Australian Government
Anti-Dumping Review Panel

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 20 May 2019 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, 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 completing the withdrawal form on the ADRP website.

[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*.

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.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: ONESTEEL MANUFACTURING PTY LIMITED
Address: Level 28, 88 Phillip Street, SYDNEY NSW 2000
Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: [redacted]
Position: [redacted]
Email address: [redacted]
Telephone number: [redacted]

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

The applicant considers it is an interested party within the meaning of paragraph 269ZX(ab) of the *Customs Act 1901*[3], as it was the applicant in relation to an application under s.269ZHB that led to the making of the reviewable decision.

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.

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

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 which were the subject of the reviewable decision are:

Hot rolled structural steel sections in the following shapes and sizes, whether or not containing alloys:

- universal beams (I sections), of a height greater than 130mm and less than 650mm;
- universal columns and universal bearing piles (H sections), of a height greater than 130mm and less than 650mm;
- channels (U sections and C sections) of a height greater than 130mm and less than 400mm; and
- equal and unequal angles (L sections), with a combined leg length of greater than 200mm.

Sections and/or shapes in the dimensions described above, that have minimal processing, such as cutting, drilling or painting do not exclude the goods from coverage of the investigation.

Excluded from the description of the goods are:

- hot rolled 'T' shaped sections, sheet pile sections and hot rolled merchant bar shaped sections, such as rounds, squares, flats, hexagons, sleepers and rails; and
- sections manufactured from welded plate (e.g. welded beams and welded columns).

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

Goods identified as hot rolled non-alloy steel sections (meeting the specified shapes and sizes set out above) are generally classified to the tariff subheading in Schedule 3 of the *Customs Tariff Act 1995*:

- 7216.31.00 statistical code 30 (channels — U and C sections);
- 7216.32.00 statistical code 31(universal beams — I sections);
- 7216.33.00 statistical code 32 (universal column and universal bearing piles — H sections); and
- 7216.40.00 statistical code 33 (equal and unequal angles — L sections).

Goods identified as hot rolled alloy steel sections (meeting the specified shapes and sizes set out above) are generally classified to tariff subheading 7228.70.00 (statistical codes 11 and 12) in schedule 3 of the *Customs Tariff Act 1995*.

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: 2019/126
Date ADN was published: 11 November 2019

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

A copy of the notice of the reviewable decision is attached as Appendix A to this 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 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:

Ground 1:

To the extent that the Commissioner has had regard to other matters considered relevant to the inquiry the subject of the reviewable decision, including the variable factors established in Review 499 (to assess whether dumping has occurred during the inquiry period, and whether dumping is likely to continue or recur if the anti-dumping measures were to expire), then the Minister has not made the correct or preferable decision with respect to:

(a) the determination of the dumping margin for Hyundai Steel;

(b) the determination of the dumping margins for the verified exporters from Taiwan (being Tung Ho Steel Enterprise Corporation (**Tung Ho**) and TS Steel Co. Ltd (**TS Steel**)) and 'all other exporters' from Taiwan; and

(c) the determination of the normal value for the exporter from Taiwan, TS Steel.

Ground 2:

The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HRS exported to Australia from Taiwan by Tung Ho is not the correct or preferable decision.

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:

Ground 1:

For the purpose of this reviewable decision, the correct or preferable decision would be:

- for the Minister to compare the invoice dates for the domestic and export sales of Hyundai for the purpose of determing whether dumping has occurred and the levels of dumping;
- for the Minister to find that the normal value for the exporters from Taiwan, Tung Ho and TS Steel, be determined under s.269TAC(1), and the normal value for 'uncooperative and all other exporters' from Taiwan be reascertained under s.269TAC(6); and
- for the Minister to find that the normal value for the exporter from Taiwan, TS Steel, not be adjusted by an amount constituting an alleged "domestic credit expense" made under s.269TAC(9).

Ground 2:

The correct of preferable decision would be for the Minister:

- in accordance with s.269ZHG(1)(b) to declare that she has decided to secure the continuation of the anti-dumping measures relating to HRS exported to Australia from Japan, Korea, Taiwan (except for Feng Hsin) and Thailand, including Tung Ho; and
- in accordance with s.269ZHG(4)(a)(i) to determine that the dumping duty notice continues in force after 20 November 2019 and as such continues to apply to Tung Ho.

11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:

Elaboration of the grounds raised in question 9 can be found at Appendix B, attached.

12. 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.

The correct or preferable decision provided in response to question 10 is materially different from the reviewable decision as follows:

Ground 1:

By comparing the invoice dates for the domestic and export sales of Hyundai, the levels of dumping will increase from the current level of 4.7 per cent to 9.5 per cent, the latter

reflecting the levels of dumping determined in SEF 499 when the invoice dates for the exporter's domestic and export sales were compared.

The determination of the normal value for the named exporters from Taiwan (Tung Ho and TS Steel) under s.269TAC(1) will likely increase the normal value ascertained for both the named exporters from Taiwan, and for 'uncooperative and all other exporters' from Taiwan, and the levels of dumping for all exporters from Taiwan the subject of the reviewable decision.

The determination that an adjustment for "domestic credit expenses" not be made will increase the normal value ascertained for the exporter from Taiwan, TS Steel, and that exporter's levels of dumping.

Ground 2:

A decision by the Minister under s.269ZZM(1)(b) to revoke the reviewable decision and substitute a new decision may result in a declaration under s.269ZZM(3)(d) that the dumping duty notice, as in force immediately before its expiry, is reinstated and applies to Tung Ho.

13. Please list all attachments provided in support of this application:

Appendix A : ADN 2019/126

Appendix B: Elaboration of the grounds raised in question 9

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: [**sgd**]

Name: [redacted]

Position: [redacted]

Organisation: [redacted]

Date: 11 December 2019

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: [redacted]
Organisation: [redacted]
Address: [redacted] [redacted]
Email address: [redacted]
Telephone number: [redacted]

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: [**sgd**]
(Applicant's authorised officer)

Name: [redacted]

Position: [redacted]

Organisation: ONESTEEL MANUFACTURING PTY LIMITED

Date: 11 December 2019

ANTI-DUMPING NOTICE NO. 2019/126

Customs Act 1901 – Part XVB

Hot rolled structural steel sections

Exported to Australia from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand

Findings in relation to Continuation Inquiry 505

Notice under subsection 269ZHG(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 11 February 2019, into whether the continuation of the anti-dumping measures in the form of a dumping duty notice applying to certain hot rolled structural steel sections (HRS or 'the goods') exported to Australia from Japan, the Republic of Korea (Korea), Taiwan (except for exports by Feng Hsin Steel Co Ltd (Feng Hsin)) and the Kingdom of Thailand (Thailand) is justified.

Recommendations resulting from that inquiry, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 505* (REP 505).

I, KAREN ANDREWS, the Minister for Industry, Science and Technology, have considered REP 505 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts and law therein.

Under subsection 269ZHG(1)(b) of the *Customs Act 1901* (the Act), I declare that I have decided to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Japan, Korea, Taiwan (except for exports by Feng Hsin and Tung Ho Steel Enterprise Corporation) and Thailand.

Under subsection 269ZHG(1)(a) of the Act, I declare that I have decided not to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Taiwan by Tung Ho Steel Enterprise Corporation.

In accordance with subsection 269ZHG(4)(a)(ii), I determine that the dumping duty notice in respect of the goods continues in force after 20 November 2019, but that after that day the notice cease to apply to Tung Ho Steel Enterprise Corporation of Taiwan.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel (www.adreviewpanel.gov.au), in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

REP 505 has been placed on the Commission's public record. The public record may be examined at www.adcommission.gov.au. Alternatively, the public record may be examined

at the Commission's office during business hours by contacting the case manager on the details provided below.

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2428 or investigations2@adcommission.gov.au.

Dated this 8 day of November 2019

KAREN ANDREWS
Minister for Industry, Science and Technology

APPENDIX B

Elaboration of the grounds raised in question 9

Ground 1: To the extent that the Commissioner has had regard to other matters considered relevant to the inquiry the subject of the reviewable decision, including the variable factors established in Review 499 (to assess whether dumping has occurred during the inquiry period, and whether dumping is likely to continue or recur if the anti-dumping measures were to expire), then the Minister has not made the correct or preferable decision with respect to:

(a) the determination of the dumping margin for Hyundai Steel;
(b) the determination of the dumping margins for the verified exporters from Taiwan (being Tung Ho Steel Enterprise Corporation (Tung Ho) and TS Steel Co. Ltd (TS Steel)) and 'all other exporters' from Taiwan; and
(c) the determination of the normal value for the exporter from Taiwan, TS Steel.

(a) Errors in the determination of the dumping margin for Hyundai Steel, in particular, incorrect determination of the date of sale for the export sales to Australia

In *Report No. 499*[1] (**REP 499**), the Commission reversed its preliminary finding in *Statement of Essential Facts No. 499*[2] (**SEF 499**) that the commercial invoice date is the date of sale for Hyundai's Australian exports.

In REP 499, the Commission indicated that in reviewing its preliminary finding, it *…conducted further analysis of Hyundai's export sales of HRS[3] and of the respective clauses and terms at the time of receipt of orders and whether they provide certainty on the establishment of the material terms of sales, including delivery, quantities and completion of contract*.[4]

In turn, the Commission found:

> *The Commission's analysis of the details of purchase orders indicate that these orders constituted contracts because they included offers for goods, acceptance of such offers and consideration that would be due on delivery. The Commission has found that the purchase orders explicitly addressed matters such as partial delivery or delayed delivery and that they did not allow for changes in price or other matters on the basis of delayed delivery.*
>
> *The Commission considered the time lags between the placement of orders and invoice dates and found that the average time lag for export sales during the review period was approximately 60 days. Although some transactions had longer time lags, the Commission found no instances where the price or other terms of the order were varied due to time lags or for any other reason. The Commission has not found any evidence that Hyundai's export*

[1] Report No. 499, *Review of anti-dumping measures applying to certain hot rolled structural steel sections exported to Australia from Japan, the Republic of Korea (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand* (11 October 2019)
[2] EPR Folio No. 499/043.
[3] Hot rolled structural steel sections, hereinafter referred to as HRS, the goods the subject of the reviewable decision.
[4] REP 499, p. 32.

> *sales were subject to any continuing negotiation between it and its customers after the order date.*[5]

The Commission explicitly states that the above analysis caused it to revise its conclusion concerning the date of sale for Hyundai's exports to Australia:

> *The Commission considers that on the basis of this analysis and evidence, that the material terms of sale were established upon placement of the order for Australian export sales of HRS. As such, the Commission considers that it is appropriate to treat the order date as the date of sale for the purposes of establishing export prices for Hyundai in the review period.*[6]

The revised treatment of the date of sale has materially affected the calculation of the dumping margin by contributing, in relevant part, to its reduction from a preliminary rate of **9.5 per cent to 4.7 per cent**.

The Commission has erred in reaching this decision. By narrowly considering the question of whether or not there were variances to the agreement between the exporter and importer between the date of order placement and invoice, the Commission has failed to have regard to the broader considerations set out in the *Manual*[7], a matter which has been previously addressed by the Anti-Dumping Review Panel in *ADRP Report No. 88*.[8]

In that decision, Panel Member O'Connor observed that the Manual outlines Commission policy and practice with regard to establishing the date of sale:

> *In establishing the date of sale, the Commission will normally use the date of invoice as it best reflects the material terms of sale. For the goods exported, the date of invoice also usually approximates the shipment date.*
>
> *Where a claim is made that a date other than the date of invoice better reflects the date of sale, the Commission will examine the evidence provided.*
>
> *For such a claim to succeed it would first be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. In doing so, the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date.*
>
> *…*
>
> *Any claim for an adjustment would need to substantively address:*
>
> - *whether, why, and to what degree, the considerations in determining price differed between export and domestic sales;*
> - ***whether the materials cost differs at the time of subsequent invoicing of that export sale*** *(compared to domestic sale invoices in the same invoice month of that export sale)* ***having regard to factors such as the production schedules for domestic and export****; and lead times for purchasing main input materials;*

[5] REP 499, p. 32.
[6] REP 499, p. 32.
[7] Dumping & Subsidy Manual (April 2017 edn), p. 62.
[8] ADRP Report No. 88, *Certain Hollow Structural Sections exported from the People's Republic of China, the Republic of Korea and Taiwan* (March 2019)

- ***whether contracts were entered into for the materials purchases, and materials inventory valuation***.[9] [**emphasis** added]

Applied here, the Commission did not consider, let alone address those factors going to the question of the effects of material costs on the respective prices of the domestic and export sales. In *ADRP Report No. 88*, Panel Member O'Connor considered this a pertinent consideration:

> *Accordingly, **I consider it logical for Ursine to have had regard to its raw material costs (i.e. the price paid for the HRC then in inventory) when setting both domestic and export prices, especially in the context of fluctuating HRC costs and the significant period over which the HRC was carried in inventory**.*[10] [**emphasis** added]

In *Reinvestigation Report 419 relevant to* Panel Member O'Connor's review of Ministerial decision, the Commission found:

> *in setting prices for domestic sales, **Ursine would have regard to HRC inventory costs that reflect prices of HRC purchased on average [original redacted] prior to the invoice being raised** … This is inconsistent with Ursine's claim that, from the perspective of HRC purchases to production to delivery, the lead time for domestic sales is fairly short. In this sense, prices for both export and domestic sales are based on HRC with significant lead times between purchase, production and sale.*
>
> *…*
>
> *The Commission considers that Ursine's price considerations for domestic and export sales on the date of invoice are substantively the same because:*
>
> - *it is reasonable for Ursine to have regard to its raw material expenses in setting prices for domestic and export sales of HSS; and*
> - *the raw material expenses used to produce domestic and export HSS derive from purchases from a very similar time period (with a discrepancy of [original redacted]*
>
> *Further, based on the finding that HSS produced during the review period was made from HRC [original redacted] for both domestic (in all cases) and export sales (in the majority of cases), and that the purchases of this HRC occurred over similar periods, the Commission is of the view that an adjustment for due allowance is not required.*
>
> *Consequently, the Commission considers that comparing the invoice dates for domestic and export sales is reasonable in these circumstances.*[11]

In accepting the recommendations contained in the Commission's *Reinvestigation Report 419*, Panel Member O'Connor decided:

> *In light of the Commission's analysis and reasoning set out in the Reinvestigation Report, I reject Ursine's claim that the Commission ought to have adopted the date of the export sales*

[9] ADRP Report No. 88, p. 38.
[10] ADRP Decision No. 88, p. 48 at [141].
[11] *Anti-Dumping Commission,* 'Report to the Anti-Dumping Review Panel, Reinvestigation of certain findings in Report 419, Hollow Structural Sections exported from China, Korea, Malaysia and Taiwan' (January 2019), pp. 14-15.

> *contract as the operative date and therefore reject Ground 2 of Ursine's Review Application.*[12]

Applied here, the evidence before the Commission supported consideration of the effects of material costs on the respective prices of the domestic and export sales.

Firstly, the exporter, Hyundai, indicated in its response to *Exporter Questionnaire* that:

> *Australian sales prices are determined on a transaction-by-transaction basis, in consideration of market circumstances, competitiveness, raw material price, supply-demand conditions, customer relationships in the Australian market…*[13] [emphasis added]

Similarly, Hyundai identified*… raw material prices…* as a relevant consideration to its domestic sales pricing policy:

> *Sales prices are determined on a transaction-by-transaction basis, in consideration of market circumstances, competitiveness, raw material price, supply-demand conditions, customer relationships in the domestic market…*[14] [emphasis added]

Secondly, although the Commission considered the significant time lags between the placement of orders and invoice dates (an average 60 days with longer periods) in the context of whether or not the export sales orders were varied, the Commission nevertheless failed to have regard to whether these time lags resulted in the prices for both export and domestic sales being based on raw material prices with significant lead times between purchase, production and sale. This was indeed considered relevant by Panel Member O'Connor in ADRP Report No. 88, who specifically directed the Commission to examine the question of the impact of the "time lags" given the relevance of raw material cost to the exporter's domestic and export pricing policy:

> *Although the focus of the reinvestigation request was upon the lag effect and its impact upon the export price, my letter to the Commission went on to state:*
>
> > *"with regard to domestic sales, the Commission will need to determine whether the HRC used in the production of the like goods, so sold, was sourced from inventory or purchased from Ursine's supplier and the material terms of such purchases."*[15]

Had the Commission examined this issue in the course of its inquiries, then the Commission would likely have concluded that Hyundai's price considerations for domestic and export sales on the date of invoice are substantively the same because:

- Hyundai explicitly acknowledges to have regard to its raw material expenses in setting prices for domestic and export sales of HRS; and
- the raw material expenses used to produce domestic and export HRS derive from purchases from a very similar time period.

With respect to the second bullet point above, Hyundai claimed, and the Commission accepted, that in respect of its domestic sales, the commercial invoice is the date of sale because:

[12] ADRP Decision No. 88, p. 49 at [143].
[13] EPR Folio No. 499/010, p. 20.
[14] EPR Folio No. 499/010, p. 28.
[15] ADRP Decision No. 88, p. 44 at [132]

> *… domestic sales are generally to established customers that purchase HRS from Hyundai's existing inventory and that are invoiced on a monthly basis.*[16]

By treating the date of order placement as the date of sale for Australian export sales of HRS, and the commercial invoice date as the date of sale for Korean domestic sales, then the Commission is misaligning the impact of the raw material prices the exporter would have had regard to when setting the export price to Australia 60-days or more days later, which are produced at or at about the same time as the like goods for sale into the domestic Korean market. Unless the exporter produced the HRS exported to Australia, 60 days, or longer periods as noted, earlier, and held it in stock until delivery (an average 60-days later), there is no justifiable reason to compare a significantly earlier export price to their contemporary domestic sales. There is no evidence to suggest that this occurred.

Therefore, the correct or preferable decision would be to compare the invoice dates for domestic and export sales in these circumstances.

(b) Errors in the determination of the dumping margins for the verified exporters from Taiwan, Tung Ho, TS Steel and 'all other exporters', in particular, the Commissioner's determination of the normal value for Tung Ho and TS Steel under s.269TAC(2)(c) was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2). The incorrect determination of normal values will have a consequential effect on the determination of normal values for 'all other exporters'

In Report No. 499, the Commission concluded that:

> *In respect of three Australian export models for Tung Ho, there were insufficient volumes of domestic sales made in the OCOT. The Commission considers that it was unable to quantify differences in cost or price to enable a specification adjustment to be made under subsection 269TAC(8) for differences between the export and domestic models. In this circumstance, the Commission considers that normal value could not be ascertained under subsection 269TAC(1) and accordingly, was ascertained under subsection 269TAC(2)(c).*[17]

Similarly for TS Steel:

> *The Commission found that for TS Steel's one Australian export model, which was of the minimum yield strength subcategory B in accordance with the MCC structure, there were insufficient volumes of sales in OCOT of an equivalent domestic model. Applying the MCC hierarchy, the Commission considers that it was unable to quantify differences in cost or price to enable a specification adjustment to be made under section 269TAC(8) for differences between the export and domestic models. In this circumstance, the Commission considers that normal value cannot be ascertained under section 269TAC(1) and accordingly have been ascertained under subsection 269TAC(2)(c).*[18]

By accepting some, but not all, of the models of the respective exporters' like goods sold in the Taiwanese domestic market as in sufficient volumes made in the ordinary course of trade (**OCOT**), the Commission indicates that there were sufficient volumes of like goods (when taken as a whole, not on a model by model comparison) sold in the ordinary course of trade, i.e. more than 5 per cent

[16] Report No. 499, p. 32.
[17] Report No. 499, p. 39 at [5.6.1.5]
[18] Report No. 499, p. 41 at [5.6.3].

of the goods exported to Australia, by volume. However, when the Commission applied the second stage of its "sufficiency" test due to an absence or low volume of domestic sales of *models* exported to Australia, then it wrongly concluded that it was not able to determine the normal values for those *models*.

In *ADRP Decision No. 110*, Panel Member O'Connor concluded that *…this approach was not open to the Commission*.[19] Adopting the comments of Senior Member Fitzhenry in her letter to the Commissioner dated 4 July 2019, the Panel Member decided that it was not open to the Commission to require that individual models also meet the sufficiency test in order to have their normal values also determined under s.269TAC(1):

> *The second leg of the sufficiency test seeks to read into s.269TAC a requirement that domestic sales, which would otherwise be considered in the ascertainment of normal value, must meet an additional requirement in order to be relevant to the determination of normal value. This additional requirement is not evident by the express language of s.269TAC nor can one be inferred when that section is read in context.*[20]

To quote the Senior Member:

> *The approach taken by the [Commission] … would mean that the Minister had a broad discretion under s.269TAC(2) to disallow sales which were not considered to be comparable or relevant for determining a price under s.269TAC(1). I am unable to find such a legislative intention in s.269TAC(2) and it would be contrary to the otherwise prescriptive nature of the circumstances in s.269TAC(2) which allow the Minister to ascertain the normal value of exports under s.269TAC(2)(c).*
>
> *In Anti-Dumping Authority & Anor v Degussa AG & Anor*[21] *the Full Court of the Federal Court confirmed that sales which fell within s.269TAC(1) could not be ignored on the basis of some criteria not found in the legislation. It is the words of s.269TAC(1) to which regard must be had. While the decision in Degussa was distinguished by the court in Pilkington (Australia) v Minister of State for Justice & Customs*[22]*, on the basis of subsequent changes to the legislation, this does not affect the comments with respect to s.269TAC(1) and s.269TAC(2) on this point.*[23]

Therefore, the applicant for review contends that the Commission ought not to have determined the normal values for certain models for Tung Ho and TS Steel under s.269TAC(2)(c), and that the correct or preferable decision is to determine the normal values for these exporters under s.269TAC(1).

In the event that the Review Panel recommends that the normal values for Tung Ho and TS Steel were incorrectly determined under s.269TAC(2)(c), then the Review Panel will further need to recommend that the determination of the normal value for all other exporters of the goods under

[19] ADRP Decision No. 110, Steel Reinforcing Bar exported from the Republic of Turkey (September 2019), p. 15 at [28].
[20] ADRP Decision No. 110, p. 18.
[21] Original fn 20: GTE (Australia) Pty Ltd v John Joseph Brown, Minister of State for Administrative Services acting for and on behalf of the Minister of State for Industry and Commerce [1986] FCA 536 at page 50.
[22] Original fn 21: [2002] FCAFC 423.
[23] ADRP Review No 100 – Wind Towers exported from the People's Republic of China, Letter from the ADRP to the ADC – Request for reinvestigation (4 July 2019), pp. 5 – 6 at [14] and [15].
and the Republic of Korea (Case 487)

s.269TAC(6) be again ascertained to take into account the new normal values determined for these named exporters, to the extent necessary.

(c) Errors in the determination of the normal value for the exporter from Taiwan, TS Steel, in particular, the Minister's decision to direct that the normal value of the goods exported to Australia by TS Steel be adjusted for differences in the exporter's domestic credit expenses is not supported by s.269TAC(9)

Even if the Minister's determination of the normal value for TS Steel under s.269TAC(2)(c) was correct, the making of a downward adjustment to the normal value to account for "the cost of domestic credit" under s.269TAC(9) was not authorised.

For clarity, s.269TAC(9) provides as follows:

> *(9) Where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.*

The *"costs to be determined"* under paragraph 2(c) are:

> *(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*
>
> *(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale.*

The purpose of calculating the normal value under paragraph 2(c) is to calculate an amount for the purpose of comparison to the export price that is a theoretical domestic sale in the "ordinary course of trade". Therefore, the normal value calculated under a 'constructed' methodology should include administrative, selling and general costs, which includes finance costs necessary to generate a value, which if sold, would be in the ordinary course of trade. It is in this context that subsection (9) must be read.

It is not open to subsection (9) to undo a value determined under paragraph 2(c) that is equivalent to an "ordinary course of trade" value by reducing it by an amount which is no longer such, i.e. potentially loss making or unrecoverable.

Where an adjustment is being made to the normal value under subsection (9) on account of "domestic credit expenses", unless the Minister is satisfied that the 'credit expense' incurred on domestic sales was incurred on domestic sales found to be in the ordinary course of trade, then the adjustment should not be allowed. Otherwise, to do so, would render the normal value (so adjusted) such that it is no longer at a level which *"instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export"* as required under sub-paragraph (ii). There is no evidence before the Minister that this inquiry was performed by the Commission. Therefore, the Minister is not authorised to make the adjustment to the normal value for TS Steel under subsection (9) on account of "domestic credit expenses".

Ground 2: The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HRS exported to Australia from Taiwan by Tung Ho is not the correct or preferable decision

In Report No. 505, the Commissioner indicated that:

> *For the purposes of this continuation inquiry, the Commissioner has had regard to other matters considered relevant to the inquiry, including the variable factors established in Review 499, to assess whether dumping has occurred during the inquiry period, and whether dumping is likely to continue or recur if the anti-dumping measures were to expire.*
>
> *Review 499 found that certain exports of HRS to Australia were at dumped prices in the review period, 1 January 2018 to 31 December 2018, which is the same as the inquiry period for this inquiry.*[24]

The dumping margin for Tung Ho determined in Review No. 499 was **negative 1.6 per cent**.

In concluding that *"it is not likely that exports of HRS at dumped prices by Tung Ho would recur if the measures expire"*, the Commission was significantly influenced by the finding that it *"found no dumping by Tung Ho over the inquiry period as a whole".*[25] Although the Commission performs analysis and comparison between Tung Ho's export prices, normal values and floor price (based on the ascertained normal value), this is all premised on a conclusion that its ascertained export price (as determined) is undumped, and that the ascertained normal value (which forms Tung Ho's floor price for the purpose of this analysis) was correctly determined under s.269TAC(2)(c) for three models. It is the applicant for review's contention that:

- the calculation of the negative dumping margin; and
- the ascertained normal value which forms the floor price,

are unsound as they are not based on a normal value correctly determined under law.

Therefore, to the extent that the Minister's decision relies on the Commissioner's determination of the normal value for three models sold by Tung Ho incorrectly under s.269TAC(2)(c), and that the dumping margin calculated for this exporter is no longer negative, but is instead found to be non-*de minimis*, then the Minister's decision not to secure the continuation of the anti-dumping measures currently applying to HRS exported to Australia from Taiwan by Tung Ho is not the correct or preferable decision.

However, even if the dumping margin calculated for Tung Ho continues to be negative or *de minimis*, then the Minister's decision not to secure the continuation of the anti-dumping measures currently applying to Tung Ho is not the correct or preferable decision because the Commission's determination of the likelihood of recurrence of dumping by Tung Ho in the absence of measures relies on the assumption that Tung Ho's export price for HRS will not fall below the proposed floor price. In order, to give this analysis any meaning, one must presume that the Commission's prediction of HRS export prices to Australia relate to the period of the continued measures, i.e. until 20 November 2024.

With respect, the Commission is entirely unqualified to speculate on future export prices for HRS to Australia, given that it acknowledged; immediately prior to reaching this conclusion; that:

[24] Report No. 505, p. 27
[25] Report No. 505, p. 36.

> *The Commission considers that the nature of HRS and its differentiation on the basis of price is such that the Australian HRS market can be described as a price sensitive one with a high degree of price elasticity. The Commission considers that export and domestic selling prices are established on the basis of a number of factors including market conditions and competition, as well as on CTMS plus profit.*[26]

Therefore, it is unclear how the Commission can confidently conclude that the "price sensitive" HRS market may not result in price pressure on Tung Ho to reduce its export price to Australia, given it has remained present in Australia across the term of the original measures, responsible for "most exports of HRS to Australia"[27] and in larger volumes:

> *Exports of HRS to Australia from Taiwan fell in the year after measures were first imposed in 2014 and have increased every year thereafter. Since the notice was altered in respect of Tung Ho in October 2016, its exports continued to increase at a relatively significant rate.*[28]

The basis for the Commission's conclusion that Tung Ho's export price will not fall below the proposed floor price is:

> *The Commission notes that increases in Tung Ho's export prices are consistent with its finding that the Australian HRS market is rising. The Commission considers that this indicates that it is not likely that Tung Ho's export prices will decrease by an amount sufficient to bring them below the floor price that was found in Review 499. As such, it is unlikely that the proposed floor price will have an impact on pricing decisions made by Tung Ho.*[29]

Presumably, when the Australian HRS market is no longer *rising*, but *falling*, then the likelihood of Tung Ho's export prices decreasing below the floor price found in Review No. 499 are entirely real and imminent. Unfortunately, having recommended to the Minister to not secure the continuation of anti-dumping measures for Tung Ho, then the recurrence of dumping by Tung Ho, and injury to the Australian industry will not be prevented. This is the logical short-coming of the Commission's reasoning, and why the Minister's decision is neither correct nor preferable.

The fact that the Commission found *"no dumping by Tung Ho over the inquiry period as a whole"*, or that *"six duty assessments indicate that Tung Ho has not exported HRS to Australia at dumped price for a significant period of time"*, is not conclusive on the likelihood determination of recurrence of dumping, but rather evidence that the anti-dumping measures have achieved their stated objective. Indeed, Panel Member O'Connor makes this precise observation in *ADRP Decision No. 70*:

> *As to the significance of the Applicants' negative dumping margins throughout the inquiry period, neither the Anti-Dumping Agreement nor the Act requires revocation as soon as an exporter is found to have ceased dumping and the continuation of measures is not precluded a priori in any circumstances other than where there is present dumping.*[30]

In attempting to predict the potential behaviour of HRS export prices to Australia across a future five-year period, and conclude that such prices will not fall below a floor price which would indicate

[26] REP 505, p. 37.
[27] REP 505, p. 34.
[28] REP 505, p.35.
[29] REP 505, p. 36.
[30] ADRP Decision No. 70, *Hot Rolled Coil Exported from Japan, the Republic of Korea, Malaysia and Taiwan* (April 2018), p. 13 at [48].

a recurrence of dumping is no sound basis on which to reach any reasonable confidence concerning a likelihood determination sufficient to not secure the continuation of the anti-dumping measures.

The correct or preferable decision would be to secure the continuation of the measures, and permit interested parties to exercise their right to seek a review of anti-dumping measures under Division 5 of the domestic anti-dumping provisions, which would include the revision (where appropriate) of the variable factors and to the extent necessary, the floor price under s. 8(5) of the *Dumping Duty Act*.[31]

[31] *Customs Tariff (Anti-Dumping) Act 1975*