Re: Section 48 of the *Customs (International Obligations) Regulation 2015*

MEMORANDUM OF ADVICE

Overview

1. In the context of Part XVB of the *Customs Act 1901* (the **Act**) and the *Customs (International Obligations) Regulation 2015* (the **Regulation**), I am asked on behalf of the Anti-Dumping Review Panel to advise on the following questions in relation to s 48 of the Regulation:

    Q1. Where

    (a) a notice issued under s 269TG(2) of the Act or 269TJ(2) of the Act is in force;

    (b) goods are exported from a country to which the notice applies;

    (c) the goods, as exported, do not fall within the scope of the notices; and

    (d) the goods, as exported, are interchangeable with goods to which the notices apply;

    is it necessary for the exported goods to have been physically altered after the goods have been manufactured in order for s 48(2) of the Regulation to apply?

    As an alternative reformulation of the issue:

    Q.2 Is it necessary, in order for s 48(2) of the Regulation to apply, for the exported goods to have been, at some time prior to export, in a state or condition in which the notices would have applied (within s 48(2)(c) of the Regulation), in order for s 48(2) of the Regulation to be applicable?

    Q.3 In the alternative, is it possible for goods to fall within s 48(2) of the Regulation if they are exported in the physical state in which they were manufactured and the goods, as manufactured and exported, do not fall within the scope of the notice?

2. For the reasons explained in this memorandum, in my view the answers to the questions posed are Q1: “No”, Q2: “No” and Q3: “Yes”.

The task

3. In my view, s 48(2) (when read in isolation) is ambiguous on the questions of whether, in order for the provision to apply in relation to particular exported goods:

   (a) those particular goods must have been manufactured in a form to which notices under s 269TG(2) and/or s 269TJ(2) of the Act would apply but are then slightly modified before export; or

   (b) those particular goods need not have been manufactured in a form to which notices under s 269TG(2) and/or s 269TJ(2) of the Act would apply, but some other criterion of applicability is met, and if so, what.

4. The ambiguities in s 48(2) must be resolved by the ordinary principles of statutory construction and by reference to the fact that the Regulation is a legislative instrument and so must be read and construed to be within the power conferred by the enabling Act. That is, s 48(2) must be read and construed subject to the regulation-making power conferred by s 270 of the Act, in a manner that avoids any inconsistency with the provisions of the Act.[1]

5. The High Court has recently reiterated the ordinary principles of the task:[2]

   (a) The task of statutory construction must begin with a consideration of the statutory text. So must the task of statutory construction end.

   (b) The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

   (c) Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth)[3] that "the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated ...) is to be

[1] See s 3 of the *Legislation Act 2003* (Cth), in combination with s 270(1) of the Act.
[2] *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]-[23], references omitted.
[3] Applicable here by reason of s 13(1)(a) of the *Legislation Act 2003* (Cth).

preferred to each other interpretation" is in that respect a particular statutory reflection of a general systemic principle. For: "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

6. Further, it is necessary to achieve to the greatest extent possible a harmonious construction of s 48 which accords to each part of it a function that can be reconciled with any apparently inconsistent parts of it, and might involve discerning a hierarchy of provisions, in other words "which is the leading provision and which the subordinate provision."[4]

Legislative context

7. The relevant provisions of the Act are found in Part XVB of the Act, headed "Special provisions relating to anti-dumping duties".

8. Before examining Division 5A and the Regulation, it is necessary to mention in broad terms certain antecedent matters. Part XVB provides for the publishing of notices triggering anti-dumping duties and countervailing measures by a regime that includes the following key steps:

   (a) Application may be made under s 269TB requesting the publication by the Minister of a dumping duty notice or countervailing duty notice in respect of goods in a consignment of goods that has been, or is likely to be imported into Australia, or like goods that may be imported into Australia, by the lodgment of an application with the Commissioner of the Anti-Dumping Commission[5].

   (b) The lodging of an application triggers a duty on the part of the Commissioner to consider the application and reach a view on certain threshold matters. Depending on the views reached by the Commissioner, this could lead to

[4] *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69]-[71].
[5] Previously this function and various others mentioned in this paragraph were conferred on the CEO of Customs, but from March 2014, the relevant functions that had been conferred on the CEO of Customs were transferred to the Commissioner of the Anti-Dumping Commission: *Customs Amendment (Anti-Dumping Commission Transfer) Act 2013* No 139, 2013, Schedule 1.

public notice being given of certain specified particulars of the application under s 269TC, and amongst other things setting a date for initiation of an investigation and inviting submissions.

(c) Under s 269TEA the Commissioner is required, after holding an investigation, to give a report in respect of the goods the subject of the application to the Minister that contains recommendations, amongst other things, as to whether a dumping duty notice or countervailing duty notice should be published, together with reasons, material findings of fact and particulars of the evidence relied upon to support those findings.

(d) Under s 269TG(1), where the Minister is satisfied as to any goods that have been exported to Australia of certain criteria concerning export price and normal value of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 8 of the *Customs Tariff (Anti-dumping) Act 1975* (**Dumping Duty Act**) applies to the goods (or to like goods exported after any preliminary affirmative determination under s 269TD).

(e) Under s 269TG(2), where the Minister is satisfied as to goods of any kind of certain criteria concerning export price and normal value of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 8 of the Dumping Duty Act applies to like goods from the date of such notice (or later date).

(f) Under s 269TJ(1), where the Minister is satisfied as to any goods that have been exported to Australia of certain criteria concerning receipt of a countervailable subsidy in respect of the goods, and material injury to an Australian industry producing like goods, then the Minister may by public notice declare that s 10 of the Dumping Duty Act applies to the goods (or to like goods exported after any preliminary affirmative determination under s 269TD).

(g) Under s 269TJ(2), where the Minister is satisfied as to goods of any kind of certain criteria concerning receipt of a countervailable subsidy in respect of the goods, and material injury to an Australian industry producing like goods,

then the Minister may by public notice declare that s 10 of the Dumping Duty Act applies to like goods from the date of such notice (or later date).

9. Before moving to further matters of legislative context, it is relevant to note certain features of notices under each of s 269TG(2) or s 269TJ(2):

   (a) Each of ss 269TG(2) and 269TJ(2) applies to "like goods" in relation to goods of a "particular kind" identified in the notice.[6]

   (b) Notices under s 269TG(2) must specify the normal value, export price and non-injurious price of the goods to which the declaration (by the notice) relates (s 269TG(3)).

   (c) Notices under s 269TJ(2) must specify the amount of countervailing subsidy that was or would be received in respect of the goods to which the notice relates, and their non-injurious price, both as ascertained by the Minister at the time of publication of the notice (s 269TJ(11)).

   (d) Notices under both ss 269TG(2) and 269TJ(2) may adopt different ways of identifying the particular kind of goods in question, and may identify not only the country from which the goods are exported and an objective description of the goods, but also particular exporters. Only a description of the goods is explicitly required by ss 269TG(2) and 269TJ(2). More details are implicitly required by virtue of the need for the notices to set out the particulars (for each particular kind of goods) required by s 269TG(3) or s 269TJ(11), particulars that will differ depending on country and exporter.

10. In 2011, the Customs Amendment (Anti-dumping Improvements) Bill (No.2) 2011 was introduced, accompanied by an Explanatory Memorandum which addressed potential future improvements of access, international consistency and compliance including a proposal to consider introduction of an anti-circumvention

[6] This is a reasonable construction of each of s 269TG(2) and s 269TJ(2) flowing from the phrase "as to goods of any kind" that appears in them. This construction of s 269TG(2) is endorsed in explicit terms by s 269TG(3)(b), and although the equivalent provision in s 269TJ - s269TJ(11) – is in more general terms, the same construction applies to s 269TJ(2) in my view. The identification of the goods to be the subject of the notice is connected with the identification of goods during antecedent steps in the process under Part XVB: see, e.g. *GM Holden Ltd v Commissioner of the Anti-Dumping Commission* [2014] FCA 708 at [29] and [30], and also [130] (Mortimer J).

framework. One aspect of circumvention activity mentioned was the avoidance of applicable duties:

> … by slight modifications being made to, or disassembly of, goods subject of measures so that the importer can declare that measures do not apply to the modified or disassembled goods. …

11. Anti-circumvention measures are not the subject of express provision in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or in the Agreement on Subsidies and Countervailing Measures, but are in various cases the subject of local legislation or regulations enacted by parties to those agreements, for example, Article 13 of Regulation (EC) No 384/96 and Article 23 of Regulation (EC) No 2026/97, each of which can extend to "the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics".

12. On 11 June 2013, Schedule 2 to the *Customs Amendment (Anti-dumping Improvements) Act (No 3) 2012* (No 196, 2012) commenced, adding Division 5A headed "Anti-circumvention inquiries" to Part XVB of the Act, together with ancillary provisions. These provisions revolved around the concept of "circumvention activity", which could take various forms defined in s 269ZDBB. The regime provided for the publishing of notices altering anti-dumping duty and countervailing duty notices as a result of inquiries into such "circumvention activities". The Explanatory Memorandum relevantly stated (emphasis added):

> 11. Schedule 2 of the Bill amends the Customs Act to address prescribed circumvention activities by importers and exporters.
>
> 12. Circumvention is a trade strategy used by the exporters and importers of products to avoid the full payment of dumping and countervailing duties. **Circumvention behaviours take various forms and exploit different aspects of the anti-dumping and countervailing system, but they all aim to ensure that the relevant goods do not attract the intended dumping or countervailing duty**.
>
> 13. This Bill will allow the Minister to amend the original notice imposing the dumping or countervailing duty, including by extending the notice so that it applies to different goods, exporters and countries which were not specified in the original notice. …

13. An additional form of circumvention activity (s 269ZDBB(5A)) was added on 1 January 2014 by the *Customs Amendment (Anti-dumping) Measures Act 2013* (No 95, 2013).

14. The key features of the anti-circumvention regime in the Act relevant to the proper construction of s 48 of the *Customs (International Obligations) Regulation 2015* are as follows.

15. Section 269ZDBB(1) establishes that a "circumvention activity" is an activity "in relation to a notice published under s 269TG(2) or s 269TJ(2)", that is, in relation to a (prospectively operative) dumping duty notice or countervailing duty notice.

16. Each of the succeeding subsections of s 269ZDBB, (2)-(5), then follow the same pattern, providing that circumvention activity "occurs" in relation to the notice "if the following apply", followed by a series of circumstances, each of which is a necessary criterion. The criteria differ from subsection to subsection, but one common feature is that each subsection sets up a category of goods defined as "circumvention goods" and another common feature is that exportation of the "circumvention goods" does not engage s 8 or 10 of the Dumping Duty Act (or, in the case of s 269ZDBB(5) only, if the goods were exported under an arrangement with another exporter to whom the notice applies, those provisions do not impose as much duty on the circumvention goods as they would if exported by the other exporter). As to the "circumvention goods" criteria:

    (a) subsection (2) relates to goods in the form of individual parts exported to Australia (amongst other things, where, in assembled form, the assembled goods would be the subject of the notice if exported by an exporter to whom the notice applies);

    (b) subsection (3) is similar to subsection (2) save that it relates to goods in the form of individual parts that are assembled in a second foreign country, to which the notice does not apply;

    (c) subsection (4) relates to goods to which the notice would apply, save that one or more intermediary foreign countries to which the notice does not apply have been interposed; and

    (d) subsection (5) relates to goods to which the notice would apply if exported by a particular exporter, if the goods were exported under an arrangement with

another exporter to whom the notice does not apply, or to whom it applies such that the amount of duty payable is lower.

17. Subsection (5A) also has a "circumvention goods" criterion, but the circumvention goods are defined as those goods to which the notice applies when exported by the actual exporter. Subsection (5A) provides that a further criterion is that either or both of ss 8 and 10 of the Dumping Duty Act apply. The gravamen of subsection (5A) is that over a reasonable period the circumvention goods are sold in Australia without price increases commensurate with the duty payable.

18. Taking its place in this context, s 269ZDBB(6) provides for the prescription by regulation of further "circumstances" in which "circumvention activity" occurs.

19. There were no such regulations until the addition of regulation 183A to the *Customs Regulations 1926* by the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015*, SLI No 15, 2015, which commenced on 1 April 2015. That provision was later re-made as s 48 of the *Customs (International Obligations) Regulation 2015.* The Explanatory Statement to the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* stated that its purpose "is to specify a new type of circumvention activity in Australia's anti-dumping system to address the practice of slightly modifying goods in order to avoid payment of anti-dumping and countervailing duties already imposed". The Statement went on to say:

> The Regulation prescribes a new circumvention activity in which goods that would have been the subject of a dumping or countervailing notice (and liable to pay duties) are slightly modified, prior to the export of the goods to Australia, to avoid the anti-dumping duty.

20. The procedural framework established under Division 5A includes the following relevant key steps:

    (a) Under ss 269ZDBC and 269ZDBD, an application may be lodged with the Commissioner requesting that the Commissioner conduct an anti-circumvention inquiry in relation to a specified notice published under s 269TG(2) or s 269TJ(2) (defined as the "original notice"). A content requirement for the application is that is must include "a description of the kind of goods that are the subject the original notice", "a description of the

circumvention activities in relation to the original notice that the applicant considers have occurred" and "a description of the alterations to the original notice that the applicant considers should be made".

(b) Under s 269ZDBE, the lodging of such an application triggers a duty on the part of the Commissioner to consider the application and reach a view on certain threshold matters. Depending on the views reached by the Commissioner, this could lead to the publication of a notice that such an inquiry is to be conducted, and giving various required particulars.

(c) After conducting an anti-circumvention inquiry, under s 269ZDBG the Commissioner must give the Minister a report recommending whether the original notice remain unaltered, or be altered because the Commissioner is satisfied that circumvention activities have occurred (and if so, the alterations to be made).

(d) Under s 269ZDBH, after considering the report and any other information that the Minister considers relevant, the Minister must declare by published notice that the original notice remain unaltered or that alterations specified in the declaration be made with effect from a day specified in the declaration. There is a non-exhaustive list of the kinds of alterations that may be made, and it includes "the specification of different goods that are to be the subject of the original notice": s 269ZDBH(2)(a).

21. Section 269ZZA(1)(ca), in Subdivision B of Division 9 of Part XVB of the Act, provides that the Subdivision deals with reviews by the ADRP of decisions by the Minister under s 269ZDBH(1).

Reasoning and conclusions

22. As already noted, statutory construction must begin and end with the relevant text. It is useful to set out s 48 of the *Customs (International Obligations) Regulation 2015* in its entirety:

> **48 Circumvention activities**
>
> (1) For subsection 269ZDBB(6) of the Act, the circumstance set out in subsection (2) of this section is prescribed.

Slight modification of goods exported to Australia

(2) The circumstance is that all of the following apply:

(a) goods (the ***circumvention goods***) are exported to Australia from a foreign country in respect of which the notice applies;

(b) before that export, the circumvention goods are slightly modified;

(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;

(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;

(e) section 8 or 10 of the *Customs Tariff (Anti‑Dumping) Act 1975*, as the case requires, does not apply to the export of the circumvention goods to Australia.

(3) For the purpose of determining whether a circumvention good is slightly modified, the Commissioner must compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including any of the following factors:

(a) each good's general physical characteristics;

(b) each good's end use;

(c) the interchangeability of each good;

(d) differences in the processes used to produce each good;

(e) differences in the cost to produce each good;

(f) the cost of modification;

(g) customer preferences and expectations relating to each good;

(h) the way in which each good is marketed;

(i) channels of trade and distribution for each good;

(j) patterns of trade for each good;

(k) changes in the pricing of each good;

(l) changes in the export volumes for each good;

(m) tariff classifications and statistical codes for each good.

23. A number of preliminary observations may be made. ***First***, the context is that there is already in existence either or both of a notice under s 269TG(2) or s 269TJ(2), and (as already outlined, in paragraph 9 above) any such notice will identify goods of a particular kind. ***Second***, the notice will apply to like goods in relation to the goods of a particular kind identified in the notice, that will or may be exported. ***Third***, the purpose of s 48 is to prescribe an additional "circumvention activity" in relation to the notice. ***Fourth***, the expression "circumvention good[s]" is set up in s 48(2)(a) and is then used in each and every one of the other criteria making up s 48(2), and in the description of the accompanying duty imposed on the Commissioner by s 48(3). In contrast, there is only one reference to good[s] the subject of the notice, in s 48(3). ***Fifth***, the expression "circumvention goods" seems to be used in s 48(2) without precision in both temporal and substantive ways, in the sense that it is used referably to the goods as they are exported to Australia (s 48(2)(a) and (e)), to the goods as they "are slightly modified" before

export (s 48(2)(b)), to the use or purpose of the goods both before and after they "are so slightly modified" (s 48(2)(c)) and to the goods in a hypothetical or counterfactual manner (had they "not been so slightly modified"… s 48(2)(d)).

24. There are two threshold issues presented:

(a) There are competing constructions of "circumvention goods" in s 48(2) available. On first appearances, the simplest construction is that "circumvention goods" must be read as having a strictly fixed meaning throughout s 48, and that as defined in s 48(2)(a), and reinforced by s 48(2)(e), it must mean goods in the form they are exported to Australia. However, this construction seems unworkable when confronted by the use of the expression in each of s 48(2)(b)-(d). They suggest that the expression can be given a more adaptable or flexible content, depending on context.

(b) The expression "slightly modified" appears in the criteria in each of s 48(2)(b)-(d). At first glance, because "circumvention goods" is defined in s 48(2)(a) and used in s 48(2)(e) referably to the form of the goods as they are exported to Australia, it is difficult to see how to construe s 48(2)(b)-(d) in a way that would advance the evidence purpose lying behind the anti-circumvention regime,[7] or that would make any sense of those criteria at all.

25. In my view, the key to resolving both issues, and thus to embarking on the path to the proper resolution of the questions I have been asked about the construction of s 48(2), is that the expression "slightly modified" appearing in connection with "circumvention goods" is to be treated as having a special meaning in s 48(2), discernible from s 48(3). In a sense, although the primary function of s 48(3) is to impose a particular duty on the Commissioner as to the way the Commissioner is to carry out the task under s 48(2), s 48(3) is also akin to a definitional provision that explains the use of "*circumvention goods are slightly modified*" in s 48(2)(b), "*circumvention goods*" and "… *are so slightly modified*" in s 48(2)(c) and "*had the circumvention goods not been so slightly modified*" in s 48(2)(d). Once this

[7] That purpose is discernible from s 269ZDBB(1) and (6) of the Act, and from the extrinsic materials referred to in paragraphs 12 and 19 above: to address activities responsive to notices that are aimed at ensuring that exportations that would have been the subject of the notices do not attract the intended duty.

approach is taken, the apparent imprecision in the use of "circumvention goods" in s 48(2)(b)-(c) is explicable and ceases to matter. The use of that expression in proximity to "slightly modified" in those criteria is in effect a shorthand way of referring to the task spelt out in detail in s 48(3).

26. Section 48(3) begins by referring to the Commissioner's task of "determining whether a circumvention good is slightly modified". That task is the very task that is mandated by aspects of each of s 48(2)(b)-(d). For the purpose of that task, the Commissioner is to "compare the circumvention good and the good the subject of the notice". In this way, s 48(3) is the gateway by which the goods the subject of the notice are introduced into the deliberative process. Comparison with the notice goods is a step which is entirely consistent with, and probably indispensable to, the objectives evidently lying behind the s 48 and the anti-circumvention regime as a whole. That is because the regime is directed to activity that circumvents the obligation to pay duty payable by reason of existing notices.[8] By reason of this aspect of s 48(3), although s 48(2)(b)-(d) do not explicitly mention the goods the subject of the notice, it can be seen that in order to ascertain whether the criteria in s 48(2)(b)-(d) are met, the Commissioner must undertake this comparison. The Commissioner is to do so "*having regard to any factor that the Commissioner considers relevant*". If this were all that was said, the relevant factors would fall to be ascertained from the existing subject matter, scope and purpose of the provision and the statutory construction task would be harder. However, more guidance is provided. The factors that must or may (for present purposes is does not matter which) be considered by the Commissioner include those listed in s 48(3)(a)-(m). Those factors are instructive as to the character of what the Commissioner may lawfully consider to be a slight modification within the scope of s 48(2)(b)-(d), because it may be assumed that the Governor-General in making the Regulation only included factors in this list that would be of potential probative value in determining whether "a circumvention good is slightly modified" and the corresponding criteria in s 48(2)(b)-(d) are met. The only potential constraint on use of the list of factors to inform the proper construction of "circumvention goods are slightly modified" in

[8] Ibid.

s 48(2) would be any inconsistency with the provisions of the Act that might arise, a matter to which I will return.

27. Turning to the three questions I have been asked, they each pose in a different way the question of whether the criteria in s 48(2) can only be met where:

    (a) particular goods have been manufactured and exist for a time in the form they were manufactured;

    (b) in the form they were manufactured, those goods are goods to which the notice would apply if they were exported;

    (c) subsequent to their manufacture but before exportation, the goods are subjected to alteration by reason of which the notices do not apply; and

    (d) the goods, as altered, are then exported.

28. In my view neither text nor context compels the above construction of s 48(2).

29. In my view, as explained above, the key to embarking on a proper construction of s 48(2) is s 48(3). That provision, at paragraph 48(3)(d), requires the Commissioner to consider *"(d) differences in processes used to produce each good*" in determining whether the criteria in s 48(2) are met that depend on whether a circumvention good is slightly modified. This provision indicates that a specific circumvention good need not already be manufactured and in existence, and then subjected to an alteration, before the criteria concerning "slightly modified" can be made out. This provision also indicates that a difference between the particular kinds of goods produced by different production processes may lawfully be considered by the Commissioner in deciding whether the criteria concerning "slightly modified" are made out.

30. To resort the ordinary accepted usage of "modification" or "modified" when used in relation to goods, there is nothing surprising about the notion of a "modification" of a particular type of goods, or of a particular supplier's products, being used to refer to a modification wrought by changes in production processes from time to time. A more limited meaning, requiring an alteration being made to an existing object, would be quite artificial.

31. Further, when regard is given to the purpose of s 48 and the anti-circumvention regime as a whole[9], it seems most unlikely that under s 48(2) anti-circumvention activity would be limited so as to exclude differences between the production processes for goods that are the subject of the notice and the production processes for the goods actually being exported. That would open up a gap in the regime which could be exploited by someone seeking to circumvent a notice.

32. I return to a point made in paragraph 3(b) above: if there is no mandatory criterion imposed by s 48 to the effect that modification of an existing manufactured good is required, what then is the relevant limiting criterion that applies? In my view, where the slight modification in question does not consist of the alteration of existing manufactured goods falling within the scope of a notice, then it will at least be a necessary criterion for s 48 to apply that a different production process has been adopted by comparison with the production process that previously resulted in the manufacture of the goods to which the notice applies. I elaborate on this point in the next paragraph.

33. I acknowledge that two aspects of the criteria in s 48(2) seem at first appearances to be referring to the actual alteration of existing objects: "before" the circumvention goods are exported they "are slightly modified" (s 48(2)(b)), and their use or purpose is the same "before" and "after" they "are so slightly modified" (s 48(2)(c)). The answer, in my view, is that the term "circumvention goods" is not used here with precision but serves as a general denotation for the goods that are to be subjected by the Commissioner to the comparison process mandated by s 48(3). Subsection 48(3), as already outlined, requires comparison to be made between the goods the subject of the notice and the circumvention goods. This drafting technique suggests that attention is not required to be directed to whether there has been a subsequent modification of a particular pre-existing object. Rather, the conclusion as to "slightly modified" is reached through comparison of goods, a more generalised inquiry. In a particular case, the goods to be compared may be the product of different production processes, as contemplated by s 48(3)(d). In that event, the goods the subject of the notice will have been produced at an earlier time, and (in response to the notice) there

[9] Ibid.

will subsequently have been a different production process used. In this way, it is meaningful to speak of the goods "before" and "after" modification.

34. There is a further contextual indication that supports the construction of s 48(2) outlined in paragraphs 28 to 32 above. The context in which s 48 falls to be construed is, as established by s 269ZDBB(1), in determining whether certain *activity* (circumvention activity) has occurred *in relation to an original notice*. The ordinary usage of "activity" is generally to referable to a series of repetitive acts that take place over a period. In that context, it is unsurprising that the regime would be designed to address modifications of goods wrought by differences in the production processes in use over time.

35. I can find no impediment in the Act to the construction of the Regulation outlined in paragraphs 28 to 32 above. In my view, there is no inconsistency with the Act occasioned by s 48 of the Regulation being read and construed as extending the anti-circumvention regime to goods that are not and never were of a kind to which the original notice applied, because s 269ZDBH expressly contemplates that the Minister may alter the original notice to specify different goods.[10]

Date: 29 June 2016

Peter R D Gray QC
Owen Dixon Chambers West
liability limited by a scheme approved
under professional standards legislation

[10] Further, although I acknowledge that the consistency of various forms of local anti-circumvention measures with international law obligations (and with the implications arising from the silence on this topic of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures) has been and continues to be the subject of controversy, the construction I have arrived at does not in my view raise any obvious inconsistency with Australia's international law obligations.