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 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.

[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 Ltd
Address: Level 28, 88 Phillip Street, SYDNEY NSW
Type of entity (trade union, corporation, government etc.): A corporation member of the Australia industry producing like goods

2. Contact person for applicant

Full name: [redacted]
Position: Senior Trade Measures Manager
Email address: [redacted]
Telephone number: [redacted]

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

The applicant for review was the applicant in relation to an application under section 269TB of the *Customs Act 1901*[3] that led to the making of the reviewable decision – being a member of the Australian industry producing like goods.

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 the subject of the reviewable decision were:

Hot-rolled solid sections of 'alloy steel', having round or near-round cross-sectional dimensions of not less than 9.5 millimetres (mm) and not greater than 98.5 mm, not in coil.

For the purpose of the description of the goods the subject of this application, 'alloy steel' here means steel containing a chemical composition that at least meets or exceeds the minimum chemical element proportions specified in Note (f) "Other alloy steel" to Chapter 72 under Schedule 3 of the Customs Tariff Act 1995 ("the Tariff") as appearing on the date of this application.

Commonly identified as 'rod', 'round bar', 'engineering bar', 'spring steel', 'alloy bar', 'high alloy bar', 'silico-manganese bar', 'grinding rod' or 'bar used for the production of grinding media', the goods covered by this application include all round or near-round hot-rolled solid sections of alloy steel bar meeting the above description of the goods regardless of the particular grade, coating, or minor modification of bar-end finish (including but not limited to, painting or chamfering).

Goods excluded from this application are:

- *Round or near-round hot rolled solid steel sections composed of:*
  - *'stainless steel' as defined under Note (e) "Stainless steel" to the Tariff; or*
  - *'high-speed steel' as defined under Note (d) "High speed steel" to the Tariff;*
- *steel reinforcing bar containing indentations, ribs, grooves or other deformations produced during the rolling process;*
- *steel rod in coil;*
- *chromium plated steel; and*
- *solid sections of steel which may be square, rectangular or hexagonal in cross-section.*

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

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

- 7228.20.10 (statistical code 44)
- 7228.20.90 (statistical code 47)
- 7228.30.10 (statistical code 70)
- 7228.30.90 (statistical code 41)
- 7228.60.10 (statistical code 72)
- 7228.60.90 (statistical code 55)

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: 2019/17
Date ADN was published: 18 March 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:

1. The Minister's decisions to accept Anti-Dumping Commission Report No. 384a (**REP 384a**) and its recommendations were not the correct decisions because the report given to the Minister was not a report authorised by the enactment in pursuance of which it was purported to be made. Firstly, there was no requirement in the Act to give any report to the Minister in circumstances in which the Commissioner was obliged to terminate the investigation under s.269TDA(13) immediately he was satisfied that any injury to the Australian industry that may be caused was negligible. Secondly, REP 384a contains a recommendation concerning action to be taken by the Minister under s.269TL in relation to all the goods the subject of the application and goods of a like kind. That section only provides for the receipt from the Commissioner of a recommendation concerning particular goods or goods of a like kind to particular goods.

2. The Minister's decision under s.269TL not to declare all the goods the subject of the application to be goods to which s. 8 of the *Dumping Duty Act* applies [**Minister's decision**] was not the correct decision because it was not authorised by the section in pursuance of which it was reported to be made. The Minister's power under s.269TL is limited to specifying particular goods that fall within the class of goods described throughout Part XVB of the Act generally, and in REP 384a in particular, as the goods

the subject of the application. The section does not authorise a declaration that purports to apply to all the goods the subject of the application.

3. The evidence presented in REP 384a to support a finding that, because of changes in the market, the threat of injury was negligible was acknowledged by the Commission itself to consist of … *statements of intent* … that were not… *determinative of what might happen in the future*. The Minister's decision, by relying on such evidence, is incorrect because Part XVB requires that a determination of injury or no threat of injury… *must be based on facts and not merely allegations, conjecture or remote possibilities.*

4. REP 384a does not consider, let alone analyse, the threat of injury to OneSteel and Milltech in market sectors other than grinding bar. Based on its incorrect assumption that threat of injury was negligible in the grinding bar segment, the preferable decision that was open to the Minister was to limit the specification of the goods in the s.269TL notice to grinding bar and publish a dumping duty notice under s.269TG(2) applying s.8 of the *Dumping Duty Act* to other alloy round bar.

Elaboration of these grounds can be found at Appendix B 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:

The correct or preferable decisions are:

1. The Minister revokes the reviewable decision and substitutes a new decision declaring, under s.269TG(1) and (2), that s.8 of the *Dumping Duty Act* applies to alloy round bar exported to Australia from the People's Republic of China.

2. Alternatively, the Minister revokes the reviewable decision and makes a new decision under s 269TL to not declare that alloy round bars of a kind having cross-sectional dimensions greater than 55 mm are not goods to which s.8 of *the Dumping Duty Act* applies and makes a further decision to declare under s.269TG(2) that alloy round bars, other than those of a kind having cross-sectional dimensions greater than 55 mm, are goods to which s.8 of the *Dumping Duty Act* applies.

11. Set out the reasons why the proposed decision provided in response to question 10 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.

Not applicable.

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:

Position:

Organisation: ONESTEEL MANUFACTURING PTY LTD

Date: 17/04/2019

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:
Organisation: MinterEllison Lawyers
Address: Minter Ellison Building, 25 National Circuit, FORREST ACT 2603
Email address:
Telephone number:

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:

Position:

Organisation: ONESTEEL MANUFACTURING PTY LTD

Date: 17/04/2019

APPENDIX B

Elaboration of grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

Ground 1: The Minister's decisions to accept Anti-Dumping Commission Report No. 384a (**REP 384a**) and its recommendations were not the correct decisions because the report given to the Minister was not a report authorised by the enactment in pursuance of which it was purported to be made. Firstly, there was no requirement in the Act to give any report to the Minister in circumstances in which the Commissioner was obliged to terminate the investigation under s.269TDA(13) immediately he was satisfied that any injury to the Australian industry that may be caused was negligible. Secondly, REP 384a contains a recommendation concerning action to be taken by the Minister under s.269TL in relation to all the goods the subject of the application and goods of a like kind. That section only provides for the receipt from the Commissioner of a recommendation concerning particular goods or goods of a like kind to particular goods.

1. In his recommendations to the Minister in REP 384a the Commissioner unequivocally expressed his finding that… *he was not satisfied that material injury, is being caused, or is threatened, to the Australian industry producing like goods due to the dumped goods.*
2. Section 269TDA(13) states that if the Commissioner is satisfied that the injury, if any, that may be caused to an Australian industry by dumped goods is negligible, he must terminate the investigation. The Customs Manual further acknowledges that, if the Commissioner is satisfied that any injury is negligible, Article 5.8 requires him to terminate the investigation immediately. This obligation was recognised by the Commissioner at the outset of his inquiry when he stated that:

   > There was no requirement in the Act to give any report to the Minister in circumstances in which the Commissioner was obliged to terminate the investigation under s.269TDA(13) immediately he was satisfied that any injury to the Australian industry that may be caused was negligible.

3. The Commissioner's failure to comply with this obligation resulted in the Applicant being denied its right to make an application for review to the Panel under s.269ZZN.
4. Moreover, the Commissioner's recommendation that the Minister publish a notice under s.269TL was in relation to 'the goods or goods of a like kind'. The goods are defined in REP 384a at page 4 as 'the goods the subject of the application'. In the context of Part XVB, the goods the subject of the application and goods of a like kind are not 'particular goods' for the purposes of s.269TL.

5. We submit that the Minister's decisions to accept both REP384a and the recommendation concerning goods that are not particular goods were not authorised by Part XVB and consequently were not correct decisions.

Ground 2: The Minister's decision under s.269TL not to declare all the goods the subject of the application to be goods to which s. 8 of the *Dumping Duty Act* applies [**Minister's decision**] was not the correct decision because it was not authorised by the section in pursuance of which it was reported to be made. The Minister's power under s.269TL is limited to specifying particular goods that fall within the class of goods described throughout Part XVB of the Act generally, and in REP 384a in particular, as the goods the subject of the application. The section does not authorise a declaration that purports to apply to all the goods the subject of the application.

6. Our claim in relation to the Minister's decision is based on the interpretation of the plain meaning of the words of s.269TL which is outlined in paragraph 4 above. The stress on 'particular goods' is noted in the judgement of Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 at [**145**]: In proceeding in this matter to give the Minister a report recommending publication of a notice under s.269TL it appears that the Commissioner takes the view that the section provides an alternative mechanism for determining whether a dumping duty notice should apply to the goods the subject of the application. There is nothing in Part XVB that provides any support for that view and the plain words of s.269TL support the construction, as Nicholas J observed, that it provides a mechanism by which particular goods may be excluded from the operation of a dumping duty notice. There is nothing in the section to suggest that its purpose is to exclude all goods the subject of the application from the operation of a dumping duty notice. The fulfilment of that purpose is achieved by the Commissioner making a decision under s.269TDA of the Act.

7. Consequently, we submit that the Minister's decision was not the correct decision because it was not authorised by the section in pursuance of which it was reported to be made.

Ground 3: The evidence presented in REP 384a to support a finding that, because of changes in the market, the threat of injury was negligible was acknowledged by the Commission itself to consist of … *statements of intent* … that were not… *determinative of what might happen in the future.* The Minister's decision, by relying on such evidence, is incorrect because Part XVB requires that a determination of injury or no threat of injury… *must be based on facts and not merely allegations, conjecture or remote possibilities.*

8. In Section 9.6 of REP 384a, the Commission concludes that:

> The structural changes to the grinding bar segment of the market are clearly relevant to the Commission's causation analysis. In the Commission's view, the weight of the available evidence

> supports a view that the injury experienced by OneSteel in this market segment since the conclusion of the investigation period is attributable to factors other than the ongoing presence of dumped goods. The Commission considers that the facts available provide insufficient evidence on which to conclude that future injury will likely be caused by dumped goods in the grinding bar segment of the market.[1]

9. However, in the immediately preceding paragraph the Commission acknowledges that Moly-Cop's…*statements of intent (or quotes)*… when taken… *together with the information provided by OneSteel, support a view that OneSteel no longer has a stable customer base in the grinding bar segment of the market, regardless of whether dumping continues*.

10. Although the Commission purports to have 'corroborated' Moly-Cop's… *statements of intents (or quotes)… with information provided by Onesteel…* the Commission reveals that its decision relies, at worst, on a factual error and, at best, mere conjecture when it states that:

> Moly-Cop has raised two <u>critical</u> issues in its submissions:
>
> - that OneSteel lacks the ability to supply grinding bar without recourse to a commercial rolling arrangement with Moly-Cop; and
>
> - that it is commercially implausible for Moly-Cop to roll grinding bar for OneSteel under commercial terms only to buy back the grinding bar for Donhad… [<u>emphasis</u> added].

11. The 'first issue' accepted by the Commission is factually inaccurate. In its submission dated 13 September 2018,[2] OneSteel produced evidence of alloy round bar (including grinding bar) <u>produced</u> with and without recourse to a commercial rolling arrangement with Moly-Cop, specifically, details of its own rolling capability. The Commission erroneously disregarded this evidence alleging that... *OneSteel itself has not addressed this issue in its submissions*.[3]

12. Secondly, in terms of the Commission's acceptance of Moly-Cop's conjecture that… *it is commercially implausible for Moly-Cop to roll grinding bar for OneSteel under commercial terms only to buy back the grinding bar for Donhad…* this not only ignores evidence of OneSteel's own rolling capability, but the evidence OneSteel led of ongoing sales to Donhad (albeit at reduced volumes) of grinding bar following completion of the acquisition of Donhad by Moly-Cop on 30 April 2018.[4] Moly-Cop sought to discount the relevance of the ongoing sales of grinding bar by OneSteel to Donhad on the basis that…*following ACCC approval of the merger between [the entities], Donhad undertook a trialling process to ensure that the grinding bar specifications it required could be manufactured at Moly-Cop's Waratah mill*.[5] This is a bizarre justification

[1] REP 384a at p.86.
[2] EPR Folio No. 384/072.
[3] REP 384a, p. 85.
[4] EPR Folio No. 384/072.
[5] REP 384a, p. 84.

given that Donhad's domestic Australian grinding bar supply has, for many years, been *manufactured at Moly-Cop's Waratah mill*.

13. OneSteel provided evidence to the Commission of Donhad's significant ongoing importation of grinding bar from dumped sources during this period.[6] However the Commission ignored and/or discounted OneSteel's evidence in preference for Moly-Cop's unverified opinions and assertions to reach the following conclusion:

> It is possible that Moly-Cop will continue to roll grinding bar for OneSteel that Donhad could then purchase from OneSteel. However, that arrangement (a prerequisite if OneSteel is to supply Donhad) is no longer a commercially stable arrangement between related entities, and is subject to the broader corporate goals of Moly-Cop and Donhad operating as related parties. OneSteel's ability to supply the grinding bar segment of the market is therefore considerably less certain than it was during the investigation period.[7]

14. It was at least equally open for the Commission to conclude, in light of the evidence led by OneSteel and the relevant information available to the Commission following publication of SEF 384a, that the ongoing and significant importation of grinding bar[8] by Donhad following completion of their acquisition on 30 April 2018 is the best evidence before the Commission that the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods, and because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened. The proper treatment to be afforded to Moly-Cop's… *statements of intent*… would have been to address them in the context of a Division 5 review of measures in the future, possibly under the revocation provisions under s.269ZA(1)(b)(ii), where the outcomes and actual impacts of the "significant changes to the structure of the Australian market for alloy round bar" are known based on evidence and facts.

Ground 4: REP 384a does not consider, let alone analyse, the threat of injury to OneSteel and Milltech in market sectors other than grinding bar. Based on its incorrect assumption that threat of injury was negligible in the grinding bar segment, the preferable decision that was open to the Minister was to limit the specification of the goods in the s.269TL notice to grinding bar and publish a dumping duty notice under s.269TG(2) applying s.8 of the *Dumping Duty Act* to other alloy round bar.

15. The Commission entirely ignores any analysis of the material injury to the Australian industry producing like goods that is being caused or is threatened by future dumped goods. The Commission does so on the basis that the 'remaining market sector' of the Australian industry

[6] EPR Folio No. 384/074.
[7] REP 384a, p. 85.
[8] Indeed the Commission admits that *"analysis of ABF data in the post investigation period on a monthly basis indicates that grinding bar continues to constitute the majority of alloy round bar imports from China into Australia."* (REP 384a, p. 87)

producing like goods will continue to include the grinding bar market segment. The Commission dismisses as… *conjecture… that the grinding bar segment of the Australian alloy round bar market is transitioning to work in progress and that its size has therefore diminished as a proportion of the broader market*.[9]

16. Without reaching a conclusion on the critical issue of the size of the alloy round bar market sector, i.e. whether it is inclusive or exclusive of the grinding bar market segment, the Commission instead points to 'advice' from Moly-Cop that:

> it is currently supplying Donhad's grinding bar requirements on arms length terms, based on global indices and including a margin.[10]

17. Without verification or further examination, the Commission appears to accept Moly-Cop's related party sales to Donhad as "arms length". Instead of testing, the arms length nature of these transaction, the Commission merely states its policy on this matter:

> The Commission notes that integrated steel manufacturers in Australia make sales to related party entities and, provided these sales can be comparably benchmarked to their sales to unrelated party entities, the Commission generally treats these transactions as sales that enter the relevant market.[11]

18. In the case of Moly-Cop, there is no evidence before the Commission to support the conclusion that it sells grinding bar to unrelated party entities. Therefore, how can the Commission have genuinely recommended to the Minister that transfers of grinding bar to Donhad were anything other than captive production or work-in-progress? The only explanation for this clear error of fact is that the Commission was erroneously comparing sales of grinding bar to Donhad, to sales of grinding balls to unrelated customers.

19. Therefore, the Commission has erred in concluding that transfers of grinding bar by Moly-Cop to Donhad has entered the market sector of the Australian industry producing like goods. As a result, the Commission has failed to accurately assess the threat of injury to OneSteel and Milltech in market sectors other than grinding bar.

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[9] REP 384a, p. 87.
[10] REP 384a, p. 87.
[11] REP 384a, p. 87.