Application for review of a Ministerial decision

***Customs Act 1901* s 269ZZE**

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 11 July 2018 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] 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
The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

Further application information
You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10 and/or 11 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal
You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

Contact
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.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

Applicant's name:	**CITIC Australia Steel Products Pty Ltd**
Address:	**Level 7 CITIC House, 99 King Street, Melbourne VIC 3000**
Type of entity (trade union, corporation, government etc.):	**Corporation**

2. Contact person for applicant

Full name:	**Hiran Perera**
Position:	**Manager**
Email address:	**Hiranperera@citic.com.au**
Telephone number:	**+61 3 9641 8000**

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

The applicant is the importer subject to the duty.

4. Is the applicant represented?

Yes ☑ No ☐

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 application are:

> *"flat rolled products of iron and non-alloy steel, of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc; and*
>
> *"flat rolled iron or steel products containing alloys, of a width less than 600mm and, equal to or greater than 600mm, plated or coated with zinc exported from Taiwan by Yieh Phui Enterprise Co., Ltd."*

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

Goods identified as galvanised steel, as per the description above, are classified to the following tariff 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
- 7225.92.00* statistical code 71.

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:	**2018/96**
Date ADN was published:	**12 July 2018**

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

See attached.

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 application 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.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

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: ☑

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

See attached.

10. 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 9:

Pursuant to s 269ZHG(1)(a) the Minister should declare that he has decided not to secure the continuation of the anti-dumping measures concerned.

11. Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:

Do not answer question 11 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

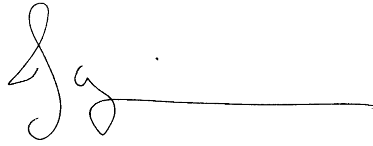
Under the reviewable decision, an anti-dumping duty is sought to be continued for a further five-year period. Based on the correct or preferable decision as outlined above, there should be no duty and no continuing anti-dumping measure.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* 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; and
- 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: Jeffrey Waincymer
Position: Trade Consultant
Organisation: Self Employed
Date: 10/08/2018

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:	**Jeffrey Waincymer**
Organisation:	**Self Employed**
Address:	**45 Victoria Road North, Malvern** **Melbourne VIC 3144**
Email address:	**jeffreywaincymer@gmail.com**
Telephone number:	**+61 418 147 629**

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: **Hiran Perera**
Position: **Manager**
Organisation: **CITIC Australia Steel Products Pty Ltd**
Date: **10/08/2018**

ADRP Submission re Final Report Nos. 449 and 450

Zinc Coated (Galvanised) Steel exported from the Republic of Korea, Taiwan and the People's Republic of China

The grounds on which the Ministerial Decision is argued to not be the correct or preferable one.

The Assistant Minister for Science, Jobs and Innovation (Assistant Minister), by Notice dated 12 July 2018, and by Anti-Dumping Notice No. 2018/96 of the same date, resolved that the anti-dumping measures applying to galvanised steel exported to Australia from China, Korea and Taiwan should continue from 5 August 2018. The Assistant Minister further resolved that the dumping margin applicable to Yieh Phui Enterprise Co Ltd should be 2.4% and determined the method of interim dumping duty payable.

The Ministerial Decision is challenged on the following grounds:

Ground 1: The Commissioner and in turn the Minister failed to follow a mandatory procedure by reason that the Commissioner published a Statement of Essential Facts (SEF) without considering all submissions made in that regard, as required under section 269ZHE(2) and each failed to redress that error in an appropriate manner

It is not in dispute that CITIC lodged a submission in December 2017 that was overlooked in the preparation of the SEF 449 and 450, (CITIC's Overlooked Pre-SEF Submission).[3]

While the Final Report does acknowledge this defect, no attempt is made to deal with the legal implications thereof, or to identify and follow a legally valid remedial process.

Where Parliament sets out a mandatory obligation, and one that is required for Australia to be in compliance with its WTO obligations, the only proper approach where there has been an admitted failure is to reinvigorate a proper process. The SEF should have been revoked, the time extended for a proper consideration and a new SEF produced.

Instead, the Commission simply purports to conclude in the Final Report that timely consideration of the submission would not have affected the outcome. No doubt any bureaucrat subject to a mandatory legislative direction, when appraised of their error, would hope to be able to conclude in the same manner, but the requirements of administrative law and proper process require more than that the bureaucrat

[3] Report Nos. 449 and 450 page 14, section 2.4.1.

responsible for the error assert that their decision would have been the same in any event.

Even if one were entitled to self-evaluate what would have gone through their minds if they had considered the submission at the relevant time, the comment in the Final Report misstates the ambit of the overlooked submission by suggesting that it was limited to complaints about the Commission's acceptance of the initial application. That is not the case.

CITIC's Overlooked Pre-SEF Submission argued that if the Application was not to be rejected outright, then:

> "greater transparency is required, beginning with non-confidential summaries of the confidential parts of the application and access provided as to the data alleged to relate to my clients."

This should not be a surprise to the drafters of the Final Report. In correspondence with the relevant officers and the then Assistant Minister, I pointed out that my submission not only took issue with the acceptance of the application, but also demanded further information required under the legislation and the WTO Anti-Dumping Agreement, namely non-confidential summaries of confidential material.

When the failure was brought to the attention of Commission officers, a response was received on 4 May 2018 from Rhys Piper, Director – Investigation 1 Anti-Dumping Commission, the salient parts of which are as follows:

> *"I have reviewed our files and can confirm that the public record version of your submission was received in the investigations1@adcommission.gov.au inbox on 22 December 2017. Unfortunately, it appears to have been missed in that inbox. It also had not been published, and ought to have been considered in the context of preparing the statement of essential facts (SEF) in respect of the continuation inquiry for galvanised steel and aluminium zinc coated steel.*
>
> *I am advised that the submission will be published on the relevant case page (#449) later today. The matters raised in your submission will now be addressed in the final report.*
>
> *Noting that the Commissioner's preliminary findings have now been published, your client is of course welcome to make further submissions in response if it wishes to do so …"*

Extracted below are the salient parts of my further correspondence with the relevant officers, Mr Rhys Piper and Mr Roman Maevsky, copied to then Assistant Minister Loundy, dated June 27, 2018.

Dear Mr Piper,

I am responding to your email and am also copying in the Assistant Minister, who no doubt is now considering your report.

In your email, you acknowledge that;

> *"The Statement of Essential Facts for both continuation inquiries (449 and 450) and the reviews of measures (456 and 457) did not address your submission of 20 December 2017."*

However, you go on to say;

> *"That submission was considered in the context of CITIC's application to extend the review of measures to include revocation. The revocation application was rejected on 22 December 2018. It was rejected because the application (which relied solely on the submission) did not include sufficient evidence to support its claims."*

Previously, you had simply acknowledged the error and suggested that it could be overcome by subsequent consideration. Is your reference to the rejection of the revocation application implying that the person who considered that, also took it into account in the separate continuation application? That seems highly unlikely. Or are you simply saying that if considered, it would have been similarly rejected? As I pointed out in my last email, having made the error, there will then be a strong sub-conscious bias towards finding no likely impact upon the outcome. Again I cast no aspersions upon individuals, but again wish to point out that this is not the proper way to respond to serious administrative error.

You go on to state:

> *"Having reviewed that submission again in the last few days, it is apparent that the submission is heavily critical of the decision to initiate the continuation inquiries. The threshold for initiating a continuation inquiry is not particularly high. One must consider whether there "**appear** to be reasonable grounds for **asserting** that the expiration of the anti-dumping measures … **might** lead, or **might be likely** to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent" (my emphasis). In the course of the inquiry the Commission has obtained additional facts to test those assertions (for the purpose of reaching the level of satisfaction described in subsection 269ZHF(2)). As a result I do not consider that the entire process is nullified in not explicitly considering the submission."*

> *This ignores my request for non-confidential summaries for the continuation. It also ignores the key differences between the applications. It is one thing to think that you have enough to initiate. It is another thing to deny interested parties the material called for under the WTO Agreement so that they can make the most meaningful submissions that you and the Minister will then consider. MY submission called for the whole investigation to be properly set up. It was not and hence my client's interests were adversely affected.*

That email responded to an email from Mr Piper dated 28 May 2018, the salient parts of which were as follows:

> *The Statement of Essential Facts for both continuation inquiries (449 and 450) and the reviews of measures (456 and 457) did not address your submission of 20 December 2017. However, that submission was considered in the context of CITIC's application to extend the review of measures to include revocation. The revocation application was rejected on 22 December 2018. It was rejected because the application (which relied solely on the submission) did not include sufficient evidence to support its claims. Having reviewed that submission again in the last few days, it is apparent that the submission is heavily critical of the decision to initiate the continuation inquiries. The threshold for initiating a continuation inquiry is not particularly high. One must consider whether there "**appear** to be reasonable grounds for **asserting** that the expiration of the anti-dumping measures … **might** lead, or **might be likely** to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent" (my emphasis). In the course of the inquiry the Commission has obtained additional facts to test those assertions (for the purpose of reaching the level of satisfaction described in subsection 269ZHF(2)). As a result I do not consider that the entire process is nullified in not explicitly considering the submission.*

Given that email exchange, it is remarkable that the Final Report simply reiterates that there is a lower threshold for initiation (a matter not in contention), and ignores the balance of the Overlooked Submission, including the reference to required non-confidential summaries. Nowhere in sections 2.4.1-2.4.4 of the Final Report does the Commission even address the challenge as to the lack of non-confidential summaries.

It is necessary to consider the proper process of dealing with any overlooked submission and further, the contents of it and the matters it asked to be addressed. The Commission erred in rejecting this in its entirety on the erroneous basis that it only dealt with the initiation phase and not with the proper evidentiary basis of an ongoing investigation. As to the latter, either my allegation about the need for non-confidential summaries on behalf of CITIC is correct or it is not. If the Commission thinks not, the Commission should have pointed out its reasoning in its report. If it is correct, it is the essential flaw that should have been addressed. By not addressing it, the Minister was not able to deal with the issue in purporting to follow the logic in the Final Report.

To similar end, it is simply avoiding the point to assert that CITIC's Overlooked Pre-SEF Submission of December 2017 contained no evidence supporting the critique of the application. One must begin with an indication of the gist of the confidential information relied upon via appropriate non-confidential summaries, before any interested party can know what case it must seek to meet and by what evidence. That is the whole point of the WTO requiring non-confidential summaries so interested parties do not have to take a scatter-gun approach to making their argument, but may instead address the matters thought to be of concern to the Commission.

This is doubly so when an importer needs assistance from an exporter to effectively respond to enquiries such as these. CITIC is not privy to alleged facts that would flow from the mandated obligation on Bluescope to provide useful non-confidential summaries of matters that are then properly investigated by the Commission and announced on the SEF. It is then commercially impossible to elicit the most appropriate and compelling information from an exporter as to its commercial in confidence domestic prices policy, among other things. It would also be unreasonable to expect importers and exporters to guess at every factual permutation that Bluescope might have alleged and then present cogent evidence against each.

Ground 2: The Commission failed to call for Bluescope to provide non-confidential summaries of the material it had submitted

It flows from the above that not only has the Commission failed to follow mandatory due process in considering submissions presented to it, but has failed to comply with a matter properly requested, being the request for provision of non-confidential summaries. Interested parties have not been able to know the nature of the confidential information provided by Bluescope and relied upon by the Commission and in due course, the Minister.

Article 11.4 ADA mandates that the Art 6 provisions regarding evidence shall apply to such continuation reviews. The elements of Article 6 dealing with the need for verification, transparency and an opportunity for interested parties to meet and engage, is particularly important for exporters found recently not to have been dumping or where there are findings close to de minimus levels (see ADRP Report No 58 and consequential Ministerial decision), where the current application for continuation must then be based on conjecture. While the applicant is naturally permitted to raise hypotheticals, it must meet the evidentiary burden of a likelihood test. Its hypothetical case must to that end be evidence based, with such evidence making injurious dumping more likely than not.

The key parts of Article 6 are extracted below:

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ***ample opportunity*** *to present in writing all evidence which they consider relevant in respect of the investigation in question. (emphasis added) …*

> *6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party* ***shall*** *be made available promptly to other interested parties participating in the investigation. (emphasis added).*

6.2 Throughout the anti-dumping investigation all interested parties ***shall have a full opportunity for the defence of their interests****. (emphasis added) …*

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see ***all information that is relevant to the presentation of their cases****, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation,* ***and to prepare presentations on the basis of this information****. (emphasis added) …*

> *6.5.1 The authorities* ***shall*** *require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be* ***in sufficient detail*** *to permit a* ***reasonable understanding*** *of the substance of the information submitted in confidence. (emphasis added) …*

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 … Subject to the requirement to protect confidential information, the authorities ***shall make the results of any such investigations available****, or shall provide disclosure thereof pursuant to paragraph 9,* ***to the firms to which they pertain*** *and may make such results available to the applicants (emphasis added).*

6.8 In cases in which any interested party refuses access to, ***or otherwise*** *does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph. (emphasis added) …*

6.10 *The authorities* ***shall, as a rule****, determine an individual margin of dumping for* ***each*** *known exporter or producer concerned of the product under investigation. (emphasis added) …*

11.2 *The authorities* ***shall*** *review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits* ***positive information*** *substantiating the need for a review.*[4] *Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately. (emphasis added) …*

11.4 *The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article …*

18.1 *No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.*[5]

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. *As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.*

2. *All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. …*

[4] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.
[5] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

5. *Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.*

Ground 3: The Final Report and Minister's Decision failed to provide any reasoning for rejecting all aspects of CITIC's Post-SEF Submission.

The Final Report simply does not address any of the arguments presented in CITIC's Post-SEF Submission. Instead, it simply notes the following alarming observation:

> "The Commission notes the submission received from CITIC. The Commission considers that the submission contains no new information that was not already before the Commission at the time of preparing SEF 449 and 450. In most respects, CITIC's submission puts forward an alternative view of the conclusions that the Commissioner ought to draw from the facts before him. The Commissioner does not consider CITIC's submission to be persuasive."[6]

Thus the Commission rejects in its entirety a 47 page submission that goes to great lengths to explain where the logic of the SEF is flawed. Neither the Minister nor ADRP are in any position to understand the basis of the Commission's rejection of the submission without the Commission providing its reasoning.

This failure poses an obvious challenge when preparing this Application to ADRP. Under the statutory framework, an applicant is required to provide the grounds for indicating why the decision was wrong. One would normally expect the applicant to look to the reasons within the Final Report and explain where they are erroneous. If as in this case, however, no reasoning whatever is provided for the rejection of CITIC's post-SEF submission, all one can effectively do is reiterate all of the arguments made in the rejected submission. I formally do so and ask ADRP to consider each and every argument in both the Pre-SEF and Post-SEF Submissions presented by CITIC.

The situation might have been different if the Final Report's conclusions were of a different nature to those within the SEF whereby the updated logic of the Commission might then at least be implied. In such circumstances the implied reasoning would be addressed in this Application to ADRP. That is not the case, however, with the Final Report essentially reiterating all of the conclusions within the SEF without addressing my previous reasoning as to why those conclusions could not be validly maintained.

At the very least, ADRP should demand a reinvestigation pursuant to section 269ZZL or call on the Commission to provide fulsome reasons for its rejection of this argument and give CITIC an opportunity to respond.

[6] Final Report page 48, section 6.6.3.1.

Ground 4: The Final Report fails to address each required element in a continuation exercise

The wording of section 269ZHF(2) is crucial. It sets up a high evidentiary burden, requiring a conclusion that dumping, plus injury "would" both occur if the duty was removed, or if that standard was not proven, that such dumping and injury would at least "be likely" to both reoccur. That is, the evidence must support this conclusion on the balance of probability. A continuation of the measure requires the Minister to be satisfied that the evidence before him makes it more likely than not that dumping will re-occur, makes it more likely than not that such dumping will be at more than de minimus levels, makes it more likely than not that such dumping will cause injury and makes it more likely than not that such injury will be material. If he is not so satisfied on each element, he cannot allow continuation of the measure.

The Final Report in section 5.1, indicates that the various periods identified have been examined for the purposes of identifying trends in the economic condition of the Australian industry before and after the imposition of anti-dumping measures. Importantly, that can only support an argument as to whether measures can be effective in removing injury and not that measures are needed. The latter depends on the likelihood of future dumping causing future material injury.

In line with WTO jurisprudence, the Federal Court of Australia has found that the term "likely" at s 269ZHF(2) means "more probable than not."[7]

That has been confirmed and adopted by ADRP.[8] Paragraph 29 of that ADRP Report demonstrates an appropriate gateway requirement in an analysis of the likelihood of future dumping. It references the fact that the Commission reviewed the particular company's export volumes, export strategies, production capacity and export prices and concluded that it did "not appear to be pursuing an aggressive export pricing strategy to Australia and has not shown a propensity to dump …" An analysis of the strategy and documentary history of Yieh Phui would find that is the only possible conclusion where that company was concerned. Yet the Final Report makes no attempt to address this question.

As was pointed out in the CITIC Post-SEF Submission, to simply examine injury factors without a concurrent dumping analysis would be contrary to the legislative requirements where there is a need for a fact-based consideration of the applicant's hypothesis as to likely future injurious dumping.

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[7] Minister of State for Home Affairs v Siam Polyethylene Co. Ltd. (No 2) (2009) 258 ALR 515, per Rares J at [48]. On appeal, this interpretation of "likely" was confirmed, although Rares J's factual analysis was overturned: Minister of State for Home Affairs v Siam Polyethylene Co. Ltd. (2010) 118 ALD 465, per Graham and Flick JJ at [90] (Bennett J concurring) ('Siam Polyethylene'). See also Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees Union (1979) 42 FLR 331, per Deane J at 346: "The word 'likely' can, in some contexts, mean 'probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a 50 per cent chance...."

[8] ADRP Report No. 50 – Food Service and Industrial (FSI) Pineapple Exported from the Kingdom of Thailand, pages 8-9.

The most significant methodological flaw in this required analysis in the Final Report is a failure to address whether dumping is likely to occur or not. Instead, the Commission simply incorporates its findings from its concurrent Review as to dumping margin, reasons that there is likely to be ongoing price competition and concludes a likelihood of dumping.

The Final Report also errs in using tentative revised Review dumping margin figures of a static nature without further analysis to hypothesise future dumping. It certainly cannot have used final figures determined by the Minister but even then, static pricing figures cannot be the basis for a continuation decision.

Where Taiwan is concerned, the logic justifying a conclusion of likely future dumping is found in section 6.6.3 at page 48 of the Final Report. It notes the following factual conclusions it purports to have made:

(1) Exporters from Taiwan have a substantial proportion of the import market in Australia.

(2) Taiwan has significant excess capacity.

(3) Prices from Taiwan were below prices from China and Korea in three of the four quarters investigated.

(4) Taiwanese prices are generally below those from Korea and China.

(5) Taiwan exporters have recently experienced significant growth in market share.

Based on these factors the following conclusion is drawn:

> "Accordingly, the Commission considers that it is likely that future exports of galvanised steel from Taiwan would be dumped on the Australian market in the absence of the current measures."[9]

There is simply no attempt to indicate why future sales would be at <u>dumped</u> prices, that is, that export prices to Australia are likely to be less than the normal values in Taiwan. The above factors do not begin to address that question. Nowhere in the Final Report is there any attention given to normal values in Taiwan and the likely trend of these and the likely effect on export prices.

A complete failure to address trends in normal values in a continuation inquiry is a complete failure to address the likelihood of future dumping. There may be a range of means for doing so and there needs to be an acceptance that this is to some degree a hypothetical exercise. Yet the exercise must be undertaken, otherwise the legislative mandate has not been followed.

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[9] Final Report page 48.

Most importantly, the Commission has had so many investigation of this product over the years with my client's exporter always fully co-operating. The Commission would know how often that exporter has been found to dump over the last five years. It would know through assessments, that this almost never occurred. On the rare occasions when an investigation had found dumping, it has been at the most modest of levels which are not then maintained.

Another way to analyse the likelihood of dumping is to consider the motivation behind export pricing. In some cases, the Commission might be able to conclude that a particular exporter will always match local prices whether it is dumping or not and hence is likely to do so whenever the need arises.

Such a conclusion is particularly unlikely given the finding of Bluescope's import parity pricing. If it was the other way around, with Bluescope setting prices and foreign exporters determined to match them, then all other things being equal, dumping might well occur if an exporter was determined to match lower Bluescope prices notwithstanding movements in normal values. That is not the Commission's finding of the way Bluescope or exporters operate.

No attempt was made to address the comments in CITIC's Post-SEF Submission at paragraphs 259 to 263 dealing specifically with Taiwan. Nor does the Commission address the fact that it regularly found on assessments of Yieh Phui that there was in fact no dumping.

Ground 5: The Final Report fails to include adequate reasoning for each of the conclusions sought to be drawn

As noted above, one challenge facing this Application is the complete failure to address any of the arguments within CITIC's Post-SEF Submission. It is somewhat difficult to point to the errors in the reasoning of a bureaucrat that simply states that a 47 page submission was not persuasive. That is a conclusion without reasons. As noted above, I must then formally ask ADRP to consider each and every argument in that submission and analyse the inadequacy of the reasoning in the Final Report in that light. The following material merely aims to highlight some of the most egregious implied errors in the Commission's conclusions in the Final Report. It does so in the rough page order of that Report.

Ground 5.1: Import Share

CITIC's Post-SEF Submission noted as follows:

> *45. When relying on import data and its inferences, the Commission has in fact failed to separately analyse the data for companies subject to measures and those that are not and companies subject to this inquiry and those that are not. It is impossible to determine whether future dumping is likely to cause material injury without doing so.*

46. Given the requirement to at least consider the proper outcome for each individual exporter, the Commission has also failed to separately analyse the data for companies subject to high levels of actual or prospective measures and those subject to low actual or prospective measures. It is impossible to determine whether future dumping is likely for Yieh Phui and then determine whether it would be likely to cause or contribute significantly to material injury without doing so.

CITIC's Post-SEF Submission thus noted that it would be necessary to consider whether exempt exporters with unused capacity would be price setters and would cause all of the material injury. The legislation clearly contemplates that individual decisions will be made about particular exporters, which in turn requires thoughtful analysis of each based on the material that is to hand. Once again, the Commission has dealt with this product and the relevant exporters on numerous occasions as highlighted on page 10 of the Final Report. The Final Report simply does not address this and did not bring this matter to the Minister's attention. The Minister was not pointed to any meaningful position on which he could exempt particular exporters. In that sense, the Final Report is in breach of section 269ZHG(5).

Ground 5.2: The Minister has failed to take proper account of distribution networks within market structure

Again as the Final Report notes, there have been numerous inquiries in relation to this product. In a whole range of submissions, it has been pointed out to the Commission that market structure and pricing must consider how Bluescope's own distribution network competes with other distributors. It has to have been clear from the Commission's investigations that Bluescope will not sell to competitor distributors at prices which would allow them to compete with Bluescope's own distribution network. Hence it cannot be correct to conclude as the Commission has done, that it "has confirmed that related and unrelated customers are treated the same in relation to pricing and the terms of sale."[10]

The Final Report also fails to address the vertically integrated operation with HRC production leading through to Colorbond and similar end value-added production. As was noted in CITIC's Post-SEF Submission:

92. While each element is addressed below in the order addressed by the Commission, the most significant finding that must colour all others, is that Bluescope has never been profitable whether measures are imposed or not, yet it has the lion's share of the market and little unused capacity. It has no trouble producing and selling what it wants, it just cannot do so profitably but keeps producing in any event. While such behaviour would normally seem odd, it is understandable when one notes the vertically integrated operation with HRC produced for this product, which in turn is used for Colorbond and

[10] Final Report page 26, section 4.3.3.

similar end value-added production. Again, this business model is in no way a justification for Continuation of measures as to imports it would never source for such a purpose.

93. The SEF has found that Bluescope only wishes to keep its pricing at import parity pricing, including as against the majority of imports that are not subject to any measures, it hence sets or follows price benchmarks in the domestic economy set by exporters not subject to these measures and then can never make a profit and finds ever-diminishing returns on capital investment. A Continuation regime is not there to give distortive protection to a monopoly producer who finds itself in this position.

The Final Report has simply failed to address the comments in relation to internal transfers and related party sales as found in paragraphs 78 to 89 of CITIC's Post-SEF Submission.

Ground 5.3: Import Parity Pricing

The Final Report at page 25 notes that Bluescope operates an "import benchmark pricing strategy." It also notes that Bluescope "places significant importance on maintaining sales volume and only would set a price below the import parity price on an exceptional basis." Benchmarking is used to set a base price, with variations then made.

Bluescope's business strategy of seeking to keep its prices at or around the import parity price, should be seen as additionally problematic, given the finding of the Commission that price generally remains the major factor which influences a customer's purchase decision.

The Final Report simply does not address any of the arguments made in CITIC's Post-SEF Submission in that regard. The most significant point to address is that even behind the protective wall of the measures, Bluescope is never able to make a profit on this product yet is operating at near full capacity. Given that the measures have not been able to remove the most significant form of commercial injury, that is, a lack of profit, it flows as a matter of logic that such injury cannot be caused by dumping unless the Commission and the Minister have failed to adequately address dumping margins in the past. That cannot be presumed to be true. They must presume that the measures that they applied from time to time were set at the level to remove injury from dumping.

The only legitimate conclusion is that Bluescope has a need to maintain its loss-making division for other reasons. The obvious one is to service its Colorbond and related requirements. Where that is concerned, losses on any intermediate stage are based on internal transfer pricing and may or may not be arbitrary in nature. The continuation provisions of the anti-dumping regime are not there to allow for protection in such circumstances.

Ground 5.4: Sales Volume

The Final Report does not address the matters raised in paragraphs 94 to 98 of CITIC's Post-SEF Submission, in particular the need to consider sales volume in the context of a finding of near full capacity for Bluescope and the captured sales volume and market share in relation to Colorbond production. There is a need to distinguish between those parts of its business that are truly subject to competitive forces and those that are captured as part of this vertical integration.

Ground 5.5: Market Share

The Final Report simply does not address the arguments in relation to market share as found in CITIC's Post-SEF Submission paragraphs 99 to 103 in particular the fact that countries subject to measures largely maintained their share with imports from other countries losing market share. This must demonstrate that anti-dumping measures have had little impact on the companies alleged to be dumping.

Ground 5.6: Price Effects

CITIC's Post-SEF Submission presented a number of arguments as to why price impacts will not be caused by likely dumping from those subject to continued measures and further, that price injury is caused by Bluescope's inability to make a profit even when operating at near full capacity. As the Post-SEF Submission pointed out:

> *65. … "a comparison of the rates shows that a majority of exporters have had their IDD significantly lowered, not raised. They will be better able to compete on price and could be expected to do so if necessary. Because Chinese exports have the lion's share of non-exempt imports under this inquiry and because the proposed drop in IDD is most alarming for Chinese exporters, continuing the measures will not protect Bluescope's prices or market share."*

The Commission could only conclude that even with the dumping margin it proposes to have continue, given the unused capacity of the many exempt suppliers or suppliers with low margins, and given the finding of Bluescope's import parity pricing strategy, the Commission cannot hypothesise Bluescope moving to profitability in the relevant products even if the measures are to continue.

The Final Report also does not address the arguments raised in CITIC's Post-SEF Submission paragraphs 104 to 112. The most significant observation is that even with growing prices, growing market share and close to full capacity, Bluescope presumably cannot constrain its costs and remains unprofitable accordingly. That is notwithstanding the fact that it is a monopoly producer and produces its own hot-rolled coil. The CITIC submission observed as follows:

> *106. Obviously in such circumstances, if the costs are real, Bluescope's cost structure must be significantly higher than those of its foreign competitors*

not subject to anti-dumping duties, given its parity pricing policy and full capacity. The Commission would have found this cost issue and profit differential when it undertook site visits, first to Bluescope and then in those countries where measures were unsuccessfully applied for, or in respect of those exporters that were found not to be subject to any measures.

107. Anti-dumping duties have nothing to do with cost control. Anti-dumping measures are also of no commercial benefit to a company that cannot make profit when competing against exporters not subject to measures when measures are in place, who have lower cost structures in relation to a product with high price elasticity of demand and who have large unused capacity.

Nor does the Final Report address concerns raised as to Bluescope's reliance on increases in global zinc prices impacting upon its margins. Such input pricing must affect all producers indiscriminately.

Given the importance of increased costs as an explanation of lack of profitability, and given that Bluescope supplies HRC to itself, one would have expected the Final Report to address the following arguments from CITIC's Post-SEF Submission, namely:

"111. Alternatively, the excessive cost was self-imposed by reason of Bluescope's internal transfer pricing or related party sales for hot-rolled coil and its transfer pricing of this product for Colorbond as discussed above. It would be interesting to see if internal pricing changes when dumping is applied to HRC. If that division uses parity pricing, it will increase its price. There will then be an automatic transfer of profit between the galvanised steel division and the HRC division. The galvanised steel division then alludes to this profit drop as a justification for Continuation of dumping duties. The law is there to deal with real harm from real external dumpers, not cascading internal protectionist policy and/or arbitrary accounting practices that have nothing to do with overall Bluescope profitability.

112. Stated differently, to the extent that Bluescope also brings successful anti-dumping actions on hot rolled coil and operates parity pricing in that market as well, the protection on that product leads to higher hot rolled coil prices that then feed in to its internal transfers or related party sales, thereby providing a self-inflicted cause for the losses on galvanised steel."

In the Final Report, the Commission notes that it found prices in the market which tend to be cheaper than those of exporters subject to the measures.[11] It simply does not address the following observation in that regard from CITIC's Post-SEF Submission:

[11] Final Report page 42.

231. … It does not indicate whether these are also cheaper than those of Bluescope, but that can be presumed. Based on other findings, this is also pricing from exporters with significant unused capacity. Hence, the Commission cannot conclude other than to say that Bluescope is wholly unable to compete profitably with exporters not subject to the measures who are hence not dumping. Those entities would set the local market prices, as in the light of their unused capacity, if others sought to compete with higher prices, the low price providers could grow their market share accordingly.

232. To simply observe instead as the Commission has done that goods originating from China and Taiwan undercut Bluescope's prices simply shows that even entities subject to the measures can compete profitably with those not subject to measures, while Bluescope cannot.

233. Most importantly, for entities who receive full refunds on assessment applications, as is the case with Yieh Phui, they are not dumping in doing so, even though they are subject to the measures and have to go through the expense of the assessment process.

Hence the Final Report cannot validly hypothesize a scenario where Bluescope can ever price this product profitably.

Ground 5.7: Profit and Profitability

The Commission has found that Bluescope never makes profit even at near full capacity and even behind the protective wall of these measures. As was noted in the CITIC Post-SEF Submission:

63. … If it can never make a profit in these circumstances because it cannot price above cost, and most importantly of all, if it cannot show an ability to raise prices with the current measures to protect it, it cannot hypothesise a profitable future behind continued measures. Its application fails logically because it admits that it cannot price at profitable levels even with the measures.

CITIC's Post-SEF Submission pointed to the vastly different findings on galvanised steel where there had never been profit and aluminium zinc-coated steel where profit had often been the case. The Final Report does not address the arguments as found in CITIC's Post-SEF Submission paragraphs 113 to 120 and in particular, the argument that if consistent lack of profitability on galvanised steel arose while measures were on foot, it must be the case that injury was caused by other factors if the Minister's measures were at an appropriate level to remove the injury caused by dumping, which must be presumed.

Ground 5.8: Other Factors

The Final Report does not address the arguments in CITIC's Post-SEF Submission paragraphs 121 to 128. That sought to argue that many of the factors referred to in section 5.6 of the SEF Final Report are either irrelevant or can be explained for other reasons than likelihood of injurious future dumping. If the Commission rejected all such arguments, it was wrong to do so and certainly wrong to do so without any reasoning. By simply stating in the Final Report that it makes observation on the information provided, this suggests that it has accepted each of those as relevant factors.

Ground 6: The Final Report fails to address injury factors other than dumping that are required to be considered

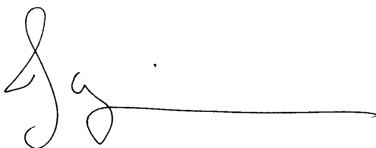
Neither the SEF nor the Final Report make mention of the likely impact of factors other than dumping including the behaviour of exempt companies, countries not subject to measures and Bluescope's joint venture with Nippon Steel and Sumitomo Metal Corporation. As noted in the CITIC Post-SEF Submission:

> *57. The more that there are countries and exporters not subject to measures, the more likely they are to be price setters in the domestic industry. Given the worldwide overcapacity that the Commission asserts, such exporters would be able to soak up market share from exporters subject to measures, with no ensuing benefit to the domestic industry. This is further demonstrated below when considering Bluescope's near full capacity, growing market share and rising prices, but total and consistent inability to make a profit on this product, whether protected by anti-dumping measures or not.*

Once again, this is not mentioned in the Final Report. Neither CITIC's arguments nor the Commission's reasons for rejecting those arguments were presented to the Minister. Hence the report is in violation of section 269ZHG(5).

CONCLUSION

For all the foregoing reasons, the ADRP should establish a review, reject the process undertaken and call for a proper investigation and a properly reasoned Final Report, or alternatively recommend the alternative rejection decision as advocated in this Application.



Jeff Waincymer
Trade Consultant
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