Australian Government
Anti-Dumping Commission

Anti-Dumping Commission
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Mr Scott Ellis
Member, Anti-Dumping Review Panel
c/- ADRP Secretariat
Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
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By e-mail: ADRP@industry.gov.au

Dear Mr Ellis,

HOLLOW STRUCTURAL SECTIONS CONTAINING OTHER ALLOYS EXPORTED TO AUSTRALIA FROM THE PEOPLE'S REPUBLIC OF CHINA, REPUBLIC OF KOREA AND MALAYSIA

I write with regard to the public notice published on 10 May 2016 advising your intention to review the decision of the Parliamentary Secretary to publish a notice under s 269ZDBH(1) of the *Customs Act 1901* (the Reviewable Decision). The Reviewable Decision was published on the Anti-Dumping Commission (ADC) website on 18 March 2016, referred to in Anti-Dumping Notice No. 2016/24.

I understand that on 17 May 2016 the ADC provided you with the Statement of Essential Facts (SEF) 291, the submissions made by interested parties, the Final Report (REP) 291 and other relevant information (as defined in section 269ZZK *Customs Act 1901*).

I have considered the applications for the Reviewable Decision and have decided to make some comments on the various grounds raised therein. Please find attached my comments (***Attachment A*** refers), which I submit for your consideration.

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

Yours sincerely,

Dale Seymour
Commissioner
Anti-Dumping Commission

9 June 2016

Attachment A

The Anti-Dumping Commission (the Commission) makes the following submissions in response to the reasonable grounds set out in the notice published on 10 May 2016. These grounds are with respect to the consideration by the Anti-Dumping Review Panel (ADRP) of a reviewable decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science and reported by the Commission in REP 291.

Whether alloyed HSS is a slightly modified (and hence a circumvention) good within the meaning of Regulation 48(2)

Both Steelforce Trading Pty Ltd and GP Marketing International Pty Ltd contend that no slight modification of the goods subject to the measures (being non-alloyed hollow structural sections (HSS)) can occur in order to produce a "slightly modified" *alloyed* HSS. By virtue of the production process and the differing raw materials required to produce these products, the parties argue that the terms of Regulation 48(2) are unable to be satisfied.

Anti-circumvention framework and the purpose of the regulation concerning the slight modification of goods

Australia's anti-circumvention framework is a recent, but important, innovation to Australia's anti-dumping framework. Maintaining a robust and strong anti-circumvention framework is integral to ensuring anti-dumping measures implemented will address material injury to Australian industry. Circumvention activity means certain trade practices of exporters and importers of dumped goods which aim to avoid the payment of anti-dumping duties that have been imposed.

As noted in the explanatory statement to the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* (the regulation which originally introduced the slight modification of goods anti-circumvention framework), the purpose of section 48 of the *Customs (International Obligations) Regulation 2015* (the regulation) is to address the practice of slightly modifying goods in order to avoid payment of anti-dumping and countervailing duties already imposed. As noted above, this activity may result in reducing the effectiveness of anti-dumping measures as a trade remedy for Australian industry.

The explanatory statement further provides that section 48(2) of the regulation provides that where the circumstances specified at paragraphs (a) through to and including (e) are present, then "circumvention activity" in relation to the notice for the purposes of section 269ZDBB(6) of the *Customs Act 1901* has occurred. The intention is that where goods, the subject of a notice, have been slightly modified by an exporter of the goods in order to avoid the payment of duties specified in that notice, then a "circumvention activity" will have occurred. Finally, the explanatory statement notes that section 48(3) provides that in deciding if goods have been slightly modified for the purposes of section 48(2), I may have regard to any factors considered relevant. These factors may include the non-exhaustive and non-mandatory list of factors set out at paragraphs (a) through to (m). No single factor will necessarily provide definitive guidance as to whether the circumvention activity has occurred or not.

The goods subject to this inquiry

Section 48(2) sets out that a circumvention activity occurs if 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.

The Commission's application of these paragraphs is set out in various sections of chapter 6 of REP 291.

Firstly, the Commission considers that if circumvention goods are exported from countries which are subject to the original notice, then the requirements of 48(2)(a) have been met. The Commission notes that the expression "slightly modified" is used in paragraphs 48(2)(b), (c) and (d) in order to determine if the "slight modification of goods" circumvention activity has occurred. In addition, to determine if a good has been slightly modified, paragraphs 48(2)(b) – (d) must be read in conjunction with section 48(3).

Various sections of chapter 6 of REP 291 set out the Commission's analysis of the degree to which the goods have been slightly modified by reference to the factors set out in section 48(3). Although all factors were examined, it is apparent that the difference in production processes used to produce each good (paragraph (3)(d)) and the resulting changes in export volumes for each good (paragraph 3(l)) and tariff classifications and statistical codes for each good (paragraph 3(m)) were significant, whereas there was little if any difference between the goods and the circumvention goods with respect to the remaining factors (for example, the goods and circumvention goods were interchangeable, sold for the same end uses to the same customers).

The Commission notes that Steelforce Trading Pty Ltd refers to a definition of the term "modify" as being "*make partial changes in; make different*". The Commission considers that this is a reasonable definition of the term, however it ought to be read in the context of the factors (such as those set out in paragraph 48(3)) which I may consider relevant.

I consider that paragraph 48(3)(d) (being "differences in the processes used to produce each good") permits an examination of any processes which are relevant to the production of the good, including the raw materials used to produce the goods and their provenance. Inevitably, this analysis will vary depending on the nature of the goods produced – for example, the mechanism through which a food product is "slightly modified" will be vastly different to that which might occur for steel products.

Accordingly, the physical characteristics of a steel product like HSS (including decisions as to the choice of feedstock and therefore it is to become an alloyed or non-alloyed product) is a relevant consideration in determining whether the good has been slightly modified. The addition of small amounts of boron to the raw materials used to produce the circumvention goods is, in my view, a partial change to the production process of the goods subject to the original notice. This slight modification, in the instances identified in REP 291, are insignificant in that they are sold to the same end users, for the same purposes, in the same circumstances and with no apparent change in performance and no substantive change in cost. Accordingly, I found that the use or purpose of the circumvention goods was the same before, and after, they were so slightly modified (as per 48(2)(c)).

If the goods had not been slightly modified by the addition of boron they would have been the subject of the original notice (as per 48(2)(d)), and (prior to the decision of the Parliamentary Secretary), section 8 and 10 of the *Customs Tariff (Anti-Dumping) Act 1975* did not apply to the export of the circumvention goods to Australia. As a result of their slight modification of the goods, certain exporters avoided paying dumping and countervailing duties. As noted above, the intention of the legislative framework is to address the practice of slightly modifying goods in order to avoid payment of anti-dumping and countervailing duties already imposed. I therefore recommended the decision which was accepted by the Parliamentary Secretary for the reasons set out in REP 291.

Whether a circumvention activity can be described as having occurred at a time when Regulation 48 had no operative effect

Steelforce Trading Pty Ltd submits that the Commission found that no circumvention activity had occurred prior to 1 April 2015, relying on a statement in REP 291, and has argued that the absence of the relevant regulation means that no circumvention activity found prior to 1 April 2015 can be described as such.

The Commission observes that the statement “no circumvention activity had occurred prior to 1 April 2015” at page 24 of REP 291 is a result of a formatting error. The relevant sentence appears out of context at the end of a paragraph dealing with an unrelated issue; in fact, it was intended to be the a title for the following sections addressing a submission made by Moulis Legal on behalf of Dalian Steelforce Hi-tech Co., Ltd and an unnamed importer. The format of that part of the chapter sets out a heading on a particular topic on which submissions were made during the inquiry, followed by a summary of the matter raised and the Commission’s consideration of those matters. It can be seen that, if the relevant sentence is elevated to become a heading as was intended, the following sections would have followed the same arrangement.

The Commission does not consider it reasonable to rely on this sentence as evidence that the Commission has reached such a conclusion, particularly when the remainder of the report demonstrates that the Commission reached precisely the opposite conclusion.

Any investigation by the Commission is, by definition, an analysis of past behaviours. The Commission observes that a circumvention activity (of any kind) can only occur after the imposition of measures. In REP 291, the relevant measures were imposed occurred in 2013.

In any event, any decision by the Parliamentary Secretary regarding a circumvention activity and the imposition of anti-dumping measures with respect to the circumvention goods has effect from no earlier than the date that an inquiry is initiated (as required by subsection 269ZDBH(8) of the *Customs Act 1901*). Accordingly, the practical effect is that no circumvention activity which occurred prior to 1 April 2015 can be remedied.

Whether the Parliamentary Secretary ought to have made a declaration with retrospective effect or ought to have made a declaration with only prospective effect

The applicants have submitted that the anti-circumvention duties should not be applied retrospectively.

The Commission notes that section 269ZDBH(8) of the *Customs Act 1901* provides for when the Parliamentary Secretary's declaration can take effect in relation to an anti-circumvention inquiry. This date can be no earlier than the date of publication of the notice under subsection 269ZDBE(4) indicating that such an inquiry is to be conducted. Accordingly, in this inquiry the Parliamentary Secretary's declaration may take effect from no earlier than 11 May 2015, being the date on which the notice was published under subsection 269ZDBE(4).

In conclusion, I am of the view that, having given due consideration to the matters raised by the applicants and addressed in this Attachment, the approach taken in the anti-circumvention inquiry and as outlined in REP 291 ought to be considered as being consistent with the relevant legislation and has resulted in the correct and preferable decision.