia from 3 January 2017.

On 21 June 2017 the then Parliamentary Secretary determined that measures on HSS should continue for goods entered for home consumption after 2 July 2017.[5] The then Parliamentary Secretary also determined to change the variable factors for interim

[4] The Commissioner published the section 269ZC notice proposing to undertake this review on 9 April 2015.

[5] Notice pursuant to subsection 269ZHG(1)(b) of the *Customs Act 1901*, 21 June 2017. Interim dumping duties applying to Dalian Steelforce were subsequently changed by the Assistant Minister

dumping duties applying to Dalian Steelforce (among others) after 2 July 2017. If Review 285 had run its normal course then the variable factors put into effect following Review 285 would have been changed by the then Parliamentary Secretary's 21 June 2017 determination. A declaration for this review should not have the effect of displacing the effect of the then Parliamentary Secretary's 21 June 2017 determination. Accordingly the Commissioner recommends that the variable factors are changed for HSS exported by Dalian Steelforce that has been entered for home consumption in Australia only up to and including 2 July 2017.[6]

[6] The Commission considers that subsection 33(3) of the *Acts Interpretation Act 1901* provides for the Assistant Minister to rescind, revoke or vary a declaration made under subsection 269ZDB(1) in like manner. Subsection 33(3) of the *Acts Interpretation Act 1901* states:

> Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

2 BACKGROUND

2.1 Investigation 177

On 19 September 2011, following application for publication of a dumping duty notice and a countervailing duty notice by OneSteel Australian Tube Mills Pty Ltd (ATM), the then Australian Customs and Border Protection Service (ACBPS) initiated an investigation (Investigation 177) into:

- alleged dumping of certain HSS exported to Australia from China, the Republic of Korea (Korea), Malaysia, the Kingdom of Thailand and Taiwan; and
- alleged subsidisation of certain HSS exported to Australia from China.

On 7 June 2012, the ACBPS provided its final report (REP 177)[7] and recommendations to the then Minister for Home Affairs (Minister). REP 177 concluded that HSS imported from China, Korea, Malaysia and Taiwan was dumped and that Chinese HSS exports were in receipt of countervailable subsidies.

Dalian's dumping and subsidy margins in REP 177 were 13.4 per cent and 11.1 per cent respectively.

The ACBPS found there was a market situation[8] in the domestic HSS market in China during the investigation period that rendered domestic sales of HSS in China unsuitable for use in determining normal values under subsection 269TAC(1) of the Act.

The Minister published a dumping duty notice in *The Gazette* and *The Australian* on 3 July 2012 imposing dumping duties on the goods exported to Australia from China, Korea, Malaysia and Taiwan and a countervailing duty notice imposing countervailing duties on the goods exported to Australia from China (excluding two exporters).

2.2 Review and reinvestigation 203

The Minister's decision following Investigation 117 was subject to review by the Trade Measures Review Officer and reinvestigation by the ACBPS.

The reinvestigation resulted in the ACBPS recommending to the Minister, in Report 203,[9] that the dumping duty notice and countervailing duty notice remain in place but that the amount of interim dumping duty (IDD) applicable to the exports of Dalian Steelforce should be changed to zero.

The Minister accepted these recommendations and on 13 May 2013 published a notice under section 269ZZM of the Act to that effect.

2.3 Federal Court of Australia decision regarding reinvestigation 203

Dalian Steelforce applied to the Federal Court of Australia for judicial review of the Ministerial decisions made in relation to reinvestigation 203. In August 2015 the Federal

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[7] Refer to REP 177.

[8] Subsection 269TAC(2)(a)(ii).

[9] Refer to REP 203.

Court of Australia (FCA) handed down its decision, which included a finding that one subsidy program found to be countervailable in REP 177 and REP 203 (program 20 - hot rolled steel provided by government at less than adequate remuneration) was not a countervailable subsidy for the purposes of subsection 269TAAC(4) of the Act.

To implement the FCA decision, the then Parliamentary Secretary reconsidered the dumping and countervailing duty notices that were issued in respect of Dalian during REP 177, to ensure that program 20 was excluded from Dalian's subsidy margin. In doing so, the Parliamentary Secretary found that Dalian's subsidy margin was negligible, and in February 2016 gave public notice of her decision under subsection 269ZZM(1) that the countervailing duty notice in respect of Dalian should be revoked retrospectively. The Parliamentary Secretary determined that Dalian's dumping margin had changed and consequently the fixed and variable component of IDD applicable to Dalian's exports had changed (with a dumping margin of 10.6 per cent), and that this would be the effective rate of duty applicable to Dalian.[10]

As a result of the then Parliamentary Secretary's decision to revoke the countervailing duty notice in respect of Dalian, countervailable subsidies have not been considered as part of this review.

2.4 Initiation of Review 285

On 10 March 2015, Steelforce Australia lodged an application requesting a review of the anti-dumping measures as they apply to Dalian Steelforce's exports of HSS to Australia under Division 5 of Part XVB of the Act.[11] Steelforce Australia's application claimed that certain variable factors relevant to the taking of the anti-dumping measures have changed.

On 9 April 2015, the Commissioner initiated this review of the anti-dumping measures in respect of HSS as they apply to Dalian Steelforce.

The review period for this review is 1 January 2014 to 31 December 2014. The review is limited to examining whether the variable factors, relevant to the taking of anti-dumping measures as they affect Dalian Steelforce, have changed.

2.5 Review process

If anti-dumping measures have been taken in respect of goods and an affected party considers that it may be appropriate to review those measures because one or more of the variable factors relevant to the taking of the measures have changed, the affected party may request that the Commissioner initiate a review (subsection 269ZA(1)).

Where the measures involve the publication of a dumping duty notice or countervailing duty notice, an application for review must not be made earlier than 12 months after the publication of the notice or the publication of a notice declaring the outcome of the last review notice (subsection 269ZA(2)(a)). The Assistant Minister may however, at any time request that the Commissioner initiate a review (subsection 269ZA(3)).

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[10] Refer to the Anti-Dumping Commission's website for public notice of the then Parliamentary Secretary's decision.

[11] All legislative references in this report are references to the *Customs Act 1901*, unless otherwise stated.

If an application for review of anti-dumping measures is received and not rejected the Commissioner must, within 110 days or such longer period as the Assistant Minister allows, place on the public record a statement of essential facts (SEF) on which he proposes to base recommendations to the Assistant Minister in relation to the review of those measures (subsection 269ZD(1)).

The Commissioner must, after conducting a review of anti-dumping measures and within 155 days or such longer period as the Assistant Minister may allow, give the Assistant Minister a report setting out recommendations on the review of the measures (subsection 269ZDA(1)).

In making recommendations in his report to the Assistant Minister, the Commissioner must have regard to (subsection 269ZDA(3)(a)):

- the application for review;
- any submission relating generally to the review of the anti-dumping measures to which the Commissioner has had regard for the purpose of formulating the SEF;
- the SEF; and
- any submission made in response to the SEF that is received by the Commissioner within 20 days of it being placed on the public record.

The Commissioner may have regard to any other matter he considers to be relevant to the review (subsection 269ZDA(3)(b)).

After considering the report of the Commissioner and any other information that the Assistant Minister considers relevant the Assistant Minister must declare by publishing a notice that the dumping duty notice and/or countervailing duty notice (subsection 269ZDB(1)):

- remain unaltered; or
- be revoked in its application to a particular exporter or to a particular kind of goods or revoked generally; or
- have effect, in relation to a particular exporter or to exporters generally, as if different variable factors had been ascertained.

The Assistant Minister must make a declaration within 30 days of receiving the report or, if the Assistant Minister considers there are special circumstances that prevent the declaration being made within that period, such longer period as the Assistant Minister considers appropriate (subsection 269ZDB(1A)).

2.6 Statement of essential facts (SEF 285)

On 28 July 2015 the Commissioner published SEF 285[12] to inform interested parties of the essential facts on which the Commissioner proposed to base a recommendation to the then Parliamentary Secretary in relation to the review.

[12] Refer to REP 285.

2.6.1 Submissions in response to the SEF 285

The Commissioner received the following submissions in response to SEF 285:

Interested party	Date received
Dalian Steelforce	31 July 2015
Dalian Steelforce	18 August 2015
Australian Tube Mills	18 August 2015
Dalian Steelforce	25 August 2015
Dalian Steelforce	31 August 2015

Table 1

Non-confidential versions of the above submissions are on the public record.

The Commissioner has had regard to these submissions in deciding on the recommendations made to the Assistant Minister in this report. Details of submissions received, and the Commission's assessment of those submissions, are included in relevant sections of this report.

2.6.2 Supplementary information to SEF 285

Following the publication of SEF 285, the Commission placed two file notes on the public record for Review 285.[13] The first, published on 17 November 2015, revealed the source of the data used to index the hot rolled coil (HRC) benchmark price in SEF 285. The second file note, published on 27 November 2015, detailed an error contained in the calculation of Dalian Steelforce's normal value in SEF 285. The error was subsequently corrected and amended calculations were provided to Dalian Steelforce.

The Commission has received a number of submissions with regards to these two file notes, which are summarised below in Table 2. The Commission has responded to the submissions in appropriate sections of this report.

Interested party	Date received
Dalian Steelforce	1 December 2015
Australian Tube Mills	3 December 2015
Dalian Steelforce	9 December 2015
Australian Tube Mills	22 December 2015
Kukje Steel Co	23 December 2015

Table 2

2.7 Report 285, application for judicial review and appeal

On 29 February 2016 the Commission provided REP 285 to the then Parliamentary Secretary. REP 285 recommended, among other things, that the then Parliamentary

[13] Accessible via the electronic public record.

Secretary impose an interim dumping duty of 17.3 per cent on exports of certain HSS exported from China by Dalian Steelforce. The then Parliamentary Secretary's decision on the recommendations in REP 285 was due before 30 March 2016.

On 17 March 2016 the applicant and Dalian Steelforce applied to the Federal Court to review the Commission's recommendations to the then Parliamentary Secretary and to review the Parliamentary Secretary's consideration of REP 285. On 9 November 2016 Robertson J found that the application failed on all grounds and dismissed the application.

On 24 November 2016 the applicant and Dalian Steelforce appealed Robertson J's decision to the Full Court. On 19 February 2018 the majority of the Full Court found for the appellants on one of five grounds of appeal, namely that Robertson J had erred by failing to conclude that the Commission had erred in calculating "actual amounts realised" within subsection 45(3)(a) of the *Customs (International Obligations) Regulation 2015* (the Regulation).[14] On that basis the Full Court ordered that REP 285 be set aside and remitted the matter to the Commission for preparation of a report according to law. Accordingly the Commission has prepared this REP 285A in place of REP 285.

[14] *Steelforce v Parliamentary Secretary* at [103] per Perram J and [143] per Bromwich J.

3 THE GOODS AND LIKE GOODS

3.1 Finding

The Commissioner considers there is an Australian industry that produces HSS with characteristics closely resembling those of the goods under consideration, and therefore, HSS manufactured by the Australian industry are considered like goods.[15]

3.2 Legislative framework

The Commissioner must be satisfied that the "like" goods are in fact produced in Australia. Subsection 269T(2) of the Act specifies that for goods to be regarded as being produced in Australia, they must be wholly or partly manufactured in Australia. In accordance with subsection 269T(3) of the Act, for the goods to be considered as partly manufactured in Australia, at least one substantial process in the manufacture of the goods must be carried out in Australia.

3.3 The goods

The goods subject to the measures (the goods) are:

> *certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as HSS (hollow structural sections). Finish types for the goods include in-line galvanised (ILG), pre-galvanised, hot-dipped galvanised (HDG) and non-galvanised HSS.*

Sizes of the goods are, for circular products, those exceeding 21mm up to and including 165.1mm in outside diameter and, for oval, square and rectangular products those with a perimeter up to and including 1277.3mm.

Categories of HSS excluded from the goods are conveyor tube; precision RHS with a nominal thickness of less than 1.6 mm and air heater tubes to Australian Standard (AS) 2556.

For additional information regarding the types of products included or excluded from the goods description, refer to SEF 285.

3.4 Tariff classification

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

- 7305.90.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37);
- 7306.61.00 (statistical codes 21, 22, and 25); and

[15] In terms of section 269T.

- 7306.69.00 (statistical code 10).

The goods exported to Australia from China are subject to a 4% rate of duty.

3.5 Like goods produced by the Australian industry

During Investigation 177 the ACBPS found that:

- there was an Australian industry producing like goods;
- a substantial process of manufacture was carried out in Australia in producing the like goods;
- the like goods were wholly manufactured in Australia; and
- there was an Australian industry consisting of four Australian companies that produce like goods in Australia.

The Commissioner remains satisfied there is an Australian industry producing like goods.

3.6 Like goods produced and sold in China by Dalian Steelforce

Dalian Steelforce advised that, during the review period, its domestic sales of HSS were dissimilar to its export sales, and consisted entirely of non-prime product or downgrade product. Non-prime or downgrade product is HSS that was initially intended for sale in the Australian market but due to defects or quality issues does not meet Australian standards.

In Investigation 177 the Commission found that although the non-prime and downgrade products were like goods to the good exported to Australia, they were not sold 'in the ordinary course of trade'. They are isolated sales of sub-standard product and it is more cost-effective to dispose of them locally than export to Australia.

3.7 Submissions regarding extension of the goods description

On 18 August 2015 ATM made a submission arguing that HSS with added boron should be included in this review. ATM states:

> *Dalian Steelforce produces and exports non-alloy HSS and alloyed HSS to Australia…The addition of boron to qualify the goods as "alloyed" is a strategic decision to avoid the anti-dumping measures…As such, the review of the variable factors must take account of the domestic and export sales by Dalian Steelforce of alloyed HSS and be reflected in the revised variable factors…*

On 25 August 2015 the Commission received a submission from Dalian Steelforce which responded to ATM's above submission, which argued that the original measures relate specifically to HSS made of carbon steel, and therefore are not subject to the review.

3.7.1 Commission's assessment

The Commission has not included alloyed HSS in the assessment of variable factors for this review of measures, as alloyed HSS was not the subject of measures during the review period.

A determination to extend the dumping duty notice in respect of HSS exported from China, Korea and Malaysia to include alloyed HSS was recommended following Anti-Circumvention Inquiry 291.[16] On 17 March 2016, with effect from 11 May 2015, the then Parliamentary Secretary published a notice amending the goods description on the original notice to include alloyed HSS exported by Dalian Steelforce (among others).[17]

[16] Refer to the electronic public record for Inquiry 291.

[17] ADN 2016/24.

4 VARIABLE FACTORS – DUMPING DUTY NOTICE

4.1 Finding

This review has found that variable factors relevant to the taking of anti-dumping measures in respect of the dumping duty notice in relation to Dalian Steelforce have changed.

The Commission recommends to the Assistant Minister that the variable factors of export price, normal value and NIP be altered.

4.2 Export price

4.2.1 Sales to Steelforce Trading

During Investigation 177, the then ACBPS (and subsequently the then Minister) were satisfied that export transactions between Dalian Steelforce and Steelforce Trading Pty Ltd (Steelforce Trading) were not arms length because it was found that the relationship between the parties had influenced the price of HSS exported to Australia.

The Commission found no evidence to indicate that the relationship between Dalian Steelforce and Steelforce Trading had changed. Accordingly, for purposes of this review, the Commission considers that sales directly between Dalian Steelforce and Steelforce Trading are not arms length sales.

For the goods imported directly by Steelforce Trading:

- the goods have been exported to Australia otherwise than by the importer;
- the goods have been purchased by the importer from the exporter;
- the purchases of the goods by the importer were not arms length transactions.

As the purchase of the goods was not at arms length, the export price cannot be ascertained under subsection 269TAB(1)(a) of the Act.

The Commission has then assessed whether a deductive export price under subsection 269TAB(1)(b) is appropriate. Subsection 269TAB(1)(b) requires that the goods be subsequently sold by the importer, in the condition they were imported, to a person who is not an associate of the importer. However, the Commission understands that, once imported by Steelforce Trading, the goods are subsequently sold to another member of the Steelforce group.

Consequently, the export price of these transactions has been determined having regard to all the circumstances of the exportation, as permitted under subsection 269TAB(1)(c). This involved using Dalian Steelforce's monthly weighted average export invoice prices, by model, excluding any part of that price that relates to post exportation charges.[18]

This approach is consistent with that taken in Investigation 177.

[18] Rep 177, page 50.

The invoiced prices between Steelforce Trading and Dalian Steelforce did not include any charges for transport after exportation; therefore no deduction was made for customs duty, ocean freight or marine insurance.

4.2.2 Sales to other entities

For goods sold to the importer via other entities, because the goods were not purchased by the importer from the exporter, subsections 269TAB(1)(a) and (b) are not applicable. The Commission considers that, for the purposes of this review, export prices should be established under subsection 269TAB(1)(c) as the price between Dalian Steelforce and the other entities. As the invoiced prices did not include any charges for transport after exportation, no deduction was made for customs duty, ocean freight or marine insurance.

The resulting FOB export price for the goods exported by Dalian Steelforce has changed since the original investigation.

4.2.3 Conclusion – export price

Export prices for all goods exported to Australia by Dalian Steelforce during the review period have been determined in accordance with subsection 269TAB(1)(c) having regard to all the circumstances of the exportations. Details of export price calculations are at **Confidential Appendix 1**.

4.3 Normal value

The Commission is satisfied that sufficient information has not been furnished and is not available to enable the normal value to be ascertained under subsections preceding subsection 269TAC(6) (other than subsection 269TAC(5D)).

Accordingly the Commission has determined the normal value under subsection 269TAC(6) having regard to all relevant information. The Commission has had regard to all relevant information and, in particular, considers that the information used to determine normal value in REP 285 is highly relevant to an assessment of Dalian Steelforce's normal value.

4.3.1 Approach to normal value in REP 285

In REP 285 the Commission calculated the normal value under subsection 269TAC(2)(c).[19] Subsection 269TAC(2)(c) provides for normal values to be calculated as the cost of production of the goods plus the selling, general and administrative (SG&A) expenses associated with the sale and profit on that sale.[20]

As required by subsection 269TAC(5B) the Commission worked out the profit in the manner, and taking account of such factors, as the regulations provide for that purpose. Section 45 of the Regulation sets out the manner in which the Commission must work out the profit and the factors that the Commission must take account of for that purpose (subsection 45(1)). In REP 285 the Commission found that there were no sales by Dalian

[19] This was consistent with the approach taken in Investigation 177.

[20] On the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export.

Steelforce of like goods in the ordinary course of trade[21] and accordingly the Commission sought to work out the amount of profit under subsection 45(3); in particular the Commission sought to work out the amount of profit under subsection 45(3)(a).

Subsection 45(3)(a) provided for the Commission to work out the amount of profit by identifying the actual amounts realised by Dalian Steelforce from the sale of the same general category of goods in the Chinese domestic market. At the time of preparing REP 285 the Commission considered that it was open to it to work out the amount of profit under subsection 45(3)(a) by reference to the cost of production in the review period; this was notwithstanding the contention that much of the HSS had not been produced during the review period but at an earlier time when production costs were different.[22]

4.3.2 Findings in the Full Court

In the Full Court Perram and Bromwich JJ found that the term "actual amounts realised" in subsection 45(3)(a) required attention to a real world figure that was actually realised and that what the Commission did does not answer that description.[23]

Justice Bromwich held that subsection 45(3)(a) required that profit to be calculated was that which was actually gained from each of the items sold in the review period by subtracting the production cost from the sale price for each.[24] This was not what took place; instead the Commission had used the cost of production for the sale period only and applied it both to items made during sale period and to items made at an earlier period.[25] Justice Bromwich considered that it was not to the point that Dalian Steelforce's data did not identify precisely when the earlier items were in fact made; rather this probably meant that subsection 45(3)(a) could not be used at all.[26]

Justice Perram held that to the extent that the figure in subsection 45(3)(a) cannot be ascertained and the other methodologies in subsection 45 were unavailable (as was the case in Review 285), then the Commission was unable to determine the figure under subsection 269TAC(2)(c)(ii). Justice Perram held that that precise situation was contemplated by subsection 269TAC(6) which expressly provided a methodology where, inter alia, subsection 269TAC(2)(c)(ii) was unable to be applied. At [97]:[27]

> In light of that, two factors compel me to the view that 'actual amounts realised' in reg 45(3)(a) requires the assessment of an actual amount not satisfied in this case. *First*, it is the ordinary meaning of the word 'actual'. What was determined by the Commissioner in this case was an amount but it was not the actual amount realised. *Secondly*, to the extent that it turns out that the figure in reg 45(3)(a) cannot be ascertained and all of the other methodologies in reg 45 are unavailable (as was the case here), then the answer is that

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[21] REP 285 at section 4.4.3.2.

[22] *Steelforce v Parliamentary Secretary* per Perram J at [88].

[23] *Steelforce v Parliamentary Secretary* per Perram J at [92].

[24] *Steelforce v Parliamentary Secretary* per Bromwich J at [140].

[25] *Steelforce v Parliamentary Secretary* per Bromwich J at [141].

[26] *Steelforce v Parliamentary Secretary* per Bromwich J at [142].

[27] *Steelforce v Parliamentary Secretary* per Perram J at [97], italics in original; see also *Steelforce v Parliamentary Secretary* per Perram J at [102] stating that the answer to any problems in assessing what subsection 45(3)(a) calls for, lies in subsection 269TAC(6).

> the Commissioner is unable to determine the figure under s 269TAC(2)(c)(ii). That precise situation is contemplated by s 269TAC(6) which explicitly provides a methodology where, *inter alia*, s 269TAC(2)(c)(ii) has proven unable to be applied. There is no need to reach for a strained interpretation of 'actual amounts realised' in reg 45(3)(a) when that provision is available.

Dalian Steelforce agreed in substance; where the Commission could not determine one of the elements in subsection 269TAC(2)(c) then the Commission should apply subsection 269TAC(6).[28]

In the event Perram J was unable to apply subsection 269TAC(6) because it required the formation of a state of satisfaction that had not yet occurred,[29] namely that the Commissioner be satisfied that sufficient information had not been furnished or was not available to enable the normal value to be ascertained under subsections preceding subsection 269TAC(6) (other than subsection 269TAC(5D)). Absent that state of satisfaction Perram J stated that REP 285 must be set aside[30] and remitted to the Commission to prepare a report according to law.[31]

4.3.3 Approach to normal value in this report

The Commission has assessed whether sufficient information has been furnished or is otherwise available to enable normal value to be ascertained under the subsections preceding subsection 269TAC(6) (other than subsection 269TAC(5D)).

On the basis that the Commission is satisfied that sufficient information has not been furnished or is not available to enable normal value to be ascertained under the subsections preceding subsection 269TAC(6) (other than subsection 269TAC(5D)) the Commission has had regard to all relevant information in determining the normal value. This has included the information previously considered for the purposes of REP 285.

4.3.4 Sufficient information has not been furnished and is not available to enable normal value to be ascertained under subsections preceding subsection 269TAC(6)

The Commissioner is satisfied that sufficient information has not been furnished and is not available to enable normal value to be ascertained under the subsections preceding subsection 269TAC(6) (other than subsection 269TAC(5D)).

4.3.4.1 Normal value is not able to be ascertained under subsection 269TAC(1)

Investigation 177, and subsequently in Reinvestigation 203, found that there is a situation in the domestic Chinese HSS market such that sales in that market are not suitable for

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[28] *Steelforce v Parliamentary Secretary* per Perram J at [113] and [125] describing Dalian Steelforce's submissions; Dalian Steelforce's submissions were specifically concerned with a situation where the Commission could not determine a cost of manufacture under subsection 269TAC(2)(c)(i) however the same argument would equally apply *mutatis mutandis* to a situation where the Commission could not determine an amount for profit under subsection 269TAC(2)(c)(ii).

[29] *Steelforce v Parliamentary Secretary* per Perram J at [103].

[30] *Steelforce v Parliamentary Secretary* per Perram J at [103].

[31] *Steelforce v Parliamentary Secretary* per Perram J at [127].

determining normal values under subsection 269TAC(1). REP 177 and REP 203 contain the reasons for this finding.

SEF 285 and REP 285 made a finding consistent with REP 177 and REP 203 in this respect. Dalian Steelforce did not challenge that finding and the finding was not otherwise disturbed by the Full Court.[32] Consistent with these findings the Commission considers that the normal value is not able to be ascertained under subsection 269TAC(1).

4.3.4.2 Normal value is not able to be ascertained under subsection 269TAC(2)

4.3.4.2.1 Normal value is not able to be determined under subsection 269TAC(2)(c)

Subsection 269TAC(2)(c) provides for normal values to be calculated as the cost of production of the goods plus[33] the selling, general and administrative (SG&A) expenses associated with the sale and profit on that sale. Subsections 269TAC(5A) and 269TAC(5B) require that the Commission work out the amounts referred to in subsection 269TAC(2)(c) in the manner, and taking account of such factors, as the regulations provide.

The Commission sought to calculate the normal value under subsection 269TAC(2)(c) in REP 285 and this approach was reviewed by the Full Court. The Full Court found that the Commission had erred in assessing profit under the regulations for the reasons described in section 4.3.2 above.

Profit under subsection 45(2)

In REP 285 the Commission noted that the domestic sales listing provided by Dalian Steelforce included sales of both non-alloy (carbon steel) HSS and alloyed HSS. Dalian Steelforce only had sales of non-alloy HSS during the investigation period for investigation 177 and the then ACBPS found that sales of those goods, while like goods, were not made in the ordinary course of trade and therefore not suitable for determining an amount for profit. Dalian Steelforce had no other domestic sales, thus no sales of 'the same general category of goods'.

The Commission further examined the sales of alloyed HSS made during the review period and considered that alloyed HSS was not a like good to non-alloy HSS, on the basis that alloyed HSS was not subject to the dumping duty notice. This was consistent with views expressed by Dalian Steelforce during Anti-Circumvention Inquiry 291.[34]

In relation to the domestic sales of like goods, the Commission was satisfied in REP 285 that these sales were only of products considered non-prime or downgrade; the Commission considered that the nature and low volume of these goods meant that domestic sales during the review period were not in the ordinary course of trade. The Commission found accordingly that there were no sales of like goods in the ordinary course of trade and so subsection 45(2) cannot apply.

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[32] *Steelforce v Parliamentary Secretary* per Perram J at [105].

[33] On the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export.

[34] Dalian Steelforce submission dated 25 November 2015 (EPR document 24 on EPR 291).

The Full Court did not disturb the Commission's finding in relation to subsection 45(2) and indeed Dalian Steelforce made submissions following SEF 285 in support of the Commission's position.[35]

The Commission accordingly concludes that profit cannot be determined under subsection 45(2).

Profit under subsection 45(3)(a) in SEF 285 and REP 285

The Commission sought to determine profit under subsection 45(3)(a) in REP 285. The Full Court found that the Commission erred in determining profit under subsection 45(3)(a) for the reasons set out in section 4.3.2 above.

For the reasons set out in section 4.3.2 above and in *Steelforce v Parliamentary Secretary* profit cannot be determined under subsection 45(3)(a).[36]

Profit under subsection 45(3)(b)

Subsection 45(3)(b) provides that the Minister may work out an amount for profit by identifying the weighted average of actual amounts realised by other exporters from sales of like goods in the domestic market of the country of export.

The Commission observed in REP 285 that it had access to information concerning profit realised on domestic sales of HSS by another Chinese exporter of the goods. However the *Dumping and Subsidy Manual* states that the Commission will only apply subsection 45(3)(b) where there are two or more other exporters providing profit data. This approach reflects the findings of the World Trade Organisation Appellate Body in the *Bed Linen* case regarding Article 2.2.2(ii) of the *Anti-Dumping Agreement* (which is given effect in Australian law in subsection 45(3)(b)). In that case the Appellate Body held that Article 2.2.2(ii) does not permit calculation of profit using data relating to only one exporter.[37]

The Full Court did not disturb the Commission's finding in relation to subsection 45(3)(b) and Dalian Steelforce made two submissions supporting the Commission's finding in relation to subsection 45(3)(b).[38]

The Commission accordingly concludes that profit cannot be determined under subsection 45(3)(b).

Profit under subsection 45(3)(c) in SEF 285 and REP 285

Subsection 45(3)(c) provides for an amount for profit to be worked out using any other reasonable method and having regard to all relevant information. Subsection 45(4) imposes a cap on the amount of profit that can be added under subsection 45(3)(c); to wit, the amount worked out under subsection 45(3)(c) must not exceed the profit normally realised by the other exporters on sales of the same general category of goods in the

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[35] Dalian Steelforce submission dated 20 August 2015 at section 3.

[36] See for example *Steelforce v Parliamentary Secretary* per Perram J at [91] and per Bromwich J at [142].

[37] *EC – Bed Linen* (DS141).

[38] Dalian Steelforce submission dated 20 August 2015 at section 3; Dalian Steelforce submission dated 16 March 2018 at section B.

domestic market. The Commission considers that the methodology in subsection 45(3)(c) is not available if the limiting machinery of subsection 45(4) cannot be applied.[39]

In REP 285 the Commission found that it did not have information that would allow it to determine the profit normally realised by other exporters or producers on sales of the same general category of goods in the domestic market. On that basis the Commission could not calculate the subsection 45(4) cap and therefore did not apply subsection 45(3)(c).

The Full Court did not disturb the Commission's finding in relation to calculating the cap under subsection 45(4) and no party challenged the finding following SEF 285 or before the Federal Court or the Full Court.[40]

Submission by Dalian Steelforce concerning subsection 45(4)

Following the Full Court handing down its judgment Dalian Steelforce made a submission to the Commission concerning, in part, determining profit under subsection 45(3). Dalian Steelforce argued that the Commission had "ample" information available with which to determine the cap under subsection 45(4);[41] on that basis, Dalian Steelforce argued, the Commission's conclusion in SEF 285 (and REP 285) that it could not determine the cap under subsection 45(4) was incorrect.

Dalian Steelforce's submission notes that the finding in SEF 285 stated that the Commission did not have access to information about the profit normally realised by other exporters of the same general category of goods in the domestic market "during the review period".[42] Dalian Steelforce contends that subsection 45(4) does not refer to any period and that therefore there is no basis for limiting a subsection 45(4) assessment to exactly the same period as the review period.[43] Dalian Steelforce considers that reasonable contemporaneity is relevant as a matter of common sense.[44]

Dalian Steelforce argues that the Commission should determine the subsection 45(4) cap by combining information from Review 267 and Investigation 177.[45] Dalian Steelforce cites SEF 285 which observed that that the five cooperating exporters in Investigation 177 operated at an overall net loss and therefore no amount for profit was included.[46]

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[39] Dumping and Subsidy Manual, page 48.

[40] Justice Perram noted the Commission's view that the methodology in subsection 45(3)(c) is not available if the cap in subsection 45(4) cannot be determined and declined to express a concluded view whether that was correct. He considered that resolution of the issue should await a case in which it is squarely raised. *Steelforce v Parliamentary Secretary* at [91]; before the Full Court Dalian Steelforce agreed with the Commission's position that subsection 45(4) is crucial to the operation of subsection 45(3)(c) – see Full Court transcript at pages 36 and 68.

[41] Dalian Steelforce submission dated 16 March 2018 at page 4.

[42] Dalian Steelforce submission dated 16 March 2018 at page 3.

[43] Dalian Steelforce submission dated 16 March 2018 at page 4.

[44] Dalian Steelforce submission dated 16 March 2018 at page 4.

[45] Dalian Steelforce submission dated 16 March 2018 at page 4; Dalian Steelforce also cites Reinvestigation 203, which reinvestigated certain findings in REP 177 and relied on information from and related to Investigation 177, see REP 203 at section 10.

[46] Dalian Steelforce submission dated 16 March 2018 at page 4.

The Commission's assessment of whether subsection 45(4) cap can be calculated

The Commission has reassessed whether the subsection 45(4) cap can be calculated for this review and remains of the view that the cap cannot be calculated for this review.

The Commission notes generally that Dalian Steelforce's submission does not state why or how available information from Review 267 and Investigation 177 would allow the Commission to determine the amount specified in subsection 45(4), namely the amount of profit normally realised by other Chinese exporters or producers. In this respect the Commission considers that the reasoning of the majority of the Full Court in respect of subsection 45(3)(a) is also relevant to subsection 45(4), namely that the meaning of the provision cannot be impermissibly adjusted to overcome a deficiency in the information available.[47] In particular, if the Commission has information concerning profits realised by other Chinese exporters or producers but those profits are not the profit *normally* realised then that information cannot be pressed into service to calculate the cap in subsection 45(4).

The Commission accepts Dalian Steelforce's proposition that subsection 45(4) does not refer to any period and accordingly an assessment of the profit normally realised by other exporters or producers is not strictly tied to the review period. However the Commission does not accept Dalian Steelforce's argument that reasonable contemporaneity is relevant "as a matter of common sense";[48] contemporaneity may be relevant in assessing whether profit information reflects profits that are normally realised (historical profit information is less likely to reflect profits that are normally realised in the relevant period) however if contemporaneous profits are not normal then information about such profits will not be suitable for assessing the subsection 45(4) cap.

The Full Court resisted arguments that a liberal construction might be used for subsection 45(3)(a) on the basis that subsection 269TAC(6) was available for circumstances that did not come within the regulations (and preceding provisions in section 269TAC). The Commission similarly considers that a liberal construction should not be used for subsection 45(3)(c) and the cap in subsection 45(4).

The Commission notes further that subsection 45(4) is concerned with "*the* amount of profit normally realised" not with *an* amount of profit normally realised.[49] On that basis subsection 45(4) would not permit the use of one of a number of amounts of profit that would be considered "normal"; there can be only one such amount.[50] It follows that, for example, information concerning the profit of a single representative exporter would not (without more) suffice to determine the subsection 45(4) cap.

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[47] Bromwich J at [142]; similarly, Perram J at [97] stating that there was no need to reach for a strained interpretation of subsection 45(3)(a) when subsection 269TAC(6) is available – by the same reasoning, there is no need to reach for a strained interpretation of subsection 45(4).

[48] Dalian Steelforce submission dated 16 March 2018 at page 4.

[49] This is consistent with the Anti-Dumping Agreement at Art 2.2.2(iii) which says "*the* profit normally realized" (emphasis added).

[50] See for example the discussion of "a normal" and "the normal" requirement in *Baker v Department* AAT No N96/1190 at [36] to [46].

The Commission considers that interpretation of the term "normally" in subsection 45(4) should start with its ordinary meaning. The Macquarie Dictionary provides the following definition for the term "normally" as:

> as a rule; regularly; according to rule, general custom, etc.

Similarly the Macquarie Dictionary provides the following definition for the term "normal" as:

> conforming to the standard or the common type; regular, usual, or not abnormal
>
> …
>
> the normal form or state; the average or mean

The Commission does not accept Dalian Steelforce's submission that exporter information from REP 177 would be suitable for use in determining the subsection 45(4) cap for the following reasons:

- As Dalian Steelforce itself observed, the weighted average of profits realised by other exporters was an overall net loss. The Commission considers that losses (being negative profits) would not usually be considered normal (in the sense of being usual, regular or according to the standard) because if losses were normal then those firms would cease trading.
- The investigation period for REP 177 was 1 July 2010 to 30 June 2011. This period was in the immediate aftermath of the global financial crisis in 2008 (GFC) and significant change in the Chinese economy. These had a substantial impact on profits for steel products. As the Commission concluded in its 2016 analysis of steel and aluminium markets:[51]

  > While prices and margins would have been expected to return to more "normal" levels once global capacity caught up with demand, the GFC, a subsequent slowdown in global economic activity and an acceleration of China's economic transition (from investment-led growth to being more consumption-based) has resulted in prices and margins falling below "normal" long-term (underlying) levels.
  >
  > Prices for steel and aluminium are today around half of their pre-GFC peaks which has reduced margins and increased the financial pressure on producers. In some cases, producer margins are negative. Inventories remain at high levels and steel utilisation rates, which were as high as 85 per cent or more pre-GFC, are now much lower at 75 per cent.

- Dalian Steelforce observed that REP 177 set profit at zero because amounts realised by other exporters was an overall net loss. The Commission considers that this has limited relevance to the current case because the relevant profits in that case were calculated under subsection 45(3)(b) and hence there was no requirement to assess whether those profits were normal as required under subsection 45(4).

The Commission does not accept Dalian Steelforce's submission that exporter information from Review 267 would be suitable to use in determining the subsection 45(4) cap for the following reasons:

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[51] *Analysis of steel and aluminium markets: Report to the Commissioner of the Anti-Dumping Commission*, August 2016 at page 33; see also page 30.

- The Commission considers that information concerning the profit of a single exporter will generally not, without more, be suitable for determining the profit normally realised by other exporters. There is no evidence that would support a finding that the profit of the single exporter in Review 267 was the profit normally realised by other exporters.[52]
- The review period for Review 267 was 1 July 2013 to 30 June 2014. The Commission's 2016 analysis of steel and aluminium markets shows that the GFC continued to have a substantial impact on margins in the Chinese steel industry during the review period for Review 267;[53] profits during that period remained abnormal. Accordingly the Commission does not consider that profit information from Review 267 would be suitable in determining an amount for profit normally realised.

Dalian Steelforce proposed that the Commission might combine information from Review 267 and Investigation 177 to determine an amount for profit normally realised under subsection 45(4). The Commission considers that there may be circumstances where combining profit information from different sources or periods may yield an amount of profit normally realised by averaging different amounts. However the Commission does not consider that combined profit information from Review 267 and Investigation 177 would be suitable for determining profits normally realised because all profits from the periods in Review 267 and Investigation 177 were impacted by the GFC and could not be considered normal.

For these reasons the Commission considers that the subsection 45(4) cap cannot be calculated for this review.

4.3.4.2.2 Normal value is not able to be determined under subsection 269TAC(2)(d)

Subsection 269TAC(2)(d) provides that normal value may be the price of like goods exported to a third country according to the following:

> if the Minister directs that this paragraph applies—the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transactions.

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[52] It is not clear to the Commission that subsection 23(b) of the *Acts Interpretation Act 1901* (AIA) would apply here (subsection 23(b) provides that words in the plural include the singular). There appears to be a contrary intention in subsection 45 (AIA at subsection 2(2)) on the basis that reading subsection 45(4) as providing a cap that is the amount of profit normally realised by another exporter would materially "change the character of the legislation" (see *Blue Metal Industries v Dilley* (1969) 117 CLR 651 at 658; also *Pfeiffer v Stevens* [2001] HCA 71).

Australia's anti-dumping legislation comes from an international agreement to which subsection 23(b) of the AIA does not apply. In that context, whether words in the plural include the singular is considered on a case-by-case basis. In *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (see [73] to [77]) the Appellate Body overruled the dispute settlement panel's reading of a plural term as including the singular "as a general matter".

[53] *Analysis of steel and aluminium markets: Report to the Commissioner of the Anti-Dumping Commission*, August 2016 at page 30.

The Commission does not have the information in this case that would be necessary to assess whether:

- sales to third countries are in the ordinary course of trade;
- such transactions are arms length;
- a price determined under subsection 269TAC(2)(d) is representative of the price paid in such sales (subsection 269TAC(3)).

Accordingly the Commission is not able to determine normal value under subsection 269TAC(2)(d).

4.3.4.3 Normal value is not able to be ascertained under subsection 269TAC(4)

In April 2005 Australia agreed that China should have market economy status for anti-dumping purposes (Australian Customs Dumping Notice 2005/26). In doing so Australia in effect recognised that the conditions for the Minister determining normal value under subsection 269TAC(4) were no longer satisfied in relation to China (see *Dumping and Subsidy Manual*, April 2017 at chapter 11).

Accordingly the Commission considers that normal value is not able to be ascertained under subsection 269TAC(4).

4.3.5 Information and methodology relevant to determining normal value under subsection 269TAC(6)

The Commission is satisfied that sufficient information has not been furnished or is not available to enable the normal value to be ascertained under subsections preceding subsection 269TAC(6) and accordingly the normal value is such amount as is determined having regard to all relevant information.

Consistent with the view of the majority in *Steelforce v Parliamentary Secretary* the Commission considers that:

- the information it used to determine normal value in REP 285 is relevant to have regard to in determining normal value under subsection 269TAC(6);
- a methodology analogous to that used to determine normal value in REP 285 (a constructed normal value) is suitable for determining normal value under subsection 269TAC(6).

The Commission considers that there is a broad discretion in how it determines normal value under subsection 269TAC(6). This is consistent with the judgments in *Pilkington v Anti-Dumping Authority*[54] in relation to subsection 269TAB(1)(c) which is drafted in similarly broad terms.

The Commission considers that it is open to it under subsection 269TAC(6) to use a methodology analogous to that used to construct a normal value under subsection 269TAC(2)(c) (as was used in REP 285). However consistent with the judgments in *Pilkington v Anti-Dumping Authority* the Commission considers that use of a subsection 269TAC(2)(c) methodology under subsection 269TAC(6) is not subject to the rigours of

[54] *Pilkington (Australia) Ltd v The Anti-Dumping Authority & Anor* FCA 205 [1995], majority judgment at page 11 and elsewhere; Lee J in a minority judgment agreed with the reasons of the majority, see page 1 of Lee J's judgment.

statutory construction that would be required under a calculation under subsection 269TAC(2)(c); to do so would confine the discretion.[55] In particular, as stated in the leading judgment in *Steelforce v Parliamentary Secretary*, the Commission would not be required to apply the stringent test set down for subsection 45(3)(a) in that case.[56]

4.3.6 Constructed normal value

The Commission considers, consistent with the majority in *Steelforce v Parliamentary Secretary*, that it should determine normal value under subsection 269TAC(6); this should be by constructing normal value using a methodology analogous to that used for subsection 269TAC(2)(c). Subsection 269TAC(2)(c) of the Act provides that constructed normal values are to be calculated as the cost of production of the exported goods plus, on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export, the selling, general and administrative (SG&A) expenses associated with the sale of those goods, and an amount for profit.

4.3.6.1 Costs of manufacture

In constructing a normal value, subsection 269TAC(5A)(a) would require that the cost to manufacture the goods is established in accordance with section 43 of the Regulation.[57]

Investigation 177 (and reinvestigation 203) determined that, in establishing the cost to manufacture HSS in China, the records of Chinese HSS exporters did not reasonably reflect competitive market costs to produce or manufacture those goods, for the purposes of section 43 of the Regulation (then regulation 180 of the *Customs Regulations 1926* (the 1926 Regulations)).

Specifically, the then ACBPS found that:

> *…the costs incurred by HSS manufacturers in China for HRC and narrow strip used in the investigation period do not reasonably reflect competitive market costs in terms of regulation 180(2).*[58]

As a result, during Investigation 177 the then ACBPS replaced HRC costs as reported by each Chinese exporter with a competitive market cost. This replacement was made with reference to a benchmark, determined to be the weighted average of domestic HRC costs incurred by verified selected and cooperating HSS exporters from Korea, Malaysia and Taiwan. The benchmark was said to be at comparable terms of trade and conditions of purchase to those observed in China, and was adjusted to account for:

- the increased purchase price of pre-galvanised HRC over black HRC, with reference to the quarterly average purchase price difference between the Steel Business Briefing (SBB) China domestic Shanghai HRC price and the China domestic Shanghai pre-galvanised HRC price;

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[55] *Pilkington v Anti-Dumping Authority*, majority judgment at page 12.

[56] See Perram J in *Steelforce v Parliamentary Secretary* at [97].

[57] Previously regulation 180 of the *Customs Regulations 1926.* The *Customs Regulations 1926* were replaced by the *Customs Regulation 2015* and the *Customs (International Obligations) Regulation 2015* which became effective on 1 April 2015.

[58] REP 177, page 39.

- differences in delivery terms observed in China (ex-works, delivered); and
- the reduced cost of narrow strip in China (for exporters that purchase narrow strip – not applicable to Dalian Steelforce).

Consistent with the original investigation, the Commission considers the costs of HRC provided by Dalian Steelforce relating to the review period do not reasonably reflect competitive market costs. The Commission has no reason to consider that the situation in the Chinese market has changed such that costs now reasonably reflect competitive market costs.

The Commission similarly considers that it is appropriate to have regard to a similar benchmarking method to that followed in Investigation 177.

Specifically, Dalian Steelforce's HRC costs have been uplifted by the difference between the price actually paid by Dalian Steelforce for that product and the price of a comparable competitive market benchmark price for that product (taking into account the applicable delivery terms and type of steel purchased).

In doing so, the Commission has indexed that benchmark to reflect any movement in the price of HRC between the original investigation period and the current review period. Consistent with the findings of the Commission in REP 267,[59] the indexation was based on pricing information from MEPS International Ltd (MEPS) in reference to domestic hot rolled coil prices in Korea and Taiwan. As set out in REP 267 the reason for this change in approach is the Commission's view of the relatively higher volatility of the East Asian HRC price.

The benchmark indexation demonstrated that, overall, HRC prices have experienced a significant decline from the period examined in Investigation 177, which was July 2010 to June 2011, and the current review period (2014 calendar year). The indexed benchmark is, on average by quarter, 23 per cent lower.

Full details of the benchmark methodology applied to Dalian Steelforce's costs can be found in REP 177 (as this same methodology was used for this review). The Commission also notes the 15 June 2015 submission, made on behalf of Dalian Steelforce, which submitted that uplift rates should be calculated separately for black and pre-galvanised HRC. The Commission used this methodology, and calculated separate uplift rates for black and pre-galvanised HRC; this is consistent with the approach used during the original investigation. Details of the benchmark calculation form **Confidential Appendix 2**.

All other costs of manufacture reported by Dalian Steelforce have been adopted without amendment.

4.3.6.1.1 Submissions in relation to conversion costs

In a submission received on 18 August 2015, ATM submitted that, given SEF 285 found Dalian's domestic sales of like goods had not occurred in the ordinary course of trade, this meant that the cost of converting HRC to HSS should be considered 'unsuitable' for the purpose of constructing normal values under subsection 269TAC(2)(c).

[59] Review of anti-dumping measures – HSS – exported by Tianjin Youfa Steel Pipe Co Ltd.

The Commission further observes that in investigation 177, ATM also requested that exporters' conversion costs should be excluded from constructed normal values on the basis that they did not reflect market values, and that the then ACBPS rejected this argument on the basis that ATM did not provide any evidence to show this was the case.

The Commission would not accept ATM's submission, noting that under subsection 269TAC(2)(c)(i) the Commission would be required to determine production costs using:

> *such amount as the Parliamentary Secretary determines to be the cost of production or manufacture of the goods in the country of export.*

The legislation does not stipulate any requirements that these production costs be associated with goods sold in the ordinary course of trade, nor is such a requirement identified in section 43 of the Regulation (which provides further direction around determining costs of production when constructing normal values).

This differs from the legislative requirements around the determination of SG&A costs. Subsection 269TAC(2)(c)(ii) states that SG&A costs are to be determined on the basis of costs associated with the sale of like goods if those goods are sold for home consumption in the ordinary course of trade.

4.3.6.1.2 Submissions in relation to the use of actual data from other exporters

In a submission to the review dated 10 July 2015, ATM claimed that the Commission should use, as a benchmark, the actual domestic HRC prices paid by Kukje Steel Co. (Kukje), a manufacturer and exporter of HSS in the Republic of Korea (Korea). Furthermore, the Commission received advice from Kukje Steel Co on 23 December 2015, requesting that its financial data be kept in confidence and used only as a reference to compare to other HRC price data.

Dalian Steelforce, on 1 December 2015, submitted that the Commission compare HRC prices received by Kukje to MEPS HRC pricing data to discern whether they are comparable, and therefore provide an indication of the appropriateness of MEPS HRC price data for Korea.

<u>The Commission's assessment</u>

The Commission observes that ATM did not make any submissions responding to SEF 285's statement that, given the methodology in Investigation 177 used a 'basket' of prices from a number of relevant countries to determine the benchmark, the Commission considered it undesirable to resort to prices from one exporter in one country. The Commission notes that ATM's submission received on 22 December 2015 instead outlines its support for the approach taken in SEF 285 to determining indexed HRC benchmark costs.

Regarding Kukje's concerns that using its actual HRC purchases to index the benchmark HRC price would compromise the confidentiality of that cost data, the Commission recognises this as a legitimate concern that would limit its ability to use Kukje's HRC price data. However the Commission found that Kukje's actual purchases of HRC were comparable to MEPS HRC price data.

In view of the above, the Commission maintains its view that the use of a MEPS-based pricing index for adjusting the benchmark is more reasonable than the use of data from a single exporter.

4.3.6.1.3 Submission in relation to determination of a HRC benchmark price

In submissions received on 18 August 2015, 31 August 2015, and 1 December 2015 Dalian Steelforce made a number of arguments regarding the determination of a HRC benchmark price.

A significant portion of Dalian Steelforce's claims were in relation to the specific data set used to index the original HRC benchmark price to the review period. Specifically, Dalian Steelforce claims that Korean and Taiwanese HRC price data from MEPS are not appropriate because:

- MEPS prices should not be used as they are largely derived from Korean prices which are unreliable. Korean prices are heavily influenced by non-arms length transactions due to the concentration of producers and buyers of domestic Korean HRC;
- MEPS data should not be used for the purposes of developing new indexed benchmarks, as MEPS prices were likely set at different levels of trade and sales terms when compared to the Chinese market;
- The volatility in MEPS pricing, when compared to SBB East Asia Import Price and other indices, showed that the MEPS data was not reliable and unsuitable for benchmarking purposes;
- The Commission's discussion of a benchmark price in SEF 285 lacked procedural fairness and transparency, due to the Commission not having released the source of HRC price data used to develop the indexed HRC benchmarks developed in SEF 285;
- It was unclear, in the benchmarks calculated in SEF 285:
    - whether the USD values used to determine the index amounts were accurately converted to Chinese RMB;
    - whether the Commission appropriately used the high and low prices to determine the quarterly indexed values; and
    - how the Commission 'weighted' Taiwanese and Korean MEPS prices;
- The Commission could not have applied the benchmark correctly, as its application resulted in some costs being uplifted to a unit value higher than the relevant monthly benchmark price; and
- The inconsistency in the use of SBB data by the Commission, and inconsistency in the Australian industry's preferences for or against SBB data, were concerning and should prohibit the rejection of SBB data in this review. The SBB East Asia Import Price was the most appropriate data series from which to determine benchmark prices, as it was the main basis upon which Australian and regional HRC pricing was determined, and that it had also been used in previous HSS duty assessments undertaken in relation to Dalian Steelforce. Dalian Steelforce suggested that, alternatively, Japanese domestic HRC prices could also be appropriate.

This submission can be viewed in full on the Commission's public record.

On 3 December 2015, the Commission received a submission from ATM supporting the Commission's choice of HRC pricing data used in indexing the original benchmark. Additionally, ATM agrees with the Commission's methodology in indexing the benchmark price, by using the average of the high and low prices outlined in the filenote placed on the public record on 17 November 2015.

Commission's assessment

The Commission relies on a number of different data providers for various investigations and reviews, depending on the specific requirements of the case. A particular data provider used in one case might not be appropriate to use in another. The Commission is not bound to consistently use data providers across cases, with each case having its own specific requirements. Further, as new information comes to light or circumstances change, the Commission has no obligation to continue to use a specific data source, which may have been used previously but may not be considered appropriate at a different point in time. The Commission used SBB data in the original investigation to ascertain the price difference between pre-galvanised and non-galvanised (black) HRC however SBB data is not the most appropriate data set to use in indexing the competitive market benchmark price.

The reasons that Korea, Taiwan, and Malaysia were chosen to be included in the original HRC benchmark price have not changed. Collectively, these countries represent a competitive market cost for HRC and narrow strip in China. This competitive market cost specifically aims to eliminate the influence of the Government of China (GOC) in the HRC market, hence using a price series which includes Chinese prices would undermine the primary aim of the benchmark as a replacement cost. The Commission considers that a 'basket' surrogate HRC price is preferable to the use of data from one single country – such as Japan, as proposed by Dalian.

SBB's East Asia CFR pricing series relates to imports of HRC into Vietnam, Philippines, Thailand, Indonesia, and South Korea. These prices are significantly influenced by the large quantities of HRC exported from China into these markets (as found in REP 177.

REP 177 found that imports of HRC into China are quite minimal, while exports of Chinese HRC into other markets are significant. It is likely that no Asian market is going to be free from the influence of Chinese HRC imports. However, as found in REP 177, the Korean, Taiwanese, and Malaysian markets are competitive and sophisticated enough to provide a representative example of competitive HRC costs, free from government influence. This is evidenced by SBB East Asian Import Prices trending significantly lower than MEPS pricing data for Korea and Taiwan. As the ACBPS noted in REP 177:

> *[A] lack of import penetration in China indicates that the imports of HRC to China may have been hindered by the domestic prices of HRC in China, which Customs and Border Protection has demonstrated...were likely to be artificially low as a result of GOC influence causing market distortions.*[60]

MEPS data is based on domestic HRC prices in Korea and Taiwan and accordingly it more accurately represents the movement of HRC prices in those two markets. Those two markets were deliberately chosen as surrogate markets because they collectively represent an average of likely competitive market costs/adequate remuneration in Asia absent GOC influence.

The Commission has used MEPS Korean and Taiwanese HRC pricing data to index the original HRC benchmark used in Report 177 and Report 203. The Commission considers that MEPS HRC pricing data most closely resembles the countries on which the original benchmark was based.

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[60] Refer to REP 177.

The benchmark HRC costs used in Report 177 and Report 203 were based on actual HRC purchases by producers based in Korea, Taiwan, and Malaysia. Unfortunately, historical pricing data is not available from any vendors of steel price data in all three countries, and only MEPS offers HRC data relating to Korea and Taiwan.

The Commission concludes that SBB East Asia HRC prices are not appropriate for benchmarking purposes for the reasons above and the likely influence of domestic Chinese HRC prices on that data. Chinese domestic HRC prices were influenced by a market situation (Report 177 and Report 203) and therefore should not be used to determine a competitive market price; for the same reasons that data should not be used to index the original benchmark price.

In relation to Dalian Steelforce's claims regarding the comparability of MEPS data with the Chinese HRC market, the Commission does not accept Dalian Steelforce's argument concerning comparability because the Commission has determined a benchmark by indexing data from the original investigation. Dalian Steelforce's remarks have focused on the sales and contract terms, and terms of trade of MEPS data, however MEPS data was only used to determine the amount of indexation that should be applied to develop a new *indexed benchmark*. Any concerns about comparability would thereby apply to the actual *indexed benchmark price,* as opposed to the MEPS data used for the purpose of determining the amount of indexation that was used to establish a benchmark. Even if Dalian Steelforce had concerns about whether the amount of indexation was determined through a comparison of two like data sets, the Commission further views this is not relevant, as the indexation was determined through comparison of MEPS data from two different periods, both of which would be subject to the same sales and contract terms.

In response to Dalian Steelforce's argument regarding the conversion of MEPS HRC pricing data into Chinese Yuan prior to indexing the benchmark, the Commission agrees that HRC prices should be indexed relative to the change in price as expressed in Chinese Yuan. Hence, the Commission has now used MEPS Korean and Taiwanese HRC prices, converted Yuan, to index the benchmark.

In order to address Dalian's claims regarding the lack of transparency about the benchmark price (the source of the benchmark was not released in SEF 285) the Commission put details of the benchmark methodology on the EPR.[61]

4.3.6.1.4 Submission in relation to application of HRC benchmark pricing to uplift raw material costs

Dalian Steelforce argued that the Commission erred in the way it applied an uplift to its cost of HRC.[62] Dalian Steelforce argued that the Commission had not replaced its HRC costs with *competitive market costs*, as the adjusted per tonne HRC cost is higher than the determined HRC benchmark *price* in some instances.

Dalian Steelforce's submission appears to suggest that, rather than adjusting its HRC costs using a single annual average weighted uplift, the Commission directly replace its per tonne HRC cost directly with the indexed benchmark HRC price. Dalian argued this

[61] Commission filenote dated 17 November 2015.

[62] Submission dated 9 December 2015.

was reasonable because it would ensure that in instances where unit HRC costs were above the benchmark price, no uplift was applied.

Dalian Steelforce claims the Commission has uplifted its raw material costs in a flawed manner and in such a way that contradicts the relevant regulations.[63] The Commission considers that the relevant regulation is section 43(2)(b)(ii) which provides:

> *If an exporter or producer of like goods keeps records relating to the like goods and the records…reasonably reflect competitive market costs associated with the production or manufacture of like goods; the Minister must work out the amount by using the information set out in the records.*

ATM provided a submission in support of the Commission's chosen methodology in adjusting Dalian Steelforce's HRC costs on 22 December 2015. ATM observed that the methodology used in SEF 285 was the same as was used in Review 267, the most recently completed HSS review.

ATM's submission then discusses Dalian Steelforce's submission regarding the application of an annual uplift to its HRC costs. While Dalian Steelforce argued against using an annualised uplift, taken as the weighted average percentage difference between actual HRC purchases and the derived competitive benchmark price, ATM contends that the Commission is unable to 'cherry pick' the months used in applying this uplift to HRC costs, as it would lead to an arbitrary rate of uplift.

Commission's assessment

In SEF 285 the Commission used annual weighted average uplift rates to adjust Dalian Steelforce's raw material costs for HRC. In response to Dalian Steelforce's submissions the Commission reviewed its approach and amended the uplift methodology by applying quarterly uplift rates to Dalian Steelforce's HRC costs.

In Investigation 177 the Commission found a market situation in the Chinese domestic market for HSS and that the cost of HRC in China did not reasonably reflect competitive market costs. As a result, subsection 43(2)(b)(ii) of the Regulation (then regulation 180 of the 1926 Regulations) does not compel the Commission to use Dalian Steelforce's recorded costs for HRC used in the production of HSS. However, as Dalian Steelforce's purchases of HRC do not reasonably reflect competitive market costs, the Commission indexed the original competitive benchmark price to 2014 prices in order to replace Dalian Steelforce's stated HRC costs with a cost that does reasonably reflect a competitive market cost. As such, the Commission does not agree with Dalian Steelforce's assertion regarding compliance with the regulations. Dalian Steelforce appears to claim that the uplifted HRC costs do not reflect a 'comparable competitive market cost'.

Dalian Steelforce points to the fact that the Commission's replacement HRC costs are mostly higher than the determined HRC benchmark prices. Dalian Steelforce further states that the Commission's replacement costs should not exceed the respective competitive benchmark prices. The Commission does not agree with Dalian Steelforce's interpretation of how HRC costs should be adjusted to attain competitive market prices. Dalian Steelforce's submission reflects a misunderstanding of the Commission's methodology in uplifting raw material costs, by comparing a benchmark *price* with an

[63] Dalian Steelforce submission of 9 December 2015.

adjusted *cost*. These are not directly comparable as claimed by Dalian Steelforce due to yield loss in the manufacture of HSS. The competitive market benchmark price was used to ascertain the percentage amount by which Dalian Steelforce underpaid for HRC (by quarter). Dalian Steelforce's HRC cost, as allocated in its cost to make and sell data, is then adjusted by this difference. Because Dalian Steelforce's actual purchase prices of HRC, per tonne, were below the competitive benchmark price, the uplift was positive.

The Commission notes that the analysis provided by Dalian Steelforce, comparing 'replacement HRC cost' with 'determined HRC benchmark prices', is simply a function of Dalian Steelforce's stated actual HRC cost versus HRC purchase price.

The Commission further notes that this approach is consistent with Investigation 177, subsequent reinvestigation 203, other single exporter reviews for HSS exports and a number of duty assessments. The Commission does not consider that Dalian Steelforce has made its case that the Commission should depart from this methodology for this review.

4.3.6.2 Selling, general and administrative costs

Section 269TAC(5A)(b) would require, in constructing normal value under subsection 269TAC(2)(c), that selling, general and administrative (SG&A) costs are worked out in the manner provided for by the regulations.

Regulation 44(2) would require that SG&A costs are worked out using information in Dalian Steelforce's records if, amongst other things, the records reasonably reflect the SG&A costs associated with the sale of like goods in the country of export. As discussed elsewhere in this report, Dalian Steelforce's domestic sales of like goods are not in the ordinary course of trade and therefore do not reasonably reflect the SG&A costs associated with the sale of like goods in the ordinary course of trade in China. Therefore, the Commission considers the SG&A costs associated with those sales are unsuitable for the purpose of constructing a normal value.

Subsection 44(3) of the Regulation provides three methods for determining SG&A costs:

- SG&A incurred in the production and sale of the same general category of goods in the domestic market; or
- SG&A incurred by other exporters of like goods in the domestic market; or
- any other reasonable method.

In SEF 285 the Commission used Dalian Steelforce's export SG&A costs for its HSS sales to Australia for the purpose of constructing a normal value under reg 44(3)(c).

4.3.6.2.1 Submissions received on selling, general and administrative costs

In a submission received on 18 August 2015, ATM submitted that the Commission use SG&A costs obtained from a recently completed review relating to exports of HSS from a single Chinese exporter, Tianjin Youfa Steel Pipe Co Ltd (Tianjin Youfa), as permitted under subsection 44(3)(b) of the Regulation.

4.3.6.2.2 Commission's assessment

Following further examination of Dalian Steelforce's domestic sales as detailed in section 4.4.3.2 below, the Commission considers that Dalian Steelforce has domestic sales of goods in the same general category as the goods exported to Australia. However, the Commission notes that these sales are of non-prime and downgrade products and are

isolated sales of sub-standard product, for which it is more cost-effective for Dalian Steelforce to dispose of locally than export to Australia. For this reason, the Commission continues to consider that Dalian Steelforce's export SG&A costs are the most suitable for use in constructing normal value

In terms of the submission from ATM to use SG&A costs from another Chinese exporter, while the Commission does have access to recent information about the domestic SG&A costs of another exporter of HSS to Australia, it does not consider this entity's costs suitable for the purpose of establishing Dalian Steelforce's normal value due to the differences in the structure and operations of that entity compared to Dalian Steelforce.

In light of the above, the Commission considers it preferable to use SG&A costs incurred by Dalian associated with the sales of exported goods, noting these costs are more likely to accurately reflect Dalian Steelforce's internal cost structure, and that these costs are also more applicable to the review period (noting the review period applicable to Tianjin Youfa's review of measures commenced and expired six months prior to this review period).

4.3.6.3 Profit

4.3.6.3.1 Submissions following SEF 285

In a submission from ATM received 18 August 2015, ATM argued that SEF 285 did not sufficiently explain why it cannot work out an amount of profit for Dalian Steelforce. ATM stated that:

> *It is not clear from SEF 285 how the Commission was satisfied that the referred domestic sales that were confirmed as sub-prime or downgrade were not either a "like good" or a good of the "same general category" when sub-prime product whilst not suitable for sale to Australian standards may have been suitable sale to Chinese standards.*

ATM further argued that if the Commission considered the sale of non-prime or downgrade goods unsuitable for the purpose of determining profit then the Commission should instead apply a level of profit based on the weighted average rate of profit applicable to Tianjin Youfa, as determined in Investigation 267, and as permitted under subsection 45(3)(b) of the Regulation.

Dalian Steelforce responded to ATM on the issue of profit.[64] Dalian Steelforce reiterated the finding in SEF 285 that sales of like goods were not sales made in the ordinary course of trade, and argued against ATMS's suggestion that the Commission should apply Tianjin Youfa's profit rate.

4.3.6.3.2 Commission's assessment

The reasons why the Commission is unable to determine profit under any of the provisions in subsection 45 are set out above in section 4.3.4.2.1.

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[64] Dalian Steelforce submission of 20 August 2015.

The Commission has a broad discretion in how it determines normal value under subsection 269TAC(6). In exercising that discretion the Commission has adopted a policy that is consistent with the statute and is appropriate and informative of the standards and values that the Commission usually applies;[65] namely it has constructed a normal value in a manner that is analogous to that used in subsection 269TAC(2)(c).

In REP 285 the Commission determined an amount for profit by reference to the cost of production in the review period (the REP 285 method) notwithstanding the contention that much of the HSS had not been produced during the review period.[66] The Full Court found that that the REP 285 method is not open to the Commission under the regulations in the current circumstances. In the absence of information that would allow use of the regulations the Commission considers that use of the REP 285 method under subsection 269TAC(6) has regard to all relevant information and is appropriate and informative of the standards and values that the Commission usually applies. The leading judgment in *Steelforce v Parliamentary Secretary* held that subsection 269TAC(6) provides the answer to the informational problem in this review[67] subject to the formation of the state of satisfaction required by subsection 269TAC(6).[68]

The Commission further notes that:

- There is no hierarchy in terms of which subsection 45(3) methodology must be used. In practice however, "the Commission normally seeks profit information using the method described for subsection 45(3)(a) because it relates to the exporter being investigated and therefore is more likely to yield the required data."[69] The REP 285 method similarly relates to the exporter being investigated in this case.
- Generally accepted accounting practice requires inventory to be revalued at the end of each year to take account of any changes in input costs.[70] On that basis the drop in steel prices claimed by Dalian Steelforce would normally lead a company producing HSS to write down the value of its existing stock and to calculate the profit on sales of that stock using the written down value. The REP 285 method substantially replicates the result of that treatment.

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[65] *Drake and Minister for Immigration and Ethnic Affairs* [1979] AATA 179 (21 November 1979).

[66] *Steelforce v Parliamentary Secretary* per Perram J at [88].

[67] *Steelforce v Parliamentary Secretary* per Perram J at [102].

[68] *Steelforce v Parliamentary Secretary* per Perram J at [103].

[69] Dumping and Subsidy Manual, page 48

[70] See Australian Bureau of Statistics *Australian National Accounts Concepts, Sources and Methods* (2000) Ch 17 "Changes in Inventories"; see also Australian Accounting Standard AASB 102 and International Accounting Standard IAS 2. China has adopted accounting standards which substantially converge with the International Accounting Standards. See Page 2 of the Country Profile prepared by the International Financial Reporting Standards Foundation Profile published 24 November 2015 also see pages 34 and 35 of a Report by KPMG which states that Chinese Accounting Standard CAS 1 is a "direct" or "close correlation " to IAS 2.

- Dalian Steelforce's domestic sales of non-prime alloyed HSS and non-prime non-alloy HSS are the closest goods to the 'prime' HSS exported to Australia. Consequently, these sales are suitable for the purpose of establishing an amount for profit in the REP 285 method.

For the above reasons the Commission has added the profit from Dalian Steelforce's sales of the same general category of goods in the Chinese domestic market using the REP 285 method to the constructed cost to make and sell the goods.

4.3.7 Conclusion – normal value

Normal values for all goods exported to Australia by Dalian Steelforce during the review period have been determined under subsection 269TAC(6) by constructing normal value in a manner analogous to that used under subsection 269TAC(2)(c); namely as the sum of the cost of manufacture of the goods in China, the SG&A and an amount for profit on the sale of those goods in the domestic market. Details of normal value calculations are at **Confidential Appendix 3**.

4.4 Dumping margin

A calculation of dumping margins is not required for the purpose of reviewing variable factors. However, for this review a dumping margin for the review period has been calculated by comparing the weighted average of export prices of the goods during the review period, with the weighted average of corresponding normal values in accordance with subsection 269TACB(2)(a) of the Act.

The weighted average dumping margin during the review period was found to be 17.3 per cent.

Calculation of this dumping margin is at **Confidential Appendix 4**.

5 NON-INJURIOUS PRICE

5.1 General

Under subsection 8(5BA) and 10(3D) of the *Customs Tariff (Anti-Dumping) Act 1975*, the Assistant Minister must have regard to the desirability of ensuring that the amount of dumping duty is not greater than is necessary to prevent injury or a recurrence of the injury. Subsections 269TACA(a) and (c) of the Act identifies the non-injurious price (NIP) of the goods exported to Australia as the minimum price necessary to remove the injury caused by the dumping.

The Commission generally derives the NIP by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping. This price is referred to as the unsuppressed selling price (USP). Deductions from this figure are made for post-exportation costs to the relevant level of trade in Australia.

Having calculated the USP, the Commission then calculates a NIP by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia.

5.2 Assessment of USP and NIP

During the original investigation, the then ACBPS determined the USP utilising Australian industry's CTMS for the investigation period plus an amount for profit during the period of January to September 2008. The then ACBPS chose January to September 2008 as the period to calculate profit because material injury, if any, to the Australian industry was negligible during that period. A separate USP was calculated by finish and the NIP for each finish was then calculated by deducting amounts for post exportation costs. The methodology was not subject to reinvestigation.

For the purpose of this review, a weighted average USP has been determined based on ATM CTMS data during the review period plus an amount of profit achieved by Australian industry in the period of January to September 2008. The NIP has been calculated to FOB delivery terms by deducting from the USP amounts for:

- importer profit;
- importer expenses;
- Australian customs duty, port charges, delivery commission, storage and handling; and
- overseas freight and insurance.

It is considered that the NIP should be determined by deducting the weighted average actual post-FOB costs, importer expenses and profit incurred by Steelforce Trading during the review period (as submitted by the company in its response to the importer questionnaire) from the determined USP.

Steelforce Trading provided the Commission with copies of ocean freight, marine insurance, and exportation costs documents for selected consignments of the goods subject to this assessment in its response to the importer questionnaire. The weighted averages of these actual incurred costs have been deducted from the USP.

In addition, Steelforce Trading submitted its SG&A costs to the review. These costs have been deducted from the USP.

The Commission notes that, during Investigation 177, a NIP was determined for Chinese exporters of the goods separately for each finish, as anti-dumping measures were also established separately for each finish of the goods. This was not subject to reinvestigation.

However, since finalising Investigation 177, the FCA has ruled that anti-dumping measures cannot be determined at a model (e.g. finish) level[71]. As such, the Commission considers that NIPs for HSS should not be calculated by finish as they were during Investigation 177, but rather only one combined NIP should be determined. This has been performed for this review.

In the context of this review, the sum of the ascertained export price and the dumping margin was lower than the NIP and hence the NIP is not the operative measure during this review period.

Details of the USP and NIP calculations are at **Confidential Appendix 5**.

[71] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870.

6 EFFECT OF THE REVIEW

6.1 Summary of findings

The Commissioner has found that, in relation to exports to Australia of HSS from China by Dalian Steelforce:

- the ascertained export price has changed;
- the ascertained normal value has changed; and
- the NIP has changed.

The Commissioner has also found that the NIP was greater than the sum of the ascertained export price and the dumping margin found for the review period and should therefore not be the operative measure[72] for HSS exported by Dalian Steelforce.

6.2 Recommended measures

The Commissioner recommends that the Assistant Minister declare:

- in accordance with subsection 269ZDB(1)(a)(iii) with effect for goods entered for home consumption from 3 January 2017 until 2 July 2017 (both dates inclusive) and for the purposes of the Act and the Dumping Duty Act, the dumping duty notice:
    - is taken to have had effect in relation to Dalian Steelforce as if different variable factors, as set out in Confidential Attachment 2, had been fixed relevant to the determination of duty.

[72] The operative measure is the lesser of the normal value or non-injurious price.

7 APPENDICES AND ATTACHMENTS

Confidential appendix 1	Export price calculation
Confidential appendix 2	Benchmark calculation
Confidential appendix 3	Normal value calculation
Confidential appendix 4	Dumping margin calculation
Confidential appendix 5	Non injurious price calculation
Confidential appendix 6	Benchmark uplift calculation
Confidential appendix 7	Profit calculation
Attachment 1	Anti-Dumping Notice 2018 / 85
Confidential attachment 2	Table of variable factors pursuant to s 269ZDB