

11 March 2015

Ms Leora Blumberg
A/g Member
Anti-Dumping Review Panel
c/- Legal Services Branch
Department of Industry and Science
10 Binara Street
CANBERRA CITY ACT 2601

BY EMAIL adrp_support@industry.gov.au

Dear Ms Blumberg,

ADRP REVIEW: Hot rolled structural steel sections exported from Japan, Korea, Taiwan and Thailand

I refer to the Anti-Dumping Review Panel's (**Panel**) invitation to the Anti-Dumping Commission (**Commission**) to comment on the various applications for review in the above matter, and the Commission's response dated 23 February 2015. Specifically, I write concerning the Commission's submission to the Panel regarding OneSteel's second claim (namely, the form of anti-dumping measures applied), and the assertion that the claim is outside the Panel's power to review, and should be excluded.

OneSteel Manufacturing Pty Ltd (**OneSteel**) has obtained legal advice that the Commission's interpretation of section 269ZZA of the *Customs Act 1901* (**Customs Act**) is an incorrect interpretation of the relevant statutory provision.

OneSteel notes the assertion by the Commission that the Panel does not have jurisdiction to review a decision relating to the form of anti-dumping measures applied because decisions made by the Minister or Parliamentary Secretary under the *Dumping Duty Act (Customs Tariff (Anti Dumping) Act 1975)* cannot be reviewed by the Panel.

The reason advanced by the Commission ignores the fact that section 6 of the *Dumping Duty Act* incorporates the *Customs Act* and requires it to be read as one with the *Dumping Duty Act*. Further, the Commission's reason fails to acknowledge that the existence of the separate enactments rest solely on the need to meet the requirements of section 55 of the *Commonwealth Constitution*.

In the present matter section 269ZX requires that the scope of the Panel's jurisdiction is to be determined by the terms of section 269ZZA of the *Customs Act* which reads, in relevant part, as follows:

"(1) This Subdivision [B] deals with the review by the Review Panel of the following decisions:

(a) a decision by the Minister to publish a dumping duty notice under subsection TG(1) or (2)..."

A 'review' of a 'decision', in the absence of the expression of a contrary intention, applies by implication to all elements that collectively form the basis of a particular decision. These elements obviously include the key benchmarks of export price, normal value and non-injurious price and the legion of relevant constituent parts of the assessment of those benchmarks such as arms-length

transactions, ordinary course of trade sales (sections 269TAA and 269TAAD respectively of the *Customs Act*), and the lesser duty rule specified in subsection 8(5B) of the *Dumping Duty Act*. A review of a decision in this context obviously extends to the amount of any dumping margin that is derived from the key benchmarks and the obligation of the Minister under subsection 8(5B) of the *Dumping Duty Act* to consider which form of dumping duty might best satisfy the requirements of the lesser duty rule.

Indeed, the *Public Notice* under subsections 269TG(1) and (2) of the *Customs Act*; in this case published by the Parliamentary Secretary on 20 November 2014 in the *Commonwealth Gazette* (No. C2014G01905); and confidential attachments contain all 'findings' relevant to a declaration that section 8 of the *Dumping Duty Act* applies to the goods, and in particular, the finding that interim dumping duty will be assessed by reference to the *ad valorem* form of dumping duty (refer **Attachment A**). The form of duty finding reflects a determination by the Parliamentary Secretary set out in a secondary and subsequent notice under subsection 8(5) of the *Dumping Duty Act* also published in the *Commonwealth Gazette* (No. C2014G01904) of 20 November 2014 (refer **Attachment B**). The terms of the secondary notice make it clear that its application is dependent on the Parliamentary Secretary having decided to issue a notice pursuant to subsections 269TG(1) and 269TG(2) of the *Customs Act*.

In OneSteel's view consideration of the correct or preferable form of dumping duty in the present matter clearly falls within the ambit of the Panel's review powers.

Further, OneSteel observes that acceptance of the Commission's submission would further erode the very limited avenues for review of administrative decisions forming part of the process of the imposition of dumping duties. In contrast to the extensive rights of review applying to the imposition of and exemption from all other forms of Customs duties, subsection 167(1) of the *Customs Act* prohibits applications to the Administrative Appeals Tribunal in respect of dumping duties.

In these circumstances, OneSteel considers that it is both incorrect, and inappropriate for the Commission to seek to prosecute an interpretation of the Panel's powers that leaves Australian industry, with no effective means of merits review against decisions of the Parliamentary Secretary, informed by (on the Commission's reading of the *Customs Act*), incontestable recommendations of the Commission. Therefore, OneSteel seeks leave of the Panel to make this submission in response to the comments of the Commission on this specific issue before the Panel. OneSteel asserts that it is within the Panel's powers of review to consider OneSteel's original review request concerning the form of anti-dumping measures applied. I would be pleased to provide a copy of OneSteel's legal opinion on this issue if the Panel considers this appropriate.

If you have any questions concerning OneSteel's submission on this matter, please do not hesitate to contact me on 0438 622 232 to discuss.

Yours sincerely



Stephen Porter
General Manager Steel in Concrete and Trade Measures
OneSteel Manufacturing Pty Ltd