



Australian Government
Department of Industry,
Innovation and Science

Anti-Dumping
Commission

Anti-Dumping Commission
GPO Box 2013
CANBERRA ACT 2601

Senior Member Joan Fitzhenry
Anti-Dumping Review Panel
c/o- ADRP Secretariat

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

Dear Senior Member Fitzhenry,

**ADRP Review No. 129: 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 Customs Act) published on 30 November 2020. This notice advised of your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) which (the Reviewable Decision):

- secured the continuation of anti-dumping measures applying to aluminium extrusion exported to Australia from China, by declaration under section 269ZHG(1)(b), and
- determined that following 28 October 2020 the notice has effect as if different specified variable factors had been fixed in relation to all exporters generally, pursuant to 269ZHG(4)(a)(ii) of the Customs Act.

I have considered the application submitted by PanAsia Aluminium Pty Ltd and Foshan Lvqiang Metal Product Co., Ltd for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Customs Act, at **Attachment A** (public version).

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

A handwritten signature in cursive script, appearing to read 'Dale Seymour'.

Dale Seymour
Commissioner, Anti-Dumping Commission

22 December 2020

COMMISSIONER, ANTI-DUMPING COMMISSION SUBMISSIONS

Background

1. On 24 January 2020, the Anti-Dumping Commission (Commission) received an application from Capral Limited (Capral) to continue the anti-dumping measures on aluminium extrusions exported from the People's Republic of China (China) (anti-dumping measures), pursuant to section 269ZHB of the *Custom's Act 1901* (Cth) (Act).¹
2. I subsequently considered the application and decided to not reject the application. Notice of my decision and my intention to inquire whether the continuation of the measures was justified was published on the Commission's website on 13 February 2020, pursuant to section 269ZHD(4).²
3. On 12 October 2020, the Minister for Industry, Science and Technology (Minister), among other things :³
 - (a) Declared that she had decided to secure the continuation of the anti-dumping measures after 28 October 2020 but that after that day, the dumping duty and countervailing duty notices had effect as if different specified variable factors had been fixed in relation to exporters generally, pursuant to sections 269ZHG(1)(b) and 269ZHG(4)(a)(iii) (Reviewable Decision).
 - (b) Determined the amount of interim dumping duty payable on goods subject to the dumping duty notice in relation to PanAsia Aluminium (China) Limited (PanAsia China) and the residual exporters was the combination duty method, pursuant to sections 8(5) of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) and sections 5(2) and (3) of the *Customs Tariff (Anti-Dumping) Regulation 2013* (Regulation).
 - (c) Directed the amount of interim countervailing duty payable on goods subject to the countervailing dumping duty notice in relation to exporters generally be ascertained as a proportion of the export price of those particular goods, pursuant to sections 10(3A) and 10(3B)(a) of the Dumping Duty Act.

¹ Continuation 543 – Electronic Public Record ('EPR 543'), document 1; All legislative references in this submission are to the *Customs Act 1901* (Cth) ('the Act') unless otherwise indicated.

² EPR 543, document 2.

³ Ibid document 62.

4. The Reviewable Decision was published on the Commission's website on 15 October 2020, as Anti-Dumping Notice No. 2020/103.⁴
5. In the Reviewable Decision, the Minister stated she had considered and accepted the recommendations and reasons for recommendations, including all the material findings of facts or law, set out in *Anti-Dumping Commission Report No. 543* (REP 543).⁵
6. On 12 November 2020, PanAsia China, PanAsia Aluminium Pty Ltd (PanAsia Australia), PanAsialum Holdings Company Limited (PanAsialum Holdings) and Opal (Macao Commercial Offshore) Limited (OPAL), collectively known as PanAsia Group applied to the Anti-Dumping Review Panel ('ADRP') for review of the Reviewable Decision.
7. On 13 November 2020, Foshan Lvqiang Metal Product Co Ltd (Foshan Lvqiang), applied to the Anti-Dumping Review Panel ('ADRP') for review of the Reviewable Decision.⁶
8. Following receipt of the applications for review, the ADRP published an intention to conduct a review.⁷ In that notice, the ADRP proposed to conduct a review of the Reviewable Decision in relation to the following grounds:⁸
 - (a) In respect of PanAsia Group's application, there were errors in the calculation of the export price of the goods on the basis that in calculating the deductive export price under section 269TAB(1)(b) the Commission erred in ascertaining the 'prescribed deductions' within the meaning of section 269TAB(2), particularly with respect to its construction of section 269TAB(2)(a); and
 - (b) To the extent that the application by the PanAsia Group establishes that the Reviewable Decision is not the correct or preferable decision, then the Reviewable Decision is not the correct or preferable decision with respect to the determination of the residual export price and/or normal value of Foshan Lvqiang's exports

Ground 1 – PanAsia Group application - The proper construction of section 269TAB(2)(a)

Summary of my submissions

9. I disagree with PanAsia Group's arguments about the correct interpretation of section 269TAB(2)(a). I submit that interim dumping duty payable is a duty of Customs paid or payable on the goods for the purposes of section 269TAB(2)(a). My view is substantiated by the express words used in sections 269TAB(2)(a) and 269X(5B)(b) of the Act.

⁴ Ibid.

⁵ Ibid.

⁶ Foshan Lvqiang application.

⁷ ADRP Review 129 – *Anti-Dumping Review Panel*, Public Notice.

⁸ Ibid page 1.

10. Consequently, I invite the ADRP to find that the Commission correctly ascertained the 'prescribed deductions' within the meaning of section 269TAB(2) and therefore that the Reviewable Decision was the correct and preferable decision.

Reasons for my submissions

Facts and context

11. The facts set out in paragraphs 26 to 36 of PanAsia Group's submissions are not in contention.
12. Further, I agree with PanAsia Group's submissions that the issue for consideration by the ADRP is the correct construction of section 269TAB(2)(a). In particular, whether the words 'any duties of Customs or sales tax paid or payable on the goods' includes interim dumping duty.

PanAsia Group's argument

13. In its application, PanAsia Group submitted that the Reviewable Decision was not the correct and preferable decision by reason of the Commission's error in calculating PanAsia China's export price.⁹
14. Specifically, PanAsia Group submitted that in determining the export price under section 269TAB(1)(b), the Commission erred in ascertaining the 'prescribed deductions' within the meaning of section 269TAB(2), particularly with respect to its construction in section 269TAB(2)(a).¹⁰
15. PanAsia contended that where a duty assessment application is on foot with a concurrent 'inquiry period', the meaning of 'any duties of Customs or sales tax paid or payable on the goods' only permits the deduction of final duties determined to be payable following the completion of a duty assessment.¹¹

Correct construction of section 269TAB(2)(a)

16. Section 269TAB relevantly provides:

(1) For the purpose of this Part, the export price of any goods exported to Australia is:

...

(b) where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

⁹ PanAsia Group Application, Attachment 2 [17].

¹⁰ Ibid [18].

¹¹ Ibid [37].

(ii) the purchase of the goods by the importer was not an arms length transaction; and

(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associated of the importer;

the price at which the goods were so sold by the importer to the person less the prescribed deductions; or

...

(2) A reference to paragraph (1)(b) to prescribed deductions in relation to a sale of goods that have been exported to Australia shall be read as a reference to:

(a) any duties of Customs or sales tax paid or payable on the goods; and

...

17. For reasons that follow, I submit that, properly construed, the following fall within the meaning of 'any duties of Customs or sales tax paid or payable on the goods' for the purposes of section 269TAB(2)(a):

- (a) interim dumping duties paid on the goods; OR
- (b) the final dumping duty payable where, for the purposes of the Act and the Dumping Duty Act, the variable factors relevant to the determination of duty payable under the Dumping Duty Act have been ascertained, taken to be ascertained or the duty assessment has been terminated, pursuant to sections 269Y(1), 269Y(4), and 269YA(4), respectively.

Section 269X(5B)(b)

18. Section 269X of the Act relevantly provides:

269X Consideration of duty assessment application

(5A) Subsection (5A) of this section applies if the Commissioner proposes to ascertain provisionally, for the purposes of paragraph (5)(a) of this section, the export price of goods (under paragraph 269TAB(1)(b) or otherwise) as the difference between:

- (a) the price at which the importer of the goods sold them, in the condition in which they were imported, to someone who was not an associate of the importer; and*
- (b) the prescribed deductions (as defined in subsection 269TAB(2)) relating to the goods.*

- (5B) *In provisionally ascertaining the export price of goods as described in subsection (5A), the Commissioner must:*
- (a) *take account of the following in relation to the goods:*
 - (i) *any change in normal value;*
 - (ii) *any change in costs incurred between importation and resale;*
 - (iii) *any movement in resale price which is duly reflected in subsequent selling prices; and*
 - (b) ***despite paragraph 269TAB(1)(b), not deduct the amount of interim duty if the Commissioner has conclusive evidence of the things mentioned in subparagraphs (a)(i), (ii) and (iii) of this subsection.***

(emphasis added).

...

19. The meaning of statutory provisions must be construed by reference to the language of the instrument as a whole,¹² and give meaning to each word.¹³ Further, legislation must be construed on the basis that its provisions are intended to give effect to harmonious goals.¹⁴ Where there is a conflict in the language between provisions the conflict must be alleviated, as far as possible, by adjusting the meaning of the competing provisions.¹⁵
20. In paragraphs 53 and 54 of its submissions, PanAsia Group identified that section 269X(5) directs the Commissioner not to take into account interim dumping duty paid when assessing a duty assessment application. PanAsia Group submitted that this phrase should thus be read consistently with section 269TAB(2)(a).¹⁶
21. I disagree. PanAsia Group did not give due regard to the fact that the phrase directing the Commissioner not to deduct interim dumping duty was prefaced with the phrase 'despite paragraph 269TAB(1)(b)'. The ordinary and grammatical reading of this phrase strongly indicates that, but for section 269X(5) which applies in the context of duty assessments, interim dumping duty falls within the operation of sections 269TAB(1)(b) and 269TAB(2)(a).
22. In addition, it is clear from the use of the words 'despite paragraph 269TAB(1)(b), not deduct the amount of interim duty' in section 269X(5B)(b), that, in duty assessments, it is open to me to deduct the amount of interim duty

¹² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

¹³ *Ibid* 381-2 [71].

¹⁴ *Ibid* 381-2 [70].

¹⁵ *Ibid*.

¹⁶ PanAsia Group application, [54].

unless I have conclusive evidence of the things mentioned in sections 269X(5B)(a)(i), (ii) and (iii).

23. If interim dumping duty did not ordinarily constitute a prescribed deduction within the meanings of section 26TAB(1)(b) and 269TAB(2)(a), the phrase 'despite paragraph 269TAB(1)(b)' in section 269X(5)(b) would have no separate work to do. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*,¹⁷ the High Court of Australia held that a construction of a provision that gives it no separate work to do 'should not be adopted'.
24. My interpretation is confirmed by item 19 of the Explanatory Memorandum to the *Customs Legislation Amendment Bill (No.2) 2002*, which introduced section 269X(5B):¹⁸

Subsection (5B) also requires that, if the CEO has conclusive evidence of these matters, export price should be ascertained with no deduction for the amount of interim duty paid. This requirement applies despite the terms of paragraph 269TAB(1)(b) which allows duties of Customs (which include dumping duties) to be deducted in calculating export price.

25. The Explanatory Memorandum also stated that subsection (5B) was introduced to give effect to Article 9.3.3 of the WTO Anti-Dumping Agreement.¹⁹
26. My interpretation is also confirmed by the ADRP's finding in *ADRP Report 104*. In that case, Member Paul O'Connor stated the following:²⁰

The Commission concluded that PanAsia's export sales were not arm's-length and determined that export price ought to be calculated using the deductive method provided by section 269TAB(1)(b). This necessitated the export price be calculated by reference to the invoice price from PanAsia Australia to its Australian customers, less 'prescribed deductions' under section 269TAB(2). One such prescribed deduction is 'any duties of Customs'. I note that section 7 of the Anti-Dumping Act relevantly provides that 'duties of Customs' are imposed in accordance with that Act and therefore are caught by the phrase 'any duties of Customs' referred to in section 269TAB(2).

Nevertheless, PanAsia argues that the Commission ought not to have deducted the amounts of interim dumping duty in calculating the export price via the deductive method. It argues that consistency supports this outcome in that when reconciliation between interim dumping duty paid and the assessment of final duty is undertaken this also requires export price to be determined by the deductive method. However, in such

¹⁷ (2011) 244 CLR 144, 192, [97] (Gummow, Hayne, Crennan, Bell JJ) ('*Plaintiff M70/2011 v Minister for Immigration and Citizenship*').

¹⁸ Pursuant to *Acts Interpretation Act 1901* s 15AB(1) which provides that consideration of extrinsic material may be given to confirm the meaning of the provision in the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act. ('AIA Act').

¹⁹ *Ibid* item 19.

²⁰ [148].

*circumstances the amounts paid by way of interim dumping duty are excluded from the amounts deducted by virtue of section 269X(5B)(b) which expressly directs the Commission 'not deduct the amount of interim duty' if certain circumstances exist. **Rather than support PanAsia's argument, I find reliance upon that section drives an outcome contrary to that sought. What section 269X(5B)(b) creates is a limited exception to the norm which is that duties imposed under the Anti-Dumping Act are to be deducted.***

(emphasis added)

27. On the above basis, I respectfully submit that the PanAsia Group's argument is flawed as it was the Parliament's express intention for interim dumping duty to fall within the operation of paragraph 269TAB(2)(a).

Use of the words 'paid' and 'payable'

28. The process of determining an export price under paragraph 269TAB(1)(b) is part of the broader process of determining the final dumping duty, pursuant to section 8(6) of the Dumping Duty Act.
29. Paragraph 269TAB(2)(a) is an essential part of determining the export price. Importantly, paragraph 269TAB(2)(b) uses the words 'paid' and 'payable' in the context of 'any duties of Customs'.
30. I submit that interim duty is considered 'paid', and therefore within the meaning of section 269TAB(2)(a), once interim dumping duty has been, in fact, given to Customs.
31. This interpretation is consistent with other provisions in Part XVB of the Customs Act. For example, section 269V(1) provides the following:

An importer of goods on which, under the Dumping Act, an interim duty has been paid may, subject to subsection (2), by application lodged with the Commissioner, request that the Minister make an assessment of the liability of those goods to duty under the Act.

32. Accordingly, it is a pre-requisite for interim duty to be 'paid' by an applicant prior to requesting the Minister to undertake an assessment of the final duty payable.
33. I submit that a consistent meaning of whether interim duty has been 'paid' should be taken across sections 269V(1) and section 269TAB(2)(a) because the same text is used.²¹ I have not identified any contrary indication in section 269TAB to warrant a different meaning to be taken.
34. In addition, if the Parliament intended paragraph 269TAB(2)(a) to not include interim dumping duty then the paragraph would need to be read by omitting the word 'paid' in this case. Omitting words from legislation is only permissible in

²¹ *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J).

circumstances involving 'simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision.'²² This interpretation would also mean the word 'paid' would have no separate work to do. As established above, a construction of a provision that gives it no separate work to do should not be adopted.²³

35. Further, I submit that the ordinary meaning of 'payable' refers to when an amount is due to be paid. Accordingly, I consider that it is only at the point at which liability to pay dumping duty arises or crystallises that dumping duty be considered 'payable'.
36. The Commission put it this way on page 62 of REP 543:²⁴

In this case, the Commission is of the view that 'final dumping duty' only becomes payable once the Minister has ascertained the variable factors relevant to the determination of duty payable under the Dumping Duty Act, in accordance with Division 6 [sic] of Part XVB.

The Minister has not yet ascertained the variable factors relevant to the determination of duty payable under the Dumping Duty Act with respect to the duty assessment applications made by PanAsia China. Therefore the Commission considers, at the time of this report, no final duty is payable by PanAsia China.

Accordingly, the Commission is satisfied that deducting the amount of interim duty paid by PanAsia China as prescribed by 269TAB(2)(a), is consistent with the requirements of determining an export price under section 269TAB(1)(b).

(footnotes omitted).

37. This view is supported by the context of the Act and works in harmony with interim duty paid or payable being within the meaning of section 269TAB(2)(a).
38. Specifically, section 8(3) of the Dumping Duty Act provides that 'pending the final assessment of dumping duty payable...an interim dumping duty is payable on those goods'.
39. Accordingly, and as stated in paragraph 6.9.2 of REP 543, I submit relevant duty paid or payable within the meaning of section 269TAB(2)(a) is interim dumping duty paid or payable until assessment of final duty has been made as follows:²⁵

²² *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38] (French CJ, Crennan, Bell JJ) ('*Taylor v Owners*').

²³ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (n 17).

²⁴ Page 62.

²⁵ *Ibid.*

- (a) following the Commissioner's termination of the duty assessment application, pursuant to section 269YA(4), or
 - (b) following the Minister's ascertainment of the variable factors relevant to the determination of duty payable under the Dumping Duty Act in respect of each consignment to which the duty assessment relates, pursuant to section 269Y(1), or
 - (c) where one or more consignments are entered for home consumption, interim dumping duty has been paid on those goods under the Dumping Duty Act and an application is not lodged under section 269V for assessment of duty payable under the Dumping Act, pursuant to section 269Y(4).
40. I disagree with PanAsia Group's submission that section 269TAB(2)(a) extends to duties of Customs (including dumping duty) that *will* become payable.²⁶ This would require a 'reading in' of words to paragraph 269TAB(2)(a). However, in *Taylor v Owners*²⁷, the majority of the High Court of Australia held that reading words in to legislation must only occur in limited situations:

[38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.

[39]... any modified meaning must be consistent with the language in fact used by the legislature...

(Footnotes omitted).

41. I respectfully submit that PanAsia Group's attempts to interpret paragraph 269TAB(2)(a) to fill gaps in the legislation which would exclude interim dumping duty would be contrary to the language in fact used by the Parliament, and would be contrary to well established principles of statutory interpretation.
42. Consequently, I submit that it is not open to interpret section 269TAB(2)(a) as excluding interim dumping duty.

²⁶ PanAsia Group submission, [43]; I note that PanAsia Group has referred to section 269TAB(2)(b) in this paragraph but for the purposes of his submissions I have taken this reference to be a typographical error. As a result, the I have read this paragraph, instead, being in reference to section 269TAB(2)(a).

²⁷ *Taylor v Owners* (n 22).

Use of the word 'any'

43. The adjective 'any' is used to introduce paragraph 269TAB(2)(a). The Macquarie Dictionary relevantly defines 'any' to mean:²⁸

In whatever quantity or number, great or small.

A great or unlimited (amount).

44. Statutory construction begins and ends with the text of the provision.²⁹ Courts will begin the task of statutory construction with the view that words should be given their ordinary meaning.³⁰
45. The word 'any' indicates a lack of restraint on the classes of duties of Customs that fall within the paragraph. If the Parliament had intended paragraph 269TAB(2)(a) to not include interim duty payable then the Act would not have used 'any' to introduce it. Instead, the paragraph would have used limiting language, or specified the classes of duties of Customs, or expressly excluded interim dumping duty from the reach of the paragraph.
46. Indeed, the Parliament had the opportunity to use the words 'final dumping duty' or 'special duty of Customs' to limit the classes of Customs duties referred to in paragraph 269TAB(2)(a), terms of which are used in section 8 of the Dumping Duty Act to refer to final dumping duty. However, the Parliament chose not to use qualifying language and instead chose the words 'any duties of Customs'.
47. Contrary to PanAsia Group's submissions, an interpretation of paragraph 269TAB(2)(a) that excludes interim dumping duty payable would contradict the express words used in the Act.

Consistency with the object of the Act and the GATT

48. I submit my proposed construction of sections 269TAB(1)(b) and 269TAB(2)(a) is consistent with the object of the Customs Act, as expressed by the Parliament in the text of the Act.
49. I further submit that my proposed construction of section 269TAB(2)(a) is consistent with article 2.4 of the Anti-Dumping Agreement. Article 2.4 refers to 'costs...incurred' and the ordinary meaning of this phrase includes costs which have been incurred, not costs which *may or will be* incurred at a later date. Article 2.4 therefore accommodates interim duties which have been paid within its scope.

²⁸ *Macquarie Dictionary* (Macquarie Dictionary Publishers, 7th ed, 2017).

²⁹ *Maloney v The Queen* (2013) 252 CLR 168, 291-292 [324] (Gaegler J);

³⁰ *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 at 304-5 (Gibbs CJ).

Ground 2 – Foshan Lvqiang application – Consequential changes to the determination of Foshan Lvqiang’s export price and/or normal value

50. In its application, Foshan Lvqiang submitted that if PanAsia China applied for a review to the ADRP and the ADRP decided that the decision, as it relates to PanAsia China, was not the correct or preferable decision, it follows that Foshan Lvqiang’s export price and/or normal value is also not the correct or preferable decision.³¹
51. This submission was made on the basis that, as a residual exporter, Foshan Lvqiang’s export price and normal value was determined in reference to PanAsia China and Kam Kiu Aluminium Extrusion Co Ltd’s export prices and normal values.³²
52. I agree with Foshan Lvqiang’s submissions and submit that any change made to PanAsia China’s export price and/or normal value should be reflected in a change to Foshan Lvqiang’s export price and/or normal value pursuant to sections 269TACAB(2)(c) and 269TACAB(2)(d), respectively.

³¹ Foshan Lvqiang submission, page 6.

³² Foshan Lvqiang submission, page 5-6; see REP 543, section 6.11, pages 66-7 and Confidential Attachment 11.