



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

¹ By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: BlueScope Steel Limited ("BlueScope").

Address: Five Islands Road, Port Kembla, NSW 2500.

Type of entity (trade union, corporation, government etc.): BlueScope is a publicly listed company on the Australian Stock Exchange.

2. Contact person for applicant

Full name: Chad Uphill

Position: Senior Commercial Specialist – International Trade Affairs

Email address: Chad.Uphill@bluescopesteel.com

Telephone number: (02) 4240 1214

3. Set out the basis on which the applicant considers it is an interested party

BlueScope Steel Limited (hereafter referred to as "BlueScope") is the sole Australian manufacturer of aluminium zinc coated steel and zinc coated (galvanised) steel the "goods" the subject of the decisions. BlueScope was the applicant company that requested the imposition of measures resulting in the measures imposed on 5 August 2013. For the purposes of Investigations No. 190 and 193, BlueScope was considered the 'Australian industry' by the then Australian Customs and Border Protection.

In the investigations the subject of this review application, BlueScope continued to be the Australian industry.

4. Is the applicant represented?

Yes No

BlueScope's representative for the purposes of this review application is Mr John O'Connor of John O'Connor and Associates Pty Ltd.

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

Subsection 269TL(1) – decision of the Minister not to publish duty notice

Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods the subject of the reviewable decision fall into two broad categories as follows:

(i) Zinc coated (galvanised) steel:

“flat rolled products of iron and non-alloy steel, of a width less than 600 mm and, equal to or greater than 600 mm, plated or coated with zinc; and

flat rolled products of alloyed steel, of a width less than 600 mm and, equal to or greater than 600 mm, plated or coated with zinc exported from:

- *China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co., Ltd, or*
- *Taiwan by Yieh Phui Enterprise Co., Ltd.”*

Additional information:

Zinc coated steel is commonly referred to as galvanised steel. The amount of zinc coating on the steel is described as its coating mass and is nominated in grams per metre squared (g/m²) with the prefix being Z (Zinc) or ZF (Zinc converted to a zinc/iron alloy coating). Common coating masses used for zinc coating are: Z350, Z275, Z200, Z100, and for zinc/iron alloy coatings are: ZF100, ZF80, and ZF30 or equivalents based on international standards and naming conventions.

The applications cover galvanised steel whether or not including any (combination of) surface treatment, for instance, whether passivated or not passivated (often referred to as chromated or unchromated), oiled or not oiled, skin passed or not skin passed, phosphated or not phosphated (for zinc iron alloy coated steel only).

Painted galvanised steel, pre-painted galvanised steel, electro-galvanised plate steel and corrugated galvanised steel are not covered by the dumping duty notice.

(ii) **Aluminium zinc coated steel:**

“flat rolled products of iron and non-alloy steel of a width equal to or greater than 600 mm, plated or coated with aluminium-zinc alloys, not painted, whether or not including resin coating.”

Additional information:

The amount of aluminium zinc coating on the steel is described as its coating mass and is nominated in grams per square metre with the prefix being AZ (Aluminium Zinc). Common coating masses are: AZ200, AZ150, AZ100, and AZ70.

The goods description covers aluminium zinc coated steel whether or not including any (combination of) surface treatment, for instance, whether passivated or not passivated (often referred to as chromated or unchromated), resin coated or not resin coated (often referred to as Anti Finger Print (AFP) or not AFP), oiled or not oiled, skin passed or not skin passed.

Painted aluminium zinc coated steel and pre-painted aluminium zinc coated steel are not covered by the dumping duty notice.

7. Provide the tariff classifications/statistical codes of the imported goods

The galvanised steel – as per the description above – is classified to the following subheadings in *Schedule 3 to the Customs Tariff Act 1995*:

- 7210.49.00 statistical code 55, 56, 57 and 58;
- 7212.30.00 statistical code 61;
- 7225.92.00 statistical code 38; and
- 7225.99.00 statistical code 71.

The last two tariff subheadings only apply to the following exporters/suppliers:

- Angang;
 - Benxi Iron and Steel (Group) International Economic & Trading Co.,
- and
- Yieh Phui.

The aluminium zinc coated steel is classified to tariff subheading 7210.61.00 (statistical codes 60, 61 and 62) in Schedule 3 to the *Customs Tariff Act 1995*.

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

Anti-Dumping Notice No. 2017/87 notified of the Assistant Minister's decision to alter the variable factors applicable to exports of galvanized steel and aluminium zinc coated steel exported by Dongbu Steel Co., Ltd of Korea.

Please refer to Non-Confidential Attachment 1 for a copy of ADN No. 2017/87.

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9. Provide the date the notice of the reviewable decision was published

ADN No. 2017/87 was published on 20 July 2017.

****Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application****

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

10.1 In establishing revised variable factors for the nominated exporters, the Assistant Minister failed to consider the significant increases in raw material prices in the period subsequent to the review period (and up to the date of the decision).

On 16 November 2016, the Commissioner received applications for the review of anti-dumping measures applicable to aluminium zinc coated steel and zinc coated (galvanised) steel (hereafter referred to as "galvanised steel") exported to Australia by Dongbu Steel Co., Ltd ("Dongbu") of Korea.

The applicant claimed that the ascertained normal value ("ANV"), ascertained export price ("AEP"), and Non-injurious Price ("NIP") relevant to the anti-dumping measures for Dongbu had changed on the basis of a fall in the price of hot rolled coil ("HRC"), the major raw material input used in the manufacture of aluminium zinc coated steel and galvanised steel.

The Commissioner examined the applications and decided not to reject either application. ADN No. 2016/30 and Consideration Reports No. 385 & 386 detailed the Commissioner's examination of the Dongbu applications. The review period applicable to both reviews is 1 October 2015 to 30 September 2016.

The Commission published a single Statement of Essential Facts ("SEF") and Final Report detailing the changes in the variable factors applicable to Dongbu (Refer SEF 385 and 386, and Report 385 and 386).

The Commission found that in relation to exports of aluminium zinc coated steel and galvanised steel by Dongbu to Australia that:

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

The Commissioner recommended that, for Dongbu, the dumping duty notice have an effect as if different variable factors had been ascertained. The Commission determined ANV's for Dongbu on the basis of domestic selling prices under subsection 269TAC(1) with adjustments under subsection 269TAC(8). In the absence of exports to Australia by Dongbu of aluminium zinc coated steel and galvanised steel during the investigation period, the Commission determined Dongbu's AEP "is most

relevantly established by reference to the ANV”.

In respect of the NIP, the Commission considered the approach used in Report No. 190 remains relevant in Investigations 385 and 386, and recommended that the NIP be determined at the respective ANV’s for each good exported by Dongbu.

The Commission noted representations of BlueScope (Submission dated 13 June 2017, EPR Document No.012) that following dramatic increases in HRC costs and aluminium zinc coated steel and galvanised steel prices immediately following the review period, the Commission should take account of these sustained movements in raw material input prices so that the revised measures do not under-address injury to the Australian industry.

The Commission, however, stated:

“The Commission notes that, although raw material prices are currently higher than those during the review period, having regard to the long term trends of HRC prices there is no evidence to establish that the current raw material prices are sustained, or more representative, than the prices verified in the review period.

The Commission, therefore, does not recommend an adjustment to the variable factors for the review period to account for the movements of HRC prices following the review period.”

The Commission’s recommendation not to make an adjustment to Dongbu’s normal values for changes in raw material HRC falling outside the review period and accepted by the Assistant Minister is not the correct or preferred decision.

The Assistant Minister is not precluded from using information subsequent to the review period for the purposes of establishing revised variable factors for Dongbu. In Report No. 188 (Hot Rolled Coil Steel from Japan, Korea, Malaysia and Taiwan) the then Trade Measures Review Officer (“TMRO”) upheld the decision of the then Minister to impose measures that referenced prices outside the investigation period. That decision was again confirmed in the subsequent reinvestigation (Report No. 209).

In examining the issue of considering prices outside the investigation period, the TMRO stated:

71. *The question is thus whether the CEO is precluded from having regard to information concerning prices outside the investigation period in relation to the separate issue of recommending what action the Minister should take once dumping is found to have occurred during the investigation period.*
72. *The Customs Act does require that a report be made to the Minister “on the basis of the examination of exportations to Australia of goods the subject of the application during a period specified in the notice [issued by the CEO as required by section 269TC(4)] as the investigation period in relation to the application” (section 269TC(4)(bf)).*
73. *However, the Customs Act also requires that that report must recommend “whether any such notice should be published and the extent of any duties that are, or should be, payable under the Dumping Duty Act because of that notice” (section 269TEA(1)(c)) and allows the CEO, in making such recommendations, to “have regard to any other matters that the CEO considers to be relevant” (section 269TEA(3)(b)).*

74. I do not consider that the Customs Act provides any express or implied prohibition on the CEO having regard to information concerning prices outside the investigation period when formulating recommendations to the Minister on the separate issue of what measures should be put in place as a result of dumping having occurred during the investigation period. Indeed, as the purpose of the Customs Act is to safeguard Australian industry from the adverse effects of future dumping (but not from adverse effects otherwise arising), it would seem to be inconsistent with that policy if the CEO were to be so constrained. (emphasis added).

Having examined whether there was any express or implied prohibition to using information outside the investigation period, the TMRO specifically addressed whether the CEO could consider information outside the investigation period as a matter of law.

76. *While BlueScope argued that the existence of these processes meant that there was no need to have regard to information concerning prices outside the investigation period when recommending the initial imposition of measures and that therefore the CEO should not have done so, I have also considered whether, as a matter of statutory interpretation, the express provision of such processes implicitly denies the capacity of the CEO to do so as a matter of law (expressio unius est exclusio alterius) so that the CEO actually could not legally do so.*

77. *I have concluded that the latter is not the case. There is a significant difference between setting measures at a level that may be too high (or too low) from the outset, and allowing only partial redress for the adverse impacts of doing so at some future time. I thus consider that the express provision of the review and assessment processes does not raise an inherent statutory prohibition on inferring an alternative way of avoiding the potential for those impacts when initially setting measures, especially as the Customs Act in section 269TEA appears to leave that option open (as discussed above). (emphasis added).*

The TMRO was satisfied that the CEO was not prohibited from considering information outside the investigation period when recommending to the Minister “*the extent of the measures that should be put in place as a result of dumping within the investigation period*”.

Importantly, the TMRO canvassed a scenario where it may be appropriate for information from outside the investigation period to be used in recommending the extent of measures to be imposed by the Minister. The TMRO proposed:

“An appropriate case could exist where it was apparent that prices after the investigation period would differ from those within the investigation period on a sustained basis so that it was apparent that ignoring the later prices would mean that anti-dumping measures were set at a level that either under- or over-redressed the dumping that has been found to exist historically and likely to continue prospectively.”

The Commission did not reject the use of information outside the review investigation period, however, it argued that the information was not “*sustained, or more representative, than the prices verified in the review period.*”

In Investigation 188, contemporary data was taken into account to protect exporters from 'punitive' measures (resulting from the over-collection of dumping duties). However, the reasoning in Investigation 188 clearly encompasses the use of contemporary data where dumping would otherwise be 'under- or over-redressed' by the imposition of measures.³ The TMRO highlighted that

³ Invest 188 at [78] (emphasis added).

as 'the purpose of the Customs Act is to safeguard Australian industry from the adverse effects of future dumping (but not from adverse effects otherwise arising), it would seem to be inconsistent with that policy if the CEO were to be so constrained' from taking into account prices outside the investigation period in appropriate cases.⁴ In other words, the TMRO's reasoning was not limited to circumstances in which the WTO Agreement would be infringed, but also where the Customs Act would not fulfil its intended purpose.

BlueScope contends that its position in the Dongbu reviews is a 'mirror image' of that of exporters in Investigation 188, and that a failure to take account of contemporary data would lead to inadequate redress to the Australian industry from 'punitive' dumping (resulting from the under-collection of dumping duties). The Assistant Minister should not take into account contemporary prices where exporters may otherwise pay duties exceeding the dumping margin, while at the same time having failed to take this into account where the Australian industry does not receive adequate redress against dumping by exporters in volatile market conditions.

BlueScope's representations to the Commission (EPR Document 010) detailed 'relevant information' including the exceptional market conditions that were experienced immediately following the review investigation period. Most raw material prices increased dramatically from decade-long lows that prevailed during the investigation period – with coking coal and iron ore increasing by approximately 62 per cent. The increase in price of these two primary inputs directly contributed to an approximate 20 per cent rise in HRC prices.

Therefore, the contemporary prices for the goods the subject of this review application were – as a minimum – at least 20 per cent higher in the contemporary period (i.e. 1 July 2016 to June 2017) than the export prices paid during the investigation period. Unquestionably, this increase in pricing represents a material disadvantage at which the Australian industry must compete, despite substantial raw material cost increases.

The variable factors determined by the Assistant Minister that are based upon the investigation period significantly under-redress the dumping that has occurred as a consequence of the dramatic rise in raw material input prices post the investigation period. The change in raw material input prices and how the dramatic increases impact each of the variable factors is considered 'relevant information' for the purposes of the Assistant Minister's consideration(s).

The failure of the Commission and the Assistant Minister to make adjustments to Dongbu's normal values of 'relevant information' including sustained changes in raw material (i.e. HRC) prices following the review period was not the correct or preferred decision. The correct and preferable decision included adjustments to Dongbu's normal values for aluminium zinc coated steel and galvanised steel to reflect contemporary prices following the review period.

10.2 The Assistant Minister should not have accepted the Commissioner's recommendation to set an exporter's export price equal to its normal value in the absence of any exports by that exporter during the review period.

BlueScope does not consider that the Commissioner should recommend that an exporter's export price be set equal to its normal value where the exporter has not exported goods during the review period (as it has accepted for Dongbu). The Commission's recommendation sets a dangerous precedent that involves the 'gaming' of measures as the Commissioner has assumed that the exporter has ceased dumping which is inconsistent with the exporter's historic behaviour.

The Commissioner cannot 'assume' that the exporter has ceased dumping by virtue of an absence of

⁴ Invest 188 at [74] and [79].

exports during the review period. The onus of proof of an absence of dumping rests with the exporter to sufficiently satisfy the Commissioner that past behaviour has altered.

BlueScope considers that the Commissioner cannot 'assume' that the exporter has ceased exporting at dumped prices merely due to a temporary absence of exports in a given period. The Commission has provided no substantive reasons, precedent or any meaningful explanation as to why it is appropriate to set the exporter's export price equal to normal value (where there have been no exports during the investigation period by the exporter, Dongbu). The effect of the Assistant Minister's decision is to afford the exporter a 'free run' in the Australian market (at the detriment of the Australian industry) with little regard to the past dumping practices of that exporter.

BlueScope notes that the only precedent for this approach can be found in relation to 'accelerated reviews' undertaken by the Commission pursuant to Division 6 of the Customs Act. As the Commission is aware, the circumstances in which an accelerated review can be undertaken are strictly limited under s269ZE to 'new' exporters. BlueScope accepts that it may be reasonable to seek to ascertain export prices for certain classes of 'new' exporters at a rate equal to their ascertained normal values where those exporters have not previously exported subject goods to Australia. These circumstances clearly do not apply in the context of Dongbu as the exporter has previously exported the subject goods in significant commercial quantities at prices that have been verified by the Commission as dumped and injurious to the Australian industry.

The reality of the Assistant Minister's decision (to treat export price and normal value as equal) is to 'reward' an exporter that abstains from exporting for a twelve-month period with a 'zero' interim duty impost following a review, despite that exporter's past history of exporting at dumped prices.

The Assistant Minister's decision has afforded Dongbu a favourable outcome viz-a-viz other exporters the subject of measures (i.e. in China and Taiwan) in respect of aluminium zinc coated steel and galvanised steel exports to Australia. The Assistant Minister's decision is not the correct or preferred decision as it under-compensates for dumping that has occurred post the investigation period by as much as 20 per cent, and exposes the Australian industry to injurious dumping that the measures were intended to prevent.

10.3 The Assistant Minister should not have accepted the Commissioner's recommendation to alter the form of measures applicable to Dongbu based upon the 'floor-price' methodology.

BlueScope acknowledges that the Assistant Minister may consider alternate forms of measures (i.e. fixed, floor price and ad valorem measures) when imposing interim duties. However, while new measures such as the ad valorem duty, and floor-price method are intended to provide greater flexibility in the imposition of measures in varying market conditions, BlueScope submits that the availability of different duty calculation methods has not redressed the effects of rapidly increasing prices as reflected in each of the variable factors in the relevant reviews. This is because the relevant exporters were given zero dumping margins based solely on the fact that they did not export to Australia during the review period.⁵

As a result of this factor it is clear that the availability of new methods of duty calculation are not sufficient to overcome the injury to the Australian industry in circumstances such as the present. Therefore, in a rising market, it was inappropriate for the Commissioner to recommend that the form of measures to apply to Dongbu's future exports be based upon the floor-price method, when normal values and export prices for aluminium zinc coated steel and galvanised steel were

⁵ See ADC 365, 366, 368, 371, 374 and 376 – Zinc Coated (Galvanised) Steel from China and Taiwan; ADC 367, 372 and 375 – Aluminium Zinc Coated Steel from China; ADN 2017/48; ADN 2017/49.

evidenced as increasing substantially following the review period (refer to the Commission's comments at Section 4.6.2 of Report No. 385 and 386).

The Assistant Minister's decision concerning the form of measures to apply to goods exported by Dongbu was not the correct or preferable decision, and the combination method (adjusted for contemporary prices) was the preferable decision.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.

The correct or preferable decisions of the Assistant Minister in Report No. 385 and 386 should have included:

- The determination of Dongbu's normal values for aluminium zinc coated steel and galvanised steel under subsection 269TAC(1), adjusted for changes in HRC prices in the period following the review period;
- The determination of Dongbu's AEP's for aluminium zinc coated steel and galvanised steel at levels not equal to normal values due to an absence of exports during the review period; and
- The form of measures to apply to Dongbu's exports to Australia be based upon the combination method.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

The correct and preferable decisions would materially alter the variable factors applicable to Dongbu from the record low levels of 1 October 2015 to 30 September 2016 to contemporary levels (i.e. July 2016 to June 2017). The difference between prices of the review period and the contemporary period is estimated at more than 20 per cent.

By assuming that the exporter has ceased dumping due to an absence of exports during the review period, Dongbu's AEP has been set lower than it should have been.

By altering the form of measures to a floor-price methodology, BlueScope will continue to suffer material injury from dumped exports by Dongbu following the Assistant Minister's decision.

PART D: DECLARATION

The applicant declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:



Name: Chad Uphill

Position: Senior Commercial Specialist – International Trade Affairs

Organisation: BlueScope Steel Limited

Date: 15 / 08 / 2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: John O'Connor
Organisation: John O'Connor and Associates Pty Ltd
Address: P.O. Box 329, Coorparoo Queensland 4151.
Email address: jmoconnor@optusnet.com.au
Telephone number: (07) 3342 1921

Representative's authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:



(Applicant's authorised officer)

Name: Chad Uphill
Position: Senior Commercial Specialist – International Trade Affairs
Organisation: BlueScope Steel Limited
Date: 15 / 08 / 2017