



Australian Government
Department of Industry,
Innovation and Science

Anti-Dumping Commission

Anti-Dumping Commission
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CANBERRA ACT 2601

Mr Paul O'Connor
Panel Member, Anti-Dumping Review Panel
c/o- ADRP Secretariat

By e-mail: ADRP@industry.gov.au

Dear Mr O'Connor

Certain aluminium extrusions exported from the People's Republic of China

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the Act) published on 24 June 2019, advising of your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) to publish a notice under subsection 269ZDB(1)(a)(iii) of the Act (the Reviewable Decision). This notice was published on the website of the Anti-Dumping Commission (the Commission) on 9 May 2019, as Anti-Dumping Notice (ADN) No. 2019/44.

I understand that the Commission has provided you with the information that was requested of me in your correspondence of 24 June 2019, that is:

1. confidential attachments to *Anti-Dumping Commission Report No. 482* relevant to the grounds of the review application;
2. submissions to the Commission commenting on the Statement of Essential Facts (SEF), including confidential attachments relevant to the grounds of the applications for review;
3. the verification reports and verification work programs relating to PanAsia Aluminium (China) Ltd (PanAsia) and Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (Kam Kiu), including confidential attachments;
4. a copy of Corrs Chambers Westgarth's (Corrs) submission on behalf of Kam Kiu dated 18 February 2019, including Corrs' letter to the Commission dated 27 February 2019 and confidential attachments;
5. *Anti-Dumping Commission Report No. 392*, including confidential attachments;
6. Kam Kiu's response to the exporter questionnaire, including confidential attachments;
7. Guangdong Zhongya Aluminium Company's Ltd (Zhongya) application for revocation of measures, including confidential attachments;
8. a copy of ADN No. 2018/138; and
9. *Anti-Dumping Commission Report No. 442*, including confidential attachments containing the dumping margins.

I have considered the applications submitted by Darley Aluminium Trading Pty Ltd, Fujian Minfa Aluminium Inc., PanAsia and Kam Kiu for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Act, at **Attachment A**.

Non-confidential versions of the submission and appendices have been provided.

The Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dale Seymour
Commissioner
Anti-Dumping Commission
24 July 2019

Attachment A

Background

1. On 31 May 2018, the then Assistant Minister for Science, Jobs and Innovation to the Minister for Jobs and Innovation (the then Assistant Minister), pursuant to subsection 269ZA(3) of the *Customs Act 1901* (Cth) (the Act),¹ requested that the Commissioner of the Anti-Dumping Commission (the Commissioner) initiate a review of the anti-dumping measures applying to certain aluminium extrusions (the goods) exported to Australia from the People's Republic of China (China).
2. Subsequent to the then Assistant Minister's request, on 12 July 2018 the Commissioner initiated a review (Review 482) of the anti-dumping dumping measures (in the form of a dumping duty notice and a countervailing duty notice) applying to the goods exported to Australia from China.²
3. On 6 September 2018, the Commissioner accepted an application to extend the review of anti-dumping measures to include a revocation review of measures applying to the goods exported from China.³ The revocation review was limited to examining whether the countervailing duty notice in relation to Guangdong Zhongya Company Ltd (Zhongya) should be revoked.
4. On 9 May 2019, the Anti-Dumping Commission (the Commission) published a notice signed by the Minister for Industry, Science and Technology (the Minister).⁴ In accordance with subsection 269ZDB(1)(a)(iii), the Minister declared that, with effect from the date of publication, the dumping duty notice and the countervailing duty notice currently applying to the goods exported to Australia from China be taken to have effect as if different variable factors had been fixed in respect of all exporters relevant to the determination of duty.
5. In the Reviewable Decision, the Minister stated that she made the Reviewable Decision following consideration, and acceptance of, recommendations made by the Commissioner on 9 April 2019, as set out in *Anti-Dumping Commission Report No. 482* (REP 482).⁵ This report outlined the Commissioner's investigations, material findings of fact and law on which his recommendations were based and evidence relied upon to support those findings.
6. Darley Aluminium Trading Pty Ltd (Darley Aluminium), Fujian Minfa Aluminium Inc. (Minfa), PanAsia Aluminium (China) Ltd (PanAsia) and Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (Kam Kiu) and its related entities, made separate applications for review of the Reviewable Decision by the Anti-Dumping Review Panel (ADRP). The Commission understands these applications were made pursuant to subsection 269ZDB(1).

¹ All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') unless otherwise indicated.

² Under division 5 of XVB of the Act.

³ ADN No. 2018/138 refers.

⁴ ADN No. 2019/44 refers.

⁵ Document no. 63 on electronic public record (EPR) 482 refers.

Application of Review submitted by Darley Aluminium

Ground 1: Finding that the subsidisation the measures are intended to prevent is likely to recur or continue amounts to a misapplication and misinterpretation of the requirement under section 269ZDA(1A)(b)

7. The Commissioner considers that the statute requires that he must recommend revocation unless he is *satisfied* as a result of the review that revoking the measures would lead, or be likely to lead, to a continuation of, or a recurrence of;
 - (a) the dumping or subsidisation; and
 - (b) the material injury that the measures are intended to prevent.⁶
8. Darley Aluminium proposes an implied requirement in subsection 269ZDA(1A)(b) of reading in the words *negligible*, or *actionable*, level of subsidy.⁷ The Commissioner understands this to mean that, unless he is satisfied that the revocation of the measures would lead, or be likely to lead, to future subsidisation at rates which are in excess of the *negligible* rate (which, for the purposes of the original investigation, was 2 per cent), the Commissioner must recommend the revocation of the measures.⁸
9. The Commissioner notes that his assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a revocation review, necessarily requires an assessment of a hypothetical situation. This view has been supported by the ADRP in the context of continuation inquiries, which noted that the Commissioner must consider what will happen in the future should a certain event (in this instance, being the revocation of the measures) occur. However, the Commissioner's conclusions and recommendation must nevertheless be based on facts.⁹
10. The Commissioner's task in a revocation inquiry is to inquire about the *likelihood* of the effects of revoking the existing measures. The Commissioner considers that his statutory task would be improperly constrained by adopting Darley Aluminium's proposed approach, which appears to over-emphasise the importance of the scale of the subsidy margin at one point in time (and its alleged correlation to the scale of the subsidy margin at a future point in time), rather than contemplating the likely changes in behaviour caused by the revocation of the measures.
11. In every case the calculation of a countervailing subsidy margin occurs after the amount of subsidy received has been established, expressed as a proportion of the export price. Given the role played by public bodies in granting subsidies, and noting that export prices will shift over time in response to the market generally and the exporter's financial objectives, it is impossible for the Commissioner to establish what a future margin will be with any precision. With respect, it is also impossible for Darley Aluminium.

⁶ Subsection 269ZDA(1A)(b).

⁷ Darley Aluminium's application to the ADRP dated 11 June 2019, page 4 refers.

⁸ For completeness, the Commissioner considers that Darley Aluminium's approach would, in a relevant case, also require that future dumping is greater than the *de minimis* rate (i.e. 2 per cent).

⁹ [ADRP Report No. 44](#) (Clear Float Glass) refers.

12. The Commissioner notes that section 269TDA (dealing with the circumstances in which an investigation must be terminated) states a specific threshold and consequence for a *negligible* countervailing margin. The Commissioner notes that subsection 269TDA(2) relates to the amount of countervailable subsidy received in the investigation (or other relevant) period - this is a backward looking test which can be based on historical data. It does not appear that the same degree of precision is required for the estimation of a future margin in a revocation review. Accordingly, the Commissioner considers that the approach proposed by Darley Aluminium is not correct.
13. However, the Commissioner recognises that the scale of any future subsidisation is nevertheless relevant when assessing the degree to which that future subsidisation is likely to cause a continuation or recurrence of material injury. These matters are addressed under the following ground.

Ground 2: Insufficient evidence that revocation of the measures would lead or be likely to lead to continuation or recurrence of material injury the measures are intended to prevent

14. The Commissioner considers that in the context of a revocation review the word *likely* has been interpreted to mean more probable than not.¹⁰ The Commissioner also considers that past conduct can often be a guide to future conduct.¹¹ Further, in *Anti-Dumping Review Panel Report No. 44*, the Senior Member considered that 'past conduct is probably the most reliable indication of future conduct'.¹²
15. The Commissioner's reasons for finding that the revocation of the measures would lead, or be likely to lead to a continuation or recurrence of both subsidisation and material injury that the measures are intended to prevent are summarised in chapter 8.4 of REP 482.
16. REP 482 also found that the imposition of measures has been a factor in the Australian industry's improved competitiveness. However, REP 482 also shows evidence of continued pressure on the Australian industry's performance from pricing of the increased volume of imports from Zhongya and other Chinese exporters. REP 482 also concluded that, should the Government of China increase the Value-Added Tax rebate on aluminium extrusions, it is likely that Zhongya will use that increased rebate in its pricing, further undercutting Australian industry prices.¹³
17. The Commissioner submits that these findings are reasonably open on the facts.

¹⁰ *Siam Polyethylene Company Ltd v Minister of State for Home Affairs and Another (No. 2)* [2009] FCA 838 [50].

¹¹ Ibid 504.

¹² [ADRP Report No. 44](#) (Clear Float Glass) at para [38].

¹³ Ibid, page 73 refers.

18. The Commissioner received a completed questionnaire from Capral as part of the revocation review. The Commissioner notes that Capral is the largest Australian industry member. The Commissioner also had regard to the data and information collected as part of previous investigations and reviews of measures. The Commissioner is satisfied that the totality of information is representative of the Australian industry as a whole.¹⁴
19. The Commissioner considers that, based on the collective body of evidence, the Minister made the correct and preferable decision in finding that revocation of the measures is likely to lead to a continuation or recurrence of the subsidisation and material injury that the measures are intended to prevent.

Application of Review submitted by Kam Kiu

Ground 1: The Commission should not have included certain like goods ('high-end models') in the calculation of profit in constructing the normal value

20. In accordance with regulation 45(2) of the *Customs (International Obligations) Regulation 2015* (the Regulation), the Minister must, if reasonably practicable, determine profit using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.
21. Kam Kiu has consistently claimed that the high-end models are not like goods and that these models should be excluded from the profit calculation. *Anti-Dumping Commission Report No. 392*, and the verification reports that were prepared as part of Reviews 392 and 482, consistently show that Kam Kiu has not provided evidence that demonstrates how these high-end models are not like goods.
22. In REP 482, the Commissioner determined that Kam Kiu's high-end models are like goods to the goods under consideration as defined in section 269T. The Commission also determined that Kam Kiu's data relating to the production and sale of like goods was available and was found to be relevant, complete and accurate and was used to determine the amount of profit in the constructed normal value.
23. Therefore, the Commissioner is of the view that it is open to him to include high-end models in the calculation of profit under regulation 45(2).

Ground 2: In including certain like goods in the calculation of profit, the Commission failed to make an adjustment for the profit to ensure a fair comparison between the goods sold domestically and those exported to Australia

24. Subsection 269TAC(9) provides for adjustments to be made in determining the costs under subsection 269TAC(2)(c) to ensure that the normal value is comparable with the export price of those goods.

¹⁴ Ibid, pages 61 – 62 refer.

25. The Commissioner was unable to make an adjustment under subsection 269TAC(9) based on the fair comparison claims made by the applicant. Kam Kiu claims that the high-end models differ from other models in that they have different combinations of tighter manufacturing tolerances, higher grades of alloy, involve additional processing (e.g. bending, cutting, punching etc.), additional preparations prior to coating and/or detailed finishes.¹⁵ However, the Commission found that the cost to make and sell (CTMS) data provided by Kam Kiu does not separate costs to a level where the costs of all high-end models, and therefore profit, can be quantified and differentiated from other models.¹⁶
26. The Commissioner does not consider that an adjustment for profit of like goods can be undertaken in accordance with subsection 269TAC(9).

Application of Review submitted by Minfa

Ground 1: The Commission should have determined an individual rate of measure for Minfa or recommended to the Minister to accept an undertaking from Minfa

27. Subsection 269ZA(1)(a) states if anti-dumping measures *have been taken* in respect of goods an affected party can apply to have the measures reviewed. Therefore, the Commissioner considers that a review of measures conducted under Division 5 of the Act is a review of an existing anti-dumping measure. Section 269T defines anti-dumping measures as the publishing of an anti-dumping notice or a countervailing duty notice or the acceptance of an undertaking under section 269TG or 269TJ.
28. On 12 March 2019, Minfa offered a price undertaking as part of the review. Anti-Dumping Notice No. 2018/111 states that Review 482 relates to the anti-dumping measures in the form of a dumping duty notice and a countervailing duty notice, the existing measures.¹⁷ It is clear from the terms of that notice that an undertaking is not part of the existing measures. For this reason, the Commissioner believes that he has no power under section 269ZDA to recommend to the Minister to accept an undertaking from Minfa as part of the review.
29. The Commissioner advised Minfa on 14 March 2019 that the Act permits the Minister to accept an undertaking by an exporter *prior* to publishing any notice with respect to the goods it exports that would otherwise become subject to any notice at the conclusion of a dumping and/or subsidy investigation. With respect to aluminium extrusions exported to Australia from China, dumping and countervailing duty notices have previously been published.
30. In its application, Minfa submits that “it is entitled to its individual rate” as it has cooperated in Review 482.¹⁸

¹⁵ Kam Kiu’s application to the ADRP dated 7 June 2019, page 3 refers.

¹⁶ REP 482 – document no. 63 on EPR 482, page 48 refers.

¹⁷ Document no. 1 on EPR 482 refers.

¹⁸ Minfa’s application to the ADRP dated 6 June 2019, page 7 refers.

31. The Commissioner did not select Minfa for examination in this review as extending the review to verify Minfa's information would have prevented the timely completion of the review.¹⁹ Therefore, Minfa is considered a residual exporter under section 269T.

Application of Review submitted by PanAsia

Ground 1: The Commission erred in uplifting PanAsia's raw material costs

32. In its application, PanAsia submits that the uplift methodology applied by the Commission in adjusting the raw material costs (aluminium ingot and billet) used in constructing the normal value is flawed as it does not apply the percentage uplifts separately determined for aluminium ingot and aluminium billet to PanAsia's corresponding ingot and billet purchases.²⁰
33. PanAsia also submits that, in adjusting PanAsia's raw material costs, the Commission erred in not making a corresponding adjustment to its scrap recovery, or cost offset for scrap, given that scrap is deducted from the uplifted raw material costs.
34. In its submission in response to the SEF dated 18 March 2019, PanAsia provided a copy of its proposed uplift methodology in a confidential attachment to the submission.²¹ This uplift methodology was demonstrated using the CTMS data PanAsia had provided in its response to the exporter questionnaire; however, in the CTMS spreadsheet provided post-SEF, PanAsia had included additional columns (columns H, AV, BC, BE, BG, BI and BK), and had included column BB which separately identified the cost of purchased billet that was transferred to the production of extrusions.
35. In REP 482, the Commission implied that the data in columns BB (transfers of purchased billet to extrusion production), BC (containing a formula which refers to data in column BB and other columns), BD (scrap) and BE (containing a formula which refers to data in column BE and other columns) was new and unverified information provided by PanAsia post-verification; therefore, the Commission did not rely upon this information to separately identify the purchased aluminium ingot from the purchased aluminium billet in order to apply separate uplifts to ingot and billet costs.
36. PanAsia suggests that the Commission has misunderstood the data recorded in certain columns (BC and BE) in **Confidential Appendix 4 (PanAsia)** (contained in Confidential Appendix 2 to REP 482) and has therefore treated the data in these columns, and data in columns BB and BD, as new and unverified information despite the Commission having previously verified the information.

¹⁹ In accordance with subsection 269TACAA(1).

²⁰ PanAsia's application to the ADRP dated 6 June 2019 refers.

²¹ Confidential Attachment A to PanAsia's submission dated 18 March 2019 refers.

37. The Commission acknowledges that columns BC and BE in **Confidential Appendix 4 (PanAsia)** contain formulas, albeit these formulas refer to data in columns BB and BD respectively. Therefore, as indicated by PanAsia, this ground of appeal centres around whether the data in columns BB and BE was provided and verified during the on-site verification visit.
38. In support of its application, PanAsia provided information in numerous confidential attachments which it purports were provided to the Commission and verified on-site, including a copy of the spreadsheet pertaining to the raw material uplift calculations.
39. The Commission reviewed the information it has obtained and verified at the verification conducted on-site at PanAsia's Hong Kong sales office between 12 September and 17 September 2018, including the information provided in support of PanAsia's application.
40. The Commission acknowledges PanAsia's assertion that the quantity and value of billet transferred to the production of extrusions (columns AZ and BA respectively) includes both the transfer of purchased billet and PanAsia's self-produced billet (produced from purchased aluminium ingot), and acknowledges that this data was recorded in the 'original' CTMS data which was provided in PanAsia's response to the exporter questionnaire.²² The Commission considers that the data relevant to PanAsia's purchased aluminium billet transferred to the production of extrusions (recorded in column BB in **Confidential Appendix 4 (PanAsia)**) was not separately identified in PanAsia's 'original' CTMS data which formed part of the verification. However, the purchases and transfers of aluminium billet, including PanAsia's purchases and transfers of aluminium ingot, do reconcile to PanAsia's raw material inventory and purchase ledgers, including sampled invoices relating to billet and ingot purchases made in January 2018, which were provided at the verification visit.
41. In relation to the verification of scrap recovery or cost offset, PanAsia had included data relevant to its aluminium scrap recovery in the original CTMS spreadsheets that it provided in response to the exporter questionnaire. Scrap was verified at the verification visit as part of the 'upwards' cost reconciliation including through the relevant sub-ledgers.
42. The Commission considers that an amendment to PanAsia's self-produced billet costs is required to ensure that the cost of the "uplifted self-produced billet" (noting that only the aluminium ingot is uplifted and not the billet conversion costs) reflects the value and quantity *transferred to or consumed in* the production of extrusions rather than the cost of the self-produced billet that was manufactured in a particular month. This would involve an additional step in the calculation to extend the unit uplifted self-produced billet cost in a particular month by the quantity of self-produced billet transferred to the manufacture of extrusions in that same month. In the Commission's view, this would result in a more accurate determination of the cost to make as it relates to the manufacture of extrusions.²³

²² PanAsia's response to the exporter questionnaire submitted on 30 August 2018 - Confidential Exhibits G-4 and G-5 refer.

²³ Although the quantity of self-produced billet transferred to the production of extrusions (extrusion workshop / department) is not included in **Confidential Appendix 4 (PanAsia)**, the Commission has obtained this data from PanAsia at the on-site verification which can be used to amend the CTM as described in paragraph 38 of the submission.

43. The Commission considers that PanAsia's purchased billet and scrap costs, as recorded in columns BB and BD respectively in **Confidential Appendix 4 (PanAsia)**, are accurate, complete and relevant and can be relied upon to undertake the relevant adjustments to the raw material costs.
44. Should you consider it appropriate to do so, the Commission remains at your disposal to amend the normal value and dumping margin calculations as they relate to PanAsia.